



# THE DOMESTIC IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

## A MANUAL

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# **THE DOMESTIC IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW**

**A MANUAL**

Geneva, Mont Blanc bridge.  
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# Foreword

The people most severely affected by armed conflict are increasingly those who are not or who are no longer taking part in the fighting. International humanitarian law has been developed as a set of rules that aims at minimizing the effects of armed conflict on these groups. Its range of conventions and protocols embraces numerous subjects such as the protection of the wounded and sick, civilians, prisoners of war and certain property, as well as the restriction or prohibition of certain means and methods of warfare.

Some international humanitarian law treaties have been widely ratified. Indeed, the Geneva Conventions have now achieved universal acceptance and their Additional Protocols of 1977 are among the most widely accepted legal instruments. The universal ratification of some other humanitarian law treaties is, however, still a long way off.

Adherence to these international conventions is only the first step. Respecting international humanitarian law requires that a number of concrete measures be taken at the domestic level, even in peacetime, to create a legal framework that will ensure that national authorities, international organizations, the armed forces and other bearers of weapons understand and respect the rules, that the relevant practical measures are undertaken and that violations of humanitarian law are prevented, and punished when they do occur. Such measures are essential to ensure that the law works when needed. To do this effectively requires coordination between various government departments, the military and civil society.

The ICRC has always had a recognized role in the development and promotion of international humanitarian law and, aware of the challenges attached to full compliance, it created an Advisory Service in 1996 to strengthen its capacity to provide services to States in this regard.

This Manual on the Implementation of International Humanitarian Law, prepared by the ICRC's Advisory Service, is based on close to 14 years of experience in the field of implementation. It covers the concrete steps required for the implementation of the Geneva Conventions and their Additional Protocols, the various weapons treaties, the Rome Statute of the International Criminal Court and other relevant treaties. It offers ratification kits, model laws and fact sheets as tools to ensure that the law and practice of States are in full conformity with the obligations that flow from humanitarian law treaties.

I hope that this manual will be useful to governments in their work in ensuring the full implementation of international humanitarian law, as, without doubt, increased ratification and effective implementation are key to greater protection of victims of armed conflict.



Dr Jakob Kellenberger  
President of the International Committee  
of the Red Cross



# Aim of this manual

The ICRC's Advisory Service was established within the ICRC Legal Division in 1996. Since then, the number of States that are parties to instruments of international humanitarian law (IHL) has increased significantly. Much work remains to be done by States, however, to ensure that the obligations set out in these instruments are adequately reflected in domestic law and applied in practice.

This manual has been drafted mainly for policy-makers and legislators, and for those assisting them in their efforts to comply with their obligation to ensure respect for IHL. It aims to assist them in the ratification of relevant instruments and to offer guidelines in the implementation process, thus enabling them to bring their laws and practice in line with the requirements of IHL.

The manual emphasizes general principles and obligations as much as possible; it does so in order to reach beyond differences in legal traditions and in levels of institutional development. It follows a treaty-based approach: for instance, one important chapter (Chapter Four) is on the core instruments of IHL, i.e. the universally ratified Geneva Conventions of 1949 and their Additional Protocols of 1977 and 2005. Other chapters deal with complementary instruments concerning the protection of specific persons and property during armed conflict (Chapter Five), weapons (Chapter Six) and the International Criminal Court (Chapter Seven). All the chapters provide succinct overviews of the contents of treaties; they do not discuss a treaty's every provision in detail. Because the manual is for use primarily by legislative drafters or those assisting them, it focuses on those provisions that require action in the form of legislative or regulatory measures. General information on IHL and its implementation is provided in the introductory chapters (Chapters One to Three), which also discuss the links between IHL and criminal law at the domestic level. The manual offers some practical tools: an extensive bibliography – with titles in English, French and Spanish – as well as annexes containing model laws and guidelines developed by the ICRC and other specialized organizations.

This manual does not set out to provide definitive legal interpretations of the provisions of the instruments that it describes. It should be regarded as a practical tool that the ICRC's Advisory Service makes available to all those involved in the implementation of IHL. It reflects the expertise accumulated during its close to 14 years of experience in implementing IHL. Combined with the ICRC's web-accessible databases on national implementation measures (<http://www.icrc.org/ihl-nat>), which provide examples of legislation and jurisprudence from countries around the world, and on IHL treaties and documents (<http://www.icrc.org/ihl>), which show the current state of signatures and ratifications, this manual should provide a number of answers.

The ICRC's Advisory Service on IHL stands ready to assist States in their efforts to further respect for IHL obligations. It may be contacted through its network of regional legal advisers or in Geneva at the address below:

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## Acknowledgement

The ICRC Advisory Service is grateful to all those persons and organizations that have contributed to the drafting of this manual, which is the result of intensive teamwork. It would particularly like to thank those organizations that have permitted the reproduction of some of their documents concerning the implementation of international humanitarian law. Responsibility for the manual, however, rests solely with the ICRC.



# 1 INTRODUCTION – THE BASICS OF IHL

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## CHAPTER ONE: INTRODUCTION – THE BASICS OF IHL

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# What is IHL?

International humanitarian law (IHL) is a set of rules which seek for humanitarian reasons *to limit the effects of armed conflict*. IHL protects persons who are not or who are no longer participating in hostilities and it restricts means and methods of warfare. IHL is also known as the law of war or the law of armed conflict.

IHL is part of international law, the body of rules governing relations between States. The sources of international law include, among others, written agreements between States (treaties or conventions which bind only those States that have expressed their consent to be bound by them), customary rules (which consist of unwritten rules derived from constant State practice considered by States as legally binding), and general principles of law.

IHL is rooted in the rules of ancient civilizations and religions – warfare has always been subject to certain principles and customs.

Universal codification of IHL began in the nineteenth century. Since then, States have agreed to a series of practical rules, based on the bitter experience of modern warfare. These rules strike a careful balance between humanitarian concerns and the military requirements of States. As the international community has grown, an increasing number of States have contributed to their development.

A major part of IHL is contained in the four Geneva Conventions of 1949. More recently they have been developed and supplemented by three further agreements: the 1977 **Additional Protocols I and II**, relating to the protection of victims of armed conflicts, and the 2005 **Additional Protocol III**, relating to the adoption of an additional distinctive emblem.

Other IHL treaties complement these fundamental instruments. Some prohibit or restrict the use of means and methods of warfare and protect certain categories of people and goods. These treaties include:

- the 1925 Protocol for the Prohibition of the Use 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, plus its two Protocols of 1954 and 1999;
- the 1972 Biological Weapons Convention;
- the 1976 Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques;
- the 1980 Convention on Certain Conventional Weapons and its five Protocols;
- the 1993 Chemical Weapons Convention;
- the 1997 Mine Ban Convention;
- the 1998 Statute of the International Criminal Court;
- the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; and
- the 2008 Convention on Cluster Munitions.

Many provisions of these treaties are now also considered as reflecting customary international law. In 2005, the ICRC published a comprehensive study on customary international humanitarian law. The study lists 161 rules governing armed conflict, the vast majority of which are applicable to both international and non-international armed conflicts. An introduction to the study is available on the ICRC's website: [www.icrc.org](http://www.icrc.org).

## When does IHL apply?

IHL applies to armed conflicts (both international and non-international) and situations of occupation. It does not cover internal disturbances or tensions such as isolated acts of violence. It does not regulate whether a State may or has rightfully used force; this is governed by an important, but distinct, part of international law, primarily set out in the United Nations Charter.

IHL distinguishes between international and non-international armed conflicts. **International armed conflicts** are those involving two or more States, regardless of whether a declaration of war has been made, or whether the parties involved recognize that there is a state of war. Parties to international armed conflicts are subject to a wide range of rules, including those set out in the four Geneva Conventions and Additional Protocol I. The law applies only once a conflict has begun, and then equally to all sides, regardless of who started the fighting.

**Non-international armed conflicts** (also often called “internal armed conflicts”) usually take place on the territory of a single State and involve either regular armed forces fighting other armed groups, or armed groups fighting each other. A more limited range of rules apply to internal armed conflicts than to international armed conflicts (in particular, common Article 3 to the Geneva Conventions and Additional Protocol II), even though customary law tends to diminish the distinction and expands the protection of certain rules of IHL to all types of armed conflicts.

# What does IHL cover?

IHL generally covers two areas:

- the **protection** of those who are not, or who are no longer, taking part in the fighting;
- **restrictions** on the means of warfare – in particular weapons – and the methods of warfare, such as military tactics.

## What is protected and from what?

As mentioned, IHL aims to protect persons who are not or who are no longer taking part in hostilities. Applicable in international armed conflicts, the Geneva Conventions deal with the treatment of the wounded and sick in armed forces in the field (Convention I), the wounded, sick and shipwrecked members of the armed forces at sea (Convention II), prisoners of war (Convention III) and civilians, including those in occupied territories (Convention IV). Civilians protected under the Fourth Geneva Convention are those in the hands of a Party to the conflict or Occupying Power of which they are not a national; they include internally displaced persons, women, children, refugees, stateless persons, journalists and other categories of individuals. Similarly, the rules applicable in non-international armed conflicts (Article 3 common to the Geneva Conventions and Additional Protocol II) concern the treatment of persons not or no longer taking direct part in hostilities.

These categories of persons are entitled to respect for their lives and for their physical and mental integrity. They also enjoy legal guarantees. They must be protected and treated humanely in all circumstances, with no adverse distinction.

More specifically, it is forbidden to kill or wound an enemy who surrenders or is incapable of defending himself, and the sick and wounded must be collected and cared for by the party in whose power they find themselves. Medical personnel, supplies, hospitals and ambulances must all be protected.

There are also detailed rules governing the conditions of internment for prisoners of war and the way in which civilians are to be treated when under the authority of an enemy power (in alien territory or under occupation). This includes the provision of food, shelter and medical care, and the right to exchange messages with their families.

The law sets out a number of clearly recognizable symbols called “distinctive emblems” which can be used to identify protected persons, places and objects. The distinctive emblems are the red cross, the red crescent, the red lion and sun, as well as the newly adopted red crystal. In addition, other symbols identify objects such as cultural property, dangerous forces, civil defense personnel and facilities.

## What restrictions are there on the means and methods of warfare?

IHL prohibits all means and methods of warfare which, *inter alia*:

- have as their primary purpose to spread terror against the civilian population;
- do not discriminate between those who are taking direct part in the fighting and those, such as civilians, who are not, the purpose being to protect the civilian population as a whole, individual civilians and civilian property;
- cause superfluous injury or unnecessary suffering;
- cause widespread, severe or long-term damage to the environment.

IHL treaties have therefore banned the use of many weapons, including exploding bullets, chemical and biological weapons, blinding laser weapons and anti-personnel mines.



# What is the difference between IHL and human rights law?

International human rights law (IHRL) is a set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain behaviour or benefits from governments. Human rights are inherent entitlements, belonging to every person as a consequence of being human. Numerous non-treaty based principles and guidelines (“soft law”) also belong to the body of IHRL.

IHRL main treaty sources include the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966), as well as the conventions on genocide (1948), racial discrimination (1965), suppression and punishment of the crime of apartheid (1973), discrimination against women (1979), torture (1984) and the rights of the child (1989).

While IHL and IHRL have historically developed separately, some recent treaties include provisions from both bodies of law. Examples are the 1989 Convention on the Rights of the Child, in particular with its 2000 Optional Protocol on the involvement of children in armed conflict, the 1998 Rome Statute of the International Criminal Court (ICC) and the 2006 Convention on the Protection of All Persons from Enforced Disappearance.

## Are IHL and IHRL applicable in the same situations?

IHL is applicable in times of armed conflict, whether international or non-international.

In principle, IHRL applies at all times, i.e. both in peacetime and in situations of armed conflict. However, some IHRL treaties permit governments to derogate from certain rights in situations of public emergency threatening the life of the nation, including wars. Derogations must, however, be notified, be the only means to confront the emergency and be proportional to the crisis at hand. They must also not be introduced on a discriminatory basis and must not contravene other rules of international law – including rules of IHL.

However, certain human rights are never derogable and are protected by both IHL and IHRL in all circumstances. Among them are the prohibition of torture or cruel, inhuman or degrading treatment or punishment, the prohibition of slavery and servitude and the prohibition of retroactive criminal laws.

## Who is bound by IHL and human rights law?

IHL binds all parties to an armed conflict. In international conflicts IHL must be observed by the States involved, whereas in an internal conflict IHL binds the government, as well as the groups fighting against it or among themselves. Thus, IHL lays down rules that are applicable to both State and non-State actors. It also provides that persons may be held individually criminally responsible for grave breaches of the Geneva Conventions and of Additional Protocol I, and for other serious violations of IHL, both in international and non-international armed conflicts.

IHRL, on the other hand, lays down rules binding governments in their relations with individuals. It also provides for individual criminal responsibility for violations that may constitute international crimes, such as genocide, crimes against humanity, forced disappearance and torture.

*For more information, please consult:*

- H.-P. Gasser, “International Humanitarian Law”, in Hans Haug (ed.), *Humanity for All: The International Red Cross and Red Crescent Movement*, Henry Dunant Institute/Paul Haupt Publishers, Berne/Stuttgart/Vienna, 1993, pp. 491-579.
- F. Kalshoven, L. Zegveld, *Constraints on the Waging of War: An introduction to international humanitarian law*, ICRC, Geneva, 2006.
- M. Sassòli, A. Bouvier, *How does Law Protect in War?* ICRC, Geneva, 2006.

# 2

## IHL TREATIES AND NATIONAL IMPLEMENTATION

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## CHAPTER TWO: IHL TREATIES AND NATIONAL IMPLEMENTATION

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The duty to implement IHL lies first and foremost with States. States have a duty to take a number of legal and practical measures – both in peacetime and in situations of armed conflict – aimed at ensuring full compliance with this body of law.

The term national implementation covers all measures that must be taken to ensure that the rules of IHL are fully respected. It is not sufficient, however, merely to apply these rules once fighting has begun; certain measures must be taken in peacetime. These measures are necessary to ensure that:

- both civilians and military personnel are familiar with the rules of IHL;
- the structures, administrative arrangements and personnel required for compliance with the law are in place; and
- violations of IHL are prevented, and punished when they occur.

Such measures are essential to ensure that the law is truly respected.

## Becoming a party to IHL treaties

Treaties are written agreements which create legal obligations between countries (or “States”). The multilateral<sup>1</sup> treaty accession procedure may be summarized as follows. The text of the treaty is adopted at an international conference, with States present. The treaty is then open for signature for a period of time, such as 12 months. States place their signature in a treaty book, indicating their intention to become bound by the treaty. A signature does not bind the State to the wording of the treaty, although the State may not defeat the “object and purpose” of the text between the time of its signature and its ratification.<sup>2</sup>

After signature, the State then ratifies the treaty by sending a letter to the depositary (e.g., the UN secretary-general or the depositary State(s)), typically after completing the domestic legal steps necessary for treaty ratification. If a State did not sign the treaty while it was open for signature, it may nevertheless become a party to the treaty by “acceding” to it, in a one-step procedure, by sending a letter to the depositary indicating its willingness to be bound.<sup>3</sup>

These procedures can be summarized as follows:

| Point in time:   | Action to take:  |
|--|--|
| Prior to adoption of text                              | <ul style="list-style-type: none"> <li>• States negotiate the wording of the text of the treaty.</li> </ul>  |
| After adoption, while the treaty is open for signature | <ul style="list-style-type: none"> <li>• States may sign the treaty, and may subsequently deposit an instrument of ratification (“ratify”).</li> </ul>   |
| After the end of the period of signature               | <ul style="list-style-type: none"> <li>• Ratification, if the treaty is signed by the State, otherwise through the deposit of an instrument of accession (“accede”).</li> </ul>                            |
| At other times   | <ul style="list-style-type: none"> <li>• States may also become party to treaties following the split of a State into multiple new States. The terms used are State succession or continuation.</li> </ul> |

<sup>1</sup> Multilateral treaties are those to which there are more than two States Parties, and they are often open to all States.

<sup>2</sup> See the 1969 Vienna Convention on the Law of Treaties, Art. 18.

<sup>3</sup> For further details, see the United Nations Treaty Handbook, available at <http://untreaty.un.org/English/TreatyHandbook/hbframeset.htm>.

# Why is becoming a party to IHL treaties important?

First, it is important that States ratify IHL treaties because they are instruments specifically designed to **provide protection to victims** in times of armed conflict. These conventions, regulating the conduct of hostilities and aiming at the protection of the people who do not or who no longer participate directly in hostilities, constitute the essential juridical basis **safeguarding the lives and dignity** of victims of armed conflict.

IHL reflects a fine compromise between humanitarian and military considerations: on the one hand, the conviction that wars have limits; on the other, the belief that wars have to be waged as rapidly as possible and with the fewest necessary resources. The ratification of IHL treaties by States sends a clear message that they are ready to abide by these rules which aim at minimizing the suffering that is unfortunately inherently attached to situations of armed conflict.

In addition, certain *jus cogens* norms, non-derogable even in times of war, are put forward in IHL (for example, prohibition of torture and slavery). Consequently, by ratifying IHL treaties and by incorporating them into national law, States are taking a firm step to respect and to ensure respect for certain fundamental rights recognized by the international community.

The ratification of IHL treaties creates the obligation for States to disseminate the rules and obligations they contain in order to have them respected by all parties to an armed conflict and to **ensure a more humane conduct of armed conflict**. In incorporating those conventions into domestic law, States have to provide for sanctions for serious breaches of their provisions. Therefore, the prospect of being sanctioned can eventually have a **deterrent effect** on potential criminals and perpetrators of war crimes and, when the provisions are applied, **decrease impunity**. In other words, the ratification of IHL treaties, which implies spreading knowledge and ensuring that appropriate and sufficient sanctions are provided for serious violations of their provisions, should contribute to **greater respect for IHL** and human rights in general.

In short, it is important that States ratify IHL treaties because these are the result of an international consensus on the necessity to limit the effects of armed conflict. Universal ratification should lead to greater predictability and protection for the victims of armed conflicts since it implies that the same rules apply to all parties. The fact that the four Geneva Conventions have been ratified by all States demonstrates the universal approval of the obligations surrounding the conduct occurring during an armed conflict. More and more States recognize the obligations resulting from IHL treaties; therefore, they contribute to **solidifying the international framework of fundamental rights and helping to protect the most vulnerable persons in time of armed conflict**.

# How to ratify/accede to IHL treaties

There is no strict rule that must be followed in order to ratify/accede to IHL treaties. What is important is that the State concerned formally declares its consent to be bound by the treaty in accordance with its national procedures for adherence to international agreements. This often requires assent by the country's parliament. Once the formal decision to be bound has been taken in accordance with national procedures, the State deposits an instrument of accession/ratification with the depositary (usually the United Nations or a State). The filing of this instrument is the action that gives international force to the State's commitment and creates treaty relations, including rights and obligations with respect to other parties.

Model letters of accession and ratification may be found in Annex I.

## What about becoming a party to an IHL treaty with a reservation or an interpretative declaration?

A reservation means a unilateral statement, however phrased or named, made by a State when becoming a party to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. Certain treaties, such as the 1998 Rome Statute of the International Criminal Court, the 1993 Chemical Weapons Convention, the 1997 Mine Ban Convention or the 2008 Cluster Munitions Convention do not accept such statements. Others provide that only specified reservations may be made. In all cases, a reservation may never be incompatible with the object and purpose of the treaty, and other States may object to the reservation. Contrary to a reservation, an interpretative declaration merely clarifies a State's position as to its understanding of some matter covered by a treaty or its interpretation of a particular provision and does not purport to exclude or modify the legal effect of a treaty.

When IHL treaties do not contain a clause concerning the possibility or impossibility of making a reservation, States may issue reservations or make declarations of understanding when becoming party to such treaties, on condition that they are not contrary to the object and purpose of the treaty and do not undermine its substance. In practice, States will attach to their instrument of ratification any reservation or declaration they may wish to make and, if the question arises, confirm declarations of any nature made at the time of signature, if they wish to maintain them.

# What needs to be done to implement IHL?

Under IHL a range of measures must be taken. Among the main ones are:

- to have IHL instruments translated into the national language(s);
- to spread knowledge of them as widely as possible both within the armed forces and the general population;
- to repress all violations of IHL instruments and, in particular, to adopt criminal legislation that punishes war crimes;
- to ensure that persons, property and places specifically protected by the law are properly identified and marked;
- to adopt measures to prevent the misuse of the red cross, the red crescent, the red crystal and other emblems and signs provided for in IHL;
- to ensure that protected persons enjoy judicial and other fundamental guarantees during armed conflicts;
- to appoint and train persons in IHL; in particular, to ensure the presence of legal advisers within the armed forces;
- to provide for the establishment and/or regulation of:
  - National Red Cross and Red Crescent Societies and other voluntary aid societies,
  - civil defence organizations,
  - national information bureaux;
- to take account of IHL when selecting military sites and in developing and adopting weapons and military tactics;
- to provide for the establishment of hospital zones, neutralized zones and demilitarized zones.

Some of these measures require the adoption of legislation or regulations and will be looked at in the following chapters. Others require the development of educational programmes, the recruitment and/or training of personnel, the production of identity cards and other documents, the setting up of special structures, and the introduction of planning and administrative procedures, all of which help ensure effective implementation of IHL. Each treaty, however, has its own implementation requirements and the purpose of this manual is to help in understanding what is specifically required.



## What are the main differences between national implementation in monist and dualist countries?

States may be generally described as either monist or dualist.<sup>4</sup> In **monist** States, treaties typically take direct effect in domestic law without separate implementing legislation. As part of the treaty accession procedure, the country's parliament adopts what is called a "ratification law", and orders it to be published in the official gazette. However, many provisions in IHL treaties require the adoption of more than what a typical "ratification law" contains. This is in part because most IHL treaties require the enactment of a number of specific provisions, including, for instance, the adoption of emblem protection measures, or the establishment of a national information bureau.

In **dualist** States, the requirement for implementing legislation is even more evident as without it treaties have no direct effect in domestic law.

Many legal systems may also be described as based on "common law" or in "continental law" (also described as "civil law"). Common-law States are primarily dualist, and civil-law States are usually monist. These general terms reflect the history of their legal system, as inspired either by English common law or by Roman law. While each system has greatly influenced the other, and in practice neither exists in its "pure" form, some of their main differences include:

| Issue                      | Common law   | Continental law  |
|----------------------------|--|--|
| Jurisprudence              | Case-law from higher courts is a source of law, and often binds judges, in addition to legislation.                          | Judges rely primarily on legislation as found in written form.   |
| Criminal law and procedure | Use of juries, hearsay rule, criminal offences in legislation other than the criminal code, existence of common-law offences | Use of examining magistrates, greater involvement in trial by judges rather than restricted to counsel |

For the purpose of national IHL implementation, many common-law jurisdictions adopt separate (stand-alone) legislation for the obligations deriving from each of the major treaties. Thus, there will often be a Geneva Conventions Act, an International Criminal Court Act, an Anti-personnel Landmines Act, and so on, all of which normally include criminal offences. Continental-law jurisdictions, on the other hand, often insert all criminal offences flowing from these treaties into their criminal code, which may be civilian or military, or both.

<sup>4</sup> In practice, States draw upon both models, depending mainly on the level of detail found in the provisions of the treaty in question.

## How can IHL implementation be achieved?

Careful planning and regular consultation are the keys to effective implementation. Many States have established bodies for this purpose, such as national IHL committees, that are addressed later in Chapter Four. In some countries, the National Societies may also be able to offer assistance with implementation.

Through its Advisory Service on International Humanitarian Law, the ICRC provides advice and documentation to governments on national implementation. It can be contacted through the nearest ICRC delegation, or at the address below.

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# 3

## IHL AND DOMESTIC CRIMINAL LAW

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## CHAPTER THREE: IHL AND DOMESTIC CRIMINAL LAW

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One of the most important elements of national implementation of IHL obligations is the enactment of a comprehensive legal framework for effective prosecution and punishment of serious violations of IHL. Almost all the treaties covered in this manual require that prosecutions be made possible for some or all serious violations of their provisions, a step that normally requires the adoption of appropriate legislation. To assist States in their consideration of such legislation, this chapter offers an overview of the main issues inherent in the adoption of criminal sanctions. For a more complete view on this issue, the reader should also consult Chapter Seven, which deals more specifically with the implementation of the Rome Statute of the International Criminal Court (ICC).

## Criminal repression in IHL

As mentioned previously, IHL is a set of rules designed to protect persons who are not, or who are no longer, participating in hostilities, and to limit the methods and means of waging war. It also sets out mechanisms designed to ensure compliance with the rules of this branch of law. Of these, the prevention and, where necessary, punishment of serious violations are particularly important. The chief responsibility for these lies with States.

Under IHL, perpetrators bear individual responsibility for serious violations they commit, and must be prosecuted and punished. The four Geneva Conventions of 1949 (GC I-IV),

their Additional Protocol I of 1977 (P I) and other treaties set forth the States Parties' explicit obligations regarding criminal repression of serious violations of the rules of IHL in armed conflict. The nature and extent of these obligations differ from one treaty to another. There are, however, a number of issues that need to be looked at in order to ensure effective repression at the national level, such as: criminal procedure; methods of incorporating punishment into criminal law; statutes of limitations; forms of individual criminal responsibility and modes of liability, such as "command responsibility"; and inter-State cooperation and assistance in criminal matters.

# Criminal procedure

Each State's substantive and procedural criminal law, together with its judicial system as a whole, must allow for the prosecution of persons allegedly responsible for serious violations of IHL. In State practice there is generally no special procedure for the repression of crimes under international law. Their prosecution and sentencing usually follow the standard procedure in the courts of jurisdiction, whether they are military or civilian, or both.

## Initiating prosecution

Serious violations of IHL may be committed by members of armed forces or by other persons, within the national territory or abroad, in the course of an international or a non-international armed conflict. Authorities desiring to prosecute a person allegedly responsible for such crimes must give prior consideration to a certain number of questions. First, it must be determined whether the alleged act constitutes a criminal offence under domestic law, and whether national courts are competent to hear such cases. The question of competent jurisdiction is particularly important for crimes committed outside the national territory, for which a specific basis of jurisdiction, including universal jurisdiction, must be provided in legislation.

It must then be decided whether prosecutions should be initiated. The main factor in such a decision should be the quality of the evidence gathered. When the defendant is a member of the armed forces, it must be decided whether military or ordinary law is applicable and by what court he or she would be tried. The independence of the body charged with instituting public action is of crucial importance in ensuring an effective system for the repression of serious violations of IHL. In certain countries, for example, the bringing of a criminal prosecution for such violations is subject to the approval of an executive authority. To overcome possible inactivity on the part of the government, e.g., for reasons of political expediency, the criteria for bringing a criminal action, and/or justifications for a refusal to do so, should be set out in clear terms in domestic legislation. Finally, it is important that the victims of such violations be given easy and direct access to justice.

## Choice of competent court

International law takes no stand on the choice of competent court. While at the national level the establishment of exceptional tribunals is generally in conflict with the requirement for an impartial and regularly constituted court, the assignment of competence to military or civilian jurisdictions for violations of IHL is left to the discretion of each State. It is by no means easy to declare *a priori* or as a general rule that one solution is preferable to another. With a view to the repression of serious violations of IHL (war crimes), national legislators should nevertheless bear in mind the following:

- war crimes may be committed by civilians as well as by military personnel;
- they may be prosecuted in times of peace as well as in times of war;
- they may involve carrying out investigations abroad or having recourse to international judicial cooperation in cases where universal jurisdiction is applied or where judgment is passed on the State's own troops sent abroad.

Solutions will depend on the relationship between military and ordinary law and between military and civilian power within the organization of the State.

## Taking and assessment of evidence

Trials of crimes committed abroad pose particular problems related to the gathering of evidence and to the right of the defence to review it. It is important to look into these issues and, if necessary, to make provision for suitable procedures, such as the admittance of testimony via video or executing letters rogatory abroad, and to bolster international judicial cooperation agreements.

To establish the defendant's guilt in war crimes cases, it must be demonstrated, among other things, that the act in question occurred in the course of an armed conflict or in connection with it. National legislation often therefore specifies which authority is empowered to qualify a given situation as an armed conflict. In addition, victims should be allowed to participate actively in the proceedings. Like the accused and the witnesses, they should also benefit from protection if needed. This would be justified in situations where resentment and the risk of revenge are high. Finally, the need to protect military secrets or national security must also be taken into account in criminal procedure, but confidentiality must not be invoked with the sole aim of preventing prosecution. *In camera* proceedings may be held if necessary.

# Methods of incorporating international crimes into domestic law

The legislator has a number of options available when translating serious violations of IHL into domestic criminal legislation and when making them subject to domestic law.

This **first option** consists of applying the existing military or ordinary national criminal law. This approach proceeds from the view that domestic criminal law provides adequate punishment for serious violations of IHL and that it is therefore unnecessary to introduce new crimes. On the assumption that the precedence of international law over national law is recognized, domestic legislation must be interpreted in accordance with the provisions of international law by which the State is bound, and any gaps in the law must be closed.

Advantage:

- Modern criminal codes provide for the punishment of a number of different offences, including serious violations of such fundamental human rights as the rights to life, health, mental and physical integrity, personal liberty and property.

Disadvantages:

- Crimes under domestic criminal law often correspond only roughly to the criminal behaviour characterizing armed conflict.
- The procedures and conditions whereby offenders may be punished under domestic criminal law do not always correspond to the requirements of IHL.
- The penalties in existing law may not be appropriate to the seriousness of the crimes in question.

The **second option** aims at criminalizing serious violations of IHL at the national level by providing for a general reference to the relevant provisions of IHL, to international law in general, or to the laws and customs of war (customary law), and specifying a range of penalties.

Advantages:

- This option is simple and economical. All breaches of IHL are made punishable by simple reference to the relevant instruments and, where applicable, to customary law.
- No new national legislation is needed when the treaties are amended or new obligations arise for a State which becomes party to a new treaty.

Disadvantages:

- Criminalization by a generic provision may prove insufficient in view of the principle of legality, particularly as this method does not permit any differentiation of the penalty in accordance with the gravity of the act, unless this is left to be decided by the judge in application of strict criteria laid down by law.
- It requires the judge of the national court to clarify and interpret the law in light of the provisions of international law, leaving the judiciary with considerable room for manoeuvre. The task is not made any easier by the fact that the definitions of war crimes contained in international instruments may not correspond exactly to the type of formulation commonly found in domestic legislation.

The **third option** consists of providing in domestic law for specific crimes corresponding to those found in international treaties. This can be achieved in various ways, in particular:

- by transcribing into national law the full list of crimes with identical wording to that of the treaties and laying down the penalties applying to each offence, whether individually or by category; or
- by separately redefining or rewriting in national law the description of the types of conduct constituting the crimes.

Advantages:

- When these crimes are separately defined in national criminal law, a treaty violation is punishable even if the treaty in question has not been ratified by the prosecuting State.
- As far as the accused is concerned, specific criminalization better respects the principle of legality, since it lays down clearly and predictably which types of conduct are considered criminal and thus subject to punishment.
- It facilitates the task of those charged with applying the law by partly relieving them of the often tedious burden of research and interpretation in the field of international law.

Disadvantages:

- Specific criminalization is a major task for the legislator, requiring considerable effort in research and drafting. It may entail an extensive review of existing penal legislation.
- If the criminalization is too detailed and specific, it may lack the flexibility needed to incorporate developments in international law at a later stage.



Finally, under the **fourth option**, national authorities may prefer to adopt a mixed approach which involves combining criminalization by a generic provision with the explicit and specific criminalization of certain serious crimes. In this case, the generic provision is residual in the sense that it concerns facts which are not specifically criminalized and subjected to punishment (in accordance with the principle *lex specialis derogat lege generali*). The combination of general and specific criminalization may also be complemented by the subsidiary application of other provisions of common criminal law.

Advantage:

- Under the various forms which it may take, this method permits treaty obligations with regard to the repression of breaches of IHL to be carried out fully and with due differentiation.

Disadvantage:

- This method requires that the judge be able to interpret simultaneously the provisions of both domestic and international law.

## Forms of criminalization

The various methods just explained, especially options 2-4 above, generally take the form of:

- a special stand-alone law separate from criminal codes; or
- an insertion into the existing criminal legislation (ordinary criminal codes or the military penal code, or both).

The combination in one piece of legislation of crimes and general principles of criminal law, in accordance with the specific requirements of international criminal law, certainly facilitates the work of legal practitioners in those States in which such a legislative method can be used. However, the adoption by a State of a special stand-alone law separate from the criminal code or codes does not always fit readily into the structure of the legislative system in criminal matters. Moreover, it runs counter to the trend in certain countries to concentrate provisions of criminal law as far as possible into a single body of law.

The option of incorporating offences into existing legislation, apart from obliging the legislator to determine the form of incorporation (specific section or chapter, complements to existing crimes and so on), also poses the problem of where punishable offences are to be placed in domestic law – whether in ordinary criminal law or in military criminal law. Because persons responsible for violations of IHL may be either military personnel or civilians, some States have placed the relevant provisions in both ordinary criminal law and military criminal law, or they have extended one of these bodies of law so that it covers both military personnel and civilians. Given that criminal legislative systems and relationships between ordinary criminal law and military criminal law vary so much from country to country, it is difficult to favour either variant in the abstract. The important thing is to ensure that the choice does not result in a vacuum of jurisdiction *in personam*.

Finally, in countries with a common-law tradition, serious violations of IHL are often sanctioned by primary legislation transposing and executing the treaty within the domestic legal system (in a Geneva Conventions Act, for example). This kind of legislation generally defines both the material scope of the crimes and the jurisdiction to which they are subject.

# Statutes of limitations

The application of a statutory limitation on legal action in the event of an offence (also known as time-barring or time limits) may relate to either of two aspects of legal proceedings. On the one hand, the statutory limitation may apply to prosecution. If a certain time has elapsed since a breach was committed, this would mean that no public action could be taken, and that no verdict could be reached. On the other hand, the limitation may apply only to the application of the sentence itself. In this case the fact that a certain amount of time had elapsed would mean the criminal sentence could not be applied. Because the repression of serious violations of IHL is essential to ensuring respect for this branch of law, the issue of statutory limitations for these violations must be raised. This is all the more important in view of the gravity of certain violations, characterized as war crimes, that run counter to the interests of the international community as a whole.

## **Statutory limitations in national criminal law systems**

Most legal systems make allowances for relatively short statutory limitations for minor offences. For more serious crimes, legal systems have favoured two other approaches. The first, found in many civil-law countries, establishes limitation periods that are much longer than those for lesser offences. The second, which is mainly linked to common law countries, sets no statutory limits at all for the prosecution of war crimes.

## **Time limits in international treaty law**

The main IHL instruments are silent on the subject. On 26 November 1968, the United Nations General Assembly adopted the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity. The Convention, which entered into force in 1970, applies to both the prosecution and the application of sentences, and covers war crimes – in particular, grave breaches of the Geneva Conventions – and crimes against humanity, including apartheid and genocide, committed in times of both war and peace. It is effective retroactively, insofar as it requires the abolition of statutes of limitations previously established pursuant to laws or to other enactments, as well as being applicable to crimes already existing under such norms.

## **Time limits in international customary law**

The recent trend towards pursuing alleged war criminals more vigorously in national and international criminal courts and tribunals, as well as the growing body of legislation giving jurisdiction over war crimes without time limits, has hardened the existing treaty rules prohibiting statutes of limitations for war crimes into customary law (see Rule 160 of the ICRC Law study on customary international humanitarian law (CIHL)). Statutory limitations may also prevent the investigation of war crimes and the prosecution of alleged suspects, constituting a violation of the customary legal obligation to do so.

## Forms of individual criminal responsibility

Individuals may be held criminally responsible not only for committing war crimes, but also for attempting, assisting in, facilitating or aiding and abetting the commission of war crimes. They may also be held responsible for planning and instigating the commission of war crimes. Commanders and other superiors may be held criminally responsible for war crimes committed pursuant to their orders.

Violations can also result from a failure to act. In situations of armed conflict, armed forces or groups are generally placed under a command that is responsible for the conduct of its subordinates. It is reasonable, then, in order to make the repression system effective, that the hierarchical superiors should be held individually responsible when they fail to take proper measures to prevent their subordinates from committing serious violations of IHL. Command responsibility was an important question during the Second World War. Although the Charters of the Nuremberg and Tokyo International Military Tribunals contained no rules on the topic, the trials held after the war laid down broad guidelines on the elements of command responsibility. Today, these have been recognized to be part of customary international law, applicable to both international and non-international armed conflicts (see CIHL Rule 153). They may be summarized as follows:

- command responsibility involves a superior, i.e. a person having effective authority over a subordinate, who can be military or civilian;
- the commander/subordinate relationship can be either *de jure* or *de facto*, emphasizing the actual material ability to prevent and punish the commission of crimes;
- responsibility may arise through both actual or constructive knowledge: the latter means that it may be sufficient if the superior “had reason to know” or “owing to the circumstances at the time, should have known” that crimes were being or would be committed;
- the superior failed to take all necessary and reasonable measures within his power to prevent the criminal conduct or put a stop to it. This includes failure to punish subordinates who commit war crimes due to a failure to investigate possible crimes and/or failure to report allegations to higher authorities.

As for treaty law, the Geneva Conventions are silent on the matter, contrary to Article 86, para. 2, of Additional Protocol I, which provides that:

“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.”

In addition, Article 87 of Additional Protocol I spells out the duties and obligations of military commanders with respect to their subordinates. The superiors must prevent and, where necessary, suppress and report to the competent authorities grave breaches committed by their subordinates. Only in the event that he or she fails in these duties does a commander risk being held criminally responsible for taking no action.

## Superior orders

Responsibility for war crimes may still arise even when they were committed as a result of superior orders. This is based on two customary rules applicable to international and non-international armed conflicts. They establish that, first, every combatant has the duty to disobey a manifestly unlawful order. Secondly, obeying a superior order may not relieve the subordinate of criminal responsibility if he or she knew – or should have known, due to the nature of the act ordered – that the order was unlawful (see CIHL Rules 154 and 155).

The rule was set forth in the Charters of the International Military Tribunals at Nuremberg and Tokyo and has more recently been included in the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone and the International Criminal Court.

It should also be mentioned that commission of war crimes as a result of superior orders has nevertheless been taken into account for mitigation of punishment. Practice in this regard includes Nuremberg and Tokyo, the more recent international criminal tribunals and numerous examples in States' military manuals, national legislation and official statements.

# Judicial guarantees

Currently, State practice establishes that in both international and non-international armed conflicts no one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees. The right to a fair trial is provided for in the four Geneva Conventions and in Additional Protocols I and II. Depriving a protected person of a fair and regular trial is a grave breach under the Third and Fourth Geneva Conventions and Additional Protocol I. Article 3 common to the four Geneva Conventions prohibits the sentencing of persons or the carrying out of executions without previous judgment pronounced by a regularly constituted court. A party to the conflict depriving a person of the right to a fair trial is committing a war crime pursuant to the Statutes of the International Criminal Court, the International Criminal Tribunals for the former Yugoslavia and for Rwanda, and the Special Court for Sierra Leone.

Many of these judicial guarantees are already included in the domestic law of States party to the Geneva Conventions, and share much in common with the rights included in international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR, Art. 14). Note that rights under Article 75, para. 4, of Additional Protocol I may not be derogated from, as is the case with certain guarantees found in the ICCPR.

States should ensure that the judicial guarantees reflected in instruments to which they are party are included in domestic legislation, in instruments such as their code of criminal procedure and rules of evidence, in stand-alone legislation regulating protected persons under the Geneva Conventions and their Additional Protocols, and in their constitution.

An overview of the major judicial guarantees in the Geneva Conventions (primarily the Third and Fourth Geneva Conventions), their Additional Protocols and the International Criminal Court follows. References to the relevant rules of the CIHL are also included:

- the principle of individual criminal responsibility (Art. 75.4(b), P I; Art. 6.2(b), P II; Art. 25.2, ICC; Rule 102, CIHL);
- the principle of *nullum crimen et nulla poena sine lege* (no crime without a law, no punishment without a law) (Art. 99.1, GC III; Art. 75.4(c), P I; Art. 6.2(c), P II; Arts 22-23, ICC; Rule 101, CIHL);
- the principle of *non bis in idem* (double jeopardy) (Art. 86, GC III; Art. 117.3, GC IV; Art. 75.4(h), P I; Art. 6.2(a), P II; Art. 20, ICC; part of Rule 100, CIHL);
- the right of the accused to be judged by an independent, impartial and regularly constituted court and without undue delay (Art. 84.2, GC III; Art. 75.4, P I; Art. 6.2, P II; Art. 67.1, ICC; part of Rule 100, CIHL);
- the right of the accused to be informed of the nature and cause of the accusation (Art. 104.2, GC III; Art. 71.2, GC IV; Art. 75.4(a), P I; Art. 6.2(a), P II; Art. 67.1(a), ICC; part of Rule 100, CIHL);
- the rights and means of defence, for example the right to defend oneself or to be assisted by a qualified lawyer freely chosen (Arts 99 and 105, GC III; Arts 72 and 74, GC IV; Art. 75.4(a) and (g), P I; Art. 6.2(a), P II; Art. 67.1(d), ICC; part of Rule 100, CIHL);
- the right to free legal assistance when the interests of justice so require (Art. 105.2, GC III; Art. 72.2, GC IV; Art. 67.1(d), ICC; part of Rule 100 CIHL);
- the right of the accused to communicate freely with counsel (Art. 105.3, GC III; Art. 72.1, GC IV; Art. 67.1(b), ICC; part of Rule 100, CIHL);
- the right to sufficient time and facilities to prepare the defence (Art. 105.3, GC III; Art. 72.1, GC IV; Art. 67.1(b), ICC; part of Rule 100, CIHL);
- the right of the accused to examine witnesses and to have witnesses examined (Arts 96.3 and 105.1, GC III; Art. 72.1, GC IV; Art. 75.4(g), P I; Art. 67.1(e), ICC; part of Rule 100, CIHL);
- the presumption of innocence (Art. 75.4(d), P I; Art. 6.2(d), P II; Art. 66, ICC; part of Rule 100, CIHL);
- the right of the accused to be present at his trial (Art. 75.4(e), P I; Art. 6.2(e), P II; Art. 67.1(d), ICC; part of Rule 100, CIHL);
- the right of the accused not to testify against himself or to confess guilt (Art. 75.4(f), P I; Art. 6.2(e), P II; Art. 67.1(g), ICC; part of Rule 100, CIHL);
- the right of the accused to have the judgment pronounced publicly (Art. 75.4(i), P I; Arts 74.5 and 76.4, ICC; part of Rule 100, CIHL);
- the right of the accused to be informed of his rights of appeal (Art. 106, GC III; Art. 73, GC IV; Art. 75.4(j), P I; Art. 6.3, P II; part of Rule 100, CIHL);
- the right of the accused to have the assistance of an interpreter, if so needed (Arts 96.4 and 105.1, GC III; Arts 72.3 and 123.2, GC IV; Art. 67.1(f), ICC; part of Rule 100, CIHL).

# Basis of jurisdiction

## General

A State may exercise jurisdiction within its own territory. Such jurisdiction includes the power to make law (legislative jurisdiction), the power to interpret or apply law (adjudicative jurisdiction) and the power to take action to enforce law (enforcement jurisdiction). However, while the assertion of enforcement jurisdiction is generally limited to national territory, international law recognizes that in certain circumstances a State may legislate for, or adjudicate on, events occurring outside its territory (extraterritorial jurisdiction).

In relation to criminal law, a number of principles have been invoked as the basis for such extraterritorial jurisdiction. These include jurisdiction over acts:

- committed by persons having the nationality of the forum State (nationality or active personality principle);
- committed against nationals of the forum State (passive personality principle); or
- affecting the security of the State (protective principle).

While these principles enjoy varying levels of support in practice and opinion, they all require some link between the act committed and the State asserting jurisdiction. However, universality, a further basis for asserting extraterritorial jurisdiction, requires no such link.

## Universal jurisdiction

Universal jurisdiction refers to the assertion of jurisdiction over offences regardless of the place where they were committed or the nationalities of the perpetrator or victims. The right to exercise such jurisdiction for war crimes committed in both international and non-international armed conflicts is recognized as a rule of customary international humanitarian law (Rule 157, CIHL). Universality is also held to apply to a range of offences, normally the core international crimes, whose repression by all States is justified or required as a matter of international public policy.

A number of other treaties oblige States Parties to provide for universal jurisdiction over certain crimes, including when they take place during armed conflict. Among these, the grave breaches regime of the Geneva Conventions and Additional Protocol I will be discussed specifically in the next section. Other universal instruments are the Convention against Torture, the Convention on the Safety of United Nations and Associated Personnel, the Second Protocol to the Hague Convention for the Protection of Cultural Property and the International Convention for the Protection of All Persons from Enforced Disappearance.

The exercise of universal jurisdiction may take the form of either the enactment of national law (legislative universal jurisdiction) or the investigation and trial of alleged offenders (adjudicative universal jurisdiction). The former is more commonly found as part of State practice and is generally a necessary basis for investigation and trial. It is, however, feasible, at least in principle, for a court to base its jurisdiction directly on international law and to exercise adjudicative universal jurisdiction without any reference to national legislation.

States have adopted a range of methods to provide for universal jurisdiction under their national law. In this regard, constitutional provisions are of central importance in determining the status of customary or treaty law in the domestic legal system. Courts might rely directly on such provisions or on international law to exercise universal jurisdiction where permitted or required. As the relevant provisions of international law are not self-executing, however, it is preferable that those bases of jurisdiction applicable to war crimes be provided for expressly in domestic law.

A number of States with a (code-based) civil-law system provide for universal jurisdiction within their ordinary and/or military penal code. This code may define the jurisdictional and material scope of the offence in the same section. More frequently, however, the provisions on universal jurisdiction are included in the general section of the code and refer to substantive offences defined elsewhere in the same instrument. Universal jurisdiction may also be laid down in criminal procedural law or in a law on the organization of the courts. Some States have granted their courts universal jurisdiction with regard to certain offences by means of a special stand-alone law.

In countries without code-based systems – generally those with a common-law system – it is the usual practice to provide for universal jurisdiction in primary legislation defining both the jurisdictional and material scope of the offence.

Whatever the method adopted, the most important issue that needs to be addressed is the question of whether universal jurisdiction requires a particular link to the forum State. Usually this is understood to require that the accused be present in the territory before proceedings are instituted.

Providing for universal jurisdiction in national law also requires attention to the following:

- in order to prevent impunity, all war crimes, whether committed in connection with an international or a non-international armed conflict, should be subject to universal jurisdiction;
- it is important to make clear that jurisdiction extends to all persons directly or indirectly responsible for committing the offences concerned, whatever their nationality and regardless of whether the offence was committed within the State's territory or abroad;
- the criteria for opening criminal proceedings, or for justifying a refusal to do so, must be set forth clearly and precisely;
- given that the jurisdiction of States may be concurrent, the exercise of jurisdiction by any one State may be subject to certain conditions, such as respect for the principle of *non bis in idem*, the taking into account of penalties already imposed abroad, and the previous exercise of jurisdiction by another State or by an international tribunal.

The condition of double criminal liability, however, according to which the offence prosecuted must also be an offence in the place where it occurred, is incompatible with the requirements of IHL.

Finally, the prosecution and trial of offences occurring abroad imposes particular problems in relation to the gathering of evidence, respect for the defendant's rights, and protection of witnesses and victims. Appropriate procedures for prosecutions and trials under universal jurisdiction must address these issues by means of suitable provisions to facilitate investigations as well as the gathering and evaluation of evidence. In this respect, arrangements for international judicial cooperation are essential and may in some cases require reinforcing.

## IHL grave breaches

Grave breaches are particularly serious violations of IHL listed in the four 1949 Geneva Conventions and Additional Protocol I, which provide for individual criminal responsibility and to which universal jurisdiction is attached. A complete list of grave breaches is provided on the next page.

More precisely, under the relevant provisions of the Geneva Conventions and Additional Protocol I, States are required to search for those suspected of having committed grave breaches "regardless of their nationality," and either bring them before their own courts or hand them over for trial to another State Party (principle of *aut dedere aut judicare*). While the Conventions do not expressly state that jurisdiction is to be asserted regardless of the place of the offence, they have been generally interpreted as providing for universal jurisdiction. As such, they are among the earliest examples of universal jurisdiction in treaty law. What is more, they provide for *mandatory* universal jurisdiction, since they oblige States to try those who have allegedly committed grave breaches or institute the necessary procedures to extradite such persons. States may institute legal enquiries or proceedings even against persons outside their territory. When extradition to another State is not an option, States must nevertheless have in place penal legislation enabling them to try alleged offenders, regardless of their nationality or the place of the offence.

More precisely, IHL requires a State to take the following actions in relation to implementation of grave breaches.

**First**, a State must enact national legislation prohibiting and punishing grave breaches either by adopting a separate law or by amending existing laws. Such legislation must cover all persons, regardless of nationality, committing grave breaches or ordering them to be committed and including instances where violations result from a failure to act when under a legal duty to do so. It must cover acts committed both within and outside the territory of the State.

**Second**, a State must search for and prosecute those alleged to be responsible for grave breaches. It must prosecute such persons or extradite them for trial in another State.

**Third**, a State must require its military commanders to prevent, suppress, and take action against those under their control who commit grave breaches.

**Fourth**, States should assist each other in connection with criminal proceedings relating to grave breaches.



## GRAVE BREACHES SPECIFIED IN THE 1949 GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL I OF 1977

| Grave breaches specified in the four Geneva Conventions of 1949 (Arts 50, 51, 130 and 147, respectively)   | Grave breaches specified in the Third and Fourth Geneva Conventions of 1949 (Arts 130 and 147, respectively)   | Grave breaches specified in the Fourth Geneva Convention of 1949 (Art. 147)  |
|--|--|--|
| <ul style="list-style-type: none"> <li>- wilful killing</li> <li>- torture or inhuman treatment</li> <li>- biological experiments</li> <li>- wilfully causing great suffering</li> <li>- causing serious injury to body or health</li> <li>- extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly</li> </ul> <p><i>(This latter provision is not included in Art. 130 Third Geneva Convention)</i></p> | <ul style="list-style-type: none"> <li>• compelling a prisoner of war or a protected civilian to serve in the armed forces of the hostile Power</li> <li>• wilfully depriving a prisoner of war or a protected person of the rights of fair and regular trial prescribed in the Conventions</li> </ul> | <ul style="list-style-type: none"> <li>- unlawful deportation or transfer</li> <li>- unlawful confinement of a protected person</li> <li>- taking of hostages</li> </ul> |

### GRAVE BREACHES SPECIFIED IN THE ADDITIONAL PROTOCOL OF 1977 (ART. 11 AND ART. 85)

|  |  |
|--|--|
| <ul style="list-style-type: none"> <li>- Seriously endangering, by any wilful and unjustified act or omission, 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 an armed conflict, in particular physical mutilations, medical or scientific experiments, removal of tissue or organs for transplantation which is not indicated by the state of health of the person concerned or 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 in no way deprived of liberty;</li> </ul> <p><b>When committed wilfully and if they cause death or serious injury to body and health:</b></p> <ul style="list-style-type: none"> <li>- making the civilian population or individual civilians the object of attack;</li> <li>- 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;</li> <li>- 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;</li> <li>- making non-defended localities and demilitarised zones the object of attack;</li> </ul> | <ul style="list-style-type: none"> <li>- making a person the object of an attack in the knowledge that he is <i>hors de combat</i>;</li> <li>- the perfidious use of the distinctive emblem of the red cross and red crescent or other protective signs;</li> </ul> <p><b>When committed wilfully and in violation of the Conventions and the Protocol:</b></p> <ul style="list-style-type: none"> <li>- 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;</li> <li>- unjustifiable delay in the repatriation of prisoners of war or civilians;</li> <li>- practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;</li> <li>- attacking clearly recognised historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of people and to which special protection has been given, causing as a result extensive destruction thereof when such objects are not located in the immediate proximity of military objectives or used by the adverse party in support of its military effort;</li> <li>- depriving a person protected by the Conventions or by Protocol I of the rights of fair and regular trial.</li> </ul> |
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## Cooperation and assistance in criminal matters

The repression of serious violations of IHL requires the cooperation of different States or bodies, not only because the persons involved in IHL-related trials (the accused, the victims, the witnesses, etc.) may be of different nationalities or in different countries, but also because the international community as a whole has a direct interest in seeing them effectively repressed. From this standpoint, international law provides for various forms of assistance, from the taking of evidence abroad to the enforcement of foreign judgments.

The need for mutual assistance is especially obvious in the case of crimes where those allegedly responsible must be brought to trial or extradited by States. Extradition is provided for in the Geneva Conventions and is further elaborated in Article 88 of Additional Protocol I and other IHL treaties. None of these instruments, however, addresses the question of the application of the exceptions that are traditionally provided for under national law and which could bar extradition in certain circumstances, such as the nationality of the person whose extradition is requested, the political nature of the crime, statutes of limitations, or the existence of a bilateral or multilateral extradition treaty.

As regards judicial assistance in criminal matters, these international instruments also impose an obligation to ensure reciprocal judicial assistance. A system of repression which is based on the principle of universal competence with regard to the prosecution and judgment of criminal acts (and which is thus cross-border in nature) will owe much of its effectiveness to the quality of the cooperation and mutual judicial assistance between the prosecuting authorities of the different States.



# **4**

# **THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS**

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## CHAPTER FOUR: THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS

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# Treaty overview: the 1949 Geneva Conventions and the 1977 and 2005 Protocols

In 1949 four Geneva Conventions were adopted. Each Convention covers the protection of a specific category of persons who are not, or who are no longer, taking part in hostilities.

## *First Convention:*

on the **care of the wounded and sick** members of **armed forces in the field** (including, *inter alia*, protection for medical facilities and personnel and for the distinctive emblem, and grave breaches)

## *Second Convention:*

on the care of the wounded, sick and shipwrecked members of **armed forces at sea** (including, *inter alia*, protection for the relevant medical facilities and personnel and for the distinctive emblem, and grave breaches)

## *Third Convention:*

on the **treatment of prisoners of war** (including, *inter alia*, rules relating to the general protection of prisoners of war, the beginning of captivity, internment, labour, relations with the exterior, penal and disciplinary sanctions, judicial proceedings, the termination of captivity, release and repatriation, information bureaux and the Central information agency, and grave breaches)

## *Fourth Convention:*

on the **protection of civilian persons** in time of war (including, *inter alia*, rules relating to the general protection of civilians in armed conflict, aliens in the territory of a party to the conflict, occupied territories, the treatment of civilian internees, including penal and disciplinary sanctions as well as release and repatriation, information bureaux and the central information agency, and grave breaches)

The 1949 Geneva Conventions are ultimately a legacy of World War II. Starting from the tragic experience gained in that conflict, they greatly improve the legal protection of war victims. Today, all States are party to the 1949 Geneva Conventions. Accepted as they are by the whole community of nations, they have become truly universal law.

The various treaties that make up what is known as “Geneva law” deal extensively with the fate of persons who have ceased to fight or have fallen into the power of the adversary. They do not set limits on the way military operations may be fought. Concurrently with the development of Geneva law, States have codified, in various stages, international rules

setting limits to the conduct of military operations. The main thrust of what is known as “Hague law”, with the various Hague Conventions of 1907 as its main expression, is to limit warfare to attacks against objectives that are relevant to the outcome of military operations. The civilian population, therefore, must be immune from military attacks.

The 1949 Geneva Conventions did not develop the rules of Hague law. In particular, they failed to cover a fundamental issue of IHL: *the protection of the civilian population against direct effects of hostilities* (i.e. protection against direct attacks on the civilian population, indiscriminate bombardment, etc.).

Furthermore, following the adoption of the Geneva Conventions, *new technologies* produced new weapons, i.e. a more powerful potential for destruction, but also new techniques for ensuring the protection of war victims.

*Decolonization* more than doubled the number of States and, with new types of conflict (wars of national liberation), new rules of IHL needed to be considered.

Finally, the ever-increasing number of *civil wars* with frequent recourse to guerrilla warfare demonstrated the need to strengthen the protection of victims of non-international armed conflicts.

In response to these challenges, Switzerland convened a diplomatic conference in Geneva. From 1974 to 1977 that conference developed two new treaties of IHL, the *Protocols additional to the Geneva Conventions*. They were adopted on 8 June 1977 and, since that date, they have been open for ratification or accession by all States party to the 1949 Geneva Conventions.

## *Additional Protocol I (1977) to the Geneva Conventions of 1949:*

on the protection of victims of **international armed conflicts** (including, *inter alia*, general protection for the wounded, sick and shipwrecked and medical personnel and transports, rules relating to missing and dead persons, rules concerning methods and means of war, combatant and prisoner-of-war status, protection for the civilian population, including protection against the effects of hostilities, civilian objects, precautionary measures, civil defence, relief in favour of the general population, treatment of persons in the power of a party to the conflict, grave breaches and repression of war crimes, and the International Humanitarian Fact-Finding Commission)

*Additional Protocol II (1977) to the Geneva Conventions of 1949:*  
on the protection of victims of **non-international armed conflicts** (including, *inter alia*, rules concerning humane treatment of persons not taking a direct part in hostilities, persons whose liberty has been restricted and penal prosecutions, protection and care for the wounded, sick and shipwrecked, protection of the civilian population, and relief societies and relief actions)

*Additional Protocol III (2005) to the Geneva Conventions of 1949:*  
on the adoption of an **additional distinctive emblem** (provides for an additional emblem referred to as the "red crystal").

The texts of these and other IHL treaties, together with the status of State signatures and ratifications, may be found at: <http://www.icrc.org/ihl>.

# Legislative, regulatory and administrative measures to implement the Geneva Conventions and their Additional Protocols

In addition to the obligation that States have to punish those who have committed serious violations of IHL, as discussed above, the Geneva Conventions and their Additional Protocols specify in a number of areas those measures that need to be adopted in order to fully implement IHL at the domestic level. They are summarized below. Some measures cover the dissemination of IHL, including also the training of qualified personnel and the presence of legal advisers in the armed forces. Others aim at providing special protection to specific categories of persons or objects, including medical personnel, children and the missing. Also, a number of measures require or suggest the marking of objects or persons in order to ensure that they are appropriately protected in times of armed conflict. Under Additional Protocol I, States shall also put into place mechanisms allowing for the review of the legality of new weapons. Finally, this chapter will discuss implementing mechanisms, such as the International Fact-Finding Commission. The vast majority of the provisions of these fundamental instruments (the Geneva Conventions and their Additional Protocols) are part of customary law.

## Translation, dissemination and training

The 1949 Geneva Conventions require the States party to the Conventions to communicate “official translations” of the Geneva Conventions to one another through the Swiss Federal Council, as well as the laws and regulations adopted to ensure their application.

They also request the parties, in times of peace as well as war, to disseminate the text of the Conventions “as widely as possible” to civilian and military audiences in their respective countries and, importantly, call for the study of the Conventions in their programmes of military instruction. In particular, the armed forces, medical personnel and chaplains should be versed in the contents of the Conventions.

## Qualified persons

Article 6 of Additional Protocol I provides for States to train “qualified personnel to assist in the application of the Conventions and of this Protocol, and in particular the activities of the Protecting Powers...” Special agreements between the parties concerned are contemplated for the deployment of such qualified personnel outside their national territory. The work envisaged for such personnel varies, and includes military, legal, medical, technical, administrative and relief-related matters.

The efforts of qualified personnel could include such measures as:

- disseminating of the content of IHL, including through the armed forces;
- establishing an order of priority among areas of national legislation which need to be supplemented or modified with the adoption of IHL obligations at the national level;
- assisting in the translation of IHL instruments;
- ensuring respect for the emblem and assisting in taking necessary corrective measures in case of misuse;
- assisting in the establishment of a civil defence service;
- assisting in the training of civil defence services;
- providing advice with regard to the construction of shelters, materials used, supply of food and water, sanitation facilities, etc.;
- compiling for the authorities a directory of groups which could provide volunteers and could assist in providing basic information regarding IHL;
- providing supplementary training for medical and paramedical personnel regarding war surgery, other medical techniques, and evacuation of victims of bombing attacks;
- promoting the stockpiling of emergency food and non-food supplies;
- reminding authorities of the importance of placing objects likely to become military targets at a safe distance from densely populated areas;
- keeping abreast of developments in IHL at international forums, in order to be able to advise the authorities; and
- taking other measures conducive to ensuring effective implementation of IHL.

The duties of some members of national IHL committees can be said to reflect in certain aspects the work of qualified personnel.

## Legal advisers

Knowledge of the law is an essential precondition for its proper application. The aim of requiring legal advisers in the armed forces, as stipulated in Article 82 of Additional Protocol I, is to improve knowledge of – and hence compliance with – IHL. As the conduct of hostilities was becoming increasingly complex, both legally and technically, States considered it appropriate when negotiating Additional Protocol I to **provide military commanders with legal advisers to help them apply and teach IHL.**



### *The role of the legal adviser*

Article 82 gives a flexible definition of the legal adviser's role, while still laying down certain rules. Legal advisers have a dual role: they advise military commanders on the correct application of IHL, and they give commanders guidance on how to teach it to the armed forces for which they are responsible. While these tasks are separate, they are also complementary, because training military personnel properly in time of peace makes the adviser's advice more effective in time of war. Article 82 therefore outlines the work of legal advisers, while leaving each State responsible for specifying their role and the conditions under which they fulfil it.

### *Expertise*

While Additional Protocol I leaves States Parties a certain degree of freedom as to the functions of their legal advisers, it does demand that they possess an **adequate level of expertise in IHL** if they are to advise military commanders effectively.

States are free to choose civilian or military legal advisers. However, the role of the legal adviser, which is primarily preventive and operational, differs from that of the judge advocate, who is concerned with military justice.

States Parties must specify the role and position of their legal advisers in precise terms, so that the advisers can carry out the tasks assigned to them under Article 82 effectively and efficiently.

### *Tasks*

**In peacetime**, the main task of a legal adviser is to develop the legal framework for the armed forces in terms of policy and law, using tools such as military manuals, disciplinary codes and directives.

Legal advisers also provide support in the teaching of IHL. The target group consists primarily of students at military schools, headquarters staff of the unit to which they are attached, junior commanders, and soldiers, especially on exercise.

Advisers take part in planning for major exercises and operations and assess the legal consequences of executing these plans, particularly with regard to the intended means and methods.

Advisers can also be involved in the process of examining new weapons, means and methods of warfare, as stipulated in Article 36 of Additional Protocol I and discussed below .

**In time of war**, the legal adviser's main task is to advise on the application of and compliance with IHL. In particular, legal advisers give opinions on current and planned military operations, apply their expertise to specific issues facing a commander, verify observance of the legal consultation

process as it involves units under command and remind commanders of their obligations within the meaning of Article 87 of Additional Protocol I. In the case of joint or multilateral operations, the legal advisers of the various armed forces involved should cooperate to ensure a degree of consistency, especially in the interpretation of the law.

However, the legal adviser does not replace the commander. Commanders always retain their leading role and their responsibility within the decision-making process. The role of the adviser is limited to briefing senior officers operating in an increasingly complex legal environment.

### *The legal adviser's position in the hierarchy*

Having clearly specified the role of their legal advisers, States must also specify the **level in the command structure at which they are to provide their expertise**. Article 82 implies two levels:

- in their role as consultants regarding the application of the Conventions and of Additional Protocol I, legal advisers could be attached to larger units and higher levels of command;
- where legal advisers are to support the teaching of IHL, it is useful to place them in a more operational context, perhaps at brigade or regimental level.

States must also specify the **hierarchical relationship** between legal advisers and the commanders they support.

### **Special protection**

In order to ensure that those not directly participating or no longer participating in hostilities are treated humanely and are taken care of, persons in charge of their relief and items required to provide that relief should be protected and easily identifiable. This is the case, for instance, for medical personnel and persons and objects involved in civil defense.

### **Protection of persons and objects entitled to use the distinctive emblems**



Although originally created to identify the medical services of the armed forces and to allow for the protection of the sick and wounded in situations of armed conflict, these emblems have come to represent impartial humanitarian assistance provided to those who suffer. The use and protection of the emblems are strictly defined and regulated in IHL. Hence, the fact that a person, organization or company is involved in, or desires to be associated with, humanitarian assistance does not of itself provide an entitlement to utilize the red cross, red crescent or red crystal.

Historically, IHL, as contained in the 1949 Geneva Conventions, had come to recognize three emblems of equal status: the red cross, the red crescent and the red lion and sun (although this last emblem has not been used since 1980). In December 2005, a diplomatic conference adopted the new Additional Protocol to the Geneva Conventions (Protocol III) relating to the adoption of an additional distinctive emblem (enjoying the same status and for the same purposes as the red cross and the red crescent), known as the red crystal. Additional Protocol III entered into force on 14 January 2007.

The use and protection of these emblems are today governed by the 1949 Geneva Conventions, their two Additional Protocols of 1977 and Additional Protocol III of 2005, as well as the domestic legislation of States.

These treaties define the individuals, organizations and services entitled to use the emblems, and the purposes for which these distinctive signs may be employed. Their use is regulated at all times, during periods of peace as well as in times of armed conflict. Any unauthorized use of the emblems is prohibited.

#### Key articles regulating the use and protection of the emblem, as well as the denominations red cross, red crescent and red crystal

|                              |                                    |
|------------------------------|------------------------------------|
| 1949 GENEVA CONVENTION I     | Arts 38-44, 53-54                  |
| 1949 GENEVA CONVENTION II    | Arts 41-45                         |
| 1949 GENEVA CONVENTION IV    | Arts 18-22                         |
| 1977 ADDITIONAL PROTOCOL I   | Arts 8, 18, 37-38, 66, 85, Annex I |
| 1977 ADDITIONAL PROTOCOL II  | Art. 12                            |
| 2005 ADDITIONAL PROTOCOL III | Arts 1-7                           |

#### **Protective use of the emblem**

The primary purpose of the emblem is to serve as the visible expression of the protection provided under IHL to the medical services in times of armed conflict. Subject to the required authorization by the State, other persons or objects may also make use of the emblem for protective purposes in times of war. This is commonly referred to as the “protective use” of the emblem.

Those entitled to make *protective* use of the emblem include:

#### *In times of armed conflict:*

- medical services (personnel, units, such as hospitals, means of transport, etc.) and religious personnel of a State’s armed forces;
- medical personnel and medical units and transports of National Red Cross, Red Crescent and Red Crystal Societies duly recognized and authorized by their governments to assist the medical services of the armed forces, and thus when employed exclusively for those purposes and subject to military laws and regulations;
- civilian hospitals (public or private) that are recognized as such by State authorities and are authorized to display the emblem; in occupied territory and in zones of military operations, persons engaged in the operation and administration of such civilian hospitals;
- all civilian medical and religious personnel either in occupied territory or in areas where fighting is taking place or is likely to take place;

- all civilian medical units and transports recognized and authorized by the competent authorities to be marked by the emblem;
- other recognized and authorized voluntary aid societies, subject to the same conditions as National Red Cross, Red Crescent and Red Crystal Societies;
- the International Federation of Red Cross and Red Crescent Societies;
- the ICRC.

#### *In times of peace:*

- medical services and religious personnel of the State’s armed forces;
- National Society medical units and transports whose assignment to medical purposes in the event of an armed conflict has been decided may display the emblem as a protective device in peacetime, with the consent of national authorities;
- the International Federation of Red Cross and Red Crescent Societies;
- the ICRC.

#### **Indicative use of the emblem**

Subject to specific rules, the emblems and the denominations Red Cross, Red Crescent and Red Crystal may also be used for the purpose of the *identification* of National Societies, the International Federation, and the ICRC. The emblem for identification purposes must be smaller than for protective purposes; this is referred to as the “indicative use” of the emblem.

Those entitled to make *indicative* use of the emblem include:

*In times of armed conflict:*

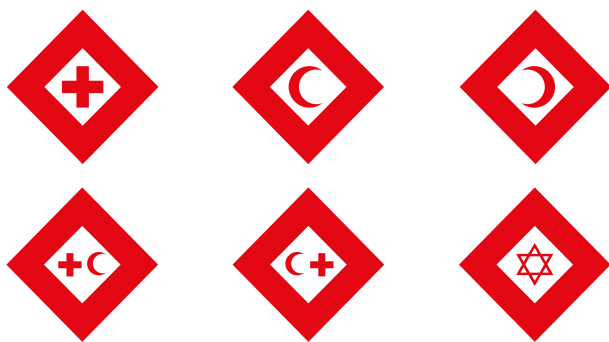
- National Red Cross, Red Crescent and Red Crystal Societies;
- the International Federation of Red Cross and Red Crescent Societies;
- the International Committee of the Red Cross.

*In times of peace:*

- National Red Cross, Red Crescent and Red Crystal Societies;
- the International Federation of Red Cross and Red Crescent Societies;
- the International Committee of the Red Cross;
- ambulances and first-aid stations operated by third parties, when exclusively assigned to providing free treatment to the wounded and sick, as an exceptional measure, on condition that the emblem is used in conformity with national legislation and that the National Society has expressly authorized such use.

Finally, it is worth mentioning that the National Societies that have opted to use the red crystal as an indicative sign may choose to add or incorporate within its centre another emblem or sign on condition that the incorporated emblem or sign is:

- an emblem or sign recognized by the Geneva Conventions or a combination thereof; or
- another emblem or sign which has been in effective use by a State and has been the subject of a notification to the other High Contracting Parties to the Geneva Conventions and to the ICRC.



National Societies that choose to make use of the red crystal may also, in conformity with national legislation, use the emblem or sign incorporated within the red crystal on its own, and its designation, within their national territory.

#### ***Necessity to prevent misuse of the emblem***

The distinctive emblems recognized under the Geneva Conventions and their Additional Protocols represent, in time of war, the visible sign of the protection provided under IHL to medical personnel and medical units and transports.

For this protection to be effective in times of armed conflict, the relevant rules of international law must be strictly respected and applied both in times of war and in peacetime. To this end, States are required to adopt all necessary legal and practical measures. This may usefully be achieved through the adoption of national legislation governing the use and protection of the emblem.

The failure of a State to adopt such legislation may lead to misuse of the emblem and thereby contribute to lessening the respect and confidence that the emblems should enjoy. The adoption of a comprehensive legal regime governing the use and protection of the emblem is therefore necessary to ensure that in the event of armed conflict, the wounded and sick will be respected and protected from hostilities, and that the care to which they are entitled will effectively reach them.

#### ***Guidelines for national regulations on the use of the emblem and prevention of all forms of abuse***

The responsibility for authorizing the use of the distinctive emblems rests with States, which must regulate their use in accordance with the terms of the Geneva Conventions and their Additional Protocols. In order to effectively control and monitor the utilization of the emblems, a State must adopt internal measures establishing the following:

- the identification and definition of the emblems that have been recognized and protected by that State;
- the determination of the national authority (or authorities) competent to regulate and monitor the use of the emblems;
- the determination of those entities entitled to employ the emblems;
- the uses for which permission is required.

In addition, a State must enact national legislation prohibiting and punishing unauthorized use of the distinctive emblems and their denominations at all times. This legislation must apply to all forms of personal and commercial use and prohibit imitations or designs capable of being mistaken for the emblems.

It is fundamental that the measures to prevent misuse also apply to members of the armed forces. This may be achieved through State regulations on military discipline and disciplinary procedures. The use of the emblems to hide or shelter combatants or military equipment during armed conflict, when committed wilfully and causing death or serious injury to body or health, is recognized as a war crime under customary law. Lesser violations of the emblems must also be sanctioned.

The prevention and repression of emblem misuse is not accomplished solely by the adoption of penal or regulatory measures. A State should also undertake to inform the public, businesses and the medical community on the proper use of the emblems.

With regard to the implementation of IHL rules on the emblem in domestic law, several general patterns can be identified.

- (i) Special stand-alone legislation outlining detailed rules on the use and protection of the emblem, combining rules with penal sanction measures, whether defining applicable penalties or referring to specific provisions in the domestic criminal law in the event of misuse. This is an approach favoured in different States with a civil-law tradition.
- (ii) Incorporation of relevant rules on the protection of the emblem, and in particular provisions outlining penal sanctions and penalties, within a general law incorporating the Geneva Conventions and, where applicable, their Additional Protocols, in domestic law (often entitled a Geneva Conventions Act). This option is observable in many countries with a common-law tradition.
- (iii) Addressing the rules on the use and protection of the emblem in a variety of relevant domestic laws and regulations (penal or military criminal codes, trademark laws, laws on the recognition or status of the National Society, military regulations, etc.).

#### **ICRC documentation on the emblem**

The ICRC has published a series of documents and articles outlining in greater detail the meaning of the emblems and the conditions of their use.

In addition, the ICRC's Advisory Service on IHL has prepared a comprehensive model law concerning the utilization and protection of the emblem (Annex II) and an updated version of its model Geneva Conventions Act (Annex III) which addresses protection of the emblems and incorporates the provisions of Additional Protocol III. States are invited to adopt these models or to use them as a basis or a guide when drafting their own domestic legislation. In addition, examples of domestic legislation protecting and regulating the use of the emblems may be accessed in the ICRC's database on national legislation and case-law.

These tools and materials may be accessed on the ICRC website at: [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/section\\_ihl\\_nat\\_model\\_laws](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/section_ihl_nat_model_laws).

#### **Civil defence**

The creation of a civil defence regime reflects a desire to mitigate the loss, damage and suffering inflicted on civilians as a result of the effects of warfare or of disaster. Article 63 of the Fourth Geneva Convention already grants civil defence organizations and their personnel, as it does for the National Red Cross and Red Crescent Societies, the right to pursue their activities under foreign occupation. Additional Protocol I expands the protection for civil defence organizations to cover all situations of international armed conflict. It guarantees

that civil defence organizations and their personnel are protected against direct attack while they carry out civil defence tasks. It stipulates that they must be entitled to perform their civil tasks except in case of imperative military necessity. It also provides a distinctive sign to identify them as well as buildings and material used for civil defence purposes. Although Additional Protocol II contains no direct reference to civil defence, the rules regarding that activity should also be complied with in non-international armed conflicts, as part of the general protection accorded to the civilian population against the dangers resulting from military operations (Art. 13, para. 1). Civil defence represents an essential component of that protection.

#### **What is civil defence?**

Civil defence is defined in IHL according to the tasks carried out rather than the organizations that carry out those tasks.

Thus, Additional Protocol I (Art. 61) defines civil defence as a list of "humanitarian tasks" to be performed for the following purposes:

- to protect the civilian population against the dangers arising from hostilities or disasters;
- to help it to recover from the immediate effects of such events;
- to provide the conditions necessary for its survival.

The list is limited to the 15 following tasks:

- warning;
- evacuation;
- management of shelters;
- management of blackout measures;
- rescue;
- medical services – including first aid – and religious assistance;
- fire-fighting;
- detection and marking of danger areas;
- decontamination and similar protective measures;
- provision of emergency accommodation and supplies;
- emergency assistance in the restoration and maintenance of order in distressed areas;
- emergency repair of indispensable public utilities;
- emergency disposal of the dead;
- assistance in the preservation of objects essential for survival;
- complementary activities necessary to carry out any of the tasks mentioned above.

#### **Who carries out civil defence tasks?**

The provisions of Additional Protocol I cover the civil defence organizations set up by the State, their personnel and any civilians called upon by the competent authorities to carry out civil defence tasks under their control. Those individuals are protected to the extent that they are assigned *exclusively* to one (or several) of the above-mentioned "humanitarian tasks", even if only temporarily.

Additional Protocol I also protects the personnel of civilian organizations of neutral or other States not engaged in the conflict who perform civil defence tasks within the territory of a warring party with the latter's consent and under its control, on condition that all the adverse parties concerned are notified of this fact. The same applies to international organizations, such as the International Civil Defence Organization (ICDO), that coordinate the civil defence work of the above-mentioned organizations.

Members of the armed forces and military units may also carry out civil defence tasks. They are protected, however, only if they are *permanently and exclusively* assigned to those tasks and if they meet the requirements set out below.

#### **Identification of civil defence**

The international distinctive sign of civil defence set out in Additional Protocol I consists of an equilateral blue triangle on an orange background (Art. 66 and Annex I, chap. V).



This sign may be used only to identify civil defence organizations and their personnel, buildings and material used exclusively for humanitarian tasks or for shelters provided for the civilian population. The parties to a conflict may also agree among themselves regarding the use of distinctive signals (lights and sirens) for the identification of civil defence services.

With the consent of the State, the international distinctive sign of civil defence may also be used to identify those services in peacetime.

#### **Domestic implementation**

Beginning in peacetime, States are encouraged to take measures to implement the rules on civil defence.

Although States have no obligation to modify the structure of their civil defence in peacetime, they must nevertheless ensure that such structures are recognizable in wartime. Regulations must therefore be issued to ensure that the civilian and military civil defence structures meet the requirements laid down by Additional Protocol I. It is recommended that States act voluntarily to extend the applicability of those regulations to cover non-international armed conflicts.

It is vital to ensure that armed forces personnel are aware of their obligations toward persons and objects displaying the international distinctive sign of civil defence. States should also ensure that all those involved in civil defence know the rules of IHL, in particular those applicable to their duties.

States must supervise the use of the international distinctive sign of civil defence as a protective device and must prevent and repress any misuse (Art. 66, para. 8), in particular by adopting the appropriate criminal legislation.

#### **The protection of children in armed conflict**

Children are a category of persons for which IHL has designed specific protection and for which States are requested to take specific implementing measures. This section presents the extent of the protection for children, whether or not they are directly used in hostilities, pursuant to the Geneva Conventions and the Additional Protocols. Because of the importance of the issue of the protection of children against the effects of hostilities, the ICRC Advisory Service has recently published the *Guiding Principles for the Domestic Implementation of a Comprehensive System of Protection for Children Associated with Armed Forces or Armed Groups*. These guiding Principles are reproduced in full in Annex XVI and are available at: <http://www.icrc.org/eng/resources/documents/legal-fact-sheet/children-guiding-principles-2011-04-01.htm>. The specific implementing measures that States are required to take under other instruments are addressed in the Section on the Convention on the Rights of the Child (Chapter Five B).

#### **Children not directly taking part in hostilities**

In the event of an **international armed conflict**, children not directly taking part in the hostilities are protected by the Fourth Geneva Convention relative to the protection of civilians (provided they fulfil the nationality criteria set forth in Article 4 of this Convention) and by Additional Protocol I. They are covered by the fundamental guarantees that these treaties provide to all protected persons, in particular the right to be treated humanely and without any adverse distinction and the prohibition of murder, torture, corporal punishment and collective punishments (Arts 27-34 GC IV and Art. 75 P I), and by the rules of Additional Protocol I on the conduct of hostilities, including the principle that a distinction must be made at all times between civilians and combatants, in particular the prohibition on direct attacks against civilians (Arts 48 and 51).

In the event of **non-international armed conflict**, children are also covered by the fundamental guarantees for persons not taking direct part in the hostilities (common Art. 3 and Art. 4 P II). They are further protected by the rules on the conduct of hostilities, including "*the civilian population as such, as well as individual civilians, shall not be the object of attack*" (Art. 13 P II).

Furthermore, the Fourth Geneva Convention includes specific provisions applicable to children only, but it is Additional Protocol I that sets out the principle of special protection: "*Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason*" (Art. 77).

A similar principle also applies to non-international armed conflicts (Art. 4, para. 3, P II). The provisions setting out this protection may be summarized as follows:

- evacuation, special zones – Arts 14, 17, 24 (para. 2), 49 (para. 3) and 132 (para. 2) GC IV; Art. 78 P I; Art. 4 (para. 3(e)) P II;
- assistance and care – Arts 23, 24 (para. 1), 38 (para. 5), 50 and 89 (para. 5) GC IV; Arts 70 (para. 1) and 77 (para. 1) P I; Art. 4 (para. 3) P II;
- identification, family reunification and unaccompanied children – Arts 24-26, 49 (para. 3), 50 and 82 GC IV; Arts 74, 75 (para. 5), 76 (para. 3) and 78 P I; Arts 4 (para. 3(b)) and 6 (para. 4) P II;
- education, cultural environment – Arts 24 (para. 1), 50 and 94 GC IV; Art. 78 (para. 2) P I; Art. 4 (para. 3(a)) P II;
- arrested, detained or interned children – Arts 51 (para. 2), 76 (para. 5), 82, 85 (para. 2), 89, 94, 119 (para. 2) and 132 GC IV; Art. 77 (paras 3 and 4) P I; Art. 4 (para. 3(d)) P II;
- exemption from death penalty – Art. 68 (para. 4) GC IV; Art. 77 (para. 5) P I; Art. 6 (para. 4) P II.

### Children participating in armed hostilities

Participation by children in armed hostilities is a widespread problem. Participation may range from aiding combatants (bringing them weapons and munitions, carrying out reconnaissance missions, etc.) to actual involvement in combat operations. The 1977 Additional Protocols were the first international treaties to cover such situations.

Thus, Additional Protocol I obliges States to take all feasible measures to prevent children under 15 from taking a direct part in hostilities. It expressly prohibits their recruitment into the armed forces and encourages the parties to give priority in recruiting, among those aged from 15 to 18, to the oldest (Art. 77). Additional Protocol II goes further, prohibiting both the recruitment and the participation – direct or indirect – in hostilities by children under 15 years of age (Art. 4, para. 3(c)).

If despite the above-mentioned rules, children take a direct part in hostilities, they must continue to benefit from their special protection by reason of their status as children (Art. 77, para. 3, P I and Art. 4, para. 3(d), P II).

### The missing and their families – the importance of the issue

In times of armed conflict, families are often left without news of their loved ones and must face a very harsh reality. Of primary concern is knowing whether the missing persons are alive or dead, dealing with subsequent effects of the loss, whether it be as a result of their absence or death, and of course the eternal question of why they disappeared at all. There are a variety of reasons for which persons may be unaccounted for, as disappearances occur in different contexts. In particular, in almost every situation of armed conflict or other situation of violence, inherent dangers lead to separation and disappearances of soldiers and

civilians alike. Within the context of international and non-international armed conflicts, violations of IHL and of human rights account for most cases of missing persons.

Fundamental rules of IHL and human rights exist to help prevent persons from going missing in situations of armed conflict or other situations of violence. To respect them is to respect the integrity and dignity of all human beings, including the deceased, **and in the context of missing persons**, it erects a barrier against disappearance and helps resolve the cases of disappearance when they unfortunately occur. If civilians and members of armed forces or armed groups who are sick, wounded, captured, deceased or deprived of their liberty were treated in accordance with these rules, there would be fewer missing persons and fewer families left in the dark about their fate. It is important for all parties to a conflict to act with determination to prevent disappearances, not to perpetrate abductions or other enforced disappearances, to clarify the fate of missing persons and to lend assistance to families who are without news of their relatives.

Several measures are available to assist in accomplishing this goal, including the issuance of identity cards and ensuring proper registration of an individual's basic personal information. These measures, which obviously go beyond the issue of the missing but are closely linked to it, will be looked at in more detail below.

Once a person has disappeared, families have the right to be informed of his or her fate and may have recourse to the parties to the conflict to obtain the information pursuant to Article 32 of Additional Protocol I and customary law. In order to uphold this right to know, the parties to a conflict must therefore search for persons reported missing as prescribed in Article 33 of Additional Protocol I, Articles 122 to 124 of the Third Geneva Convention and Articles 136 to 141 of the Fourth Geneva Convention. The parties must facilitate enquiries made by members of families dispersed as a result of the conflict so as to help them restore contact and bring them together.

A further responsibility incumbent upon the parties to a conflict concerns deceased persons and is extensively outlined in IHL. Articles 15 of the First Geneva Convention, 18 of the Second Geneva Convention, 16 of the Fourth Geneva Convention and 34 of Additional Protocol I require that all possible measures be taken to search for, recover and identify the dead and maintain lists showing the exact location and markings of the graves, together with particulars of the dead interred therein. In order to centralize the relevant information and be able to reply efficiently to inquiries, States have the obligation to establish, upon the outbreak of a conflict, a national information bureau, the details of which are provided below.

Because of the importance of the issue of the missing in armed conflicts and other situations of violence, the ICRC Advisory



Service has recently published the *Principles for legislating the situation of persons missing as a result of armed conflict or internal violence*, which should assist States and their national authorities with the adoption of legislation that will address, prevent and resolve situations of missing persons. These guiding principles are intended to be a comprehensive legal framework that may assist States in completing their domestic legislation on missing persons. It covers the fundamental concepts of the law regarding the rights of missing persons and their families, alongside the State's obligation to ensure and uphold these rights. As such, this model lends itself as a tool for those States wishing to complement or complete existing legislation, or those seeking to fill the legal void that may exist regarding the governance of cases of missing persons. It can be used in whole or in part, and can focus as needed on prevention, resolution or any other aspects of the missing persons issue.

The *Principles for legislating the situation of persons missing as a result of armed conflict or internal violence* are reproduced in full in Annex IV and are available at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/missing-model-law-010907>.

### Identity cards and capture and internment cards

In order to apply IHL it is essential to be able to identify combatants and protected persons. The 1949 Geneva Conventions and Additional Protocol I of 1977 contain provisions for achieving that aim. Measures for personal identification provide a means of specifying the status of persons involved in or affected by an armed conflict and thus of indicating the protection to which they are entitled. Merely possessing an identification document, however, is not a criterion entitling the holder to protection (except in the case of military personnel posted to civil defence organizations), since it is the capacity or function of the person that is the determining factor.

As mentioned above, identification measures also help to prevent disappearances and to facilitate the tracing of missing persons. It is the States and parties to the conflict that must implement these measures, which enable the organizations provided for under IHL to function properly (such as national information bureaux and the Central Tracing Agency, whose mission is to inform States on the fate of their nationals and to inform families on what has become of their relatives).

#### *Nature and significance*

Measures for identifying persons are closely connected with the concept of **protection**, which constitutes the very basis of the legal instruments of IHL. They are a means for the persons concerned to prove their status and thus claim the protection that is their due.

#### *Identity cards*

The identity card is the basic document with which the status and identity of persons who have fallen into the hands of the adverse party can be determined, and it must be issued

by States to any person liable to become a prisoner of war (Art. 17 GC III).

It must contain at least the owner's surname, first names, date of birth, serial number or equivalent information and rank. As further optional information, the identity card may also bear the description, nationality, religion, blood group and rhesus factor, fingerprints or photo of the holder, or the date of expiry.

In parallel with this measure, the authorities are required to issue **specific identity cards** for military personnel carrying out special tasks or for certain categories of civilians, containing the basic information plus certain other particulars concerning the assignment (such as the distinctive emblem of the activity, the person's training or position, or the stamp and signature of the competent authority).

#### *Identity discs*

Authorities may supplement the above measures by providing identity discs (Art. 16 GC I; Art. 19 GC II). The identity disc is worn permanently around the neck on a chain or strap. It can be a single or double disc made, as far as possible, of durable, stainless material which is resistant to battlefield conditions. The inscriptions it bears are similar to those on the identity card and should be indelible and fade proof.

#### *Capture cards*

The parties to a conflict which are holding prisoners of war are required to enable the latter to write a card direct to their families and to the Central Tracing Agency informing them that they have been captured (Art. 70 GC III). An individual capture card will contain the prisoner's surname and first names, his State of origin, rank, serial number and date of birth, his family's address, and information relating to his captivity, address and state of health. Should a prisoner refuse to fill a capture card or wish to refrain from revealing certain information, however, this must be respected.

#### *Internment cards*

The internment card is modelled on the capture card and is adapted to the situation of civilian internees. It is also intended for the families and the Central Tracing Agency, and clearly identifies the general circumstances of the civilian internee by providing information notably on his internment, address and state of health, provided that the internee considers it appropriate to reveal these details (Art. 106 GC IV).

Models of the abovementioned identification means are included in Annex V.

#### *Identification of children*

In view of the fact that, depending on their age, children are unable to take care of themselves and are extremely vulnerable in time of armed conflict, IHL has provided specific measures for their identification.

The authorities could thus provide children under 12 years of age with *identity discs* adapted to their status and similar to those described above (Art. 24 GC IV).

In the special circumstances of occupation, the authorities are required to take steps to identify children (Art. 50 GC IV), such as providing them with an *identity card* or an *identity disc* that they wear at all times.

And finally, if children have been evacuated to a foreign country for compelling reasons of health or safety, the State arranging for the evacuation and, where appropriate, the authorities of the host country, must draw up an *information card* and send it to the Central Tracing Agency with a view to facilitating the children's return to their families (Art. 78, para. 3 P I).

#### **Availability of means of identification and training**

Since means of personal identification should be available at all times, the authorities must make preparatory arrangements in peacetime. It is also their responsibility to ensure that the persons concerned are carrying, or at least know to carry, their identity documents should an armed conflict break out.

The usefulness and importance of these measures should be explained in the course of training for military personnel and other categories of persons specifically concerned. Special attention should also be devoted to this aspect when IHL is being disseminated to a wider public.

#### **National information bureaux**

National information bureaux are required (Third and Fourth Geneva Conventions) to be established "upon the outbreak of a conflict and in all cases of occupation". Articles 122-124 of the Third Geneva Convention cover the bureaux' responsibilities with respect to prisoners of war, and their relationship with the Central Prisoners of War Information Agency. Articles 136 to 141 of the Fourth Geneva Convention cover all protected persons in custody.

Resolution 14 of the 25th International Conference of the Red Cross (1986) recommended that States establish their information bureaux in peacetime, prior to the outbreak of conflict, in order to be better prepared.

The steps that States can and should take for the establishment and smooth running of national information bureaux, in order to reduce the number of persons missing in armed conflicts, can be summed up as follows:

- A. Every State must take all measures necessary to establish an information bureau when a conflict breaks out and in all cases of occupation:
  - to centralize, without adverse distinction, all information on the wounded, sick, shipwrecked, dead, protected persons deprived of their liberty, children whose identity is in doubt and persons who have been reported missing, and to provide this information to the appropriate authorities through the Protecting Powers and the ICRC Central Tracing Agency;
  - to be responsible for replying to all enquiries concerning protected persons and for making any enquiries needed to obtain any information requested that is not in its possession;
  - to act as an intermediary for the free transport of matter, including correspondence, sent to and by protected persons.
- B. An information bureau with analogous responsibilities should be set up in a non-international armed conflict whenever appropriate. Its mandate could include:
  - informing family members of the whereabouts or fate of their relatives;
  - taking all necessary measures to enquire about the whereabouts or fate of a missing person when requested, in the event it is not in possession of the relevant information, and searching for additional information.
- C. In international and non-international armed conflicts, information bureaux should also centralize information on persons belonging to the party responsible for the information bureau.
- D. The structure and working procedures of the information bureau to be set up, the role to be played by the National Red Cross/Red Crescent/Red Crystal Society, and the coordination mechanisms for the collection and transmission of information should be defined in peacetime.
- E. Procedures, directives or instructions must be issued to ensure that, in international armed conflicts, all persons belonging to the adverse party who are detained or interned and all known deaths resulting from the hostilities are registered, and that the information is transmitted to the appropriate authorities. These procedures, directives or instructions must provide that:
  - the information recorded is of a nature to make it possible to identify the persons exactly and to advise the next-of-kin quickly;
  - information the transmission of which might be detrimental to the person concerned or to his or her relatives is forwarded to the ICRC Central Tracing Agency only.
- F. Similar procedures, directives or instructions should be issued to ensure that, in non-international armed conflicts, all persons belonging to the adverse party who are detained or interned and all known deaths resulting from the hostilities are registered, and that information not detrimental to the persons concerned or to his/her relatives is transmitted to the families or to the appropriate authorities.



G. Domestic law and regulations must provide that the information bureaux and the ICRC Central Tracing Agency enjoy free postage for all mail. The exemption from charges should be extended to any other means of communication available, or at least the charges should be greatly reduced.

### Marking of objects which require protection

Because of their nature and the necessity to protect them in times of armed conflict, some objects shall be easily identifiable in hostilities. One way of ensuring this is by their appropriate marking. This is the case for installations containing dangerous forces and for cultural property.

#### Dangerous forces

Article 56, paragraph 7, of Additional Protocol I provides for the marking of works or installations containing “dangerous forces” (“namely dams, dykes and nuclear electrical generating stations”) with a group of **three bright orange circles**, as provided in Annex I to the Protocol.



The works and installations concerned are civilian objects *a priori*, and may therefore not be attacked. Even if they become military objectives, as defined in Article 52(2) of Additional Protocol I, they still enjoy special protection and may not be attacked when such attacks may cause severe losses among the civilian population because of the release of dangerous forces. The special protection against attack ceases under specific circumstances described in Article 56 (2) of Additional Protocol I. The protection of dams and dykes ceases when three cumulative conditions are fulfilled: (1) they are not used in their normal function; (2) they are used in regular, significant and direct support of military operations; (3) an attack is the only feasible way to terminate such support. As for nuclear electrical generating stations, special protection ceases only if they provide electrical power in regular, significant and direct support of military operations and if an attack is the only feasible way to terminate that support.

Marking is optional; the special protection is therefore due even if the works or installations are not marked. Yet it seems clear that it is in the interests of a party to the conflict that wishes its dams, dykes or nuclear electrical generating stations to be respected to communicate a list of them with their geographical location to the adversary through the Protecting Powers or organizations replacing them.

Article 15 of Additional Protocol II provides for a very similar prohibition to attack works and installations containing dangerous forces in non-international armed conflicts.

#### Cultural property

Both Additional Protocols of 1977 prohibit the commission of any act of hostility against cultural property or its use in support of military operations (Art. 53 PI, Art. 16 PII). Additional Protocol I adds that, under certain circumstances, the destruction of clearly recognized cultural property that is the object of special protection given by special arrangement may amount to a grave breach entailing individual criminal responsibility. For more information on the marking of cultural property, see Chapter Five A.

## Review procedures related to new weapons

Article 36 of Additional Protocol I requires each State party to determine whether the employment of any new weapon, means or method of warfare that it studies, develops, acquires or adopts would, in some or all circumstances, be prohibited by international law. All States have an interest in assessing the legality of new weapons, regardless of whether they are party to Additional Protocol I. Assessing the legality of new weapons contributes to ensuring that a State's armed forces are capable of conducting hostilities in accordance with its international obligations. Carrying out a legal review of proposed new weapons is of particular importance in light of the rapid development of new technologies.

Article 36 of Additional Protocol I does not specify how a review of the legality of weapons, means and methods of warfare is to be carried out. Both the issues of substance and those of procedure need to be considered in establishing a legal review mechanism. The legal review applies to weapons in the widest sense as well as the ways in which they are used, bearing in mind that a means of warfare cannot be assessed in isolation from its expected method of use. The legal framework of the review is the international law applicable to the State, including IHL. In particular, this consists of the treaty and customary prohibitions and restrictions on specific weapons, as well as the general IHL rules applicable to all weapons, means and methods of warfare. General rules include those aimed at protecting civilians from the effects of weapons and combatants from unnecessary suffering. The assessment of a weapon in light of the relevant rules will require an examination of all relevant empirical information pertaining to the weapon, such as its technical description and actual performance, and its effects on health and the environment. This is the rationale for the involvement of experts in various disciplines in the review process.

Significant procedural issues that will merit consideration in establishing a review mechanism include determining which national authority is to be made responsible for the review, who should participate in the review process, the stages of the procurement process at which reviews should occur, and the procedures relating to decision-making and record-keeping. It is important that States ensure that whatever the form of the mechanism, they are capable of taking an impartial and multidisciplinary approach to legal reviews of new weapons, and that they exchange information about their review procedures.

For more information see: *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare – Measures to Implement Article 36 of Additional Protocol I of 1977* (Annex VI).

# International Humanitarian Fact-Finding Commission

In an effort to secure the guarantees accorded to the victims of armed conflict, Article 90 of Additional Protocol I provides for the establishment of an International Fact-Finding Commission. The Commission was officially constituted in 1991 and is a permanent body whose primary purpose is to investigate allegations of grave breaches and other serious violations of IHL. As such, the Commission is an important means of ensuring that IHL is both applied and implemented during armed conflict.

## Composition

The Commission is composed of 15 individuals elected by those States that have recognized its competence. Commission members act in a personal capacity and do not represent the States of which they are nationals. Each member must be of high moral standing and established impartiality. Elections take place every five years and States have an obligation to ensure that all regions of the world are fairly represented.

## Powers and functioning

The principal task of the Commission is to ascertain whether or not a grave breach or other serious violation of the Geneva Conventions or Additional Protocol I has in fact occurred.

The Commission is also competent to facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and Additional Protocol I. Generally, this means that it may, in addition to communicating its conclusions as to the facts, make observations and suggestions to promote compliance with the treaties on the part of the warring parties.

Although the Geneva Conventions and Additional Protocol I are applicable only to international armed conflicts, the Commission has expressed its willingness to enquire into alleged violations of humanitarian law arising from non-international armed conflicts, provided that the parties involved consent to this.

## Commission of enquiry

In order for the Commission to begin an enquiry there must be a request for it to do so by a State that has recognized the Commission's competence, whether or not that State is involved in the conflict concerned. Private individuals, organizations or other representative bodies do not have such authority, nor does the Commission have the power to act upon its own initiative.

Enquiries are generally conducted by a seven-member Chamber consisting of five members of the Commission

itself plus two ad hoc appointees. Each party to the conflict nominates one ad hoc member, but no member of the Chamber may be a national of a party to the conflict.

During the course of the investigation, the warring parties are invited to assist the Chamber and are given an opportunity to present and challenge evidence. In addition, the Chamber is authorized to conduct its own investigations. All evidence is disclosed to the parties and to any other States that may be concerned, all of which have the right to make observations.

## Report of the Commission

The Commission submits a report to the parties based upon the findings of the Chamber. The report contains the Commission's findings regarding the facts, together with any recommendations. The Commission does not disclose its conclusions publicly unless requested to do so by all parties to the conflict.

## Recognizing the Commission's competence

One of the most important characteristics of the Commission is that it may conduct an investigation only with the consent of the parties involved. A State does not automatically recognize the Commission's competence by signing or ratifying Additional Protocol I, but only by separately affirming that recognition. A State may make a comprehensive declaration, thereby permanently recognizing the Commission's competence, or it may consent to the investigation of a particular dispute.

## Comprehensive declaration

A comprehensive declaration can be made when signing, ratifying, or acceding to Additional Protocol I, or at any subsequent time.

By making such a declaration, a State authorizes the Commission to enquire into any conflict that may arise between itself and another State which has made the same declaration. No additional approval is then required for the Commission to act. The declaration must be submitted to the depositary, i.e. the Swiss Confederation.

A model declaration of recognition of the competence of the Commission is proposed in Annex VII.

A party to an armed conflict that has not made a comprehensive declaration may accept the Commission's competence on a temporary basis, that acceptance being limited to the specific conflict in which it is involved. This form of recognition does not constitute permanent acceptance of the Commission's competence.

Any party to a conflict may ask the Commission to conduct an enquiry. If a party which has not given its consent is the object of a complaint, the Commission will convey the allegation to that party and ask it to consent to an enquiry. If consent is refused, the Commission is not authorized to conduct an enquiry. If consent is granted, the enquiry procedure will begin.

In a conflict involving parties that have not made the comprehensive declaration, a warring party will not be bound by a previous consent; it is up to that State to decide whether to reaffirm the Commission's competence should it become the object of a complaint. Obviously, the request for an enquiry must come from a State that has also recognized the Commission's authority.

Further information on the Commission is available on its website and from the following address:

International Humanitarian Fact-Finding Commission  
Federal Parliament (West)  
3003 Bern  
Switzerland  
Tel.: +41 31 322 3525  
Fax: +41 31 324 9069  
<http://www.ihffc.org>

# Wrap-up: Key articles requiring the adoption of IHL national implementation measures

The following chart summarizes many of the most important obligations, together with their article numbers in the relevant treaties:

|   | 1949 Geneva Conventions |                          |                              |   | 1977 Protocols                 |        |
|---|-------------------------|--------------------------|------------------------------|---|--------------------------------|--------|
|   | First                   | Second                   | Third                        | Fourth                                  | I                              | II     |
| <b>Translation</b>  | 48                      | 49                       | 41, 128                      | 99, 145                                 | 84                             |        |
| <b>Dissemination and training</b>                                       | 47                      | 48                       | 41, 127                      | 99, 144                                 | 80, 82-83, 87                  | 19     |
| <b>VIOLATIONS</b>   |                         |                          |                              |   |                                |        |
| General provisions  | 49-54                   | 50-53                    | 129-132                      | 146-149                                 | 85-91                          |        |
| War crimes  | 49-50                   | 50-51                    | 129-130                      | 146-147                                 | 11, 85-90                      |        |
| Compensation  |                         |                          |                              |   | 91                             |        |
| <b>PROTECTION</b>   |                         |                          |                              |   |                                |        |
| Fundamental guarantees  | 3, 12                   | 3, 12                    | 3, 13-17                     | 3, 27-34                                | 11, 75-77                      | 4-5, 7 |
| Judicial and disciplinary guarantees; rights of prisoners and detainees | 3                       | 3                        | 3, 5, 17, 82-90, 95-108, 129 | 3, 5, 31-35, 43, 64-78, 99-100, 117-126 | 44-45, 75                      | 6      |
| Medical and religious personnel   | 40, 41                  | 42                       |                              | 20                                      | 15-16, 18                      | 10, 12 |
| Medical transports and facilities                                       | 19, 36, 39, 42-43       | 22, 24-27, 38-39, 41, 43 |                              | 18, 21-22                               | 12, 18, 21-23                  | 12     |
| Cultural property   |                         |                          |                              |   | 53                             | 16     |
| Dangerous forces  |                         |                          |                              |   | 56                             | 15     |
| Identity cards  | 27, 40, 41, Annex II    | 42, Annex                | 17, Annex IV                 | 20                                      | 18, 66-67, 78-79, Annexes I&II |        |
| Capture and internment cards  |                         |                          | 70, Annex IV                 | 106, Annex III                          |                                |        |
| Use/misuse of emblems and symbols                                       | 44, 53-54               | 44-45                    |                              |   | 18, 37-38, 66, 85, Annex I     | 12     |
| <b>EXPERTS AND ADVISERS</b>   |                         |                          |                              |   |                                |        |
| Qualified persons   |                         |                          |                              |   | 6                              |        |
| Legal advisers  |                         |                          |                              |   | 82                             |        |
| <b>ORGANIZATIONS</b>  |                         |                          |                              |   |                                |        |
| National Societies  | 26                      |                          |                              | 63                                      | 81                             | 18     |
| Civil defence   |                         |                          |                              | 63                                      | 61-67                          |        |
| Information bureaux   |                         |                          | 122-124                      | 136-141                                 |                                |        |
| Mixed medical commissions   |                         |                          | 112, Annex II                |   |                                |        |
| <b>MILITARY PLANNING</b>  |                         |                          |                              |   |                                |        |
| Weapons/tactics   |                         |                          |                              |   | 36                             |        |
| Military sites  |                         |                          |                              |   | 57-58                          |        |
| <b>PROTECTED ZONES AND LOCALITIES</b>                                   | 23, Annex I             |                          |                              | 14, 15                                  | 59-60, Annex I                 |        |

# **5**

## **TREATIES CONCERNING PEOPLE AND PROPERTY IN ARMED CONFLICT**

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## CHAPTER FIVE: TREATIES CONCERNING PEOPLE AND PROPERTY IN ARMED CONFLICT

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Certain provisions of the Geneva Conventions and their Additional Protocols have been complemented and the protection they grant enhanced by the adoption of specific instruments which provide for the protection of designated categories of persons or property in the event of armed conflict. This chapter addresses more specifically the protection of cultural property, and the issue of recruitment and participation of children in armed conflict, which was briefly discussed in the previous chapter.

# PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

## Background

The high number of inter-religious and inter-ethnic conflicts has led not only to attacks against civilians but also, in many cases, to the destruction of civilian objects, including cultural property. Destruction of cultural property is particularly common in such conflicts, as this property symbolizes the cultural identity and history of the adverse party.

Cultural property to be protected during armed conflict includes, as identified in the Hague Convention No. IV of 1907, historic monuments and institutions dedicated to religion, charity and education as well as works and institutions dedicated to arts and sciences.

Today, in addition to the 1949 Geneva Conventions and their 1977 Additional Protocols, the main treaties of IHL on the protection of cultural property are the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its 1954 and 1999 Protocols (hereinafter referred to as the 1954 Hague Convention and Protocols).



## A Treaty overview

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

The 1954 Hague Convention provides for a system of general and special protection of cultural property. The Convention defines cultural property as:

- movable or immovable property of great importance to the cultural heritage of every people, such as:
  - monuments of architecture, art or history, whether religious or secular;
  - archaeological sites, groups of buildings which are, as a whole, of historical or artistic interest;
  - works of art;
  - manuscripts, books, and other objects of artistic, historical or archaeological interest;
  - scientific collections and important collections of books or archives;
  - reproductions of the above property.
- buildings whose main and effective purpose is to preserve or exhibit movable cultural property, such as:
  - museums;
  - large libraries;
  - depositories of archives;
  - refuges intended to shelter cultural property in the event of armed conflict.
- centres containing a large amount of cultural property, known as “centres containing monuments”

The 1954 Convention is supplemented by Regulations for its execution, the purpose of which is to determine the practical measures through which observance of the protection can be ensured. These instruments apply in situations of international armed conflict (Art. 18). In the event of non-international armed conflict, each party to the conflict shall be bound to apply, as a minimum, the provisions of the 1954 Convention which relate to respect for cultural property; the other provisions (in particular Art. 4) can be brought into force by means of special agreements (Art. 19).

*General protection.* The general principle of the protection of cultural property in armed conflicts is based on the obligation to safeguard and respect that property (Art. 2). **Safeguarding** of cultural property comprises all the preparatory measures to be taken in time of peace in order to provide the best possible material conditions for its protection (Art. 3). **Respect** for cultural property implies refraining from committing any hostile act against it, and prohibiting, preventing and if necessary stopping any form of theft, pillage or misappropriation and any acts of vandalism. “Imperative military necessity” is the only ground on which the obligation to respect can be waived.

*Special protection.* The placing of cultural property under special protection grants that property immunity against any act of hostility and any use, including that of its surroundings, for military purposes (Art. 9). To be placed under special protection, the cultural property must not be used for military purposes and must be situated at an adequate distance from military objectives.

Model letters of accession to the Convention and its two Protocols are available in Annex 1 E. The content of the Protocols is explained in further detail below.

### The 1954 Hague Protocol

The purpose of this instrument is to prevent the exportation of cultural property from a territory which is occupied partially or entirely by a State party to the Convention. It includes obligations related to the return of any cultural property illegally exported from occupied territory or temporarily placed in third States.

### The 1999 Second Protocol to the 1954 Hague Convention

The Second Protocol applies to situations of international and non-international armed conflict (Arts 3 and 22). It supplements the 1954 Hague Convention on issues related to respect for cultural property and the conduct of hostilities, in particular through measures to strengthen their implementation.

It creates a new category of protection – *enhanced protection* – intended for cultural property which is of the greatest importance for humanity and is not used for military purposes. It furthermore defines the respective sanctions for serious violations committed against cultural property and specifies the conditions in which individual criminal responsibility is incurred.

Cultural property may be placed under enhanced protection provided that it meets the following three conditions (Art. 10):

- it is a cultural heritage of the greatest importance for humanity;
- it is protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection; and
- it is not used for military purposes or to shield military sites, and a declaration has been made by the party which has control over the cultural property confirming that it will not be so used.

The Second Protocol makes provision for two new institutions, the Committee for the Protection of Cultural Property in the Event of Armed Conflict and the Fund for the Protection of Cultural Property in the Event of Armed Conflict.

### Committee for the Protection of Cultural Property in the Event of Armed Conflict

The Committee is composed of twelve parties. The functions of the Committee are, *inter alia*, as follows (Art. 27):

- to grant, suspend or cancel enhanced protection for cultural property;
- to establish, maintain and promote the List of Cultural Property under Enhanced Protection;
- to monitor and supervise the implementation of the Second Protocol; and
- to consider and comment on the reports on the implementation of the Second Protocol submitted to it by the parties every four years.

A State party to the Second Protocol may request the Committee to provide the following (Art. 32):

- international assistance for cultural property under enhanced protection; and
- assistance with respect to the preparation, development or implementation of the laws, administrative provisions and measures for the enhanced protection of cultural property pursuant to Article 10, paragraph (b).

### Fund for the Protection of Cultural Property in the Event of Armed Conflict

The Fund is a trust fund which works in conformity with the Financial Regulations of the United Nations Educational, Scientific and Cultural Organization (UNESCO) (Art. 29, para. 2). Its resources consist of (Art. 29, para. 4):

- voluntary contributions made by the parties;
- contributions, gifts or bequests made by:
  - other States;
  - UNESCO or other organizations of the United Nations system;
  - other intergovernmental or non-governmental organizations; and
  - public or private bodies or individuals;
- any interest accruing on the Fund's resources;
- the funds raised by collections and receipts from events organized for the benefit of the Fund; and
- all other resources authorized by the guidelines applicable to the Fund.

Disbursements from the Fund are to be used to grant financial assistance primarily in support of:

- preparatory measures to be taken in peacetime; and
- emergency, provisional or other measures to protect cultural property during armed conflicts or recovery measures after the end of hostilities.

# Guidelines for national implementation

## The 1954 Hague Convention

**Administrative** measures should be adopted to ensure (1) identification, inventorying and marking of cultural property; (2) education and training. **Legislative** measures must be taken to ensure the repression of violations of international obligations.

### Identification and inventories

Cultural property should be identified and listed. The following measures may be taken to do so:

- **identification:** consists in deciding to consider an object, a building or a site to be cultural property worthy of protection. This protection may come within the responsibility of various national authorities, for example, the federal or central authorities in the case of cultural property of international and national interest; the responsibility for cultural property of regional or local interest may be delegated to local authorities. The competent authority or authorities must be determined in each case;
- **inventory:** listing all protected property and placing these lists at the disposal of the bodies concerned with the protection of cultural property, i.e. civilian or military authorities, specialized organizations or other interested institutions.

Inventories can contain the following information:

- general details of the property;
- legal information concerning its registration in State registers;
- details of the owner;
- the use for which the property is intended (public, educational, religious, etc.);

- nature of the property's value (archaeological, historical, artistic, etc.);
- details of its origin (construction, year, period, style, etc.);
- measurements, materials and techniques used;
- description of the property;
- details of archivally stored graphic data on the property: documents, photographs, model(s), audiovisual information, etc.

It would be advisable to have back-up documentation to ensure that, in the event of damage, the property can be restored or rebuilt. Depending on the type of property concerned, various methods can be used to compile reference documentation:

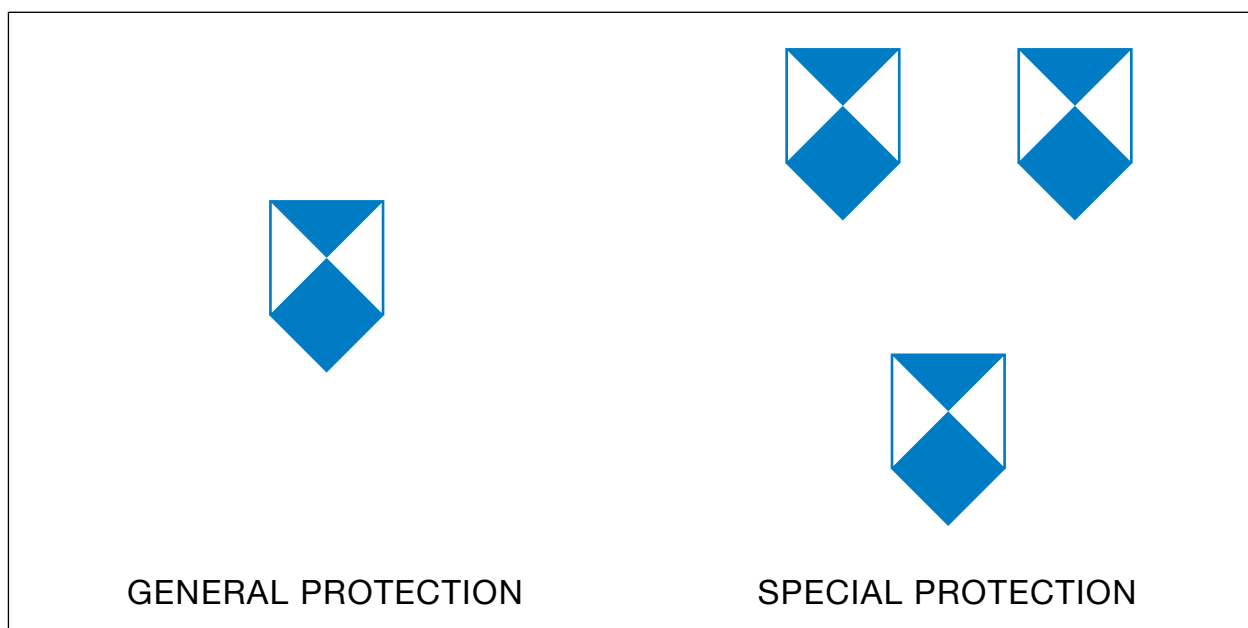
- descriptions in writing, drawings, photographs, plans and diagrams, copies, reproductions, casts or digital images;
- microfilms or photogrammetrical survey records, particularly for storing the above information.

Inventories of cultural property are useful not only in armed conflict situations but also in natural disasters. They are also one of the most effective means of protecting works of art from theft, pillage or destruction, including vandalism.

Furthermore, places which may be used as refuges for movable cultural property must be identified or, where necessary, constructed.

### Distinctive emblems

Cultural property may (in the case of property under general protection, Art. 6) or must (cultural property under special protection, Art. 10) be marked by an emblem. The distinctive emblems of cultural property are as follows:



The distinctive emblem may not be placed on any immovable cultural property unless an authorization, duly dated and signed by the competent national authority, is displayed at the same time (Art. 17).

Although the 1954 Hague Convention stipulates that the emblem shall be royal blue (Art. 16, para. 1), a lighter shade of blue ensures greater visibility for the purposes of protection in armed conflicts.

### Identity cards

Persons responsible for protecting cultural property carry a special identity card bearing the distinctive emblem. This card mentions at least the surname and first names, date of birth, title or rank, and function of the person concerned. It bears the photograph of the holder as well as his/her signature or fingerprints or both. It also bears the stamp of the competent authorities. A specimen of the card chosen must be transmitted to the other High Contracting Parties for their information (Regulations, Art. 21, paras 2 and 3).

The model identity card proposed in the Annex to the Regulations is as follows:

**IDENTITY CARD**  
for personnel engaged in the  
protection of cultural property

Surname.....  
First names.....  
Date of birth.....  
Title or Rank.....  
Function.....

is the bearer of this card under the terms of the  
Convention of The Hague, dated 14 May 1954,  
for the Protection of Cultural Property in the  
event of Armed Conflict.

Date of issue                      Number of Card

Front

Photo  
of bearer

Signature of bearer or  
finger-prints or both

Embossed  
stamp  
of authority  
issuing  
card

|        |      |      |
|--------|------|------|
| Height | Eyes | Hair |
|--------|------|------|

Other distinguishing marks

.....  
.....  
.....  
.....

Reverse side

## International Register of Cultural Property under Special Protection

Refuges, centres containing monuments and other immovable property under special protection must be entered in the International Register of Cultural Property under Special Protection, which is maintained by the Director-General of UNESCO.

In order to obtain special protection, the national authorities must send UNESCO's Secretariat descriptions of the property's location and certify that it meets the established criteria for special protection (Regulations, Art. 13).

The request for registration must be accompanied by a precise geographical description of the site in question, containing, for example:

- details of the boundaries of the centres containing monuments and of the principal cultural property preserved in each centre;
- the approximate distance of the site from the head office of the nearest administrative unit;
- a topographical map indicating the location, preferably on a scale of 1:25,000 or 1:50,000.

States requesting special protection are advised to consult with the UNESCO Secretariat on the conditions for inclusion on the Register before filing the request, so as to ensure that it contains all the information required.

### Dissemination

In order to spread knowledge of these instruments, it is essential that the text of the Convention and the Regulations for its execution be translated into national language(s). The official languages of the Convention and the 1954 Protocol are English, French, Spanish and Russian. Official translations into other languages must be sent to the Director-General of UNESCO for communication to the other States Parties (Art. 26). The Second Protocol is drawn up in Arabic, Chinese, English, French, Russian and Spanish (Art. 39).

The obligations deriving from the Convention and its Regulations must be made known as widely as possible. To do so:

- the international rules and national obligations deriving from these instruments must be incorporated into military regulations or instructions, and a spirit of respect for the culture and cultural property of all peoples must be fostered among the members of the armed forces in time of peace (Art. 7 of the Convention);
- the study of these rules and obligations must be extended so that the principles contained in these instruments are made known to the whole population and especially to armed forces and personnel engaged in the protection of cultural property (Art. 25 of the Convention).

### Penal sanctions

For these rules to be respected, it is essential that violations thereof be penalized. To that end, national penal legislation must provide means of prosecuting and imposing sanctions on persons who have committed breaches of the 1954 Hague Convention or have ordered such breaches to be committed, irrespective of their nationality (Art. 28).

## The 1999 Second Protocol to the 1954 Hague Convention

The Second Protocol contains a number of obligations which States must consider and if necessary fulfil as soon as they ratify it; these include measures relating to:

- identification and safeguarding of cultural property;
- granting of enhanced protection;
- dissemination; and
- penal and administrative sanctions.

### Identification and safeguarding

The identification and safeguarding (Art. 5) of cultural property consist of:

- preparing inventories of cultural property;
- planning emergency measures for protection of the property against fire or structural collapse;
- preparing for the removal of movable cultural property or providing for adequate *in situ* protection of such property;
- designating competent authorities responsible for the safeguarding of cultural property.

### Granting of enhanced protection

For property to have this protection, the authorities of the State in which it is situated must submit a request for it to be included in the List of Cultural Property under Enhanced Protection (Art. 11). This request must contain all the information needed to show that the property fulfils the conditions laid down in Article 10. The decision to enter it in the List is taken by a four-fifths majority of the members present and voting of the Committee for the Protection of Cultural Property in the Event of Armed Conflict (Art. 11 (5)), which can also suspend or cancel enhanced protection (Art. 14).

The parties to a conflict must ensure the immunity of cultural property placed under enhanced protection by refraining from (Art. 12):

- making such property the object of attack;
- using such property or its immediate surroundings in support of military action.

Enhanced protection is lost (Art. 13):

- if such protection is suspended or canceled in accordance with Article 14, which establishes that the Committee may decide to suspend or cancel enhanced protection if the property no longer meets any one of the criteria entitling it to this protection or if a party to a conflict violates the immunity of the property under enhanced protection;

- if, and for as long as, the property has by its use become a military objective, subject to the limitations described in the subsequent text of Article 13 (precautions to be taken in attack, requirements of immediate self-defence, etc.).

### Dissemination

Translation of the text of the Second Protocol into national language(s) is an integral part of its dissemination.

In order to fulfil their dissemination obligation, States Parties must, as appropriate:

- incorporate guidelines and instructions for the protection of cultural property into their military regulations;
- develop and implement, in cooperation with UNESCO and relevant governmental and non-governmental organizations, peacetime training and educational programmes;
- communicate to one another, through the Director-General of UNESCO, information on the laws, administrative provisions and measures taken under the foregoing two points;
- communicate to one another as soon as possible the laws and administrative provisions adopted to ensure the application of the Second Protocol.

### Penal and administrative sanctions

The States undertake to adopt the necessary measures with regard to the determination of criminal responsibility, jurisdiction, extradition and mutual legal assistance.

To do so, each State must take the necessary steps to establish the following offences as criminal offences under its domestic law and to make such offences punishable by appropriate penalties when they are committed intentionally and in violation of the Convention or of the Second Protocol (Art. 15):

- making cultural property under enhanced protection the object of attack;
- using cultural property under enhanced protection or its immediate surroundings in support of military action;
- extensive destruction or appropriation of protected cultural property;
- making cultural property protected under the Convention or the Second Protocol the object of attack;
- theft, pillage or misappropriation of cultural property protected under the Convention or acts of vandalism directed against that property.

All offences come under the jurisdiction of the State in which the offence was committed or the State of which the alleged offender is a national (Art. 16, para. 1 (a) and (b)). In the case of the first three offences, States also have jurisdiction when the alleged offender is present in their territory (Art. 16, para. 1(c)). However, the Second Protocol clearly indicates that the nationals of States which are not party thereto do not incur individual criminal responsibility by virtue of the Second Protocol, and that the Second Protocol does not impose

an obligation to establish jurisdiction over such persons, except if they serve in the armed forces of a State party to the Protocol (Art. 16, para. 2(b)).

Furthermore, States are required to prosecute or extradite any person accused of committing the three first above-mentioned offences against property under enhanced protection or of having caused extensive destruction of cultural property (Art. 18). Provision is also made for general obligations with regard to mutual legal assistance, including, for example, assistance in connection with investigations, extradition or the obtaining of evidence (Art. 19).

In addition to the penal sanctions for which provision is made in the Convention (Art. 28), the parties to the Second Protocol must adopt the necessary legislative, administrative or disciplinary measures to terminate or to impose sanctions for other violations when they are committed intentionally, as follows (Art. 21):

- any use of cultural property in violation of the Convention or the Second Protocol;
- any illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or the Second Protocol.

### The Rome Statute

Article 8 of the Rome Statute states that “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives” constitutes a war crime if committed in either an international or a non-international armed conflict (para. 2 (b) (ix) and (e) (iv)).

By virtue of the principle of complementarity, the ICC exercises jurisdiction only when a State is effectively unable to prosecute alleged war criminals within its jurisdiction or does not want to do so. In order to take advantage of this principle and to ensure criminalization at the national level, States which are party to the Rome Statute should adopt legislation enabling them to prosecute perpetrators of such crimes.

# OTHER INTERNATIONAL TREATIES CONCERNING THE INVOLVEMENT OF CHILDREN IN ARMED FORCES AND ARMED GROUPS

## Background

The problem of children associated with armed forces or armed groups has existed for decades and has had dramatic effects on the lives of thousands of children. Although the question was partly dealt with by the 1949 Geneva Conventions and their Additional Protocols of 1977, this issue, among others, was also addressed in a comprehensive framework dealing with all rights related to children, the Convention on the Rights of the Child, and more in depth in the 2000 Optional Protocol on the involvement of children in armed conflict. The issue of child soldiers has also been dealt with in international labour law, in International Labour Organization (ILO) Convention No. 182 of 1999, on the worst forms of child labour. For those three treaties, specific implementation measures are required of States. Finally, international criminal law also deals with the problem of child soldiers in the 1998 Rome Statute of the International Criminal Court.

# Overview of protection afforded to children against unlawful recruitment and participation in hostilities

## The 1989 Convention on the Rights of the Child

This treaty, which has been almost universally ratified, covers all fundamental rights of the child. Article 38 of the Convention applies both to international and non-international armed conflicts. Under Article 38, States shall refrain from recruiting children less than 15 years of age into their armed forces and shall take all feasible measures to ensure that those aged less than 15 years do not take a direct part in hostilities (para. 2). In recruiting, priority shall be given to the oldest of those aged between 15 and 18 (para. 3). It thus falls short and lowers the standards on the ban on direct or indirect participation laid down by Additional Protocol II, discussed in Chapter Four.

Article 39 of the Convention relates to the recovery and reintegration of child victims of different forms of abuse, including, *inter alia*, in situations of armed conflict. States have the obligation to take all appropriate measures to promote physical and psychological recovery and the social reintegration of children victims of armed conflict. Such recovery must take place in an environment which fosters the health, self-respect and dignity of the child.

## The 2000 Optional Protocol to the Convention on the Rights of the Child

The 2000 Optional Protocol on the involvement of children in armed conflict generally strengthens protection for children in armed conflicts:

- States parties must take all feasible measures to ensure that members of their armed forces who have not reached the age of 18 years do not take a direct part in hostilities (Art. 1). Concrete measures which States must take can be of a legislative, administrative or other nature, and could include measures to prevent a member of the armed forces who has not attained the age of 18 years from being deployed or maintained in an area where hostilities are taking place.
- Compulsory recruitment into the armed forces of persons under 18 years of age is prohibited (Art. 2). The obligation resting upon States parties is absolute and should be interpreted as an obligation of result not to recruit anyone under the age of 18. This reflects also the obligation of States to eliminate and prohibit the worst forms of child labour, including their forced or compulsory recruitment, as stated in ILO Convention No. 182. Through measures which may be of a legislative, administrative or other nature, States should ensure that the process of compulsory recruitment, from registration up to physical integration in the armed forces, guarantees that the minimum age requirement of 18 years is satisfied.

- States parties shall raise the minimum age for voluntary recruitment from 15 years. States party to the 2000 Optional Protocol must deposit, upon ratification or accession to the Protocol, a binding declaration in which they state the minimum age permitted for voluntary recruitment into their national armed forces. This declaration may be strengthened at any time by notification to the United Nations secretary-general in the capacity of depositary (Art. 3, para. 4). Article 3, paragraph 3 specifies that States parties must maintain minimum safeguards when permitting voluntary recruitment of persons below the age of 18 so as to ensure that the recruitment is genuinely voluntary and that the persons concerned are fully informed. Finally, Article 3, paragraph 5 of the 2000 Optional Protocol provides that the minimum age standard for voluntary recruitment does not apply to schools operated by or under the control of the armed forces.
- Armed groups distinct from the national armed forces should not, under any circumstances, recruit (whether on a compulsory or voluntary basis) or use in hostilities persons under the age of 18 years, and States parties must take all feasible measures to prevent, prohibit and criminalize such practices (Art. 4).
- States parties shall take all feasible measures to demobilize or otherwise release from service children who were recruited and used in hostilities, contrary to the provisions of the 2000 Optional Protocol (Art. 6, para. 3). When necessary, States parties have the obligation to accord these children “all appropriate assistance for their physical and psychological recovery and their social reintegration.”

Model letters of accession to the Convention on the Rights of the Child and the 2000 Optional Protocol are provided in Annex I D.



## **B** Inter-State cooperation

Pursuant to Article 7 of the 2000 Optional Protocol, and in line with Article 8 of ILO Convention No. 182, States are to cooperate with each other in the implementation of these instruments, including through technical cooperation and financial assistance.

# Reporting

Both the Convention on the Rights of the Child and the 2000 Optional Protocol require States parties to submit periodic reports to the Committee on the Rights of the Child on measures they have taken to implement their obligations. Article 44, paragraph 1 of the Convention on the Rights of the Child and Article 8, paragraphs 1 and 2 of the 2000 Optional Protocol provide the obligation for States to submit an initial report two years after the entry into force of the Convention or the Protocol in their country, and thereafter every five years. In these documents, States have to report on the measures taken concerning the implementation of the different provisions, and for States party to the 2000 Optional Protocol, this must include the measures taken to implement the provisions on participation and recruitment of children. In addition, the Committee is also entitled to request further information from States parties concerning the implementation of the Convention (Art. 44, para. 4) and the 2000 Optional Protocol (Art. 8, para. 3).

The ILO Convention No. 182 also requires States parties to report on the measures taken to ensure the law and practice is in conformity with its provisions. Such reports are examined by a committee of experts which can ask for further information and specific measures to be taken.

## Guidelines for national implementation

Despite the rules laid down by international law, many children are recruited into armed forces or armed groups and take an active part in hostilities. It is suggested that priority be given to the implementation of the following rules.

### Participation in hostilities

- States party to **Additional Protocol I** (Art. 77, para. 2) and the **Convention on the Rights of the Child** (Art. 38, para. 3) must enact legislative measures prohibiting the recruitment and the direct participation in hostilities of children under 15, and measures ensuring that priority in recruitment be given to the oldest among those aged between 15 and 18.
- States party to **Additional Protocol II** shall enact legislative measures prohibiting the recruitment of children under 15 and any participation by them during non-international armed conflicts (Art. 4, para. 3, c)).
- A State bound by the **2000 Optional Protocol** to the Convention on the Rights of the Child should enact legislative measures prohibiting and punishing both the use in hostilities and the compulsory recruitment into its armed forces of children under 18 years of age (Arts 1, 2 and 6). Such States must also enact legislative measures prohibiting and punishing the use in hostilities and any form of recruitment of children under 18 by armed groups distinct from the national armed forces (Art. 4).
- States party to **ILO Convention No. 182** shall take, as a matter of urgency, immediate and effective measures to secure at all times the prohibition and elimination of forced or compulsory recruitment of children for use in armed conflict, irrespective of its nature. This Convention also stresses the importance of education and insists that States parties take effective and time-bound measures to take account of the special situation of girls in this regard (Art. 7, para. 2 e)).
- In order to take advantage of the principle of complementarity, States party to the **Rome Statute** should ensure that their national criminal legislation makes it possible to prosecute persons who,
  - in an international armed conflict, have conscripted or enlisted children under 15 years of age (the age should be 18 when it is compulsory or forced, if the State is also a party to ILO Convention No. 182 or the 2000 Optional Protocol) into the national armed forces or who have used them to participate actively in hostilities (Art. 8, para. 2, b)-xxvi)).
  - in a non-international armed conflict, have conscripted or enlisted children under 15 years of age (the age should be 18 when it is forced or compulsory, if the State is also a party to ILO Convention No. 182 or the 2000 Optional Protocol) into the national armed forces or who have used them to participate actively in hostilities (Art. 8, para. 2, c)-vii)).

Because of the importance of the issue of the participation of children in hostilities, the ICRC Advisory Service has recently published the *Guiding Principles for the Domestic Implementation of a Comprehensive System of Protection for Children Associated with Armed Forces or Armed Groups*. These guiding Principles are reproduced in full in Annex XVI, page 237.

To facilitate the implementation of the specific rules prohibiting the recruitment or use of children in armed conflict the Advisory Service has also drafted Model Legislative Provisions. These Model Provisions are reproduced in full in Annex XVII, page 297.

### Dissemination

A large-scale effort to promote knowledge of and compliance with IHL is required in order to ensure true respect for children. States are legally obliged to engage in dissemination activities (in addition to the obligations laid down in the 1949 Geneva Conventions and their Additional Protocols of 1977, see also Art. 6, para. 2 of the 2000 Optional Protocol).

Thus, States should include the concept of child-specific protection in peacetime training and exercises at all levels of the national armed forces and security forces.

Likewise, consideration should be given to introducing this subject into the curriculum of universities and specialized institutions, and to organizing campaigns to raise awareness among the general public, in particular among children and adolescents.

# 6 WEAPONS TREATIES

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This chapter provides an overview of the steps required (or recommended) for States to be in a position to prevent and suppress, under domestic law, violations of IHL-based weapons treaties. These treaties, which complement the 1949 Geneva Conventions and their Additional Protocols, as well as the Hague Conventions, Regulations and Declarations of 1899 and 1907, aim to restrict or prohibit certain means of warfare. Such restrictions and prohibitions have been developed, in the words of the 1868 Saint Petersburg Declaration, with the aim of “alleviating as much as possible the calamities of war”.

IHL contains prohibitions on the employment of weapons of a nature to cause superfluous injury or unnecessary suffering, of an indiscriminate nature and those that have or may have indiscriminate effects.

The treaties and treaty sets in which specific prohibitions and restrictions have been placed include:

- the 1925 Geneva Protocol,
- the 1972 Biological Weapons Convention,
- the 1976 Environmental Modification Convention,
- the 1980 Convention on Certain Conventional Weapons and its five Protocols,
- the 1993 Chemical Weapons Convention,
- the 1997 Convention on the Prohibition of Anti-personnel Mines and on their Destruction,
- the 2008 Convention on Cluster Munitions.

This chapter provides an overview of the prohibitions or restrictions covered by each treaty mentioned above and guidance to enable States to fulfil those obligations under these treaties that require or may require domestic legislation.

## THE 1925 GENEVA GAS PROTOCOL AND THE 1972 BIOLOGICAL WEAPONS CONVENTION

### Background

The ultimate objective of the 1972 Biological Weapons Convention, as set out in the Preamble, is to “exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons”.

The use of bacteriological weapons is prohibited under the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. The 1972 Convention does not explicitly prohibit the use of biological weapons but complements the Geneva Protocol, as affirmed both in the Preamble and in Article VIII of the Convention, by prohibiting the development, production, stockpiling, acquisition, retention and transfer of such weapons, and requiring their destruction. The 1972 Convention was opened for signature on 10 April 1972 and entered into force on 26 March 1975. The depositary Governments for the Convention are the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

The 1972 Convention, rather than the 1925 Protocol, is the main instrument around which national implementation work is undertaken. Although it does not expressly forbid

the use of biological weapons, the Conference of States parties convened to review the operation of the Convention (the Review Conference) has stated that use would not only contravene the objectives of the Convention but would also violate the total ban on the production and stockpiling of biological weapons, as use presupposes possession.<sup>1</sup>

The United Nations Security Council has also dealt with the prohibition of biological weapons. On 28 April 2004, the Security Council adopted Resolution 1540, which required all States to adopt national legislation to prevent and punish actions forbidden by the 1972 Convention, specifically relating to non-State actors. Further, it reiterated the obligation on States party to the Convention to ensure that they had taken measures necessary to carry out its full implementation.

<sup>1</sup> In paragraph 3 of Article I of the Final Declaration of the Fourth Review Conference of the 1972 Convention, which reads “[t]he Conference reaffirms that the use by States Parties, in any way and under any circumstances of microbial or other biological agents or toxins, that is inconsistent with the prophylactic, protective or other peaceful purposes, is effectively a violation of Article I of the [C]onvention” (BWC/CONF. IV/9 Part II, Art. I, para. 3, 1996).

# Treaty overview

The fundamental obligation of each State party to the 1972 Convention lies in its commitment never in any circumstances to develop, produce, stockpile or otherwise acquire or retain (Art. I):

“microbial or other biological agents, or toxins, whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;

weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.”

Each State party also undertakes not to transfer to any recipient whatsoever, directly or indirectly, and not to assist, encourage, or induce any State, group of States or international organization to manufacture or otherwise acquire, any of the agents, toxins, weapons, equipment or means of delivery (Art. III).

## **Destruction**

Each State party undertakes to destroy, or to divert to peaceful purposes, all agents, toxins, weapons, equipment and means of delivery which are in its possession or under its jurisdiction or control (Art. II).

While the Convention stipulates that the destruction or conversion must be carried out not later than nine months after the entry into force of the Convention, the Review Conference has declared that any State adhering to the Convention after that date should have fulfilled this obligation at the time of adherence.

## **Breaches of the Convention**

Any State party to the Convention which finds that any other State party is acting in breach of obligations deriving from the provisions of the Convention may lodge a complaint with the Security Council of the United Nations (Art. VI).

Each State undertakes to provide or support assistance to any Party which so requests, if the Security Council decides that such Party has been exposed to danger as a result of a violation of the Convention (Art. VII).

Model letters of accession to the Convention are available at Annex I F.



## Inter-State and international cooperation and assistance

The Convention provides for a conference of States parties to be held to review the operation of the Convention (Art. XII). This Review Conference has in fact met at regular intervals since 1980, and has adopted recommendations (in the form of Final Declarations) aimed at promoting the application and the effectiveness of the Convention and at indicating the way in which the States parties interpret the provisions of the Convention.

The States parties are also requested to supply information pertaining to compliance with Articles I to III, and to participate in the mechanisms for implementation of certain provisions of the Convention, especially Articles V and X.

Confidence-building measures introduced as a result of the Second Review Conference in 1986 ask the States parties to:

- exchange data on research centres and laboratories, national biological defence research and development programmes, and outbreaks of infectious diseases and similar occurrences caused by toxins;
- encourage publication and use of results of biological research related to the Convention and promote contacts between scientists working in this field;
- declare legislation, regulations and other measures adopted to implement the Convention;
- declare past activities in offensive and/or defensive biological research and development programmes;
- declare vaccine production facilities.

The information which is the subject of such measures is to be sent to the United Nations Office for Disarmament Affairs, in accordance with a standard procedure, no later than 15 April each year, and should cover the previous calendar year. An implementation support unit has been established to provide administrative support and assistance, national implementation support and assistance, support and assistance for confidence-building measures and support and assistance for obtaining universality of the Convention.

The States parties undertake to consult one another and to cooperate in solving any problems which may arise in relation to the objective or the application of the Convention (Art. V). Any State party has the right to convene a consultative meeting open to all Parties.

The States parties also undertake to facilitate the fullest possible exchange of equipment, materials and information relating to the use of agents and toxins for peaceful purposes (Art. X).

# Guidelines for the development of national legislation to implement the Convention

The Convention requires that each State party shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of agents, toxins, weapons, equipment and means of delivery within its territory, under its jurisdiction or under its control anywhere (Art. IV).

While this provision only refers explicitly to the implementation of Article I, the Review Conferences have requested the States parties to take the measures necessary to prohibit and prevent all acts that could constitute a contravention of any provision of the Convention. In particular they have reaffirmed the prohibition on use and clarified issues pertaining to the prohibition on transferring bacteriological weapons and the obligation to destroy them.

In order to fulfil all its obligations under the Convention, each State should therefore:

- take legislative, administrative and other measures to guarantee compliance with the provisions of the Convention.

States should also consider the following:

- enacting legislation providing for physical protection of laboratories and other facilities to prevent unauthorized access to and removal of pathogenic or toxic material;
- ensuring that textbooks and medical, scientific and military educational programmes include the prohibitions contained in the Convention and the 1925 Protocol.

In particular, States should consider enacting penal legislation to prohibit and prevent any activity in breach of the Convention. As well as those acts expressly referred to in the Convention, States may consider adding import, export, re-export, transport, transit, trans-ship and transfer to the list, in order to ensure the complete prohibition of the actions contemplated in Article I. States should also consider reference to ancillary offences such as assisting, encouraging or inducing the commission of these acts. In terms of jurisdiction, these measures must be undertaken for acts conducted anywhere within the State's territory, under its jurisdiction or under its control. In addition, each State should apply such measures to acts committed by its nationals outside its territory. Penalties need to be created for these offences. States should consider allowing for the seizure and forfeiture of items related to the prohibited acts.

States should also consider creating a licensing scheme to prevent unauthorized dealings in microbial and biological agents and toxins, especially when combined with weapons, equipment or other means of delivery, and providing for domestic enforcement measures through an inspection regime. This would of course also entail conferring powers such as search and seizure, examination and information-gathering. Penalties would also need to be created for obstructing an inspector.

The relevant minister will also need to be given the power to enact regulations on a number of issues including reporting to the Review Conference on compliance with the Convention as mentioned below.

## A Rome Statute

It is worth noting that Article 8 of the Rome Statute states that “employing poison or poisoned weapons” and “employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” constitute war crimes. Although the language used here is different from that of the Biological Weapons Convention, it has been interpreted by most as encompassing biological weapons. According to the principle of complementarity, the International Criminal Court has jurisdiction in situations where a State is unable or unwilling to prosecute. In order to take advantage of this principle and to ensure criminalization at the national level, States should adopt legislation enabling them to prosecute perpetrators of such crimes.

# Model legislation

Together with the Verification, Research, Training and Information Centre (VERTIC), the ICRC has published a model law designed to cover the penal sanctions necessary to comply with the 1925 Geneva Protocol and the 1972 Convention (Annex VIII). While the law is aimed primarily at common-law States, it may also prove useful for States with other legal traditions. The model law draws on provisions from the legislation of States party to the Convention.

# THE 1976 CONVENTION ON THE PROHIBITION OF MILITARY OR ANY HOSTILE USE OF ENVIRONMENTAL TECHNICAL MODIFICATION

## Background

The Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD Convention) is an instrument of IHL and international disarmament law specifically intended to prevent the alteration of the natural environment as a means of armed conflict. Protocol I additional to the 1949 Geneva Conventions also contains provisions protecting the environment; they complement those of the ENMOD Convention. The ENMOD Convention was negotiated at the Conference of the Committee on Disarmament and was adopted by the United Nations General Assembly on 10 December 1976. It was opened for signature in Geneva on 18 May 1977 and entered into force on 5 October 1978. The depositary is the United Nations secretary-general.

# Treaty overview

The ENMOD Convention is specifically intended to prevent use of the environment as a means of warfare by prohibiting the deliberate manipulation of natural processes that could produce phenomena such as floods, hurricanes, tidal waves or other severe changes in climate.

## Prohibitions

States party to the Convention undertake “not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party” (Art. I, para. 1). The States parties further undertake not to “assist, encourage or induce” any State, group of States or international organization to engage in such activities (Art. I, para. 2). The environmental modification techniques covered are those intended to change, “through the deliberate manipulation of natural processes, the dynamics, composition or structure of the Earth” (Art. II). To be banned by Article I, the use of prohibited techniques must meet all of the following criteria:

- be for hostile purposes;
- cause destruction, damage or injury to another State party;
- have widespread, long-lasting or severe effects.

While not strictly part of the ENMOD Convention, “Understandings” were drawn up at the time of the Convention’s adoption that define the extent, duration and severity criteria (Art. I) for application of the Convention.<sup>2</sup> Of particular importance is the Understanding on what is meant by the terms “widespread”, “long-lasting” and “severe”, as follows:

- widespread: encompassing an area of several hundred square kilometres;
- long-lasting: lasting for a period of months, or approximately a season;
- severe: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

The Understandings also include, as examples, a non-exhaustive list of phenomena that could result from the use of environmental modification techniques: earthquakes and tsunamis; an upset in the ecological balance of a region; changes in weather patterns (clouds, precipitation, cyclones and tornadic storms); changes in climate patterns; changes in ocean currents; changes in the state of the ozone layer and changes in the state of the ionosphere.

## Breaches of the Convention by a State party

Any State with reason to believe that any other State is violating the Convention may lodge a complaint with the Security Council of the United Nations, on the basis of which the Security Council may conduct an enquiry (Art. V, paras 3 and 4).

Each State party also undertakes to assist any State party that so requests, if the Security Council decides that the party concerned has been exposed to danger as a result of a violation of the Convention (Art. V, para. 5).

<sup>2</sup> See CCD/518 of September 1976 (Consultative Committee of Experts), reaffirmed in ENMOD/CONF.I/13/II. p. 3 (Art. II).

## Inter-State and international cooperation and assistance

### Review Conference

The Convention stipulates a procedure for the regular review of the Convention's implementation (Art. VIII). The ENMOD Review Conference met in 1984 and 1992.

### Consultation, cooperation and scientific exchange

The States parties have a duty to consult each other and cooperate to resolve any problems related to the objectives of the Convention or its application (Art. V, paras 1 and 2). In particular, a consultative committee of experts may be convened for that purpose. The committee's functions and rules of procedure are set out in an annex to the Convention.

The States parties also undertake to facilitate the fullest possible exchange of scientific and technological information on the use of environmental modification techniques for peaceful purposes, and to cooperate in the economic and scientific realms for the preservation, improvement and peaceful utilization of the environment (Art. III).

See Annex I G for model instruments of accession to the Convention.

# Guidelines for the development of national legislation to implement the Convention

There is no express obligation on States to take legislative measures for this Convention as there are in some other IHL weapons treaties; however, each State party to the Convention undertakes to “take any measures it considers necessary in accordance with its constitutional processes to prohibit and prevent any activity in violation of the provisions of the Convention anywhere under its jurisdiction or control” (Art. IV).

Each State should enact criminal legislation to outlaw and repress the use of prohibited techniques within its territory and anywhere else under its jurisdiction or control. In addition, that legislation should contain provisions to ensure extraterritorial application, allowing for the prosecution of nationals abroad.



# **C** THE 1980 CONVENTION ON CERTAIN CONVENTIONAL WEAPONS AND ITS FIVE PROTOCOLS (WITH TWO AMENDMENTS)

## **Background**

The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW) applies two general customary rules of IHL to specific weapons, namely: (1) the prohibition on the use of weapons that are indiscriminate; and (2) the prohibition on the use of weapons of a nature to cause unnecessary suffering or superfluous injury. It was adopted on 10 October 1980 and entered into force on 2 December 1983. The depositary is the United Nations secretary-general. Although it contains detailed rules for specific weapons that raise humanitarian concerns, the Convention does not lessen the obligation of States to refrain from using weapons not covered by the CCW, but which would nonetheless violate customary rules of IHL.

# Overview of the Convention and its Protocols

## The Convention

The CCW consists of a framework instrument and five individual protocols that regulate specific categories of weapons of humanitarian concern. Protocols I to III were adopted when the CCW was concluded in 1980. Protocols IV and V were subsequently added by the States parties at the First and Second Review Conferences, respectively. The First Review Conference also amended Protocol II in 1996 to strengthen the rules on mines, booby-traps and other devices.

Today, the CCW applies to all situations of armed conflict. Although it was initially intended to apply only to international armed conflicts, its scope of application was broadened in 2001, when Article 1 of the framework instrument was amended, to non-international conflicts as well. In addition, while most of its rules regulate behaviour during armed conflict, the CCW also requires certain action after the fighting has ended. In particular, Protocol II as amended and Protocol V require the parties to a conflict to take specific measures after the end of active hostilities to minimize the dangers posed by mines, booby-traps and other forms of unexploded and abandoned ordnance.

## Protocol I: Non-detectable fragments

Protocol I prohibits the use of any weapon the primary effect of which is to injure by fragments that are not detectable in the human body by X-rays.

## Protocol II as amended: Mines, booby-traps and other devices

Protocol II, as amended on 3 May 1996, regulates the use of landmines, booby-traps and certain other explosive devices and requires specific action to minimize the impact of these weapons on civilian populations. It entered into force on 3 December 1998.

The Protocol contains rules prohibiting or restricting the use of landmines (anti-personnel and anti-vehicle), booby-traps and other devices (Art. 3). These include prohibitions on the use of such weapons if they are of a nature to cause unnecessary suffering or superfluous injury (Art. 3, para. 3), are designed to explode when detected by mine-detection equipment (Art. 3, para. 5), directed against civilians or civilian objects (Art. 3, para. 7) or are used indiscriminately (Art. 3, para. 8). Any time these weapons are employed, their use, location and other information must be recorded and retained (Art. 9) and precautions must be taken to limit the impact on civilians (Art. 3, para. 10).

There are also more specific restrictions on the use of anti-personnel mines. It is, for example, prohibited to use anti-personnel mines that are not detectable (Art. 4). In addition, the use of anti-personnel mines without self-destruct and

self-deactivation features is limited to very specific situations (Art. 5). Article 6 also prohibits the use of anti-personnel mines that are remotely delivered unless they are in compliance with the technical annex to the Protocol. However, given the wide adherence to the Mine Ban Convention, the rules in amended Protocol II on anti-personnel mines are not relevant for most States.

In addition to the general rules in Article 3, there are specific rules on the use of booby-traps and other devices (Art. 7). It is prohibited, for example, for booby-traps and other devices to take the form of an apparently harmless portable object or for them to be attached to or associated with recognized protective emblems or signs (e.g. Red Cross, Red Crescent or Red Crystal), sick, wounded or dead persons, medical equipment, toys, food or historic monuments. In addition, when combat is not taking place, such weapons are not to be used in cities, towns or areas containing a concentration of civilians unless specific precautions are taken.

A central provision of amended Protocol II is that it requires the parties to the conflict to take specific action after the end of active hostilities to lessen the post-conflict dangers of mines, booby-traps and other devices for civilians.

Parties using mines, booby-traps and other devices must:

- maintain records on the locations where such weapons were used or laid (Art. 9) ;
- clear, remove, destroy or maintain them following the end of active hostilities (Art. 3, para. 2 and Art. 10);
- make records and other relevant information available to the other parties to the conflict and the United Nations secretary-general (Art. 9).

States parties must take all appropriate steps, including legislative and other measures, to prevent and suppress violations of the Protocol by persons or on territory under their jurisdiction or control. These include penal sanctions for those who wilfully kill or cause serious injury to civilians (Art. 14).

## Protocol III: Incendiary weapons

Incendiary weapons are those that are primarily designed to set fire to objects or to burn persons through the action of flame or heat, such as napalm and flame throwers (Art. 1).

It is prohibited in all circumstances to make civilians the object of attack by incendiary weapons. It is also prohibited to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons. It is prohibited to make a military objective located in a civilian area the object of attack by non-air-delivered incendiary weapons unless the military objective is separated

from the concentration of civilians and feasible precautions are taken to avoid incidental loss of civilian life or injury or damage to civilians and civilian objects. It is further prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons unless they are being used to conceal combatants or other military objectives (Art. 2).

#### **Protocol IV: Blinding laser weapons**

Protocol IV, which was adopted on 13 October 1995 and entered into force on 30 July 1998, prohibits the use of laser weapons specifically designed to cause permanent blindness, and the transfer of such weapons to any State or non-State entity (Art. 1).

With regard to the use of lasers which may not be considered weapons, the Protocol requires that all feasible precautions be taken to avoid permanent blindness. These precautions must include training of armed forces and other practical measures (Art. 2). This is intended to minimize the dangers that may arise in the use of lasers designed to determine distance or identify targets.

#### **Protocol V: Explosive remnants of war**

Protocol V, which was adopted on 28 November 2003 and entered into force on 12 December 2006, requires the parties to a conflict to take measures to reduce the dangers posed by explosive remnants of war.

Explosive remnants of war (ERW) are defined as explosive ordnance that have been used or fired but have failed to explode as intended (unexploded ordnance) and stocks of explosive ordnance left behind on the battlefield (abandoned ordnance). Such weapons include artillery shells, mortar shells, hand grenades, submunitions and other similar weapons. The Protocol does not apply to the weapons covered by amended Protocol II (mines, booby-traps and other devices).

The Protocol requires each party to an armed conflict to:

- record information on the explosive ordnance employed by its armed forces and, after the end of active hostilities, to share that information with the other parties to the conflict and organizations engaged in ERW clearance or programmes to warn civilians of the dangers of these devices (Art. 4);
- take all feasible precautions to protect civilians from the effects of ERW, including the fencing and monitoring of territory and the provision of warnings and risk education (Art. 5);
- mark and clear ERW in territory it controls after a conflict (Art. 3, para. 2);

- for territory it does not control, provide technical, material and financial assistance to facilitate the removal of ERW in those areas that resulted from its operations. This assistance can be provided directly to the party in control of the territory or through a third party such as the United Nations, international agencies or non-governmental organizations. (Art. 3, para. 1).

In addition to the obligations placed upon the parties to a conflict, all States parties in a position to do so must provide assistance for the marking and clearance of ERW, risk education, and assistance for the care, rehabilitation and socio-economic reintegration of ERW victims (Art. 8).

Although the Protocol is only binding on a State once it has entered into force for that State, those States that have a pre-existing ERW problem have “the right to seek and receive assistance” from other States parties to address that problem. In parallel, States parties in a position to do so, are obliged to provide assistance to help ERW-affected States parties reduce the threats posed by the weapons.

Model instruments of accession for the Convention and its Protocols are available at Annex I H.

## Inter-State and international cooperation and assistance

The States party to the CCW meet annually to review progress related to the Convention and its Protocols and to examine issues of implementation and compliance. In addition, the parties to amended Protocol II must provide implementation information relating to that Protocol. They also meet formally as States parties. Meetings of the Group of Governmental Experts of the Convention itself have been held annually since 2002 to consider proposals for new protocols. The States party to Protocol V meet annually, and held their own meeting of governmental experts in 2008. They are also working on developing formats for reporting information on the Protocol's implementation.

# Guidelines for the development of national legislation

## Introduction

The CCW regulates weapons by either prohibiting all use of a weapon in armed conflict or regulating its use in certain circumstances. To ensure that these rules are respected and to prevent and punish any violations, States should include these prohibitions in their domestic law and adopt penal sanctions for unlawful actions. Such action is already required for violations of amended Protocol II (see below).

## Preventing and suppressing violations of amended Protocol II

Amended Protocol II is the only Protocol that obliges States to take legislative measures for implementation. It expressly requires States, in Article 14, to “take all appropriate steps including legislative and other measures, to prevent and suppress violations” of the Protocol, including penal sanctions by persons or on territory under its jurisdiction or control.

It goes further to say that these measures should “include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict... wilfully kill or cause serious injury to civilians”.

Thus, in accordance with the restrictions of the Convention, a State will need to ensure that under its domestic legislation, or military policies as appropriate, it prohibits the use of anti-personnel mines that are not detectable and that it prohibits mines, booby-traps and other devices that:

- cause superfluous injury and unnecessary suffering;
- employ a mechanism or device designed to detonate the munition by the presence of mine detectors;
- are directed against the civilian population or individual civilians or civilian objects;
- are used in an indiscriminate manner;
- are remotely-delivered and that are not equipped with a self-destruct or self-neutralizing mechanism.

It should be noted that such measures are superfluous with regard to anti-personnel mines if the State is a party to the Mine Ban Convention, however, there is still the requirement to legislate for such restrictions with regard to mines other than anti-personnel mines, booby-traps and other devices.

States are further obliged to prohibit the attachment to or association with booby-traps of articles such as children's toys, animals or sick, wounded or dead people. States need to create penalties for breaches of these prohibited acts.

A State should also consider how best to implement other provisions of amended Protocol II, for example the protection of civilians and civilian populations (Art. 3, para. 10), recording of affected areas (Art. 9), the removal and clearance of mines, booby-traps and other devices (Art. 10), the exchange of equipment and relevant information, provision of information to the database on mine clearance and assistance for mine clearance (Art. 11).

## Possible approaches to implementing other CCW Protocols

While States are implementing amended Protocol II, they may also consider reflecting the prohibition of weapons under Protocols I and IV in domestic law. In this regard the law should, in accordance with **Protocol I**, prohibit the use of a weapon the primary effect of which is to injure by fragments, which in the human body escape detection by X-rays. In addition, it may also be useful to prohibit the production, acquisition, stockpiling, retention and transfer of such weapons. Although prohibiting such acts is not specifically mandated by Protocol I, it will ensure that actions other than use, such as the development, production, possession and transfer of such weapons, are equally proscribed. The prohibition of such acts has also been included in recently adopted weapons treaties such as the Mine Ban Convention and the Convention on Cluster Munitions.

A similar approach could be taken regarding **Protocol IV**, which bans the use of blinding laser weapons. This Protocol prohibits the use and transfer of blinding lasers, and these acts should be included in domestic criminal legislation. Similar to what has been stated above, explicitly prohibiting the development, production and retention of these weapons will ensure that prohibited weapons are not produced, possessed or sold.

The restrictions of **Protocol III** on incendiary weapons will also need to be the subject of domestic implementation measures. States should ensure that, through legislation, regulatory measures or military policies, there are prohibitions on:

- making the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons;
- attacks by air-delivered incendiary weapons on any military objective located within a concentration of civilians;

- making any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
  - making forests or other kinds of plant cover the object of attack by incendiary weapons, except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.
- the taking of all feasible precautions to protect the civilian population, individual civilians and civilian objects from the risks and effects of explosive remnants of war, including warnings, risk education to the civilian population, marking, fencing and monitoring of territory affected by explosive remnants of war;
  - the protection of humanitarian missions and organizations from the effects of explosive remnants of war;
  - the provision of information to the relevant databases on mine action established within the United Nations system;
  - the taking of generic preventive measures, such as appropriate management of munitions and their manufacture as well as training measures aimed at minimizing the occurrence of explosive remnants of war.

A State party to **Protocol V** will also need to ensure that the appropriate measures are in place to implement the following provisions:

- the recording and retention of information on the use or abandonment of explosive ordnance (recording and retention systems need to be in place prior to a conflict);
- the marking, clearance, removal and destruction of explosive remnants of war in any affected area under its control;
- the reduction of the risk posed by explosive remnants of war in such areas by:
  - surveying and assessing the threat posed;
  - assessing and prioritizing needs and practicability in terms of marking and clearance, removal or destruction;
  - taking steps to mobilize resources to carry out these activities;

The Convention and Protocols also require that military manuals reflect the obligations undertaken. Training should of course also reflect these obligations.

## C Rome Statute

Article 8 (b) (xx) of the Rome Statute states that it is a war crime to employ weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict. It creates a proviso, however, restricting the provision to those weapons, projectiles and material and methods of warfare that are the subject of a comprehensive prohibition and are included in an annex to the Statute. As yet this annex does not exist.

# Model legislation

For information on relevant steps taken by States in order to implement the Convention and its Protocols at the domestic level, please consult <http://disarmament.un.org/ccw/ccwmeetingsprottwo.html>.

Model implementing legislation for the Convention and its five Protocols is provided in Annex IX.



# D THE 1993 CHEMICAL WEAPONS CONVENTION

## Background

The 1993 Chemical Weapons Convention aims to prevent for all time the possibility of the use of chemical weapons. Like the 1972 Biological Weapons Convention, it complements and in many ways strengthens the 1925 Geneva Protocol prohibiting the use of asphyxiating, poisonous or other gases. The Convention was adopted on 30 November 1992, opened for signature on 13 January 1993 and came into force on 29 April 1997. The depositary is the United Nations secretary-general.

The Convention does not allow any reservations (Art. XXII), and extends the prohibition on the use of chemical weapons to their development, production, stockpiling, retention and transfer, requiring that they, and the facilities where they are produced, be destroyed.

Since it is based on the idea that achievements in the field of chemistry should be used exclusively for the benefit of mankind, the Convention promotes and establishes oversight of activities of the chemical industry which may pose risks to the Convention. It also provides for a system of assistance and protection for States against which chemical warfare has been used or threatened (Art. X).

The United Nations Security Council has also reinforced the Convention's prohibition of chemical weapons. On 28 April 2004, the Security Council adopted Resolution 1540, which required all States to adopt national legislation to prevent and punish actions forbidden by the 1993 Convention, specifically relating to non-State actors. Further, it reiterated the obligation on States party to the Convention to ensure that they had taken the measures necessary for its full implementation.

# Treaty overview

## Prohibitions and destruction

Each State party to the Convention undertakes never under any circumstances to use, develop, produce, otherwise acquire, stockpile, retain or transfer chemical weapons, to engage in any military preparations to use chemical weapons or to assist, encourage or induce, in any way, anyone to engage in any activity prohibited under the Convention (Art. I, para. 1). It also prohibits the use of riot-control agents as a method of warfare (Art. I, para. 5).

Each State party to the Convention also undertakes to destroy chemical weapons or any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control (Art. I, paras 2 and 4). Destruction must be completed not later than 10 years after entry into force of the Convention for that State (Art. IV, para. 6 and Art. V, para. 8). All chemical weapons abandoned by a State party on the territory of another State party must also be destroyed, in accordance with the Convention's Verification Annex (Art. I, para. 3).

## Prohibited weapons and production facilities

The Convention adopts a broad definition of chemical weapons which covers all toxic chemicals. It also bans the production of toxic chemicals except for purposes not prohibited under the Convention, such as where intended for industrial, agricultural, research, medical, or pharmaceutical purposes, or purposes related to protection against toxic chemicals. It also covers munitions and devices specifically designed to cause death or other harm by the release of toxic chemicals and any equipment specifically designed for use directly in connection with these munitions and devices.

## Verification

The Convention establishes a verification system to monitor compliance by States parties with their obligations under the treaty to destroy weapons and facilities. This system, which is specified in detail in the annexes to the Convention, provides for initial and thereafter annual declarations to be made concerning the industrial chemical production of the State (Arts III, IV, para. 7, V, para. 9 and Art. VI, paras 7 and 8, and Verification Annex).

Actual verification is carried out through inspections of three kinds: routine inspections on the basis of national declarations (Arts IV–VI), challenge inspections for the sole purpose of determining facts relating to possible non-compliance with the Convention (Art. IX) and inspections in response to an allegation that chemical weapons have been used (Art. X).

Toxic chemicals used for purposes not prohibited under the Convention and facilities related to such chemicals are also subject to verification measures as provided in the Verification Annex (Art. VI, para. 2).

## The Organization for the Prohibition of Chemical Weapons (OPCW)

The task of the OPCW is to ensure the implementation of the Convention and to provide a forum for consultation and cooperation among the States parties, which are de facto members of the Organization (Art. VIII, paras 1 and 2). The Technical Secretariat of the OPCW, which has its headquarters in The Hague, is responsible for carrying out the verification measures and providing technical assistance to the States parties in implementing the provisions of the Convention (Arts VIII, para. 3 and VIII, para. 37 ff).

Each State party must designate or establish a National Authority, the mandate, structure and powers of execution of which are left to the discretion of the State, to serve as the national focal point for effective liaison with the OPCW (Art. VII, para. 4) and which is key to the implementation of the Convention.

A model letter of accession is available in Annex I I.

## D Inter-State and international cooperation and assistance

States party to the Convention meet annually to review progress in the implementation of the Convention, and States engage in regular reporting on their obligations. The members of each State party's National Authority also meet once a year.

In addition, a number of assistance measures, including training and legislative drafting support, have been organized, often through the Secretariat of the OPCW and Member States. More information may be found at <http://www.opcw.org/>.

# Guidelines for the development of national legislation

Each State party, in accordance with the procedures set out in its Constitution, must adopt the measures necessary to fulfil its obligations under the Convention (Art. VII), and inform the OPCW that it has done so (Art. VII, para. 5). The Convention's definition of chemical weapons should be incorporated into national legislation in order to avoid differences of interpretation.

Each State must in particular extend its penal legislation to cover activities prohibited under the Convention, i.e. to develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone, or engage in military preparation to use them, or use riot control agents as a method of warfare. It must provide for prosecution of its nationals (Art. VII, para. 1) and for the extraterritorial application of these penal measures.

Article VII of the Convention looks at extending the repression of prohibited activities among States parties through cooperation measures. A National Authority also needs to be created to facilitate liaison on matters arising from the Convention, as follows:

- the State party shall cooperate and afford legal assistance to other States parties in fulfilling obligations under the Convention, in particular the prevention and suppression of prohibited activities (Art. VII, para. 2);
- the State party shall designate or establish a National Authority to ensure effective liaison with the OPCW and other States parties (Art. VII, para. 4).

The form and content of the other measures that are necessary to implement the Convention will depend on the weapons stocks and facilities in the possession of a State party, and on the nature of its chemical industry. Among other things, these measures must ensure and facilitate:

- the mandatory transfer of the information needed to prepare accurate and complete national declarations from the entities concerned to the National Authority;
- in the framework of the verification system, and in accordance with the Verification Annex, the entry and removal of OPCW inspection equipment and approved materials, the access of the inspection team to the facilities, and the conduct of inspections, particularly with respect to the taking of samples and their analysis;
- the review of existing national regulations in the field of trade in chemicals in order to render them consistent with the object and purpose of the Convention (Art. XI, para. 2(e)), in accordance with control measures required by the Convention;
- the confidential treatment of the information received in confidence from the OPCW, in accordance with the Confidentiality Annex (Art. VII, para. 6);
- respect for the privileges and immunities that are necessary for the exercise of the functions of the OPCW and persons designated by the Convention (Art. VIII, paras 48 to 51 and Verification Annex).

## D Rome Statute

According to the Rome Statute, the International Criminal Court is competent to try alleged perpetrators of war crimes, including the employment of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, committed in situations of international armed conflict (Art. 8, para. 2(b) (xviii)). This would include chemical weapons.

In accordance with the principle of complementarity, the Court may bring alleged criminals to justice only when a State is unable or unwilling to do so. It should be recalled here that to benefit from this principle a State must first enact legislation enabling it to prosecute the perpetrators of war crimes.

# Model legislation

The OPCW has published model legislation which is included in Annex X, with its consent.

# E THE 1997 CONVENTION ON THE PROHIBITION OF ANTI-PERSONNEL MINES AND ON THEIR DESTRUCTION

## Background

The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction (the Mine Ban Convention) aims at a complete ban on anti-personnel mines. These mines were prohibited in light of the severe humanitarian problems they cause and on the basis that the right of the parties to an armed conflict to choose the methods or means of warfare is not unlimited, on the principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and on the principle that a distinction must be made between civilians and combatants. The Convention was opened for signature in Ottawa on 3 December 1997 and entered into force on 1 March 1999. The depositary for the Convention is the United Nations secretary-general.

# Treaty overview

## Basic obligations

States adhering to this treaty must never under any circumstances use, or develop, produce, otherwise acquire, stockpile, retain or transfer anti-personnel mines directly or indirectly or in any way help anyone else to do so (Art. 1). They must also destroy existing anti-personnel mines, whether in stockpiles or in the ground, within a fixed time period. A limited number of these mines may be retained for the sole purpose of developing mine clearance and destruction techniques and training people in the use of these techniques (Art. 3).

## Destruction and clearance of anti-personnel mines

Stockpiled anti-personnel mines must be destroyed within four years after the Convention's entry into force for a particular State (Art. 4). Emplaced mines must be cleared and destroyed within 10 years after entry into force (Art. 5). Pending such destruction, every effort must be made to identify mined areas and to have them marked, monitored and protected by fencing or other means to ensure the exclusion of civilians. If a State cannot complete the destruction of emplaced mines within 10 years it may submit a request to a meeting of States parties or a Review Conference for an extension of the deadline for a period of up to 10 years.

## Monitoring of the Convention

The Convention includes a variety of measures designed to ensure that it is being respected and to deal with suspected violations. It obliges States parties to file an annual report (Art. 7, see below) and to work together to facilitate compliance by States parties with their obligations.

If there are concerns about compliance by a State party, any State party may submit a request for clarification of the matter to the relevant State party via the United Nations secretary-general. If there is no response or if the response is unsatisfactory, the requesting State can submit the matter to a meeting of States parties. The meeting of States parties can decide to send a fact-finding mission to the State concerned. On the basis of the mission's report, the meeting of States parties may request the State party concerned to take measures to address the compliance issue within a specified time period. It may also suggest ways and means to further clarify or resolve the matter under consideration, including the initiation of appropriate procedures in conformity with international law.

A model letter of accession is provided at Annex I J.



## E Inter-State and international cooperation and assistance

### Annual reports

Article 7 of the Convention requires States parties to file annual reports with the United Nations secretary-general covering the preceding calendar year. Such reports are to be submitted no later than 30 April of each year.

These reports must provide information on a variety of matters, including on all stockpiled anti-personnel mines and their destruction, locations of mined areas, number of mined areas cleared, mines retained for training purposes and measures taken to prevent civilians from entering mined areas. States parties must also report on what implementing measures they have taken to fulfil their obligations under Article 9 of the Convention.

The Meeting of States parties to the Convention has adopted a reporting format to be used by States in the preparation of these reports. The format can be obtained from:

APLC Secretariat Office for Disarmament Affairs  
(Geneva Branch) Palais des Nations, Room C-113.1  
Avenue de la Paix 8-14, 1211 Geneva 10, Switzerland  
Fax: +41 22 917 0034  
E-mail: [aplc.article7report@unog.ch](mailto:aplc.article7report@unog.ch)  
Website: [www.unog.ch/disarmament](http://www.unog.ch/disarmament)

### International assistance

Article 6 of the Convention lists the main areas in which States parties in a position to do so are to assist each other in complying with the obligations under the treaty. It stipulates that each State party in a position to do so shall provide assistance for mine clearance, mine-awareness programmes and the care and rehabilitation of mine victims. States that are mine-affected have a right to seek and receive such assistance directly from other parties to the treaty and through the United Nations, regional or national organizations, components of the International Red Cross and Red Crescent Movement or non-governmental organizations. These cooperative aspects of the Convention are intended to play as great a role as the ban it imposes in providing an effective international response to the suffering caused by these weapons.

# Guidelines for the development of national legislation

## Legislative measures required by Article 9

The Convention requires States to create legislation to implement the obligations arising from it. These include legislative, regulatory and administrative measures.

**Article 9** requires each State party to the Convention to: take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State party under this Convention undertaken by persons or on territory under its jurisdiction or control.

National legislation should therefore prohibit and make it an offence, in accordance with Article 1 of the Convention, to use, develop, produce, otherwise acquire, stockpile, retain or transfer anti-personnel mines and should provide the appropriate penalty to punish each of these activities as well as those who assist, encourage or induce such acts.

The following is a checklist aimed at assisting each State party to determine whether its legislation is sufficient to implement Article 9.

|   | Does your legislation <b>prohibit</b> and <b>provide punishment</b> for these violations? (Art. 9)* | Is there a prohibition for <b>assisting, encouraging and inducing</b> these violations? (Art. 1 (c) and Art. 9)* |
|---|---|--|
| <b>Use</b> (Art. 1 (a))   |   |  |
| <b>Acquisition</b> (Art. 1 (b))   |   |  |
| <b>Stockpiling</b> (Art. 1 (b))   |   |  |
| <b>Retention</b> (Art. 1 (b))   |   |  |
| <b>Transfer</b> , including the physical movement of anti-personnel mines into or from national territory and the transfer of title to and control over the mines (Art. 1 (b), and Art. 2, para. 4) |   |  |
| <b>Development</b> (Art. 1 (b))   |   |  |
| <b>Production</b> (Art. 1 (b))  |   |  |

\* Note that the law must apply in all circumstances, whether or not the act takes place in a situation of armed conflict, and be applicable to acts undertaken by persons or on territory under the State's jurisdiction or control.

## Definitions

States parties must ensure that their implementing legislation contains definitions consistent with those established by Article 2 of the Convention.

Article 2 of the Convention defines the terms “anti-personnel mine”, “mine”, “anti-handling device”, “transfer” and “mined area”. Implementing legislation should include definitions of each of these terms or a reference to the definitions contained in the Convention. If definitions are included in the legislation, they should be consistent with the wording in the Convention. This will prevent discrepancies between the Convention and national law and undesirable loopholes.

In addition to the definitions contained in the Convention, a number of common-law States have included in their implementing legislation definitions of terms such as “component”, “Convention”, “fact-finding mission”, “premises”, and “prohibited object”.

## Components of anti-personnel mines

Although the Convention does not explicitly refer to components of anti-personnel mines, a number of States have classified components designed or adapted to form part of an anti-personnel mine as “prohibited objects”, making possession, acquisition, or transfer of these an offence.

## Exceptions

Article 3, paragraph 1 of the Convention permits retention or transfer of a number of anti-personnel mines for the development of and training in mine detection, mine clearance, or mine destruction techniques. The number of anti-personnel mines retained or transferred shall not exceed the minimum number absolutely necessary for these purposes. Under Article 3, paragraph 2, the transfer of anti-personnel mines for the purpose of destruction is also permitted.

If a State party chooses to retain anti-personnel mines for the development of and training in mine detection, mine clearance, or mine destruction techniques, it should allow for these exceptions in its implementing legislation. Some States stipulate the maximum number of anti-personnel mines that may be retained or transferred for these permitted purposes. In addition to these exemptions, States may need to allow certain persons to possess mines for the specific purposes of the conduct of criminal proceedings, for rendering an anti-personnel mine harmless, for future destruction, or for delivery to the designated authority or minister for destruction. Some States have argued that there is no need to retain anti-personnel mines for the above purposes.

## Penalties

Article 9 of the Convention requires States parties to impose penal sanctions for activities prohibited under the Convention, without specifying the penalties which should apply.

States parties should ensure that their implementing legislation provides for penal sanctions proportionate to the nature and seriousness of the offence and appropriate to the regime of penalties applicable to other offences. Implementing legislation generally provides that offenders are liable to a term of imprisonment and/or a fine.

States parties may also wish to include a provision in their implementing legislation allowing seizure or forfeiture of anti-personnel mines or other prohibited objects (essentially, components of anti-personnel mines) involved in the commission of an offence.

## Jurisdiction

Article 9 of the Convention requires States parties to impose penal sanctions for activities prohibited under the Convention undertaken by persons or on territory under their jurisdiction or control.

States parties should ensure that their implementing legislation provides for jurisdiction over offences committed within the territory of the State, or other territory it controls, as well as acts undertaken by the State’s nationals outside its territory.

## Destruction of stockpiles and clearance of mined areas

Under Articles 4 and 5 of the Convention, each State party is required to destroy or ensure the destruction of:

- all stockpiled anti-personnel mines it owns or possesses, or that are under its jurisdiction or control, as soon as possible but no later than four years after the entry into force of the Convention for that State;
- all anti-personnel mines in mined areas under its jurisdiction or control, as soon as possible but no later than 10 years after the entry into force of the Convention for that State.

A number of States have included in their implementing legislation provisions to facilitate destruction and clearance of anti-personnel mines. These grant power to enter and search premises and permit collection and transfer of anti-personnel mines for destruction. For States that have anti-personnel mines stockpiled or in mined areas under their jurisdiction or control, provisions such as these may be useful in facilitating destruction and clearance programmes.

The implementing legislation of some States contains a provision establishing a specific date for completion of stockpile destruction. Such provisions may be a useful way to ensure that the deadline in the Convention is met. A provision may need to be included to require the marking, monitoring and protection of known or suspected mined areas under the State's jurisdiction or control, by fencing or other means, to ensure the effective exclusion of civilians, until clearance is completed.

### Fact-finding missions

Article 8 of the Convention establishes a clarification procedure which may be used if a State party has concerns about compliance by another. The measures range from requests for clarification to fact-finding missions.

Each State party must allow for cooperation with a fact-finding mission carrying out activities on its territory or on territory under its control, in accordance with Article 8 of the Convention. This may require the adoption of legal, regulatory and administrative measures to:

- ensure that members of the fact-finding mission enjoy the privileges and immunities specified under the Convention (Art. 8, para. 10);
- receive, transport and accommodate the fact-finding mission and ensure its security to the maximum extent possible (Art. 8, para. 11);
- allow the fact-finding mission to bring equipment necessary to gather information on the alleged compliance issue into the State's territory (Art. 8, para. 12);
- enable the fact-finding mission to speak with those who might be able to provide relevant information (Art. 8, para. 13);
- grant the fact-finding mission access to all areas and installations under the State's control (Art. 8, para. 14).

The implementing legislation of most States contains provisions dealing with some or all of these issues. States should also consider whether the legislation should provide penalties for obstructing or deceiving any member of a fact-finding mission exercising his or her functions or powers under the Convention.

### Further appropriate legal, administrative and other measures

States should also ask the following question of their existing domestic framework: are there laws, regulations or other measures to assist the ministry or department responsible for preparing annual reports under Article 7, for example by requiring all persons, including other government officials, to provide the necessary information?

It should also be recalled that there are other obligations under the Convention that may require implementation through administrative action or practical measures. These include the clearing of mined land, the provision of medical and rehabilitative care for mine victims and the furnishing of assistance to mine-affected countries. There may also be a need for the revision of military doctrine.

States parties should consider whether implementing legislation should confer information-gathering powers on the minister responsible for filing reports under Articles 7 and 8 of the Convention, with a view to fulfilling the reporting requirements to the United Nations secretary-general and providing answers to requests for clarification received by States parties. States may need to review national laws to ensure that they do not impede access to, and full disclosure of, information required to fulfil the reporting obligations set out in Articles 7 and 8.

## E Model legislation

The ICRC has published model legislation reproduced as Annex XI.

Guidance on drafting mine action legislation (relating more to the legal status in domestic law of mine action / clearance bodies, rather than to criminal provisions for violations of the Convention) is available at:

[http://www.gichd.ch/fileadmin/pdf/publications/Developing\\_MA\\_Legislation\\_2006](http://www.gichd.ch/fileadmin/pdf/publications/Developing_MA_Legislation_2006).

# THE CONVENTION ON CLUSTER MUNITIONS

## Background

The Convention on Cluster Munitions (CCM) seeks to end the ongoing death, injury and suffering among civilian populations that have been associated with the use of cluster munitions. These weapons have killed and injured many thousands of civilians in the countries where they have been used. On 30 May 2008, 107 States concluded an international treaty prohibiting cluster munitions as defined in the CCM. These negotiations were part of the “Oslo Process”, a Norwegian-led initiative to conclude a treaty on cluster munitions by the end of 2008. The Convention opened for signature on 3 December 2008. The depositary is the United Nations secretary-general.

The CCM reinforces fundamental customary IHL rules applicable to all States, which require the parties to a conflict to distinguish at all times between civilians and combatants, to direct operations only against military objectives and to take constant care to spare civilians and civilian objects.

## F Treaty overview

### Prohibitions

States adhering to this Convention must never under any circumstances use, or develop, produce, otherwise acquire, stockpile, retain or transfer cluster munitions. They are also prohibited from assisting, encouraging or inducing anyone else to do so (Art. 1, para. 1).

### Destruction and clearance of cluster munitions

The Convention requires each State to destroy stockpiles of cluster munitions under its jurisdiction and control within eight years after the entry into force of the instrument for that State (Art. 3). This deadline can be extended for an additional period of up to four years and further extensions may also be granted in exceptional circumstances. The Convention also permits a State to retain, acquire and transfer a limited number of cluster munitions and unexploded submunitions for training in clearance, detection and destruction or for the development of counter-measures.

Each State must also clear its territory contaminated with abandoned or unexploded submunitions (cluster munition remnants) within 10 years of becoming a party to the Convention (Art. 4). If a State is unable to do so, it may request extensions for additional periods of up to 5 years. Prior to clearance, States parties are required to survey, assess and record the threat posed by cluster munition remnants and to take all feasible steps to protect civilians.

### Assistance to victims

Each State party with cluster munition victims in its territory or under its control must provide for their medical care, rehabilitation, psychological support and social and economic inclusion (Art. 5). The State must also assess the national needs in these areas and develop plans and mobilize resources to meet them. This is the first time that such a detailed provision on victim assistance has appeared in an IHL treaty. It also requires States parties not to discriminate between victims of cluster munitions and those who have suffered injuries or disabilities from other causes.

A “cluster munition victim”, it is worth noting, means not only those people killed and injured by cluster munitions but also their families and communities, reflecting developments in the context of weapons removal which acknowledges that the term “victim” encompasses not only those directly killed or injured but also their families and the communities that suffer socio-economic and other consequences.

### Monitoring of the Convention

States parties are required to report annually to the United Nations secretary-general on matters related to the implementation of the Convention (Art. 7). These include the types and numbers of cluster munitions destroyed, the size and location of cluster munition contaminated areas, the status and progress of clearance programs, the measures taken to provide risk education and warnings to civilians, the status of victim assistance programmes and the national measures taken to prevent and suppress violations of the Convention.

Meetings of States parties are to be held regularly to review the status and operation of the Convention (Art. 11). Such meetings are an important opportunity to examine the state of implementation, discuss best practices and resolve issues which may arise in the implementation of or compliance with the Convention.

If there are concerns about a State’s compliance, clarification may be sought through the United Nations secretary-general. If necessary, the issue may be submitted to a Meeting of States parties, which can adopt procedures or specific mechanisms to help clarify the situation and suggest a resolution. If a dispute arises between two or more States parties, efforts shall be made to settle the issue by negotiation or other peaceful means of their choice, including a referral to the International Court of Justice in accordance with the Court’s Statute (Art. 8).

Each State party has an obligation to take all appropriate legal, administrative and other measures to implement the Convention, including the imposition of penal sanctions to prevent and suppress violations by persons or on territory under the State’s jurisdiction or control (Art. 9). This often requires the adoption of national legislation as well as amendments to the orders and regulations governing the armed forces.

Model instruments of ratification and accession are provided in Annex I K.

## Inter-State and international cooperation and assistance

Article 6 of the Convention lists the main areas in which States parties are to assist each other in complying with the obligations under the Convention. Each State party has the right to seek and receive assistance from other States. In addition, States parties in a position to do so are to provide technical, material and financial assistance aimed at ensuring the implementation of the obligations under the Convention. This includes assistance for the destruction of cluster munitions and submunitions, the clearance of cluster munition remnants, measures to protect civilians and the care and rehabilitation of victims.



# Guidelines for the development of national legislation

## The measures required by Article 9

The Convention requires States to take specific action to implement the obligations arising from it. As indicated in Article 9, each State party shall:

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

In most States the imposition of penal sanctions to prevent and suppress violations will require the adoption or amendment of national legislation. Such legislation should therefore create an offence, in accordance with Article 1 of the Convention, for using, developing, producing, otherwise acquiring, stockpiling, retaining or transferring cluster munitions and for directly assisting, encouraging or inducing these acts. It should also provide the appropriate penalty to punish each of these activities.

It should also be noted that there are other obligations under the Convention whose implementation may be achieved through regulations and administrative orders. These include the clearing of affected land, the provision of medical and rehabilitative care for victims and the furnishing of assistance to cluster munition-affected countries. Also relevant are the need to review export licences, the notification of companies involved in the production and sale of cluster munitions and the revision of military doctrine.

## Definitions

States parties should ensure that their implementing legislation, administrative orders, regulations and other measures taken contain, where appropriate, the definitions found in Article 2 of the Convention. This will help ensure that such measures are consistent with the Convention and will prevent discrepancies and undesirable loopholes.

Article 2 of the Convention defines the terms “cluster munition”, “cluster munition victims”, “explosive submunition”, “failed cluster munition”, “unexploded submunition”, “abandoned cluster munitions”, “cluster munitions remnants”, “transfer”, “self-destruction mechanism”, “self-deactivating”, “cluster munition contaminated area”, “mine”, “explosive bomblet”, “dispenser” and “unexploded bomblet”.

Implementing legislation, administrative orders, regulations and other measures could repeat the wording of each of these terms or include a reference to the definitions contained in the Convention.

## Exceptions

Article 3, paragraph 6 of the Convention permits retention or acquisition of a number of cluster munitions for the development of and training in detection, clearance, or destruction techniques. The number of cluster munitions retained or transferred shall not exceed the minimum number absolutely necessary for these purposes. Under Article 3, paragraph 7, the transfer of cluster munitions to another State party for the purpose of destruction is also permitted.

If a State party chooses to retain or acquire cluster munitions for training or other permitted purposes, it should allow for these exceptions in its implementing legislation and other relevant regulatory measures. In addition to these exemptions, States may need to allow for certain persons to possess cluster munitions and submunitions for the specific purposes of the conduct of criminal proceedings, for rendering cluster munitions and submunitions harmless, for future destruction, or for collection by the designated authority or minister for destruction.

## Penalties

Article 9 of the Convention requires States parties to impose penal sanctions for activities prohibited under the Convention, without specifying the penalties that should apply.

States parties should ensure that their implementing legislation provides for penal sanctions proportionate to the nature and seriousness of the offence and appropriate to the regime of penalties applicable to similar offences. Implementing legislation generally provides that offenders are liable to a term of imprisonment and/or a fine.

States parties may also wish to include a provision in their implementing legislation allowing seizure or forfeiture of cluster munitions or other prohibited objects involved in the commission of an offence.

## Jurisdiction

Article 9 of the Convention requires States parties to impose penal sanctions for activities prohibited under the Convention undertaken by persons or on territory under their jurisdiction or control.

States parties should ensure that their implementing legislation provides for jurisdiction over offences committed within the territory of the State, or other territory it controls, as well as acts undertaken by the State's nationals outside its territory.

## Destruction of stockpiles and clearance of cluster munition-contaminated areas

Under Articles 3 and 4 of the Convention, each State party is required to destroy or ensure the destruction of:

- all stockpiled cluster munitions under its jurisdiction and control, as soon as possible but no later than eight years after the entry into force of the Convention for that State;
- all cluster munition remnants in areas under its jurisdiction or control, as soon as possible but no later than ten years after the entry into force of the Convention for that State.

Regulations, administrative orders and, in some instances, domestic legislation will need to be adopted or amended so as to allow the implementation of this requirement. If a State is contaminated by cluster munition remnants it should include a provision to require the marking, monitoring and protection of known or suspected cluster munition contaminated areas under the State's jurisdiction or control, by fencing or other means, to ensure the effective exclusion of civilians, until clearance is completed.

## Compliance

Article 8 of the Convention establishes a clarification procedure which may be used if a State party has concerns about compliance by another. The measures range from requests for clarification, to referral to a Meeting of States parties or to the International Court of Justice.

Articles 7 of the Convention requires States to report on various issues, as discussed above. States parties should consider whether implementing legislation should confer information-gathering powers on the minister responsible for filing reports under Article 7 of the Convention and require disclosure of information on cluster munitions. States may need to review, and perhaps amend, national laws and regulations to ensure that they do not impede access to, and full disclosure of, information required to fulfil the Article 7 reporting obligation.

## F Model legislation

The ICRC has published model legislation which covers many of these issues. The legislation is reproduced as Annex XII.

# 7

## THE INTERNATIONAL CRIMINAL COURT

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## CHAPTER SEVEN: THE INTERNATIONAL CRIMINAL COURT

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# Background

The United Nations has considered the idea of establishing a permanent international criminal court at various times since the end of the Second World War. In 1993 and 1994, it set up two ad hoc tribunals to punish serious violations of IHL committed, respectively, in the former Yugoslavia and Rwanda. A series of negotiations to establish a permanent international criminal court that would have jurisdiction over serious international crimes began in 1994 and led to the adoption of the Statute of the International Criminal Court (the Rome Statute) in July 1998 in Rome and its entry into force on 1 July 2002. This accomplishment is the culmination of years of effort. The establishment of the ICC is a further step towards the effective punishment of persons responsible for having committed the world's gravest crimes.

# Treaty overview

The Rome Statute is an international treaty which establishes an international court with jurisdiction over the most serious crimes. It is thus able to help States try persons accused of these acts, in accordance with the complementarity principle explained below.

## Crimes within the ICC's jurisdiction

Four international crimes fall within the ICC's jurisdiction, i.e. aggression, genocide, crimes against humanity and war crimes.

*Aggression.* Although provided for in the Rome Statute, the Court will only exercise jurisdiction over this crime once provisions defining aggression and setting out the conditions for such exercise are adopted (Art. 5, para. 2).

*Genocide.* The ICC has jurisdiction over the crime of *genocide*, which is defined using the exact terms of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Art. 6 of the Rome Statute). More precisely, genocide is defined in the Statute as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group:

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children of the group to another group.

*Crimes against humanity.* These crimes comprise any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population (Art. 7):

- murder;
- extermination;
- enslavement;
- deportation or forcible transfer of population;
- imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- torture;
- rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- persecution of any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in Article 7 of the Statute or any crime within the jurisdiction of the Court;
- enforced disappearance of persons;

- the crime of apartheid;
- other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

*War crimes.* The ICC has jurisdiction in respect of *war crimes* committed during international or non-international armed conflicts (Art. 8). One very positive aspect of Article 8 is that for the first time it offers at the international level a quite comprehensive list of war crimes applicable to all types of armed conflicts, including, in particular, crimes such as sexual violence and using children under the age of 15 to participate actively in hostilities. Unfortunately, however, not all grave breaches of Additional Protocol I have been included in the Rome Statute even though they can be considered as part of customary law. The grave breaches that are not mentioned include:

- launching an attack against works or installations containing dangerous forces in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
- unjustifiable delay in the repatriation of prisoners of war or civilians;
- practices of apartheid, although this last crime has been considered as a form of crime against humanity.

Also, the list of war crimes in non-international armed conflicts, although a fundamental achievement of the Rome Statute, is still under par with the list and definition of war crimes recognized in international armed conflicts, in particular for war crimes related to the conduct of hostilities.

A table containing the war crimes under the Rome Statute and their source in IHL treaties is set out in Annex XIII.

The crimes included in the Rome Statute are supplemented by a document entitled "Elements of Crimes", which was adopted by the Assembly of States Parties on 1 September 2000. This document aims at assisting the Court in its interpretation and application of the crimes mentioned above.

## When can the ICC exercise its jurisdiction?

As soon as a State becomes a party to the Rome Statute, it accepts the jurisdiction of the ICC in respect of the crimes mentioned above. Under Articles 25 and 26 of the Statute, the Court has jurisdiction over individuals (aged 18 or above) and not States. The ICC may exercise its jurisdiction at the instigation of the Prosecutor or a State party, providing one of the following States is bound by the Statute:

- the State on the territory of which the crime was committed; or
- the State of which the person accused of the crime is a national.

A State which is not a party to the Statute may make a declaration to the effect that it accepts the Court's jurisdiction. Also, under the collective security framework of Chapter VII of the United Nations Charter, the Security Council may refer a situation to the Prosecutor for investigation. It may also request that no investigation or prosecution commence or proceed for a renewable period of 12 months.

### **Application of the complementarity principle**

Once the conditions mentioned above have been fulfilled, the ICC will enter into play only if the principle of complementarity is also respected. In the light of this principle, the ICC shall be and can only be complementary to national criminal courts. In other words, the ICC is only expected to step in as a last resort in the event of States failing or unable to properly discharge their prosecution duties with regard to the gravest international crimes. Under the principle of complementarity,

national authorities are in no way stripped of their sovereign powers to bring to justice individuals falling within their criminal jurisdiction. Basically, this principle reaffirms that the major burden of repressing international crimes is placed on the national judicial systems of States. More precisely, under Article 17 of the Rome Statute, the ICC has no power to take over a case that is being genuinely investigated or prosecuted by a State that has jurisdiction over it. The only exception is when a State is unwilling or unable to carry out the investigation or prosecution. It clearly follows from the foregoing that this principle is only intended to be used as a tool for more effective operation of a comprehensive machinery of repression aimed at preventing, halting and punishing the most serious international crimes.

A model letter of accession to the Rome Statute is provided in Annex I L.



# What national implementation measures are required?

Under the 1949 Geneva Conventions and Additional Protocol I of 1977, States must prosecute persons accused of grave breaches before their own national courts or extradite them for trial elsewhere (see Chapter Three). Nothing in the Rome Statute releases States from their obligations under existing instruments of IHL or under customary international law. By virtue of the principle of complementarity, the jurisdiction of the ICC is intended to come into play *only* when a State is unable or unwilling to prosecute alleged war criminals over which it has jurisdiction, as explained above. To benefit from this principle, States will need to have adequate legislation enabling them to prosecute such crimes. Furthermore, States party to other instruments of IHL are still required to enact implementing legislation giving effect to their obligations under those instruments.

A number of international and non-governmental organizations are working in the field of implementation of the Rome Statute. Some of them even offer guidelines and model laws aimed at assisting States in this regard. Readers are invited to consult, for instance:

- Coalition for the International Criminal Court, information on (draft) legislation for the implementation of the Rome Statute available at: <http://www.iccnw.org/?mod=romeimplementation>;
- Amnesty International, “The International Criminal Court: Checklist for Effective Implementation”, August 2000, available at: <http://www.amnesty.org/en/library/info/IOR40/011/2000/en>;
- Commonwealth Secretariat, “Report of the Commonwealth Expert Group on Implementing Legislation for the Rome Statute of the International Criminal Court,” 2004, and “Model Law on Rome Statute,” both available at: <http://www.thecommonwealth.org/Internal/38061/documents>;
- International Centre for Criminal Law Reform and Criminal Justice Policy, “International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute,” March 2008, available at: <http://www.icclr.law.ubc.ca/Site%20Map/Publications%20Page/International.htm>

## Preliminary conditions to be fulfilled

There are a number of conditions which need to be fulfilled in order to achieve a comprehensive and effective system of criminal repression in which States have a primary role to play. For instance, States should:

- ratify the Rome Statute as soon as possible, since universal ratification strengthens and renders more effective the complementarity principle;

- refrain from making use of the opting-out clause (Art. 124) or formulating declarations which would amount to a reservation, the latter being prohibited (Art. 120);
- assist one another and the ICC in connection with proceedings relating to crimes that come within the Court’s jurisdiction. This will require the enactment or amendment of legislation to ensure full cooperation with the ICC, including any necessary transfer of those accused of such crimes.

The complementarity principle requires that States put into place comprehensive mechanisms ensuring cooperation with the Court and between States at all stages of the proceedings. In terms of implementing measures at the national level, this means that States should carry out a thorough review of their national constitution and legislation to ensure that they can take advantage of the complementarity principle on which the ICC is founded and try individuals under their own legal systems for offences that fall within the Court’s jurisdiction.

## Constitutional issues to be tackled

As regards possible changes to national constitutions, practice shows that the ratification of the Rome Statute by a State does not generate insurmountable problems for preserving its constitutional regime. However, it is true that the Rome Statute does contain a number of legal standards that may have to be revised by national authorities: immunity of persons having an official capacity; the obligation of States to surrender their own nationals to the ICC at the Court’s request; the relationship between international and national courts as found in their constitutions, etc. Ultimately, it must be underlined that States are free to adopt the approach of constitutional compatibility that is most suitable to their legal system. The international experience amassed up to now shows that several legal possibilities (implementing strategies) are available to ensure compatibility of the Rome Statute rules with national constitutions, such as:

- the adoption of a constitutional amendment of a general nature with a view to recognizing the ICC’s jurisdiction at the constitutional level;
- the adoption of amendments of a specific nature for the purpose of bringing certain constitutional norms into compliance with the Rome Statute;
- the interpretation of the Rome Statute in such a way as to ensure its compatibility with a national constitution without making an amendment thereto.

For more detail, please refer to the ICRC Advisory Service fact sheet on the issues raised with regard to the Rome Statute by National Constitutional Courts, Supreme Courts and Councils of States, reproduced in Annex XIV.

# Guidelines for domestic implementation

Although detailed guidelines and model laws on the implementation of the Rome Statute may be found in the documents and on the websites of the organizations mentioned above, some of the most important issues in this regard will be addressed below.

The constitutional and legislative review process carried out by States needs to be comprehensive in order to ensure full implementation of the complementarity regime. It covers a vast number of fields such as the definition of crimes, the basis of jurisdiction, the general principles of criminal law and the defences available, as well as ICC requests for assistance, including arrest and surrender, evidence, judicial guarantees, enforcement of penalties and national security questions. Some of these questions are further addressed below, with particular emphasis on the elements aimed at rendering more effective the complementarity principle. Also, the issues mentioned in Chapter Three on IHL and domestic criminal law should be considered.

## Implementing the definitions of crimes under the Rome Statute

In order to ensure that the complementarity principle is fully applicable, States should ensure that crimes under the Rome Statute are crimes under national legislation, i.e. genocide, crimes against humanity and war crimes.

*Relevant provisions of fundamental texts:*

- Rome Statute: Articles 6 (Genocide), 7 (Crimes against humanity), 8 (War crimes);
- ICC Elements of Crimes.

In order to comply with their other obligations under treaty and customary law, States could also include a general clause which would cover all other serious violations of IHL entailing individual criminal responsibility.

- For a list of war crimes recognized as such by IHL, please refer to Rule 156 of the ICRC study on customary international humanitarian law and its commentary, pp. 568-603.

For all crimes included in the Rome Statute that are also grave breaches under the Geneva Conventions and their Additional Protocol I (Rome Statute, Art. 8, para. 2(a)), States shall ensure that they can exercise their jurisdiction regardless of the place where the crime was committed or the nationality of the alleged author(s) or victim(s) pursuant to the universal jurisdiction principle.

The same would apply to crimes listed in the following universal treaties: the Convention against Torture (Art. 5); the International Convention on the Protection of All Persons from Enforced Disappearance (Art. 9); the Convention on

the Safety of United Nations and Associated Personnel (Art. 10); and the Second Protocol to the 1954 Hague Convention (Art. 16, para. 1).

For other international crimes listed in the Rome Statute, States have the right to vest universal jurisdiction in their national courts.

In all cases, States should ensure that they are able to exercise jurisdiction with respect to crimes committed on their territory or by or against their nationals.

*For more information on universal jurisdiction, refer to Chapter Three.*

## Statutes of limitations

States should ensure that crimes listed in the Rome Statute are not subject to any form of statute of limitations (Art. 29). For more detail, see Chapter Three: Statutes of limitations.

## Amnesties

The granting of amnesty should not be construed to enable war crimes or to enable those guilty of international crimes under the Rome Statute to evade punishment. The same should apply to pardon or other similar measures. States should, however, comply with their IHL obligation to endeavour, at the end of hostilities, to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes.

## Irrelevance of official capacity

States should ensure that the crimes included in the Rome Statute apply to all persons without any distinction based on official capacity, including the head of state or head of government, members of government or parliament, elected representatives and government officials (see Rome Statute, Art. 27).

It should be noted that this principle is not new to international law. Firstly, it has become a common rule of law in many States that the immunity of State officials is granted strictly for certain public functions and is not absolute. The commission of an international crime cannot fall within the competence of a public official. Secondly, the principle of non-immunity for State officials should not be viewed as “an exclusive product” of the Rome Statute. This is certainly not the first step taken in the direction of bringing to justice State officials guilty of perpetrating international crimes. The 1949 Geneva Conventions and their Additional Protocols of 1977 provide a clear obligation for States Parties not to absolve themselves or others of liability in respect of grave breaches of IHL. Other international treaties, such as the 1948

Convention on the Prevention and Punishment of the Crime of Genocide and the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid, to which many States are already party and which are believed to reflect customary international law of a universal character, also provide for the application of the principle of non-immunity. Therefore, in this regard the Rome Statute only strengthens what already exists in contemporary international law.

### Forms of participation

The Rome Statute is quite detailed when it comes to the forms of participation that might entail individual criminal responsibility and that should be included in the domestic legislation of States Parties. More particularly, the Rome Statute requires that:

- States should not only provide for the responsibility of individuals who have committed international crimes, but also for those who have ordered, solicited, induced, aided, abetted or otherwise assisted in the commission of such crimes (Art. 25, para. 3(a) to (c));
- individuals should also be responsible for contributing to the commission or the attempted commission of a crime when such participation is made with the aim of furthering a common criminal purpose (also known as “joint criminal enterprise”) (Art. 25, para. 3(d));
- the attempt to commit a crime should also be criminalized, as long as the action taken “commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions” (Art. 25, para. 3(f));
- finally, for the crime of genocide and in line with the Convention on the Prevention and Punishment of the Crime of Genocide, the Rome Statute includes responsibility for direct and public incitement to commit the crime (Art. 25, para. 3(e)).

### Responsibility of civilian and military commanders

Civilian and military commanders should obviously be held responsible for their direct participation in the crime, including by having ordered, solicited, induced, aided or abetted the commission of the crime. The Rome Statute is the first international instrument expressly stating the criminal responsibility of both military and civilian commanders/superiors for having failed to prevent or repress crimes committed by their subordinates.

For the military commanders and in line with what is provided by customary law (see Chapter Three and the ICRC study on customary international humanitarian law, Rule 153, pp. 558-563), the ICC states that:

“A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”

As regards superiors other than military commanders, the Rome Statute is more stringent regarding the level of knowledge and control of the superior over the criminal activities (see Art. 28, para. (b)). More precisely, civilian superiors may be found responsible if they “knew or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes”. Also, the crimes need to concern “activities that were within the effective responsibility and control of the superior”, which is not a requirement for the military.

### Defences

There are a number of grounds that are mentioned in the Rome Statute for excluding criminal responsibility (see Arts 31-33). Defences with regard to international crimes should be compatible with international law. Some of the grounds mentioned in the Rome Statute could apply to all criminal conduct. Others are more specific to international crimes, such as the defence based on duress, to which very strict conditions are attached (duress may only be accepted if it consisted of a threat of imminent death or of continuing or imminent serious bodily harm against the accused or another person, and the person acted necessarily and reasonably to avoid this threat, provided that the person did not intend to cause a greater harm than the one sought to be avoided (see Art. 31, para. 1(d)). The Statute remains silent as to the admissibility of duress in case of murder.

Also, with regard to the defence based on superior orders, the Rome Statute reflects customary law since it states as a general rule that “the fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility”. However, following an exception found in the domestic legislation of some States, the Statute does admit that superior orders might be considered as a defence if three conditions are met:

- (a) the person was under a legal obligation to obey orders of the government or the superior in question;
- (b) the person did not know that the order was unlawful; and
- (c) the order was not manifestly unlawful.

In addition, the Rome Statute makes it clear that orders to commit genocide or crimes against humanity will always be manifestly unlawful. As for war crimes resulting from unlawful orders, practice is unclear, even though the level of detail provided by the Rome Statute leaves little room for claims of ignorance.

### **Guarantees linked to the trial**

As mentioned in Chapter Three, States shall ensure that their criminal proceedings for international crimes afford all essential judicial guarantees. This is to ensure in particular that the complementarity principle fully applies. To the list found in Chapter Three, the Rome Statute adds the right of the accused to make an unsworn oral or written statement in his or her defence (Art. 67, para. 1(h)).

### **Penalties**

The penalties provided for the crimes contained in the Rome Statute should be proportionate to the crimes committed and to the responsibility of the perpetrators. States should envisage having recourse to the penalties provided for in the Rome Statute, which are:

- imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
- a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

In addition to imprisonment, the States may wish to have recourse to additional penalties provided for in the Rome Statute, which are:

- a fine; or
- a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

### **Reparation for victims**

States should ensure that judgments and decisions rendered by the ICC concerning reparations for victims are fully enforceable in their jurisdictions. National legislation should provide for mechanisms aimed at providing appropriate reparation for victims of international crimes in accordance with international law. In this regard, it should be envisaged, if feasible, to provide in national legislation for courts in criminal matters to order reparation, including restoration or restitution of property, for such victims (Rome Statute, Arts 75 and 79).



# 8 SUPPORT FOR IHL IMPLEMENTATION

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## CHAPTER EIGHT: SUPPORT FOR IHL IMPLEMENTATION

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There are a number of bodies that could help national authorities to better implement IHL. Internally, States may decide to create interministerial working groups, often called committees for the implementation of IHL or national humanitarian law committees, the purpose of which is to advise and assist the government in implementing and spreading knowledge of IHL. Outside the State structures, international organizations and civil society in general may also play an important role through the exchange of expertise and cooperation. Key players in this regard are the National Red Cross and Red Crescent Societies.

## National IHL committees

Creating a national committee can be a useful and indeed decisive step in ensuring the comprehensive implementation of IHL. It represents a commitment to securing the essential guarantees laid down for the victims of armed conflict, demonstrating that the State is taking steps towards fulfilling its fundamental obligation to respect and ensure respect for IHL.

Neither the 1949 Geneva Conventions nor their Additional Protocols require such a committee to be set up. It is therefore entirely up to the State concerned to determine how it is created, how it functions, and who its members are.

There is considerable flexibility as to the role and characteristics of such committees. Some of the most important features will be addressed below, but any State is free to add others. It is important to emphasize that the full implementation of IHL is an ongoing process and is not completed solely by passing laws and issuing regulations. Comprehensive implementation involves monitoring the application and promotion of the law, as well as keeping informed of and contributing to its development. It is therefore recommended that a national IHL committee be a permanent and not an ad hoc body.

### Functions

Since the implementation of IHL is primarily the responsibility of governments, national bodies set up to this end must be **linked to the executive branch**. Their legal status will depend on the constitutional structure of and the procedures applied by the State concerned. Promoting respect for, and in particular, implementing IHL at the national level is a permanent process. Providing the IHL body with a formal structure will ensure the continuity of this work.

National bodies on IHL should be authorized to **promote**, **advise on** and **coordinate** all matters relating to the implementation of IHL at the national level, and to promote compliance with and development of the law. The competence and composition of the bodies should be clearly defined and may be set out in a statutory text. They should **promote** the ratification of or adherence to humanitarian treaties, work for the harmonization of national legislation, regulations and practices with the international instruments of humanitarian law to which the State is a party, and promote their implementation. They should also be in a position to **evaluate** existing national legislation, judicial

decisions and administrative provisions in the light of the obligations stemming from the 1949 Geneva Conventions and, where applicable, the Additional Protocols of 1977 and 2005 and other instruments of humanitarian law, to submit to the national authorities advisory opinions on issues relating to the implementation of humanitarian law, and to formulate recommendations and **proposals** in this regard.

These opinions and recommendations may relate to the following areas in particular:

- incorporation of the provisions of humanitarian treaties into national law;
- preparation of all the legislative, statutory or administrative measures required for the effective application of and hence respect for the rules of humanitarian law;
- adoption of appropriate legislation providing for the repression of grave breaches of the law and regulating the use of the red cross/red crescent/red crystal emblem and other protected signs and signals;
- adoption of regulations to define and guarantee the status of persons protected under the terms of humanitarian law and to ensure respect for individual and fundamental guarantees in times of armed conflict;
- training and appointment of staff qualified in the field of humanitarian law, particularly legal advisers to the armed forces;
- location and marking of sites protected by humanitarian law.

National IHL committees should be able to **monitor** implementation of their recommendations and conclusions, **carry out** any other task relating to humanitarian law that the government may assign to them, and give **opinions** on any questions on the law submitted to them; they play a key role in spreading knowledge of humanitarian law and, to that end, should have the necessary authority to carry out studies, propose **dissemination** activities, and take part in such activities.

These bodies should also be involved in the preparation of training programmes on humanitarian law for the armed forces and the security forces, and for any civilian or military authority with responsibility for the application of IHL. They should also be involved in developing educational programmes on IHL for schools and other academic and vocational institutions, including universities.



## Composition

In order to fulfil their role, national bodies on IHL should be set up in such a way that they are **representative**. National bodies must comprise representatives of all government departments concerned with humanitarian law, and in particular must include representatives of the executive, judicial and legislative branches with sufficient authority to make commitments on their principals' behalf. The relevant ministries will depend on the committee's mandate, but they are likely to include Defence, Foreign Affairs, Internal Affairs, Justice, Finance, Education and Culture.

The committee should involve the **National Society** because of the role conferred on National Societies by the humanitarian treaties and by the Statutes of the International Red Cross and Red Crescent Movement, and because of the National Societies' knowledge and expertise in the humanitarian field. A committee's operating mechanisms should allow it to consult or associate in its work experts such as legal specialists, doctors, university professors and military personnel, as well as representatives of civil society such as professional associations and non-governmental organizations.

It is important to assess whether the participation of representatives of civil society (NGOs, youth movements, women's associations, etc.), as full members of the committee or as ad hoc members will bring added value to its long-term work or constitute an obstacle to frank and effective discussion among members who represent various authorities. Whatever the case, the committee has to reconcile a desirable degree of openness with the possible need for confidentiality in its discussions.

## Working methods

The operating procedures of national bodies for IHL should take the following factors into account.

- **Continuity.** They should be organized in such a way as to ensure continuity in their work on IHL, so that the matter remains a topical item on government agendas. They should meet as often as is necessary, on a regular basis, with all members duly convened and present.
- **Definitions of objectives and strategies.** The bodies should define their working methods and, in particular, draw up a table of areas requiring implementation measures, identify the measures to be taken and the authorities concerned, establish a plan of action and set priorities. They should hold their discussions in plenary sessions or, if necessary, delegate responsibility for certain activities to individual members or sub-committees.
- **Progress reports.** They should report periodically to the government and other authorities concerned with their work. This report is often public and annual reports of committees have been shared at regional meetings.
- **Resources.** They should be allocated sufficient human, material and financial resources to undertake their tasks. While there is no need to remunerate their members, it is most desirable that the committee should have a

budget that allows it to cover its own running expenses (photocopies, mail, telephone). The national authorities should automatically grant it logistic resources (premises for its meetings, a photocopier, a person in charge of the secretariat, Internet access) and a working budget. Whatever the situation, as the committee is made up of ministerial representatives, an internal sharing of working expenses should be organized from the outset. This can be done by determining what expenses each ministry or department is actually prepared to cover (photocopies, human resources, production of documents). The committee can also seek to obtain funds on a one-off basis for the organization of occasional events (seminars or conferences) or to form external partnerships, for example, with the National Red Cross or Red Crescent Society or with universities or other academic institutions.

- **Cooperation.** National bodies for humanitarian law should contact and cooperate with each other on a regular basis, since the problems and issues they handle are often similar. Accordingly, they should maintain relations and exchange information on their activities and experiences with bodies in countries in the same regions or with similar legal systems; organize joint activities and/or invite experts from other bodies to participate in their own work. They should develop regular contacts with other institutions involved in or concerned by the implementation of humanitarian law, and with the ICRC Advisory Service on International Humanitarian Law. Keeping the ICRC Advisory Service informed, in particular, reporting to it any new development concerning humanitarian law at the national level, enables the Service to provide adequate support and assistance. The committee must draw the attention of not only the authorities but also other target groups who are interested in IHL to its activities.
- **Hold meetings.** They should organize and take part in multinational and regional meetings between bodies of the same type and seek the support of regional and international organizations to this end.

## Compatibility studies

A national IHL committee's first task is often to analyse the status of implementation of IHL at the national level. This analysis, also known as a compatibility study, makes it possible to identify gaps and set priorities with regard to the measures to be adopted. The study should contain a description and an assessment of national mechanisms for the implementation of IHL, a description of the relationship between domestic law and international law in the State in question, and a discussion of national implementation measures, such as any legislative measures taken.

As far as possible, these compatibility studies should be open to consultation by the public, or even published. This would, in particular, make them available to other committees. The authorities may, however, prefer the study to remain confidential, and such an approach can in certain cases ensure greater efficacy in the adoption of the national

measures recommended. In that event, consultation of the study should at least be authorized on request, following decisions taken by the committee on a case-by-case basis.

The committee must bear in mind that conducting a study on all the measures to be taken is only a first step towards their realization.

### **Compatibility study between domestic law of [State] and the obligations stemming from IHL**

- I. INTRODUCTION  
[Objectives, utilization, distribution]
- II. NATIONAL MECHANISMS FOR IMPLEMENTATION OF IHL  
[Description and assessment of such mechanisms]
- III. DOMESTIC LAW AND PUBLIC INTERNATIONAL LAW  
[Description of the relationship between international law and domestic law in the State in question]
- IV. ASSESSMENT OF NATIONAL MEASURES FOR IMPLEMENTATION OF IHL
  1. Participation in treaties
  2. Translation of treaties into national language(s)
  3. Dissemination and instruction
  4. Legislative measures and regulations
    - Protection of red cross, red crescent and red crystal names and emblems and of other distinctive signs
    - Repression of war crimes
    - Judicial guarantees
    - Protection of children
    - Identification (medical and religious activities, armed forces, press, installations and works containing dangerous forces, cultural property and places of worship)
    - Structures providing protection and assistance (National Red Cross or Red Crescent Society, civil defence, national information bureau, protected zones and localities, graves registration service)
    - Environment
    - Military planning (separation of military objectives and civilian objects, determination of the lawfulness of new weapons)
- V. CONCLUSIONS AND RECOMMENDATIONS  
[Summary of conclusions of sections II and IV, and recommendations relating to measures to be taken]

### **Other documentation**

The ICRC Advisory Service has published a series of documents and books on the work of national IHL committees, and information is available on the ICRC's website at: [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/section\\_ihl\\_nat\\_national\\_committees](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/section_ihl_nat_national_committees)

Further practical advice to facilitate the work of national IHL Committees is provided in Annex XV.

# National Societies

National Societies are well placed to promote the implementation of IHL within their own countries. The Movement's Statutes recognize the role played by the Societies in conjunction with their governments to ensure respect for IHL and for protective emblems. The Societies' contacts with the national authorities and other entities concerned and, in many cases, their own expertise in national and international law give them a key part to play in this field. They may also be able to draw on, or provide, advice and support within the Movement.

## Action by National Societies

There are various measures that the National Societies may take.

### Participation in IHL instruments

- discussing their content and purpose with national authorities
- promoting support for those instruments

### Adaptation of national legislation

- making national authorities aware of the need for legislation to implement the law
- drafting national legislation and/or commenting on the draft legislation of the national authorities;
- encouraging the introduction and adoption of implementing legislation
- explaining to legislators and the general public the need to implement humanitarian law by adapting national legislation

### Protection of the emblems

- raising awareness among national authorities, professionals, business people and the general public
- making known the need for legislation to protect the emblems, and encouraging its adoption
- monitoring use of the emblems
- reporting misuse of the emblems to the appropriate national authorities
- advising national authorities on legal questions related to use of the emblems

### Dissemination

*In addition to the Societies' own work to spread knowledge of the law, activities in this domain can include:*

- reminding national authorities of their own obligation to spread knowledge;
- providing authorities with advice and promotional materials;
- taking part in the authorities' promotional programmes;
- monitoring the continuation and content of national programmes.

### Legal advisers in the armed forces and qualified persons

- making national authorities aware of the need for legal advisers in the armed forces as well as qualified persons
- taking part in the training of armed forces advisers and qualified persons
- recommending suitable candidates for the qualified persons

### National committees for the implementation of humanitarian law

- making the national authorities aware of the advantages of having these committees
- providing advice and materials on setting them up;
- providing secretarial and other services
- advising the committees once they are set up
- encouraging the committees to meet regularly

### National Society resources

National Societies have a range of resources with which to promote implementation. Full advantage should be taken of them.

### National expertise in international humanitarian law

This expertise may be provided by:

- the National Society's own legal adviser or staff member responsible for the dissemination of humanitarian law;
- legal experts serving in other capacities within the Society;
- an academic or military specialist acting as honorary legal adviser to the Society;
- legal experts, in particular those with an academic or military background, who are in regular touch with the Society.

The National Society may be able to provide specialized knowledge that would not otherwise be available to the authorities. Its experts are likely to have the combination of expertise in national law and international humanitarian law necessary to ensure effective implementation.

### National contacts

Implementation may be promoted by contacting:

- the government (including ministries such as Foreign Affairs, Defence, Justice and Health);
- the armed and security forces;
- the legislative branch;
- the judiciary and representatives of the legal profession;
- civil defence and relief organizations;
- representatives of the medical and teaching professions.

Given the role and position of National Societies within their respective countries, they are likely to be well placed to cultivate these contacts.

## Cooperation and assistance

In promoting implementation, National Societies can also draw on advice, materials and direct assistance from others within the International Red Cross and Red Crescent Movement, including:

- other National Societies within the same region;
- National Societies from countries with a similar legal system;
- National Societies or NGOs with experience in particular areas of implementation;
- the ICRC.

Using and developing their own resources, and drawing on the advice and assistance of other members of the International Red Cross and Red Crescent Movement, National Societies can do much to bring about effective implementation of international humanitarian law.

# ANNEXES

# Annexes

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# I MODEL INSTRUMENTS OF RATIFICATION OF/ACCESSION TO IHL TREATIES



# A. THE TWO ADDITIONAL PROTOCOLS OF 1977

Note: As all States are party to the Geneva Conventions, sample letters are provided only with respect to the Additional Protocols. Similar sample letters are on the ICRC website at: <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jr4u?opendocument>.

## Ratification of/accession to the two Additional Protocols of 8 June 1977

To the Swiss Federal Council

### Bern

Mr President,  
Members of the Council,

I have the honour to bring to your notice that the Government of ....., in conformity with the decree of .....<sup>1</sup>, declares its ratification of/accession to the two Protocols additional to the Geneva Conventions of 12 August 1949 for the protection of war victims, adopted on 8 June 1977, namely:

- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I);
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

I should be obliged if you would kindly bring the above to the notice of the States party to the Geneva Conventions of 12 August 1949.

Please accept the assurance of my highest consideration.

.....  
Date  
.....  
Minister for Foreign Affairs

<sup>1</sup> This could also be an act, a governmental decree or a law.

## B. SUCCESSION TO THE FOUR GENEVA CONVENTIONS OF 12 AUGUST 1949 AND THEIR TWO ADDITIONAL PROTOCOLS OF 8 JUNE 1977

### Depositary: Swiss Federal Council, Bern, Switzerland

The Government of ..... is honoured to inform the Swiss Federal Council that it considers itself, by virtue of succession, to be bound by the following treaties to which ..... was party:

1. Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949;
2. Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949;
3. Geneva Convention III relative to the Treatment of Prisoners of War, of 12 August 1949;
4. Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, of 12 August 1949;
5. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977;
6. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977.

(optional clause)

However, the Government of ..... does not maintain any of the reservations made to those treaties by ..... and, therefore, considers itself bound by the said treaties without any reservation.

(optional clause)

The Government of ..... declares that it recognizes *ipso facto* and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the International Fact-Finding Commission to inquire into allegations by such other Party, as authorized by Article 90 of Protocol I.

.....  
Seal

.....  
Date

.....  
Signature



## D. THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD

*Note: The United Nations secretary-general is the depositary for both the Convention and the Protocol. As almost all States are party to the Convention, sample letters of accession are given only for the Protocol.*

WHEREAS the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict was adopted and opened for signature on 25 May 2000,

NOW THEREFORE I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs] declare that the Government of [name of State], having considered the above-mentioned Optional Protocol, ratifies/accedes to the same and undertakes faithfully to perform and carry out the stipulations therein contained.

IN WITNESS WHEREOF, I have signed and sealed this instrument.

Done at ... [place], on this ... day of ... [date] ...

[Signature]

.....  
Head of State or Prime Minister or Minister for Foreign Affairs  
[Seal]

*Please also note the requirement in Article 3, paragraph 2 of the Optional Protocol to submit a binding declaration at the moment of accession or ratification:*

*"2. Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced."*

## E. THE 1954 HAGUE CONVENTION AND ITS 1954 AND 1999 PROTOCOLS

*Note: The State concerned must deposit an instrument of ratification (for signatory States) or of accession (for States which have not signed the Convention) with the director-general of UNESCO. The instrument must be sent to the following address:*

Director-General of UNESCO  
7, place Fontenoy  
75352 Paris 07 SP  
France

### THE CONVENTION

Whereas the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict is open to ratification/accession by [name of State],

Now therefore the Government of [name of State], having considered the aforesaid Convention, hereby ratifies/accedes to the said Convention and undertakes faithfully to carry out the stipulations therein contained.

IN WITNESS WHEREOF, I have signed and sealed this instrument.

Done at ... [place], on this ... day of ... [date] ...

[Signature]

.....  
Head of State or Prime Minister or Minister for Foreign Affairs  
[Seal]

## THE PROTOCOLS

*Note: Only States already party to the Convention may become party to its Protocols, by depositing an instrument of ratification, acceptance or approval with the director-general of UNESCO. However, a State not signatory to the Protocols may accede to them by depositing an instrument of accession. The instrument must be sent to the following address:*

*Director-General of UNESCO  
7, place Fontenoy  
75352 Paris 07 SP  
France*

Whereas the [1954][1999] Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict is open to (*accession/ratification*) by [name of State],

NOW THEREFORE I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs], declare that the Government of [name of State], having considered the above-mentioned Protocol, hereby accedes to/ratifies the said Protocol and undertakes faithfully to carry out the stipulations therein contained.

IN WITNESS WHEREOF, I have signed and sealed this instrument.

Done at ... [place], on this ... day of ... [date] ...

[Signature]

.....  
Head of State or Prime Minister or Minister for Foreign Affairs  
[Seal]

## F. THE BIOLOGICAL WEAPONS CONVENTION

*Note: Unlike other IHL treaties, there exist three depositary States for the Convention: the United Kingdom of Great Britain and Northern Ireland, the United States of America, and the Russian Federation. States may choose to send the document to one of the three States, although it may be best practice to send confirmation of the deposit of an instrument of accession to the other two depositaries, for information.*

WHEREAS the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction was adopted on 16 December 1971 and opened for signature at London, Moscow and Washington on 10 April 1972,

NOW THEREFORE I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs], declare that the Government of [name of State], having considered the above-mentioned Convention, ratifies/accepts/approves the same Convention and undertakes faithfully to perform and carry out the stipulations therein contained.

IN WITNESS WHEREOF, I have signed and sealed this instrument.

Done at [place], on this ... day of ... [date] ...

[Signature]

.....  
Head of State or Prime Minister or Minister for Foreign Affairs  
[Seal]

## G. THE ENMOD CONVENTION

*Note: To become a party, a State must deposit an instrument of ratification, acceptance, approval or accession with the United Nations secretary-general, the treaty's depositary, at the following address:*

*United Nations  
Treaty Section, Office of Legal Affairs  
New York, NY 10017*

WHEREAS the Convention on the prohibition of military or any hostile use of environmental modification techniques (with annex) was adopted by the General Assembly of the United Nations on 10 December 1976,

NOW THEREFORE I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs], declare that the Government of [name of State], having considered the above-mentioned Convention, ratifies/accepts/approves the same Convention and undertakes faithfully to perform and carry out the stipulations therein contained.

IN WITNESS WHEREOF, I have signed and sealed this instrument.

Done at ... [place], on this ... day of ... [date] ...

[Signature]

.....  
Head of State or Prime Minister or Minister for Foreign Affairs  
[Seal]



# H. THE CONVENTION ON CERTAIN CONVENTIONAL WEAPONS AND ITS PROTOCOLS

*Note: To become a party, a State must deposit an instrument of ratification, acceptance, approval or accession with the United Nations secretary-general, the treaty's depositary, at the following address:*

United Nations  
Treaty Section, Office of Legal Affairs  
New York, NY 10017

*Moreover, in order to become a party to the Convention on Certain Conventional Weapons, a State must declare its consent to be bound by at least two of the Convention's five Protocols.*

## Model A - For States parties to the 1980 Convention

WHEREAS the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (with Protocols I, II and III) was adopted at Geneva on 10 October 1980,

WHEREAS the State of ..... deposited its instrument of ratification of/acceptance of/approval of/ accession to the same Convention and expressed its consent to be bound by Protocols I, II and III annexed thereto on [date],

WHEREAS Review Conferences or Meetings of States party to the same Convention duly adopted Protocol IV on 13 October 1995, Protocol II as amended on 3 May 1996, the amendment to Article 1 of the Convention on 21 December 2001, and Protocol V on 28 November 2003,

NOW THEREFORE I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs], declare that the Government of [name of State], having considered the above-mentioned instruments, consents to be bound by [Protocol I, Protocol II as amended on 3 May 1996, Protocol III, Protocol IV, Protocol V]<sup>3</sup> and ratifies/accepts/approves/accedes to the amendment to the Convention and undertakes faithfully to perform and carry out the stipulations therein contained.

IN WITNESS WHEREOF, I have signed and sealed this instrument.

Done at ... [place], on this ... day of ... [date] ...

[Signature]

.....  
Head of State or Prime Minister or Minister for Foreign Affairs  
[Seal]

[Signature] + [Seal]

<sup>3</sup> States party to the Convention that have already consented to be bound by at least two of the Protocols will need to modify the instrument accordingly.

## Model B - For non-party States

WHEREAS the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (with Protocols I, II and III) was adopted at Geneva on 10 October 1980,

WHEREAS Review Conferences or Meetings of States party to the same Convention duly adopted Protocol IV on 13 October 1995, Protocol II as amended on 3 May 1996, the amendment to Article 1 of the Convention on 21 December 2001, and Protocol V on 28 November 2003,

NOW THEREFORE I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs], declare that the Government of ....., having considered the above-mentioned Convention, its Protocols and the Amendment to the Convention, accedes to the Convention and to the amendment to the Convention, consents to be bound by [Protocols I, II as amended on 3 May 1996, III, IV, V]<sup>4</sup> and undertakes faithfully to perform and carry out the stipulations therein contained.

IN WITNESS WHEREOF, I have signed and sealed this instrument.

Done at ... [place], on this ... day of ... [date] ...

[Signature]

.....  
 Head of State or Prime Minister or Minister for Foreign Affairs  
 [Seal]

<sup>4</sup> States must consent to be bound by at least two of the Protocols.

# I. THE CHEMICAL WEAPONS CONVENTION

*Note: To become a party, a State must deposit an instrument of ratification, acceptance, approval or accession with the United Nations secretary-general, the treaty's depositary, at the following address:*

*United Nations  
Treaty Section, Office of Legal Affairs  
New York, NY 10017*

WHEREAS the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction was adopted on 13 January 1993,

WHEREAS the said Convention has been signed on behalf of the Government of ..... on  
..... ,

NOW THEREFORE I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs], declare that the Government of [name of State], having considered the above-mentioned Convention, ratifies/accepts/approves the same Convention and undertakes faithfully to perform and carry out the stipulations therein contained.

IN WITNESS WHEREOF, I have signed and sealed this instrument.

Done at ... [place], on this ... day of ... [date] ...

[Signature]

.....  
Head of State or Prime Minister or Minister for Foreign Affairs  
[Seal]

## J. THE MINE BAN CONVENTION

*Note: To become a party, a State must deposit an instrument of ratification, acceptance, approval or accession with the United Nations secretary-general, the treaty's depositary, at the following address:*

*United Nations  
Treaty Section, Office of Legal Affairs  
New York, NY 10017*

WHEREAS the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction was adopted at Oslo on 18 September 1997,

NOW THEREFORE I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs], declare that the Government of [name of State], having considered the above-mentioned Convention, ratifies/ approves/accepts/accedes to the same and undertakes faithfully to perform and carry out the stipulations therein contained.

IN WITNESS WHEREOF, I have signed and sealed this instrument.

Done at ... [place], on this ... day of ... [date] ...

[Signature]

.....

Head of State or Prime Minister or Minister for Foreign Affairs  
[Seal]

## K. THE CLUSTER MUNITIONS CONVENTION

*Note: To become a party, a State must deposit an instrument of ratification, acceptance, approval or accession with the United Nations secretary-general, the treaty's depositary, at the following address:*

*United Nations  
Treaty Section, Office of Legal Affairs  
New York, NY 10017*

WHEREAS the Convention on Cluster Munitions was adopted at Dublin on 30 May 2008,

NOW THEREFORE I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs], declare that the Government of [name of State], having considered the above-mentioned Convention, ratifies/approves/accepts the same and undertakes faithfully to perform and carry out the stipulations therein contained.

IN WITNESS WHEREOF, I have signed and sealed this instrument.

Done at ... [place], on this ... day of ... [date] ...

[Signature]

.....  
Head of State or Prime Minister or Minister for Foreign Affairs  
[Seal]

## L. THE ROME STATUTE

*Note: A State may become a party to the Rome Statute by depositing its instrument of ratification/acceptance or approval with the United Nations secretary-general. The instrument must be sent to the following address:*

The Secretary-General  
United Nations Headquarters  
Secretariat Building  
New York, NY 10017  
United States of America

*The instrument could be along the following lines:*

WHEREAS the Rome Statute of the International Criminal Court was adopted at Rome on 17 July 1998,

NOW THEREFORE I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs], declare that the Government of [name of State], having considered the above-mentioned Statute, accepts/approves/accedes to the same and undertakes faithfully to perform and carry out the stipulations therein contained.

IN WITNESS WHEREOF, I have signed and sealed this instrument.

Done at ... [place], on this ... day of ... [date] ...

[Signature]

.....  
Head of State or Prime Minister or Minister of Foreign Affairs  
[Seal]



# **II**

## **MODEL LAW CONCERNING THE USE AND PROTECTION OF THE EMBLEM**



## Annex 2

### Model law<sup>1</sup> concerning the use and the protection of the emblems of the red cross, the red crescent and the red crystal<sup>2</sup>

# I. GENERAL RULES

## ARTICLE 1

### Scope of protection

Having regard to:

- the Geneva Conventions of 12 August 1949, their Additional Protocols I and II of 8 June 1977,<sup>3</sup> including Annex I to Additional Protocol I as regards the regulations concerning identification of medical units and transports,<sup>4</sup> and Additional Protocol III of 8 December 2005;<sup>5</sup>
- the Regulations on the Use of the Emblem of the Red Cross or the Red Crescent by the National Societies, as adopted by the 20th International Conference of the Red Cross, and subsequent amendments;<sup>6</sup>
- Resolution 1 of the 29<sup>th</sup> International Conference of the Red Cross and Red Crescent (Geneva, 20-21 June 2006);<sup>7</sup>
- the law (decree, or other act) of [date] recognizing the [National Society of ...];<sup>8</sup>
- the following are protected by the present law:
  - the emblems of the red cross, the red crescent and the red crystal on a white ground;<sup>9</sup>
  - the designations “red cross,” “red crescent” and “red crystal”;<sup>10</sup>
  - the distinctive signals for identifying medical units and transports.

<sup>1</sup> This model law is proposed for consideration by States that have a civil-law system. It outlines the provisions that should be included in a comprehensive legal regime regulating the use and protection of the emblem in conformity with the requirements of the 1949 Geneva Conventions, their two Additional Protocols of 1977 and Additional Protocol III of 2005. The said requirements may be met through the adoption of stand-alone legislation for which the following may serve as a model.

In States with a common-law system, the protection of the emblem is usually regulated in a chapter of a Geneva Conventions Act. In consideration of Additional Protocol III, such States should review their Geneva Conventions Act to both extend the protective regime of the red cross and the red crescent to the new emblem – the red crystal – and to incorporate the text of Additional Protocol III as a schedule. The ICRC Advisory Service on International Humanitarian Law has developed a model Geneva Conventions Act and may be contacted for technical assistance in the implementation of the provisions of Additional Protocol III.

<sup>2</sup> The “red crystal” is not formally recognized as the designation of the new distinctive emblem in the text of Protocol III additional to the Geneva Conventions, adopted on 8 December 2005. It was decided by Resolution 1 of the 29th International Conference of the Red Cross and Red Crescent (Geneva, 20-21 June 2006) to use the name “red crystal” to designate the distinctive emblem of Protocol III. Accordingly, Article 1 of the preamble to the following model law provides for the protection of the “red crystal” designation.

<sup>3</sup> To make it easier to find these treaties, it is advisable to indicate their precise locations in the official national compendium of laws and treaties. They are also reproduced in the *Treaty Series of the United Nations*, Vol. 75 (1950), pp. 31-417, and Vol. 1125 (1979), pp. 3-699 and posted on the website of the Swiss Federal Department of Foreign Affairs (<http://www.eda.admin.ch/eda/fr/home/topics/intla/intrea/chdep/warvic.html>). They may also be accessed on the website of the ICRC at <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>.

<sup>4</sup> The Annex was revised on 30 November 1993 and its amended version entered into force on 1 March 1994. It is reproduced in the *International Review of the Red Cross*, No. 298, January-February 1994, pp. 29-41.

<sup>5</sup> The full text of Additional Protocol III is available on the website of the Swiss Federal Department of Foreign Affairs (<http://www.eda.admin.ch/eda/fr/home/topics/intla/intrea/chdep/warvic.html>). It may also be accessed on the ICRC website at <http://www.icrc.org/ihl.nsf/FULL/615?OpenDocument>.

<sup>6</sup> The current Regulations were adopted by the 20th International Conference of the Red Cross in 1965 and revised by the Council of Delegates in 1991. They were submitted to the States party to the Geneva Conventions and entered into force on 31 July 1992. The Regulations are reproduced in the *International Review of the Red Cross*, No. 289, July-August 1992, pp. 339-362.

<sup>7</sup> Accessible on the ICRC website at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/international-conference-resolution-220606?opendocument>.

<sup>8</sup> As a voluntary relief society, auxiliary to the public authorities in the humanitarian sphere. Wherever the present law refers to the “National Society of ...” the name of the Society should be inserted. The official name as it appears in the law or instrument of recognition should be used.

<sup>9</sup> It is important that national legislation in all cases protect the emblems of the red cross, the red crescent and the red crystal, as well as the names “red cross,” “red crescent” and “red crystal.”

<sup>10</sup> When reference is made to the emblem, the term “red cross,” “red crescent” or “red crystal” is generally in lower case while the designation “Red Cross,” “Red Crescent” or “Red Crystal” with initial capitals is reserved for Red Cross, Red Crescent or Red Crystal institutions. This rule helps to avoid confusion.

# ARTICLE 2

## Protective use and indicative use

1. In time of armed conflict, the emblem used as a protective device is the visible sign of the protection conferred by the Geneva Conventions and their Additional Protocols on medical personnel and medical units and transports. The dimensions of the emblem shall therefore be as large as possible.
2. The emblem used as an indicative device shows that a person or an object is linked to an institution of the International Red Cross and Red Crescent Movement. The emblem shall be of a small size.

## II. RULES ON THE USE OF THE EMBLEM

### A. Protective use of the emblem<sup>11</sup>

# ARTICLE 3

## Use by the medical service of the armed forces

1. Under the control of the Ministry of Defence, the medical service of the armed forces of *[name of the State]* shall, both in peacetime and in time of armed conflict, use the emblem of the *[name of the emblem to be used]* to mark its medical personnel, medical units and transports on the ground, at sea and in the air.

Medical personnel shall wear armbands and carry identity cards displaying the emblem. These armbands and identity cards shall be issued by *[e.g. Ministry of Defence]*.<sup>12</sup>

Religious personnel attached to the armed forces shall be afforded the same protection as medical personnel and shall be identified in the same way.

2. Where this may enhance protection, the medical services and religious personnel attached to the armed forces may, without prejudice to their current emblem, make temporary use of either of the other distinctive emblems recognized by, and enjoying equal status under, the Geneva Conventions and their Additional Protocols.

<sup>11</sup> In order to confer optimum protection, the dimensions of the emblem used to mark medical units and transports shall be as large as possible. The distinctive signals provided for in Annex I to Protocol I shall also be used.

<sup>12</sup> Pursuant to Article 40 of the First Geneva Convention, armbands are to be worn on the left arm and shall be water-resistant; the identity card shall bear the holder's photograph. States can model the identity card on the example attached to this Convention. The authority within the Ministry of Defence which is to issue armbands and identity cards must be clearly specified.

## ARTICLE 4

### Use by hospitals and other civilian medical units

1. With the express authorization of the Ministry of Health<sup>13</sup> and under its control, civilian medical personnel, hospitals and other civilian medical units, as well as civilian medical transports, assigned in particular to the transport and treatment of the wounded, sick and shipwrecked, shall be marked by the emblem, used as a protective device, in time of armed conflict.<sup>14</sup>
2. Civilian medical personnel shall wear armlets and carry identity cards displaying the emblem. These armlets and identity cards shall be issued by [Ministry of Health].<sup>15</sup>
3. Civilian religious personnel attached to hospitals and other medical units shall be identified in the same way.

## ARTICLE 5

### Use by the [National Society of ...]<sup>16</sup>

1. The [National Society of ...] is authorized to place medical personnel and medical units and transports at the disposal of the medical service of the armed forces.

Such personnel, units and transports shall be subject to military laws and regulations and may be authorized by the Ministry of Defence to display as a protective device the emblem of the red cross [red crescent or red crystal], or, where this may enhance protection, to make temporary use of either of the other distinctive emblems recognized by, and enjoying equal status under, the Geneva Conventions and their Additional Protocols.<sup>17</sup>

Such personnel shall wear armlets and carry identity cards, in accordance with Article 3, paragraph 2 of the present law.

2. The National Society may be authorized to use the emblem as a protective device for its medical personnel and medical units in accordance with Article 4 of the present law.

<sup>13</sup> It is important to indicate clearly the authority which is competent to grant such authorization and monitor the use of the emblem. This authority shall work together with the Ministry of Defence, which may, if necessary, give advice and assistance.

<sup>14</sup> See Articles 18 to 22 of the Fourth Geneva Convention, and Articles 8 and 18 of Protocol I. Article 8 in particular defines the expressions "medical personnel", "medical units" and "medical transports". Hospitals and other civilian medical units should be marked by the emblem only during times of armed conflict. Marking them in peacetime risks causing confusion with property belonging to the National Society.

<sup>15</sup> As concerns armlets and identity cards for civilian medical personnel, Article 20 of the Fourth Geneva Convention and Article 18, paragraph 3, of Protocol I provide for their use in occupied territory and in areas where fighting is taking place or is likely to take place. It is, however, recommended that armlets and identity cards be widely distributed during times of armed conflict. A model of an identity card for civilian medical and religious personnel is given in Annex I to Protocol I. The authority which is to issue the armlets and identity cards (for example a department of the Ministry of Health) should be specified.

<sup>16</sup> Pursuant to Article 27 of the First Geneva Convention, a National Society of a neutral country may also place its medical personnel and medical units and transports at the disposal of the medical service of the armed forces of a State which is party to an armed conflict. Articles 26 and 27 of the First Geneva Convention also provide for the possibility that other voluntary aid societies recognized by the authorities may be permitted, in time of war, to place medical personnel and medical units and transports at the disposal of the medical service of the armed forces of their country or of a State which is party to an armed conflict. Like the personnel of National Societies, such personnel shall then be subject to military laws and regulations and shall be assigned exclusively to medical tasks. These aid societies may be authorized to display the emblem. Such cases are rare, however. If such an authorization has been granted, or is to be granted, it might be useful to mention this in the present law. Furthermore, Article 9, paragraph 2, sub-paragraph c) of Protocol I provides for the possibility of an impartial international humanitarian organization placing medical personnel and medical units and transports at the disposal of a State which is party to an international armed conflict. Such personnel shall then be placed under the control of this party to the conflict and subject to the same conditions as National Societies and other voluntary aid societies. They shall in particular be subject to military laws and regulations.

<sup>17</sup> This should in principle be the same emblem as that used by the medical service of the armed forces. With the consent of the competent authority, the National Society may, in time of peace, use the emblem to mark units and transports whose assignment to medical purposes in the event of armed conflict has already been decided. See Article 13 of the Regulations on the Use of the Emblem.

## B. Indicative use of the emblem<sup>18</sup>

### ARTICLE 6

#### Use by the [National Society of ...]

1. The [National Society of ...] is authorized to use the emblem as an indicative device in order to show that a person or an object is linked to the National Society. The dimensions of the emblem shall be small, so as to avoid any confusion with the emblem employed as a protective device.<sup>19</sup>
2. The [National Society of ...] may, in accordance with national legislation and in exceptional circumstances and to facilitate its work, make temporary use of the red crystal.<sup>20</sup>
3. The [National Society of ...] shall apply the Regulations on the Use of the Emblem of the Red Cross or the Red Crescent by the National Societies.<sup>21</sup>
4. National Societies of other countries present on the territory of [name of the State] shall, with the consent of the [National Society of ...], be entitled to use the emblem under the same conditions.

## C. International Red Cross and Red Crescent organizations

### ARTICLE 7

#### Use by the international organizations of the International Red Cross and Red Crescent Movement

1. The International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies may make use of the emblems of the red cross and red crescent at any time and for all their activities.<sup>22</sup>
2. The International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies, and their duly authorized personnel, may make use of the red crystal in exceptional circumstances and to facilitate their work.<sup>23</sup>

<sup>18</sup> Pursuant to Article 44, paragraph 4 of the First Geneva Convention, the emblem may be used, *as an exceptional measure* and in peacetime only, as an indicative device for marking vehicles, used as ambulances by third parties (not forming part of the International Red Cross and Red Crescent Movement) and aid stations exclusively assigned to the purpose of giving treatment free of charge to the wounded or sick. Express consent for displaying the emblem must, however, be given by the National Society, which shall control the use thereof. Such use is not recommended, however, because it increases the risk of confusion and might lead to misuse. The term "aid station" by analogy also covers boxes and kits containing first-aid supplies that are used, for example, in shops or factories.  
The United Nations Convention of 8 November 1968 on road signs and signals provides for road signs displaying the emblem to mark hospitals and first-aid stations. As these signs are not in conformity with the rules on the use of the emblem, it is advised to employ alternative signs, for example the letter "H" on a blue ground, to indicate hospitals.

<sup>19</sup> The emblem may not, for example, be placed on an armband or the roof of a building. In peacetime, and as an exceptional measure, the emblem may be of large dimensions, in particular during events where it is important for the National Society's first-aid workers to be identified quickly.

<sup>20</sup> Paragraph 2 is not applicable to the domestic legislation of States in which National Societies have opted to use the red crystal in accordance with Article 3, paragraph 1 of Protocol III.

<sup>21</sup> These Regulations enable the National Society to give consent, in a highly restrictive manner, for third parties to use the name of the Red Cross or the Red Crescent and the emblem within the context of its fundraising activities (Article 23, Sponsorship).

<sup>22</sup> Article 44, paragraph 3 of the First Geneva Convention and Article 1, paragraph 4 of the Internal Regulations of the International Federation of Red Cross and Red Crescent Societies.

<sup>23</sup> Article 4 of Additional Protocol III.

## III. CONTROL AND PENALTIES

### ARTICLE 8

#### Control measures

1. The authorities of *[name of the State]* shall at all times ensure strict compliance with the rules governing the use of the emblems of the red cross, the red crescent and the red crystal, the names “red cross,” “red crescent” and “red crystal,” and the distinctive signals. They shall exercise strict control over the persons authorized to use the said emblems, names and signals.<sup>24</sup>
2. They shall take every appropriate step to prevent misuse, in particular:
  - by disseminating the rules in question as widely as possible among the armed forces, the police forces, the authorities and the civilian population;<sup>25</sup>
  - by issuing instructions to national civilian and military authorities on the use of the distinctive emblem in accordance with the Geneva Conventions and their Additional Protocols and by providing for the necessary penal, administrative and disciplinary sanctions in cases of misuse.

### ARTICLE 9

#### Misuse of the emblem as a protective device in time of armed conflict<sup>26</sup>

1. Anyone who has wilfully committed or given the order to commit acts resulting in the death of, or causing serious harm to the body or health of, an adversary by making perfidious use of the red cross, the red crescent or a distinctive signal, has committed a war crime and shall be punished by imprisonment for a period of [...] years.<sup>27</sup> Perfidious use of the red crystal under the same conditions shall be subject to the same penalty.<sup>28</sup>

Perfidious use means appealing to the good faith of the adversary, with the intention to deceive him and make him believe that he was entitled to receive or was obliged to confer the protection provided for by the rules of international humanitarian law.

2. Anyone who in time of armed conflict has used wilfully and without entitlement the red cross, the red crescent or the red crystal, or a distinctive signal, or any other sign or signal which constitutes an imitation thereof or which might lead to confusion, shall be punished by imprisonment for a period of [...] months or years].

<sup>24</sup> It is recommended that responsibilities be clearly set down, either in the present law or in an implementing regulation or decree.

<sup>25</sup> In particular among members of the medical and paramedical professions, and among non-governmental organizations, which must be encouraged to use other distinctive signs.

<sup>26</sup> This is the most serious type of misuse, for in this case the emblem is of large dimensions and is employed for its primary purpose, which is to protect persons and objects in time of war. This Article should be brought into line with penal legislation (for example, the military penal code), which generally provides for the prosecution of violations of international humanitarian law, in particular the Geneva Conventions and their Additional Protocols.

<sup>27</sup> By virtue of Article 85, paragraph 3, sub-paragraph f) of Protocol I, perfidious use of the emblem is a grave breach of the Protocol and is regarded as a war crime (Article 85, para. 5). Such misuse is therefore particularly serious and must be subject to very severe penalties.

<sup>28</sup> See Article 6, paragraph 1 of Additional Protocol III.

# ARTICLE 10

## Misuse of the emblem as an indicative device in peacetime and in time of armed conflict<sup>29</sup>

1. Anyone who, wilfully and without entitlement, has made use of the emblem of the red cross, the red crescent or the red crystal, the words “red cross,” “red crescent” or “red crystal”, a distinctive signal or any other sign, designation or signal which constitutes an imitation thereof or which might lead to confusion, irrespective of the aim of such use;

anyone who, in particular, has displayed the said emblem or words on signs, posters, announcements, leaflets or commercial documents, or has affixed them to goods or packaging, or has sold, offered for sale or placed in circulation goods thus marked;

shall be punished by imprisonment for a period of [... *days or months*] and/or by payment of a fine of [*amount in local currency*].<sup>30</sup>

2. If the offence is committed in the management of a corporate body (commercial firm, association, etc.), the punishment shall apply to the persons who committed the offence or ordered the offence to be committed.

# ARTICLE 11

## Misuse of the white cross on a red ground

Owing to the confusion which may arise between the arms of Switzerland and the emblem of the red cross, the use of the white cross on a red ground or of any other sign constituting an imitation thereof, whether as a trademark or commercial mark or as a component of such marks, or for a purpose contrary to fair trade, or in circumstances likely to wound Swiss national sentiment, is likewise prohibited at all times; offenders shall be punished by payment of a fine of [*amount in local currency*].

# ARTICLE 12

## Interim measures

The authorities of [*name of the State*]<sup>31</sup> shall take the necessary interim measures. The authorities may in particular order the seizure of objects and material marked in violation of the present law, demand the removal of the emblem of the red cross, the red crescent or the red crystal and of the words “red cross,” “red crescent” or “red crystal” at the cost of the instigator of the offence, and order the destruction of the instruments used for their reproduction.

<sup>29</sup> Even though misuse of the emblem as an indicative device is less serious than the misuse described in Article 9, it must be taken seriously and rigorously prevented or, failing that, suppressed. Indeed, the emblem will be better respected during an armed conflict if it has been protected effectively in peacetime. Such effectiveness derives in particular from the severity of any penalties imposed. Consequently, it is recommended that the penalties include imprisonment and/or a heavy fine likely to serve as a deterrent.

<sup>30</sup> In order to maintain the deterrent effect of the fine, it is important that its amount be periodically reviewed so as to take account of the depreciation of the local currency. This remark also applies to Article 11. It might therefore be appropriate to set the amounts of the fines by means other than the present law, for example in an implementing regulation.

<sup>31</sup> Indicate the competent authority (e.g. courts, administrative authorities, etc.).

## ARTICLE 13

### Registration of associations, trade names and trademarks

1. The registration of associations and trade names, and the filing of trademarks, commercial marks and industrial models and designs making use of the emblem of the red cross, the red crescent or the red crystal or the designation “red cross,” “red crescent” or “red crystal” in violation of the present law shall be refused.
2. Persons making use of the red crystal or the designation “red crystal,” or of any sign constituting an imitation thereof, prior to the adoption of Additional Protocol III<sup>32</sup> shall be permitted to continue such use, provided that the said use shall not be such as would appear, in time of armed conflict, to confer the protection of the Geneva Conventions and their Additional Protocols, and provided that such rights were acquired prior to the entry into force of this law.

## ARTICLE 14

### Role of the [National Society of ...]

The [National Society of ...] shall cooperate with the authorities in their efforts to prevent and repress any misuse.<sup>33</sup> It shall be entitled to inform [competent authority] of such misuse and to participate in the relevant criminal, civil or administrative proceedings.

## IV. APPLICATION AND ENTRY INTO FORCE

## ARTICLE 15

### Application of the present law

The [Ministry of Defence, Ministry of Health] is responsible for the application of the present law.<sup>34</sup>

## ARTICLE 16

### Entry into force

The present law shall enter into force on [date of promulgation, etc.].

<sup>32</sup> Additional Protocol III was adopted on 8 December 2005.

<sup>33</sup> The National Societies have a very important role to play in this regard. The Statutes of the International Red Cross and Red Crescent Movement stipulate expressly that the National Societies shall “also cooperate with their governments to ensure respect for international humanitarian law and to protect the red cross and red crescent emblems” (Art. 3, para. 2).

<sup>34</sup> It is particularly important to specify which national authority has ultimate responsibility for applying this law. Close cooperation between the ministries directly concerned, generally the Ministries of Defence and Health, would be advisable. A national committee for the implementation of international humanitarian law could play a useful role in this respect.

# III MODEL GENEVA CONVENTIONS (CONSOLIDATION) ACT

Legislation for common-law States  
on the 1949 Geneva Conventions  
and their 1977 and 2005 Additional Protocols



# MODEL GENEVA CONVENTIONS ACT

for common-law States

Using the Geneva Conventions Acts adopted by different States, and following discussions held with common-law experts, the ICRC Advisory Service on IHL has drawn up this model Geneva Conventions Act, which gives effect to the provisions of the four Geneva Conventions of 12 August 1949, Additional Protocols I and II of 8 June 1977, and Additional Protocol III of 8 December 2005.

## MODEL GENEVA CONVENTIONS (CONSOLIDATION) ACT [20XX]

An Act to enable effect to be given to certain Conventions done at Geneva on 12 August 1949, to the Protocols additional to those Conventions done at Geneva on 8 June 1977 (Protocols I and II), and to the Protocol additional to those Conventions of 8 December 2005 (Protocol III), and for related purposes

BE it enacted by the Parliament of [insert country name] as follows:

### PART I – PRELIMINARY

#### 1. Short title and commencement

- (1) This Act may be cited as the *Geneva Conventions Act* [insert year].
- (2) This Act shall come into force on [insert date].

#### 2. Interpretation

(1) In this Act, unless the contrary intention appears:

- (a) “**court**” does not include a court-martial or other military court;
- (b) “**the First Convention**” means the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted at Geneva on 12 August 1949, a copy of which Convention (not including the annexes to that Convention) is set out in Schedule 1;
- (c) “**the Second Convention**” means the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted at Geneva on 12 August 1949, a copy of which Convention (not including the annex to that Convention) is set out in Schedule 2;
- (d) “**the Third Convention**” means the Geneva Convention relative to the Treatment of Prisoners of War, adopted at Geneva on 12 August 1949, a copy of which Convention (not including the annexes to that Convention) is set out in Schedule 3;
- (e) “**the Fourth Convention**” means the Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted at Geneva on 12 August 1949, a copy of which Convention (not including the annexes to that Convention) is set out in Schedule 4;
- (f) “**the Conventions**” means the First Convention, the Second Convention, the Third Convention and the Fourth Convention;

- (g) **“prisoners’ representative”**, in relation to a particular protected prisoner of war at a particular time, means the person by whom the functions of prisoners’ representative within the meaning of Article 79 of the Third Convention were exercisable in relation to that prisoner at the camp or place at which that prisoner was, at or last before that time, detained as a protected prisoner of war;
- (h) **“protected internee”** means a person protected by the Fourth Convention or Protocol I, and interned in [insert country name];
- (i) **“protected prisoner of war”** means a person protected by the Third Convention or a person who is protected as a prisoner of war under Protocol I;
- (j) **“the protecting power”**, in relation to a protected prisoner of war or a protected internee, means the power or organization which is carrying out, in the interests of the power of which he or she is a national, or of whose forces he or she is, or was at any material time, a member, the duties assigned to protecting powers under the Third Convention, the Fourth Convention or Protocol I, as the case may be;
- (k) **“Protocol I”** means the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), done at Geneva on 8 June 1977, a copy of which Protocol (including Annex 1 to that Protocol) is set out in Schedule 5;
- (l) **“Protocol II”** means the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), done at Geneva on 8 June 1977, a copy of which Protocol is set out in Schedule 6;
- (m) **“Protocol III”** means the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), done at Geneva on 8 December 2005, a copy of which Protocol is set out in Schedule 7;
- (n) **“the Protocols”** means Protocol I, Protocol II and Protocol III.

(2) If the ratification on behalf of [INSERT COUNTRY NAME] of any of the Conventions or of either of the Protocols is subject to a reservation or is accompanied by a declaration, that Convention or that Protocol shall, for the purposes of this Act, have effect and be construed subject to and in accordance with that reservation or declaration.

## PART II – PUNISHMENT OF OFFENDERS AGAINST THE CONVENTIONS AND PROTOCOL I

### 3. Punishment of grave breaches of the Conventions and Protocol I

(1) Any person, whatever his or her nationality, who, in [INSERT COUNTRY NAME] or elsewhere, commits, or aids, abets or procures any other person to commit, a grave breach of any of the Conventions, of Protocol I or of Protocol III, is guilty of an indictable offence.

(2) For the purposes of this section:

- (a) a grave breach of the First Convention is a breach of that Convention involving an act referred to in Article 50 of that Convention committed against persons or property protected by that Convention;
- (b) a grave breach of the Second Convention is a breach of that Convention involving an act referred to in Article 51 of that Convention committed against persons or property protected by that Convention;
- (c) a grave breach of the Third Convention is a breach of that Convention involving an act referred to in Article 130 of that Convention committed against persons or property protected by that Convention;

- (d) a grave breach of the Fourth Convention is a breach of that Convention involving an act referred to in Article 147 of that Convention committed against persons or property protected by that Convention;
- (e) a grave breach of Protocol I is anything referred to as a grave breach of the Protocol in paragraph 4 of Article 11, or paragraph 2, 3 or 4 of Article 85, of the Protocol; and
- (f) a grave breach of Protocol III is any misuse of the Protocol III emblem amounting to perfidious use in the meaning of Article 85, paragraph 3 f) of Protocol I.

(3) In the case of an offence against this section committed outside [insert country name], a person may be proceeded against, indicted, tried and punished therefor in any place in [insert country name] as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.

#### **4. Punishment of other breaches of the Conventions and Protocols**

(1) Any person, whatever his or her nationality, who, in [insert country name], commits, or aids, abets or procures any other person to commit, a breach of any of the Conventions or Protocols not covered by section 3, is guilty of an indictable offence.

(2) Any national of [insert country name] who, outside [insert country name], commits, or aids, abets or procures the commission by another person of a breach of any of the Conventions or Protocols not covered by section 3 is guilty of an indictable offence.

#### **5. Penalties and procedure**

(1) The punishment for an offence against section 3 or section 4 is:

- (a) where the offence involves the wilful killing of a person protected by the relevant Convention or by Protocol I, imprisonment for life or for any lesser term; and
- (b) in any other case, imprisonment for a term not exceeding 14 years.

(2) An offence against section 3 or section 4 shall not be prosecuted in a court except by indictment by or on behalf of the [Attorney-General/Director of Public Prosecutions].

#### **6. Proof of application of the Conventions or Protocols**

If, in proceedings under this Part in respect of a breach of any of the Conventions or of either of the Protocols, a question arises under:

- (a) Article 2 or Article 3 of that Convention (which relate to the circumstances in which the Convention applies);
- (b) Article 1 or Article 3 of Protocol I (which relate to the circumstances in which that Protocol applies); or
- (c) Article 1 of Protocol II (which relates to the circumstances in which that Protocol applies);
- (d) Article 1 of Protocol III (which relates to the circumstances in which that Protocol applies);

a certificate under the hand of the [Minister of State for Foreign Affairs] certifying to any matter relevant to that question is prima facie evidence of the matter so certified.

#### **7. Jurisdiction of courts**

(1) A person shall not be tried for an offence against section 3 or section 4 by a court other than the [insert name of court].

(2) The enactments relating to the trial by court-martial of persons who commit civil offences shall have effect for the purposes of the jurisdiction of courts-martial convened in [insert name of country] as if this Part had not been passed.

# PART III – LEGAL PROCEEDINGS IN RESPECT OF PROTECTED PERSONS

Notice of trial of protected persons to be served on protecting power, etc.

## 8. (1) The court before which:

- (a) a protected prisoner of war is brought up for trial for an offence; or
- (b) a protected internee is brought up for trial for an offence for which that court has power to sentence him or her to imprisonment for a term of two years or more;

shall not proceed with the trial until it is proved to the satisfaction of the court that a notice containing the particulars mentioned in sub-section (2), so far as they are known to the prosecutor, has been served not less than 3 weeks previously on the protecting power (if there is a protecting power) and, if the accused is a protected prisoner of war, on the accused and the prisoners' representative.

(2) The particulars referred to in sub-section (1) are:

- (a) the full name, date of birth and description of the accused, including his or her profession or trade; and where the accused is a protected prisoner of war, the accused's rank and his or her army, regimental, personal and serial number;
- (b) the accused's place of detention, internment or residence;
- (c) the offence with which the accused is charged; and
- (d) the court before which the trial is to take place and the time and place appointed for the trial.

(3) For the purposes of this section, a document purporting:

- (a) to be signed on behalf of the protecting power or by the prisoners' representative or by the person accused, as the case may be; and
- (b) to be an acknowledgement of the receipt by that power, representative or person on a specified day of a notice described in the document as a notice under this section;

shall, unless the contrary is shown, be sufficient evidence that the notice required by sub-section (1) was served on that power, representative or person on that day.

(4) A court which adjourns a trial for the purpose of enabling the requirements of this section to be complied with may, notwithstanding anything in any other law, remand the accused for the period of the adjournment.

## 9. Legal representation of certain persons

(1) The court before which:

- (a) any person is brought up for trial for an offence under section 3 or section 4 of this Act; or
- (b) a protected prisoner of war is brought up for trial for any offence;

shall not proceed with the trial unless:

- (i) the accused is represented by counsel; and
- (ii) it is proved to the satisfaction of the court that a period of not less than 14 days has elapsed since instructions for the representation of the accused at the trial were first given to the counsel;

and, if the court adjourns the trial for the purpose of enabling the requirements of this sub-section to be complied with, then, notwithstanding anything in any other law, the court may remand the accused for the period of the adjournment.

(2) Where the accused is a protected prisoner of war, in the absence of counsel accepted by the accused as representing him or her, counsel instructed for the purpose on behalf of the protecting power shall, without prejudice to the requirements of paragraph (ii) of sub-section (1), be regarded for the purposes of that sub-section as representing the accused.

(3) If the court adjourns the trial in pursuance of sub-section (1) by reason that the accused is not represented by counsel, the court shall direct that a counsel be assigned to watch over the interests of the accused at any further proceedings in connection with the offence, and at any such further proceedings, in the absence of counsel either accepted by the accused as representing him or her or instructed as mentioned in sub-section (2), counsel assigned in pursuance of this sub-section shall, without prejudice to the requirements of paragraph (ii) of sub-section (1), be regarded for the purposes of sub-section (1) as representing the accused.

(4) Counsel shall be assigned in pursuance of sub-section (3) in such manner as may be prescribed in regulations or, in the absence of provision in the regulations, as the court directs, and counsel so assigned shall be entitled to be paid by [the Minister] such sums in respect of fees and disbursements as may be prescribed by regulations.

## **10. Appeals by protected prisoners of war and internees**

(1) Where a protected prisoner of war or a protected internee has been sentenced to imprisonment for a term of two years or more, the time within which the person must give notice of appeal or notice of application for leave to appeal to [insert name of appeal court] shall, notwithstanding anything in any enactment relating to such appeals, be the period from the date of conviction or, in the case of an appeal against sentence, of sentencing, to the expiration of 10 days after the date on which the person receives notice given:

- (a) in the case of a protected prisoner of war, by an officer of [the Armed Forces]; or
- (b) in the case of a protected internee, by or on behalf of the governor or other person in charge of the prison or place in which he or she is confined;

that the protecting power has been notified of his or her conviction and sentence.

(2) Where, after an appeal against the conviction or sentence by a court of a protected prisoner of war or a protected internee has been determined, the sentence remains or has become a sentence of imprisonment for a term of two years or more, the time within which the person must apply to the [Attorney General] for a certificate authorizing an appeal to [insert name of appeal court] shall be the period from the date of the previous decision on appeal until seven days after the date on which the person receives notice given by a person referred to in paragraph (a) or (b), as the case may require, of sub-section (1) that the protecting power has been notified of the decision of the court on the previous appeal.

(3) Where sub-section (1) or (2) applies in relation to a convicted person, then, unless the court otherwise orders, an order of the court relating to the restitution of property or the payment of compensation to an aggrieved person shall not take effect, and a provision of a law relating to the revesting of property on conviction shall not take effect in relation to the conviction, while an appeal by the convicted person against his or her conviction or sentence is possible.

(4) Sub-sections (1) and (2) do not apply in relation to an appeal against a conviction or sentence, or against the decision of a court upon a previous appeal, if, at the time of the conviction or sentence, or of the decision of the court upon the previous appeal, as the case may be, there is no protecting power.

## 11. Reduction of sentence and custody of protected prisoners of war and internees

(1) In any case in which a protected prisoner of war or a protected internee is convicted of an offence and sentenced to a term of imprisonment, it shall be lawful for the [Attorney-General] to direct that there shall be deducted from that term a period, not exceeding the period, if any, during which that person was in custody in connection with that offence, either on remand or after committal for trial (including the period of the trial), before the sentence began, or is deemed to have begun, to run.

(2) In a case where the [Attorney-General] is satisfied that a protected prisoner of war accused of an offence has been in custody in connection with that offence, either on remand or after committal for trial (including the period of the trial), for an aggregate period of not less than three months, it shall be lawful for the [Attorney-General] to direct that the prisoner shall be transferred from that custody to the custody of [an officer of the Armed Forces] and thereafter remain in military custody at a camp or place in which protected prisoners of war are detained, and be brought before the court at the time appointed by the remand or committal order.

# PART IV – MISUSE OF THE RED CROSS AND OTHER EMBLEMS, SIGNS, SIGNALS, IDENTITY CARDS, INSIGNIA AND UNIFORMS

## 12. Use of red cross, red crescent and other emblems

(1) Subject to the provisions of this section, it shall not be lawful for any person, without the consent in writing of the [Minister of Defence or a person authorized in writing by the Minister to give consent under this section], to use or display for any purpose whatsoever any of the following:

- (a) the emblem of a red cross with vertical and horizontal arms of the same length on, and completely surrounded by, a white ground, or the designation "Red Cross" or "Geneva Cross";
- (b) the emblem of a red crescent moon on, and completely surrounded by, a white ground, or the designation "Red Crescent";
- (c) the emblem in red on, and completely surrounded by, a white ground, of a lion passing from right to left of, and with its face turned towards, the observer, holding erect in its raised right forepaw a scimitar, with, appearing above the lion's back, the upper half of the sun shooting forth rays, or the designation "Red Lion and Sun";
- (d) the emblem in red on, and completely surrounded by, a white ground of a red frame in the shape of a square on edge (whether or not incorporating within its centre another emblem or sign or combination thereof in accordance with Article 3, paragraph 1 of Additional Protocol III), or the designation "Red Crystal", or the designation "third Protocol emblem";
- (e) the emblem of a white or silver cross with vertical and horizontal arms of the same length on, and completely surrounded by, a red ground, being the heraldic emblem of the Swiss Confederation;
- (f) the sign of an equilateral blue triangle on, and completely surrounded by, an orange ground, being the international distinctive sign of civil defence;
- (g) any of the distinctive signals specified in Chapter III of Annex I to Protocol I, being the signals of identification for medical units and transports;

- (h) the sign consisting of a group of three bright orange circles of equal size, placed on the same axis, the distance between each circle being one radius, being the international special sign for works and installations containing dangerous forces;
- (i) a design, wording or signal so nearly resembling any of the emblems, designations, signs or signals specified in paragraph (a), (b), (c), (d), (e), (f) (g) or (h) as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems, designations, signs or signals;
- (j) such other flags, emblems, designations, signs, signals, designs, wordings, identity cards, information cards, insignia or uniforms as are prescribed for the purpose of giving effect to the Conventions or Protocols.

(2) The [Minister of Defence or a person authorized in writing by the Minister to give consent under this section] shall not give such consent except for the purpose of giving effect to the provisions of the Conventions or Protocols and may refuse or withdraw such consent as necessary.

(3) This section extends to the use in or outside [insert country name] of an emblem, designation, sign, signal, design, wording, identity card, identification cards, insignia or uniform referred to in sub-section (1) on any ship or aircraft registered in [insert country name].

### **13. Offences and penalties**

(1) Any person who contravenes section 12(1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding [insert maximum fine] or to imprisonment for a term not exceeding [insert maximum period of imprisonment] or both.

(2) Where a court convicts a person of an offence against section 12(1), the court may order the forfeiture to the State of:

- (a) any goods or other article in connection with which an emblem, designation, sign, signal, design or wording was used by that person; and
- (b) any identity cards, identification cards, insignia or uniforms used in the commission of the offence.

(3) Where an offence against section 12(1) committed by a body corporate is proved to have been committed with the consent or connivance of a director, manager, secretary or other officer of the body corporate, or a person purporting to act in any such capacity, he or she, as well as the body corporate, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(4) Proceedings under section 12(1) shall not be instituted without the consent in writing of the [Attorney-General].

### **14. Saving**

In the case of a trade mark registered before the passing of this Act, sections 12 and 13 do not apply by reason only of its consisting of or containing an emblem specified in sub-paragraph 12(1) (b), (c) or (d) or a design resembling such an emblem, and where a person is charged with using such an emblem, sign or design for any purpose and it is proved that the person used it otherwise than as, or as part of, a trade mark so registered, it is a defence for the person to prove:

- (a) that the person lawfully used that emblem, sign or design for that purpose before the passing of this Act; or
- (b) in a case where the person is charged with using the emblem, sign or design upon goods or any other article, that the emblem, sign or design had been applied to the goods or that article before the person acquired them or it by some other person who had manufactured or dealt with them in the course of trade and who lawfully used the emblem, sign or design upon similar goods or articles before the passing of this Act.

# PART V – REGULATIONS

## 15. Regulations

[insert name of regulation-making authority] may issue regulations:

- (a) prescribing the form of flags, emblems, designations, signs, signals, designs, wordings, identity cards, information cards, insignia or uniforms for use for the purposes of giving effect to the Conventions or the Protocols or both, and regulating their use;
- (b) prescribing the penalty that may be imposed in respect of contravention of, or non-compliance with, any regulations made under paragraph (a) of this section, which may be a fine not exceeding [insert maximum fine] or imprisonment for a term not exceeding [insert maximum period of imprisonment] or both; and
- (c) providing for such other matters as are required or permitted to be prescribed, or that are necessary or convenient to be prescribed, for carrying out or giving effect to this Act.

## SCHEDULES

1. The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted at Geneva on 12 August 1949
2. The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted at Geneva on 12 August 1949
3. The Geneva Convention relative to the Treatment of Prisoners of War, adopted at Geneva on 12 August 1949
4. The Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted at Geneva on 12 August 1949
5. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), done at Geneva on 8 June 1977
6. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), done at Geneva on 8 June 1977
7. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), done at Geneva on 8 December 2005
8. Resolution 1 of the 29<sup>th</sup> International Conference of the Red Cross and Red Crescent (Geneva 20 – 21 June 2006)





# **IV GUIDING PRINCIPLES/MODEL LAW ON THE MISSING**

**Principles for legislating the situation of persons missing  
as a result of armed conflict or internal violence**

**Measures to prevent persons from going missing and  
to protect the rights and interests of the missing  
and their families**

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# INTRODUCTION

The ICRC remains dedicated to addressing the issue of missing persons, which is of growing concern in the modern world. Families are left without news of their loved ones and must face a very harsh reality. Of primary concern is knowing whether the missing persons are alive or dead, dealing with subsequent effects of the loss, whether it be as a result of their absence or death, and of course answering the eternal question of why they disappeared at all. There are a variety of reasons for which persons may be unaccounted for, as disappearances occur in different contexts, including enforced or involuntary disappearances such as abduction, and as a result of natural disasters or migratory movements. In particular, in almost every situation of armed conflict or internal violence, inherent dangers lead to separation and disappearances of soldiers and civilians alike. Within the context of international and non-international armed conflicts, violations of IHL and of human rights account for most cases of missing persons.

Fundamental rules of IHL and human rights exist to help prevent persons from going missing in situations of armed conflict or internal violence. To respect the principles of international law is to respect the integrity and dignity of all human beings, including the deceased, and in the context of missing persons, it erects a barrier and encourages a resolution of cases of disappearance. If civilians and members of armed forces or armed groups who are sick, wounded, captured, deceased, or deprived of their liberty were treated in accordance with these rules, there would be fewer missing persons and fewer families left in the dark about their fate. It is important for all States to act with determination to prevent disappearances, not to perpetrate abductions or other enforced disappearances, to clarify the fate of missing persons and to lend assistance to families who are without news of their relatives.

*The Principles for legislating the situation of persons missing as a result of armed conflict or internal violence* are offered as a tool to assist States and their national authoritative bodies with the adoption of legislation that will address, prevent and resolve missing person cases. States have an obligation to disseminate IHL and implement its fundamental principles and its rules into their national legal system and practice. With the now universal acceptance of the 1949 Geneva Conventions, the applicability of common Article 1, which reaffirms the obligation of all parties to undertake to respect and to ensure respect for the fundamentals of humanitarian law in all circumstances, is all the more relevant. Respect means that the State is under an obligation to do everything it can to ensure that the rules in question are respected by its organs as well as by all others under its jurisdiction. Ensuring respect means that States, whether engaged in a conflict or not, must take all possible steps to ensure that the rules are respected by all, and in particular by the parties to the conflict in question. This underlying principle is essential to the cause of missing persons and it is imperative that States adopt measures to prevent persons from becoming missing and to protect the rights and interests of the missing and their families.

To ensure the best possible protection for missing persons and their families, such situations must be dealt with on the basis of legal considerations appropriate to each case. This model is intended to be a comprehensive legal framework that may assist States in completing their domestic legislation on missing persons. It is based on the principles of international law, in particular international human rights law and IHL. Human rights treaties apply at all times and in all circumstances to all persons subject to the jurisdiction of a State party, and therefore continue to apply in times of violence alongside IHL which is specifically applicable in situations of armed conflict and is non-derogable. There is often debate regarding which provisions are obligatory in nature for the State and which are strong recommendations – however, this aspect of the problematic will not be addressed in this context as the goal is to ensure the best possible protection of the victims, which include both the missing person and his or her family. The provisions of international law and IHL which relate to the missing can be found in the ICRC report *The missing and their families*, published in 2003 as a follow-up to the International Conference of Governmental and Non-Governmental Experts held in February 2003. This comprehensive list has been reproduced in Annex 3 of this document.

The principles of international law attach paramount importance to the prevention of disappearances. Several measures are available to assist in accomplishing this goal, including the issuance of identity cards and ensuring proper registration of an individual's basic personal information. Once a person has disappeared, families have the right to be informed of his or her fate and may have recourse to the State for providing the information as per Article 32 of Additional Protocol I (AP I). In order to uphold this right to know, the parties to a conflict must therefore search for persons reported missing, as prescribed in Articles 32 and 33 of AP I and Articles 136 to 141 of the Fourth Geneva Convention (GC IV). The State must facilitate enquiries made by members of families dispersed as a result of the conflict so as to help them restore contact and bring them together. A further responsibility incumbent upon the parties to a conflict concerns deceased persons and is extensively outlined in IHL. Articles 15 of GC I, 18 of GC II, 16 of GC IV and 34 of AP I require that all possible measures be taken to search for, recover and identify the dead and maintain lists showing the exact location and markings of the graves, together with particulars of the dead interred therein.

International rules regarding missing persons apply in both international and non-international armed conflicts. Rule 117 of the ICRC's study on customary international humanitarian law, published in 2005, indicates that State practice has established a norm applicable in both international and non-international armed conflicts whereby each party to the conflict must take all feasible measures to account for persons reported missing and must provide their family members with any information it has on their fate.

The new United Nations Convention against Enforced Disappearance, recently adopted by the United Nations General Assembly, is the first universally binding instrument that addresses enforced disappearance, defined as the abduction or deprivation of liberty of a person by State authorities and the subsequent refusal to disclose his or her whereabouts or fate. Enforced disappearance is regarded as a human rights violation and it is categorically prohibited. When committed as part of a widespread or systematic attack directed against any civilian population, it is considered as a crime against humanity under the Rome Statute of the International Criminal Court.

Guiding principles are presented here in the form of a model law with the support of an article-by-article commentary to aid in the development of the actual legislative text to be adopted by the State. The model law covers the fundamental concepts of the law regarding the rights of missing persons and their families, alongside the State's obligation to ensure and uphold these rights. It is divided into chapters that outline basic rights as well as certain measures of enforcement in situations prior to people becoming missing, once they are reported missing and in the eventuality of suspected or actual death. The notion of prevention is addressed by a provision on adopting preventive measures of identification and is directly linked to the chapter on criminal responsibility that seeks to establish violations of the law as criminal and thereby liable to prosecution and penal sanctions. As such, this model lends itself as a tool for such States that wish to complement or complete existing legislation, or those that seek to fill the legal void that may exist regarding the governance of cases of missing persons. It can be used as a whole or in part, and can focus as needed on prevention, resolution or any other aspects of the issue. Several examples of State legislation are available for reference on the ICRC web database of National Implementation of IHL at the following link: <http://www.icrc.org/ihl-nat>. The Advisory Service on International Humanitarian Law of the ICRC remains readily available for consultation and to provide assistance to States during the discussion and drafting of their national legislation implementing principles of international humanitarian law.

Worldwide, the ICRC continues to work on the problem of missing persons with the parties to conflicts, humanitarian organizations and others with a stake in the issue. This includes efforts to promote existing international law, to support the strengthening of relevant domestic law, to cooperate with military forces to ensure that soldiers wear some means of identification and that human remains are properly handled on the battlefield. The short-term objective is to create a domestic legislative framework that addresses the situation of missing persons. In the long term, the goal would be to resolve all current cases of missing persons and bring closure to the suffering of their families and, ultimately, to prevent future cases of disappearance.

# PART I – GENERAL PROVISIONS

## ARTICLE 1

### Object of the Law

- 1) The present law aims to prevent persons from becoming missing, to provide for aid in the search for and the tracing of missing persons in the context of armed conflict or internal violence, and to protect the rights and interests of missing persons and their relatives.
- 2) In respect of State obligations to disseminate and enact principles of international humanitarian and human rights law, the present law implements the provisions of international treaties and conventions for the protection of victims of war and for the protection of human rights relevant to the prevention of persons becoming missing and the protection of missing persons and their relatives which [*name of the State*] is a party to, including:
  1. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949;
  2. Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949;
  3. Geneva Convention (III) relative to the Treatment of Prisoners of War, of 12 August 1949;
  4. Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, of 12 August 1949;
  5. International Covenant on Civil and Political Rights (1966);
  6. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977;
  7. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977;
  8. Convention on the Rights of the Child (1989);
  9. Rome Statute of the International Criminal Court (1998);
  10. International Convention for the Protection of All Persons from Enforced Disappearances (2006).

### COMMENTARY

- Several international treaties of a universal or regional character contain provisions linked to issues related to missing persons, including:
  - International humanitarian law:
    - Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949);
    - Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949);
    - Geneva Convention (III) relative to the Treatment of Prisoners of War (1949);
    - Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949);
    - Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 1977;
    - Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 1977;
  - International human rights law:
    - International Covenant on Civil and Political Rights (1966);
    - Convention on the Rights of the Child (1989);
    - International Convention for the Protection of All Persons from Enforced Disappearance (2006);
    - regional conventions on the protection of human rights: European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); American Convention on Human Rights (1969); African Charter on Human and Peoples' Rights (1981).

- Other relevant international texts of a universal or regional character:
  - Rome Statute of the International Criminal Court (1998);
  - United Nations Declaration on the Protection of All Persons from Enforced Disappearance (1992);
  - United Nations Guidelines concerning computerized personal data files (1990);
  - Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981);
  - OECD Guidelines governing the Protection of Privacy and Trans-border Flows of Personal Data (1980).
- The principles of customary international law also address the protection of and respect for the rights of the missing and their families. These underlie or complement the provisions adopted in international treaties. They are referenced in the ICRC study on customary international humanitarian law, published in 2005.
- Legislative, regulatory and other measures aimed at preventing persons from becoming unaccounted for and accounting for persons reported missing must be taken to implement the obligations arising from the above instruments and to give effect to internationally protected humanitarian and human rights, without distinction of any kind. Enacting domestic legislation contributes to the fulfilment of a State's obligations to respect and ensure respect for IHL by disseminating and implementing the fundamentals of IHL in its national legal system and practice.

## ARTICLE 2

### Definitions

For the purpose of the present law:

- 1) *Missing person* is a person whose whereabouts are unknown to his/her relatives and/or who, on the basis of reliable information, has been reported missing in accordance with national legislation in connection with an international or non-international armed conflict, a situation of internal violence or disturbances, natural catastrophes or any other situation that may require the intervention of a competent State authority.
- 2) *Relative of the missing person* – unless otherwise specified, for the purpose of the present law, the term “relative” shall be understood in accordance with the provisions of the [Civil Code/Family Law]. It shall include, at a minimum, the following persons:
  - children born in and out of wedlock, adopted children or stepchildren;
  - lawfully wedded partner or unwedded partner;
  - parents (including stepmother, stepfather, adoptive);
  - full or half or adopted sisters and brothers.
- 3) *State authority for tracing missing persons* shall be a designated State authority which shall have competence for the tracing of missing persons and be entrusted with the performance of other functions or tasks in accordance with the present Law.
- 4) *National Information Bureau (NIB)* is the office in charge of collecting and transmitting information, documents and objects concerning persons protected by IHL who have fallen into the hands of an adverse party, in particular prisoners of war and civilian internees.
- 5) *Registry* is the centralized database for the management of tracing requests regarding missing persons.
- 6) *Reliable information on disappearance of a person* is considered to be the information from which it is possible to reasonably conclude that the whereabouts of a certain person are unknown to his/her relatives or, if that person has no relatives, he/she does not appear at his/her regular or temporary place of residence.

- 7) *Minimum data on a missing person* is information such as a missing person's name, place and date of birth, marital status, occupation, address, date and details of last news/circumstances of disappearance, and rank for military personnel/combatants.
- 8) *Identification of human remains* is the activity carried out by a competent official whose expertise to carry out such activity is recognized by competent State authorities, and aimed at establishing the identity of a person or human remains.

## COMMENTARY

- National authorities should ensure that the definition of *missing person* is sufficiently wide in scope so as to protect the rights of the missing and their families who need support in consequence of the circumstances. The definition should include the element of uncertainty about the fate of the person reported missing, even if some of the consequences that flow from the state of being missing may mean that the recognition of such status has similar effects to a declaration of death.

How national law defines the missing person will often derive from the background for adoption of the measures. It can recognize the status of missing persons in a limited or broad manner depending on the nature and extent of missing persons and families affected. National law may wish to distinguish between those who go missing in a particular factual, emergency or violent situation, in a specific timeframe or in a specific circumstance such as disappearance following arrest/detention or in relation to an armed conflict. The definition can also be extended to cover persons missing as result of a natural disaster and those who go missing for other reasons. The more narrowly defined the category of persons concerned, the more likely it is that some missing persons will fall outside the scope of the legal provisions. Alternatively, it may be desirable to provide specific provisions for particular situations where needed, and other provisions of a general nature.

For those States that have acceded to the International Convention on the Protection of All Persons from Enforced Disappearance, the law should incorporate the definition of enforced disappearance as set out in Article 2 of that Convention.

- The general definition of *relative of the missing person* should be wide enough to include persons affected by the unknown whereabouts of the missing person, although it might be necessary to restrict the definition in specific provisions that provide certain rights. Notwithstanding the general provisions on family relationships found in existing law, for the purpose of protection of and assistance to "relative(s)" of missing persons, the term should be understood to include:
  - children born in and out of wedlock, adopted children or stepchildren;
  - lawfully wedded partner or unwedded partner;
  - parents (including stepmother, stepfather, adoptive);
  - full or half or adopted sisters and brothers.

The definition of *relative* could also be widened to the extent that it takes into account the specific cultural environment whereby the notion of family might extend to include, for example, close friends.

- In order to ensure consistent and uniform interpretation and enforcement of the law, other terms and concepts may be defined, as the case may be. The proposed model defines some additional terms and further develops their contents within specific provisions encompassing the various principles that regulate the situation of missing persons. For example:
  - State authority for tracing missing persons;
  - National Information Bureau;
  - Registry;
  - reliable information on disappearance of a person;
  - minimum data on a missing person;
  - identification of human remains.



# PART II – BASIC RIGHTS AND MEASURES

## ARTICLE 3

### Fundamental rights

- 1) All persons without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status shall enjoy the following fundamental rights:
  - (a) the right not to be arbitrarily deprived of their life;
  - (b) the right to be protected against torture, and other cruel, inhuman or degrading treatment;
  - (c) the right to liberty and security, and the right not to be arbitrarily deprived of liberty, including the fundamental and judicial procedural guarantees that must be afforded to all persons deprived of liberty;
  - (d) the right to a fair trial affording all judicial guarantees;
  - (e) the right to respect for family life;
  - (f) the right to know the reason for their incarceration and to exchange news with relatives or other persons in a close relationship by any means of communication available;
  - (g) the right not to be subjected to enforced disappearance or involuntary disappearance and/or illegal or arbitrary abductions;
  - (h) the right to recognition as a person before the law.
- 2) Missing persons and their relatives may not be discriminated against on any grounds such as language, race, sex, nationality, religion, colour of skin, political ideology.
- 3) Foreign citizens shall be entitled to the same rights under the present law as citizens of [name of the State] unless they benefit from better protection under other legislation.
- 4) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

### COMMENTARY

- In order to prevent persons from becoming unaccounted for and to account for persons reported missing, legislative, regulatory and other measures must be taken to implement the obligations arising from IHL and to give effect to internationally protected human rights. Those rights and prohibitions include:
  - the right not to be arbitrarily deprived of one's life;
  - the right not to be arbitrarily deprived of one's liberty;
  - the right to a fair trial affording all judicial guarantees;
  - the right to respect for one's family life;
  - the right to know the fate of the missing and to exchange news with relatives or other persons in a close relationship by any means of communication available;
  - the prohibition of torture and other cruel, inhuman or degrading treatment;
  - the prohibition of enforced disappearance;
  - the right to be recognized everywhere as a person before the law.
- Care should be taken in the preparation of any law on missing persons to ensure that it contains no unjustified selective element. Non-discrimination is easiest to ensure by limiting restrictions on the applicability of the law and making it relevant to all missing persons under a State's jurisdiction. This is particularly important when considering missing persons who are foreign nationals or members of particular ethnic or other groups that live or have lived within a territory that has had its borders redefined as a result of conflict. Families of persons who went missing within the former State may be left without redress if, by the change in their State/nationality, they are left without the opportunity to benefit from measures designed to assist them.

- In cases where a national of a third State is missing and his/her family is not resident on that territory, care should be taken to notify the authorities of that territory of the missing person. The judicial and other authorities of third States are more likely to recognize the validity of a missing registration or certificate of absence or death if they can see that the procedures established for issuing such documents have a legal basis and are carried out by competent, properly designated authorities.
- Following an international armed conflict, bilateral and multilateral cooperation among States in conjunction with humanitarian organizations can lead to more effective assistance to families. States should endeavour to address the humanitarian nature of the problem independently of other inter-State issues so as to avoid further distress to the families of missing persons pending the resolution of political issues.
- Regional and international institutions should encourage inter-State cooperation. They may also have an important role to play on their own. The role of the independent and impartial Central Tracing Agency (CTA) established by the ICRC as per the Geneva Conventions is paramount in putting the needs of the missing at the forefront, especially when several State actors are involved. The CTA is in charge of centralizing all information on prisoners of war and protected persons and of forwarding it as rapidly as possible to the authorities concerned, except where doing so might be detrimental to the persons concerned or to their relatives.
- Respect for the law should be ensured, notably by providing the necessary technical and financial means, and administrative or penal sanctions in case of breach by the officials mandated to uphold the law. Penalties for failing to fulfil the responsibilities and obligations towards the missing and their families as outlined in the law are provided for in Article 24.

## ARTICLE 4

### **Rights of persons arrested, detained or interned**

- 1) Arrest, detention and imprisonment shall be carried out and duly registered in accordance with the provisions of the Law and only by competent officials or persons legally authorized for that purpose; those persons shall be identifiable and, wherever possible, should identify themselves. Information to be registered shall include:
  - (a) the identity of the person deprived of liberty;
  - (b) the date, time and location where the person was deprived of liberty and the name of the authority that deprived the person of liberty;
  - (c) the name of the authority having decided the deprivation of liberty and the reasons for the deprivation of liberty;
  - (d) the name of the authority controlling the deprivation of liberty, as well as the place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
  - (e) the dates when the arrested person will be brought before the judicial authority and other relevant information relating to the judicial proceedings;
  - (f) elements regarding the physical integrity of the person deprived of liberty;
  - (g) in the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the human remains;
  - (h) the date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.
- 2) Persons deprived of their liberty, whether interned or detained, shall be informed, at the time of arrest, of the reasons for their arrest and promptly informed of any charges against them.
- 3) Any person deprived of liberty shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful. This paragraph does not apply to persons protected under the Third and Fourth Geneva Conventions referred to in Article 1 who are interned.

- 4) Anyone who is arrested, detained or imprisoned may request a medical examination and shall receive adequate health care, as the case may be. Such examination shall be conducted in private without the presence and/or influence of the detaining authorities.
- 5) The serious illness or death of a person deprived of his/her liberty shall be notified without delay to the spouse, a near relative or any other person previously designated by the person interned or detained.
- 6) Persons deprived of their liberty, whether interned or detained, shall have the right to inform any person with a legitimate interest, such as their families or legal counsel, as a minimum, of their capture or arrest, the location of the place where they are detained and their state of health. They shall be authorized to communicate with and be visited by their family, counsel or any other person of their choice, subject only to the conditions established by law, or, if they are foreigners in the country where they are deprived of liberty, to communicate with their consular authorities, in accordance with applicable international law.
- 7) The transfer or release of persons deprived of their liberty shall be notified to the spouse, a close relative or any other person with a legitimate interest.
- 8) For the purpose of paragraph 3, the competent authority shall issue regulations providing for the issuance of capture and internment cards for use by prisoners of war and interned civilians in situations of international armed conflict.

## COMMENTARY

- Arrest, detention or imprisonment must be carried out only in strict accordance with the provisions of the law and by competent officials or persons authorized for that purpose. Those persons should be identifiable and, wherever possible, should identify themselves. To that end, regulations, orders and instructions should be issued to govern arrest and detention procedures.
- Persons deprived of their liberty must be informed promptly of the reasons for their arrest or detention. In addition, competent authorities should ensure the effective protection, *inter alia*, of the right to request a medical examination and to receive health care.
- Official registers of all persons deprived of their liberty must be maintained and kept up-to-date in every place of internment or detention (including police stations and military bases) and made available to relatives, judges, counsels, any other person having a legitimate interest, and other authorities. The information to be registered should include:
  - the identity of the person deprived of liberty;
  - the date, time and location where the person was deprived of liberty and the name of the authority that deprived the person of liberty;
  - the name of the authority having decided the deprivation of liberty and the reasons for the deprivation of liberty;
  - the name of the authority controlling the deprivation of liberty;
  - the place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
  - elements regarding the physical integrity of the person deprived of liberty;
  - in the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the human remains;
  - the date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.
- The right of persons to inform their families or any other person of their choice of their capture, arrest or detention is provided for under both IHL and human rights law. Domestic law and regulations should thus ensure that persons deprived of their liberty, whatever the reason for their internment or detention, have the right to inform their families, at least, of their capture/arrest, address and state of health and adequate means of communication should be provided. This right should not be interpreted as restricting the right to correspond with the members of one's family.

- In situations of international armed conflict, capture/internment cards must be issued by the authorities for the purpose of establishing contacts between prisoners of war/interned civilians and their families.
- Capture card – The parties to a conflict which are holding prisoners of war are required to enable the latter to write a card direct to their families and to the CTA informing them that they have been captured. An individual capture card will contain in particular information relating to the prisoner's surname and first names, his State of origin, rank, serial number and date of birth, his family's address, and his captivity, address and state of health. Should a prisoner wish to refrain from revealing certain information, however, this must be respected.
- Internment card – This is modelled on the capture card and is adapted to the situation of civilian internees. It is also intended for the families and the CTA, and clearly identifies the general circumstances of the civilian internee by providing information notably on his/her internment, address and state of health, provided that the internee considers it appropriate to reveal these details.
- In the event of death, there is an obligation to provide a death certificate, to handle the human remains with respect and dignity, and to return the body to the family and/or to ensure burial.
- Protected persons under the Third and Fourth Geneva Conventions may be interned for the duration of hostilities (prisoners of war) or for imperative reasons of security (civilian internees). The Conventions provide for specific procedures in relation to the internment of such protected persons.

## ARTICLE 5

### **Rights of relatives of persons arrested, detained or interned**

- 1) The closest known relative, the counsel or the designated representative of a person deprived of liberty, shall receive from the competent authority the following information:
  - (a) the name of the authority having decided the deprivation of liberty;
  - (b) the date, time and location where the person was deprived of liberty and the location where the person was admitted to the place of deprivation of liberty;
  - (c) the name of the authority controlling the deprivation of liberty;
  - (d) the whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;
  - (e) the date, time and place of release;
  - (f) elements regarding the physical integrity of the person deprived of liberty;
  - (g) in the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the human remains.

Accurate information shall be provided without delay.
- 2) In the event of an enforced disappearance, any person with a legitimate interest, such as a relative of the person deprived of liberty, his/her representative or counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.
- 3) No one shall incur penal responsibility or be subjected to threats, violence or any form of intimidation for inquiring about the fate or whereabouts of relatives who are detained or interned or for maintaining private or personal contacts with them, regardless of the nature of the act for which a person was arrested, detained or interned or which he/she is suspected of having committed.

**COMMENTARY**

- The relatives of the victim have the right to know the truth regarding the circumstances of the arrest, detention or internment, the progress and results of the investigation and the fate of the disappeared person.
- In order to prevent persons from being unaccounted for, accurate information about the arrest and the place of detention or internment, including any transfers and release, should be made available without delay to relatives and legal counsels or representatives. Such an obligation for the detaining authority is recognized under several provisions of IHL, human rights law, and other international texts. These are based on:
  - the right not to be held in secret places or *incomunicado*;
  - the right for the person arrested to inform, or require the competent authorities to notify a relative or any other person of their choice of their arrest, address and state of health;
  - the right to the assistance of defence counsel of their choice;
  - the right to request and receive a medical examination and health care.
- No penal responsibility should be imposed on relatives for seeking information regarding the fate of a relative who is detained or interned, nor for maintaining private or personal contact with him/her. This right must be upheld no matter the nature of the act the person is suspected of having committed, even if it is criminal in nature or an act against State security.

## ARTICLE 6

### **Rights of missing persons**

The rights and interests of missing persons shall be protected at all times until their fate has been ascertained or their death recognized.

**COMMENTARY**

- By recognizing a special legal status for the missing, national law responds to needs regarding the legal rights and obligations of the missing person and the uncertainty and hardship faced by the family. It provides a framework and appropriate remedies to deal with everyday practical issues.
- Missing persons should be presumed to be alive until their fate has been ascertained. The foremost right of a missing person is that of search and recovery. Within his/her right to life and security, a missing person has the right to have a thorough investigation conducted into the circumstances of the disappearance until a satisfactory conclusion can be drawn as to his/her fate.
- While the fate of a person has not been ascertained, his/her legal status of absence should be acknowledged and a certificate offered to attest to the uncertain fate and to allow for the protection of his/her rights.
- A person should not be declared dead without sufficient supporting evidence. It is therefore desirable to provide for an interim period of absence before a death certificate is issued. The length of time that this period of absence endures after absence is declared should be reasonable, in order to allow for proper investigation of the circumstances of the person's disappearance and his/her fate. This interim period can be a function of the circumstances of the disappearance and the ability to investigate it. In the event the person is found alive, the certificate of absence should be annulled and the legal status of the person and his/her rights fully re-instituted.

- The rights and interests of missing persons, including their civil status, property and assets, must be protected at all times until their fate has been ascertained or their death recognized. In a legal system where missing persons are to be presumed to be alive until their fate has been ascertained or their death legally declared, provisional arrangements may be made for the management of the missing persons' property and assets. These should take into account the preservation of the missing persons' interests and the immediate needs of their relatives and dependents. Judicial or administrative control should thus be ensured, for instance, by the nomination of a temporary or provisional guardian over the missing persons' property and assets.
- If needed, a representative should be appointed to safeguard the interests of the missing person. The representative should be able to petition the relevant executive, administrative or judicial authorities if needed in respect of specific matters such as rights and obligations related to civil status or family concerns, and financial or property management issues, or any other considerations.

## ARTICLE 7

### Right of relatives to know the fate of missing persons

- 1) Everyone has a right to know about the fate of his/her missing relative(s), including their whereabouts or, if dead, the circumstances of their death and place of burial, if known, and to receive the human remains. The authorities must keep relatives informed about the progress and results of investigations.
- 2) No one shall incur penal responsibility or be subjected to threats, violence or any form of intimidation for inquiring about the fate or whereabouts of relatives, nor for maintaining private or personal contact with them if their whereabouts have been ascertained, regardless of the nature of the act they may have been arrested, detained or interned for or are suspected of having committed.

#### COMMENTARY

- The right of the family to know the fate of a missing relative is provided for under international human rights law and IHL.
- IHL imposes an obligation on each party to an armed conflict to take the necessary measures to clarify the fate of the missing person and to inform the family. This obligation can be met in part by investigating cases of disappearances that occurred on the territory under its control and keeping the relatives informed of the progress and results of the investigation.
- Both the right to know the fate of a missing relative and the correlative obligation of the public authorities to carry out an effective investigation into the circumstances surrounding a disappearance are recognized under international human rights law, notably through the protection of the right to life, the prohibition of torture and other forms of cruel, inhuman or degrading treatment and the right to family life.
- As time passes, the likelihood that persons who are unaccounted for will return diminishes. The responsibility of the authorities to provide information on the fate of the missing remains, but the focus is likely to shift towards the exhumation of gravesites and the identification and return of human remains.
- This change of approach is also reflected by the families who, with time, increasingly speak of the need to receive the human remains of their relatives. This is an important step in accepting the fact of their death and starting the separation and grieving process associated with burial ceremonies.
- No penal responsibility should be imposed on relatives for seeking information regarding the fate of a relative, nor for maintaining contact once the fate of the person has been determined. This right must be upheld no matter the nature of the act the person is suspected of having committed, even if it is criminal in nature or an act against State security.

# PART III – LEGAL STATUS OF MISSING PERSONS AND RELATED RIGHTS

## ARTICLE 8

### Recognition of absence

- 1) The law must recognize and establish the legal personality of the missing person.
- 2) In accordance with [*reference to national law*], a declaration of absence shall be issued at the request of any interested person or of the competent authority by the [*judicial authority*], if it is established that a person has been missing for a period of over [...] years.
- 3) The [*judicial authority*] may issue a declaration of absence upon presentation of a certificate of absence delivered according to the following paragraph.
- 4) A certificate of absence may be delivered by [*the competent administrative or military authority*]. It shall be considered as proof of absence for the purpose of administrative and pension claims.
- 5) The court shall designate a representative of the absentee. The representative shall manage the interests of the absentee in his/her best interests during the period of absence. He shall have the rights and obligations as defined in [*national law on guardianship*].
- 6) Where an interested person other than a relative requests a declaration of absence, a relative or the court-appointed representative may intervene and oppose such a declaration with the competent authority.

### COMMENTARY

- It is essential to recognize and attribute a legal status to a missing person. A declaration of absence should be issued at the request of relatives, other interested persons or the competent authority if it has been established that a person has been missing for a determined period of time. The minimum period of absence before a declaration of absence is issued should not be less than one year, but provision may be made for a shorter period with regard to particular events or circumstances.
- A representative, preferably with legal powers, should be appointed to protect the interests and see to the immediate needs of the missing person and his/her dependents. The representative must be entitled under the declaration of absence to preserve the rights of the missing person and manage property and assets in his/her interest. For the dependants, financial assistance by way of an allowance drawn from the assets of the missing person might be arranged when no public assistance is available. A declaration of absence should enable the heirs to take provisional possession of the missing person's estate, as would a declaration of death if the case so merits; however, provision should be made in the event of a missing person's return with regard to compensation/reparation, restitution, assistance and social care.
- A competent administrative or military authority should be granted the authority to issue a certificate of absence to enable relatives to assert their rights, in particular before administrative authorities. Such a certificate should be in a particular form to ensure its validity, bear the appropriate authentication of the competent authority and include a provision that it may be adapted or revoked to respond to a change in status of the missing person. A judicial validation of the certificate through a summary procedure (declaration of absence) is required to assert the rights of the missing person.

- Account must be taken of the particular difficulty of gathering and furnishing the necessary evidence/documentation in times of armed conflict or internal violence, and in post-conflict situations. Hence, provision should be made for the presentation of substitute or alternate evidence/documentation that may be given probative value, including attestations of absence established by military units, reliable local institutions or the ICRC (e.g. ICRC attestations based on tracing requests).
- The legal interests of missing persons should be adequately protected through the designation of an appropriate representative on his/her behalf. The designation can be made in the declaration of absence. In some cases it may be appropriate for the role of legal representative to fall to a State authority, which can then petition the court or other authorities in respect of specific matters such as custody/guardianship of minors, disposal of assets, access to bank accounts and use of income. In other cases, there may be a suitable person such as a spouse or parent who can deal with these issues alone, provided the ability to do so has official recognition, via registration or otherwise. It should be possible to revoke the authority of the legal representative should the missing person be located.
- The civil status of the missing person should remain as is during the period of absence. All related rights should be safeguarded and related responsibilities fulfilled through an appointed representative.
- Where an interested person other than a relative requests a declaration of absence, a relative should be able to intervene and oppose such a declaration with the competent authority. This would ensure the cautious treatment of the missing persons' assets and that these are administered responsibly at least during any period while there is no presumption of death of the missing person.
- A model certificate of absence is provided in Annex 1 of this document.

## ARTICLE 9

### **Rights of relatives regarding the legal status of missing persons**

- 1) The civil status of the spouse of a person declared missing shall not be modified before the absence or death of the missing person has been legally recognized in accordance with Article 8 and Article 20 of the present law.
- 2) As an exceptional measure, and in derogation of paragraph 1, in case both parents are missing or not present, there shall be established provisional guardianship over under-aged children of such persons within 15 days from the date of submission of the request for tracing the missing person to the competent State authority, taking account of the best interest of the child as the primary consideration.
- 3) In the event the absence has been officially recognized and after the expiration of an interim period of [...] year(s) following such a declaration of absence, the marriage shall be ended at the request of the surviving spouse. In the event death has been officially recognized, the marriage shall be terminated at the request of the surviving spouse.
- 4) In the event absence has been officially recognized, a relative of the missing person may request authorization temporarily to manage the missing person's property and assets before a competent court. When absence has not been officially recognized, a relative of the missing person may request before a competent court and exercise temporary management of the missing person's property and assets, where this is in the best interest of the missing person.
- 5) Relatives of the missing person who can prove their material dependence on the missing person's income should be entitled to submit a request to the authority of the competent court claiming that an allowance be drawn from the assets of the missing person in order to meet their immediate needs.
- 6) Where an interested person other than a relative requests a certificate of absence, the relatives may intercede on behalf of their own rights and oppose such a declaration with the competent authority.



**COMMENTARY**

- The civil status of the spouse and children should not be modified before the death of the missing person has been legally recognized.
- The spouse of the missing person should be considered as remaining married unless the marriage is terminated or annulled. Consideration may be given to providing for the possibility of such termination upon petition of the spouse as long as the interests of the missing are taken into account. This may be possible through the operation of existing laws on divorce or with a suitable adjustment to them.
- The interests of the child should receive particular attention, as there may be no second parent or care giver in lieu of the person who has been declared missing. A provision may ensure that children are adequately protected in these situations, in the manner which best suits their needs. It is recommended that measures be taken for the provisional custody of the child immediately after the parent(s) have been reported missing and that adoption remain consistent with the 1989 Convention on the Rights of the Child and does not occur against the express wishes of the child, his/her relatives or legal guardians.
- A number of issues surrounding the management of property of persons unaccounted for, whether situated in the country or abroad, may be raised by relatives of missing persons. Property may have been lost or destroyed. Real property is often the family's most important and valuable asset and losing title or possession may severely affect the economic situation of the affected family. Issues related to property claims will be different depending on the nature of the situation. They may involve foreign elements in case of armed conflicts or displacement of population within or across borders. At least in the shorter term, the family will need to be able to manage the assets of the missing person which were generating income or providing shelter.
- In a legal system where missing persons are presumed to be alive until their fate has been ascertained or their death legally declared, provisional arrangements may be made for the management of a missing person's property and assets. These should take into account the immediate needs of the missing person's relatives and the preservation of the missing person's interests. Judicial or administrative control should thus be ensured, for instance, by the nomination of a temporary or provisional guardian over the missing person's property and assets. This representative would ideally be able to see to the immediate rights and obligations of the missing person and to the needs of his/her dependents. If possible, financial assistance by way of an allowance drawn from the assets of the missing person can be arranged when no public assistance is available.

## ARTICLE 10

### **Right to financial assistance and social benefits for the missing and their relatives**

- 1) The competent authority shall assess and recognize the specific financial and social needs of missing persons and their families.
- 2) The right to financial assistance and social benefits is an individual and non-transferable right.
- 3) In accordance with the present law and on condition that absence or death has been recognized, dependents of the missing person who were materially supported by him/her who came to be in need of material support following his/her disappearance, shall have the right to monthly financial assistance. A special fund shall be established for that purpose.
- 4) The acceptance of public assistance shall not be considered as a waiver of the right to obtain reparation or compensation for damage resulting from a violation of national or international law by individuals or by State authorities or officials.

**COMMENTARY**

- In many instances, the missing persons are men who served as the family breadwinner, so dependent women and children are more vulnerable. On the basis of a needs assessment, authorities should address the specific needs of the families and dependents of missing persons who have been declared absent in relation to an armed conflict or internal violence. They should be entitled to the same social or financial benefits provided for other victims. A certificate of absence as described in Article 8 or an attestation issued by the ICRC, for instance, should be sufficient for any claim for assistance.
- Assistance should also be provided, if needed, to persons who have been unaccounted for, for a period of time. During their absence, their rights and financial assets including property should be duly safeguarded. Missing persons returning after a prolonged period of absence should be entitled to assistance for their rehabilitation and reintegration into society, in addition to direct financial support. The fiscal regime applicable to the missing person's revenues and property should also take into account the period of absence.
- There should be no adverse discrimination between the dependents of service persons and civilians, on the basis of gender. In many instances, the missing persons are men who were the family breadwinner, so as such dependent women and children are more vulnerable and thereby merit special protection.
- Basic social services should be offered to the dependents of missing persons. This may include: an allowance for basic material needs; housing benefits and employment opportunities; health care; an education allowance for the children; and legal assistance. When there is a system of social security, families of the missing should have access to it.
- A mechanism for needs assessment and processing of requests for assistance must be put into place and be readily accessible to the victims and their families.
- A request for financial assistance should be submitted to the relevant State or local authority in charge of social welfare in the place of residence of the requesting person, which shall study the request and issue an opinion. The request and the opinion should then be transmitted to the institution providing the assistance, which should take the final decision within a reasonable delay (for example, 10 to 15 days) as to the assistance granted. The decision should be subject to appeal before an administrative tribunal.
- To ensure due implementation of the present law, the relevant State or local authority should submit the list of processed requests to the [authority], which should monitor the processing of such requests by State or municipal authorities.

# PART IV – TRACING MISSING PERSONS

## ARTICLE 11

### Preventive measures of identification

- 1) In accordance with applicable national law, the competent national authorities shall ensure that all persons receive a personal identity document or any other means of identification upon request. Children shall either have their own personal identity document or be registered on their parents' identity documents.
- 2) In times of armed conflict or internal violence, the competent national authorities shall ensure that persons at risk, including in particular unaccompanied children, elderly and disabled persons, refugees and asylum seekers, are registered individually and as soon as possible, in compliance with the rules governing the protection of personal data.
- 3) The competent authority shall issue regulations providing for the issuance, registration and delivery of identification cards and tags to military and associated personnel, including:
  - (a) members of the armed forces and other persons liable to become prisoners of war;
  - (b) medical and religious personnel of the armed forces;
  - (c) members of the armed forces and military units assigned to civil defence.
- 4) The competent authority shall issue regulations providing for the issuance, registration and delivery of identification cards to civilian personnel, such as:
  - (a) civilian medical personnel and civilian religious personnel;
  - (b) permanent or temporary staff of civilian hospitals;
  - (c) civilian civil defence personnel;
  - (d) personnel engaged in the protection of cultural property;
  - (e) journalists engaged in dangerous professional missions, provided that they fulfil the conditions constituting that function.

### COMMENTARY

- It is of paramount importance to adopt identification measures to help prevent disappearances and facilitate tracing in the event a person does go missing. Such measures may be adopted or needed in peacetime, in time of armed conflict or other situations of violence, or in post-conflict situations, depending on the measures required. However, the legal and institutional framework should already be established in peacetime, so that the different procedures can be activated when needed with the least delay.
- Under IHL, measures for identifying persons are closely connected with the concept of protection, which constitutes the very basis of IHL instruments. It is therefore essential to properly identify persons who are entitled or likely to be entitled to protection under IHL.
  - *Identity card* – This is the basic document with which the status and identity of persons who have fallen into the hands of the adverse party can be determined. It must be issued to any person liable to become a prisoner of war and must contain at least the owner's surname, first name, date of birth, serial number or equivalent information, rank, blood group and rhesus factor. As further optional information, the identity card may also bear the description, nationality, religion, fingerprints and photo of the holder.

- *Specific identity card* – This must be issued for military personnel carrying out special tasks or for certain categories of civilians. It should contain the basic information plus certain other particulars concerning the assignment, such as the distinctive emblem of the activity, the person's training and position, and the stamp and signature of the competent authority. The categories concerned by these measures include civilian medical and religious personnel and those attached to the armed forces, civilian civil defence personnel and journalists engaged in dangerous professional missions, provided that they fulfil the conditions constituting that function.
- *Identity disc* – The authorities may supplement the above measures by providing identity discs. The identity disc is worn permanently round the neck on a chain or strap. It should be made, as far as possible, of durable, stainless material which is resistant to battlefield conditions. The inscriptions it bears are similar to those on the identity card and should be indelible and fade-proof.

It is also important that the issuing and use of the ID, or the information appearing on it, should not be likely to give rise to arbitrary or unlawful discrimination. It should be possible for a personal identity document or any other means of identification to be available to any person on request.

- The usefulness and importance of the means of and standing operating procedures for identifying individuals should be explained, in particular, in the course of training for military personnel and other categories of persons specifically concerned. Special attention should also be devoted to this aspect when IHL is being disseminated to a wider public.
- IHL has provided specific measures for identification of children, especially those under 12 years old, who should either have their own personal ID or be registered on their parents' ID. If children have been evacuated to a foreign country for compelling reasons of health or safety, the State arranging for the evacuation and, where appropriate, the authorities of the host country must draw up an information card and send it to the CTA with a view to facilitating the children's return to their families.
- Necessary measures should be taken to ensure that all persons at risk are registered individually in compliance with the rules governing the protection of personal data.

## ARTICLE 12

### State authoritative body for tracing missing persons

- 1) Within 60 days from the date the present law enters into force, an independent and impartial State authority for tracing missing persons and identification of human remains (hereinafter the *[authority]*) shall be established.
- 2) The *[authority]* shall:
  - (a) receive tracing requests and, on the basis of submitted tracing requests, collect, check and provide to the applicant and State authorities available information and facts on disappearance, as well as information on the whereabouts and fate of a person, in accordance with the national legislation and with the standards on the protection and management of personal data laid out in the present Law;
  - (b) be responsible for the operation of a Registry of data (hereinafter referred to as the Registry) as established under Article 14 of the present law and adopt necessary regulations to this end;
  - (c) take appropriate measures to ensure the right of persons deprived of freedom to inform their relatives of their condition, whereabouts and the circumstances of their detention/imprisonment in accordance with Article 4 of the present law;
  - (d) ensure that a proper search for the dead is conducted in collaboration with the competent national or local authorities, as soon as practical during and after any event, including an armed conflict, likely to have caused a large number of deaths or disappearances;
  - (e) ensure the adoption of all preparatory measures required for the establishment and operation of a National Information Bureau in the event of an armed conflict or in case of occupation in accordance with Article 13 of the present law;
  - (f) take measures to ensure the enjoyment of rights by relatives of the missing person in accordance with the present law and other legislation;
  - (g) perform any other tasks required by its duties.

- 3) The [authority] shall operate and perform its functions through both a central office and local representations. The scope of competence and procedure for the operations of the [authority] shall be specified by its statute.
- 4) Information that has been collected or submitted to the [authority] before the present law enters into force may, at the discretion of an applicant, also be submitted to the [authority] after the law's entry into force and shall be considered as acceptable should it meet the minimum data requirement as provided in Article 2, paragraph 7 of the present law.
- 5) The attributions of the State authority established under this provision are without prejudice to the power of national or international courts or other bodies for tracing missing persons and identifying human remains.

## COMMENTARY

- Consideration may be given to the designation of a competent authority, the [authority], to deal with missing persons and their families. This may be an existing office within a specific government ministry or a specially created office. The institutional necessities for the tracing of missing person will obviously vary according to the scope of application of the law, including the choices made regarding the personal, temporal and material scope of the law.
- The [authority] should have the competence to receive tracing requests for persons who are unaccounted for, to carry out an investigation into the circumstances surrounding the missing person and to reply to the applicant.
- The [authority] should also be competent to act as an interface with other State authorities for all issues related to the search for missing persons, the identification of human remains, and the protection of the rights of missing persons and their relatives.
- It is essential that the States fulfil their obligation to institute National Information Bureaux. This will ensure that information on persons deprived of their freedom is available and forwarded. It will also serve to prevent disappearances, to reassure the families about the fate of their relatives and to secure the fundamental guarantees to which everyone is entitled.

# ARTICLE 13

## National Information Bureau

- 1) The [authority] must ensure that within 60 days from the date the present law enters into force, a National Information Bureau (hereinafter the [NIB]) shall be set up under the authority of [name of the national authority]. The NIB must be operational in the event of armed conflict of an international or non-international character.
- 2) The NIB shall be responsible for centralizing without adverse distinction all information on the wounded, sick, shipwrecked, dead, protected persons deprived of their liberty, children whose identity is in doubt and persons who have been reported missing.
- 3) The structure, membership and working procedure of the NIB, and the coordination mechanisms for the collection and transmission of information to the appropriate authorities, including the Registry established by the State authority, and to the CTA, shall be defined by [regulations].

## COMMENTARY

- The registration of persons detained or interned is perfectly consistent with the law's objective to protect persons not or no longer participating in the hostilities. Because of the tasks they are required to perform and the information they have to collect and transmit to the relatives of persons deprived of their freedom, the National Information Bureaux play a pivotal role in preventing disappearances. In addition, the establishment of a NIB, as provided for in the 1949 Geneva Conventions, is one means of ascertaining the fate of those who have gone missing on the battlefield or in enemy-controlled territory, and thus of allaying their families' anxiety.
- The NIB must be operational as soon as hostilities break out. It is therefore advisable to lay the groundwork for its establishment in time of peace. If it does not already exist, the authority must ensure it is established. It must fully recognize the role of the NIB during armed conflict, and may also be authorized and structured to play a larger role in supporting the search for missing persons in a wider context, during times of peace and internal violence.
- The NIB serves as a link between the various parties to an armed conflict. They have to provide it with certain information on prisoners of war and other protected persons as quickly as possible. The NIB must immediately forward that information to the States concerned (in the case of prisoners of war) or to the State of which the protected persons are citizens or on whose territory they reside (in the case of protected persons who are kept in custody for more than two weeks, subjected to assigned residence or interned), via the CTA. The State that ultimately receives the information must forward it as quickly as possible to the families concerned. The NIB must also reply to all inquiries it may receive regarding prisoners of war or protected persons. In the case of prisoners of war, the NIB may make any inquiries necessary to obtain information that is not in its possession.
- As for the nature, composition and working methods of the NIB, there are no strict regulations in IHL treaties. The NIB would normally be part of a governmental administration. Since the State is responsible for ensuring that the NIB performs its duties, it must be able to exercise control over it. The State may choose to institute one or two NIBs. If a government administration is to be in charge, it may be logical to institute one NIB for civilians and another for the military, since these two categories of persons are usually dealt with by two different sets of authorities.
- The facilities granted to the NIB must be determined in advance, by legislative or regulatory means. Such facilities include:
  - exemption from postal dues of the correspondence, relief shipments and remittances of money addressed to prisoners of war and civilian internees or despatched by them;
  - so far as possible, exemption from telegraphic charges (or, at least, greatly reduced rates);
  - the provision of special means of transportation organized by the Protecting Powers or by the ICRC to convey the correspondence, lists and reports exchanged between the CTA and the NIB;
  - the provision of the necessary accommodation, equipment and staff to ensure the NIB's efficient operation.
- Depending on the category to which the protected persons belong, for example, sick, wounded, shipwrecked or dead combatants, prisoners of war or protected civilians, the NIB may collect the information, documents and objects which may assist in their identification. This includes information on their capture, state of health, wounds, sickness or cause of death and changes of situation (transfers, releases, repatriations, escapes, admissions to hospital, deaths). It may also be necessary to collect notifications that escaped prisoners of war have been recaptured, certified lists of all prisoners of war who died in captivity, certificates of death or duly authenticated lists of the dead, information indicating the exact location and markings of graves and articles of value (including foreign currency and documents of importance to the next of kin such as last wills or other articles of intrinsic or sentimental value).
- In respect of human rights law, an alternative mechanism of tracing may be set up allowing for a petition to a local court that could operate in times of peace or internal conflict.

# ARTICLE 14

## Registry of information on missing persons

- 1) With a view to ensuring effective and speedy tracing and clarification of the fate of the missing persons, the Registry of centralized data on the missing persons shall be established.
- 2) The Registry shall accumulate and centralize data on the missing persons to assist in the process of establishing their identities, and the location and circumstances of their disappearance.
- 3) The data entered into the Registry shall be subject to independent, impartial and thorough verification of their accuracy and concordance with information from official records on the missing persons kept in [*name of the State*].
- 4) All State authorities of [*name of the State*] must afford all necessary assistance and cooperation to the [*authority*] to facilitate the operation of the Registry.

### COMMENTARY

- The information about missing persons should be located in a centralized institution, to give a coherent overview of the scope of the problem, to assist with the location of missing persons and to give a reference point to other authorities, including foreign authorities, which may be more readily able to identify than the local reporting authority. This is particularly the case where, due to conflict or internal disturbances, families may move away from the area in which the initial report was made; they should not have to return there only for administrative reasons relating to the person who is missing if this can be addressed elsewhere. Every effort should be made to ensure data recorded locally are compiled centrally as soon as possible to avoid confusion and contradiction.
- The Registry accumulates and centralizes data on the missing persons to establish their identities, and the location and circumstances of their disappearance. These data are both administrative, such as name, age, place of residence, and qualitative, including professional details, activities and known whereabouts.
- The introduction and maintenance of safeguards in conformity with the applicable principles for the collection and processing of information relating to missing persons and their families should not put a particular burden on national authorities or those involved in collecting or processing the information. Without them, however, a significant amount of information, often of a highly sensitive nature, is potentially vulnerable to inappropriate use and this may place the person to whom it relates, or a family member, in danger.

# ARTICLE 15

## Submission of a tracing request

- 1) Any interested person may report a missing person immediately and submit a request for tracing directly to the State authority established under Article 12 of the present law or through designated local authorities.
- 2) The powers of the [*authority*] to receive such requests and to undertake the tracing of the missing persons shall not be prejudicial to the powers of other State authorities in charge of criminal prosecution.
- 3) The [*authority*] shall ensure that procedures to report that a person is missing are widely known and facilitated.
- 4) The person submitting the tracing request is required to provide minimum data on the missing person's identity, as provided by Article 2, paragraph 7 of the present law. In case such minimum required data are not provided, the person who made the request shall provide additional information within a reasonable time.

- 5) Requests to trace a foreign citizen may be submitted by the foreign citizen's relatives and by the relevant authorities of the missing citizen's State of citizenship in accordance with the same procedure as for [name of the State] citizens, if:
  - the missing person had temporary/permanent residence on the territory of [name of the State];
  - the missing person did not have temporary/permanent residence on the territory of [name of the State] but the applicant can provide reliable information that the disappearance took place on its territory.
- 6) Tracing requests that have been submitted to the authorities of the [interior or other competent ministry] before the present law enters into force may, at the discretion of an applicant, also be submitted to the [authority] after the law's entry into force and shall be considered as acceptable should they meet the minimum data requirement as provided by Article 2, paragraph 7 of the present law.

## COMMENTARY

- Registration of a tracing request is a commitment to do everything possible to respond to a report that a person has gone missing. It may be impossible to clarify the fate of all missing persons at certain moments due to circumstances, such as instances of ongoing violence that pose a threat to general safety. However, this should not *de facto* determine that no cases of missing persons be registered or investigated at all. On the contrary, an active process must be established and facilitated by the [authority], with special emphasis on preventing persons from going missing.
- In most cases, it will be necessary to institute a procedure through which persons can be reported missing, registered and consequently have legal effects. The report that a person is missing may coincide with the denunciation of a crime (e.g. kidnapping), but procedures should exist to register the person as missing whether or not that person may also be the victim of a crime. Where a possible criminal act has been notified to the authorities, they should begin to investigate in the usual manner.
- A wide range of persons should be able to register the fact that a person is missing. National authorities should ensure that any person with a legitimate interest may register a missing person. This includes family members and dependents, as well as legal representatives of the missing person or the family. However, it may also include other persons who are able to demonstrate a legitimate interest, such as friends and neighbours, or any person who can bear credible witness that a person is missing. Any request for such registration will of course need to be subject to challenge if information is presented to show the whereabouts of the person, or if the missing person comes forward.
- To facilitate reporting and registration, national authorities may wish to designate local institutions (police or others) as the appropriate authority for such reports. In many cases this will be the nearest one to the residence of the missing person or place where the person was last seen, but it should also be possible to make the registration elsewhere when there are grounds for doing so. National law may wish to enumerate these grounds but, if it does so, it should leave open the possibility of other reasonable grounds being adduced. These may include the place of residence of the family where it is different from that of the missing person.
- The reporting should be possible as soon as there are concerns about the missing person. There normally should not be a time lapse prescribed, however, if one does exist, it should be reasonable and may depend on the circumstances reported. A record should be kept of any attempt to report a person missing regardless of the time at which it is made. The time factor with respect to the point at which any legal effects may come into application should be clearly established.
- Comprehensive information relating to the missing person should be collected at the time of registration. It is important to ensure that a sufficient number of details regarding the missing person and the circumstances of the disappearance are recorded at the moment of reporting as important details may be forgotten with the passage of time. In addition to basic information such as name, age and gender, it is essential to note the clothes worn at last sighting, the place of last sighting, the reason why the person is thought to be missing, and details of family members and of the person making the report. It should be sufficient that the person making the report is able to identify the person deemed to be missing and to give the grounds on which the concern that the person is missing is based, so registration should not be prevented if information is missing.
- Information collected should not be detrimental to the person reported missing. While it should be shared amongst the appropriate and necessary authorities, all information should be protected once provided.



# ARTICLE 16

## Cessation of tracing

- 1) A tracing request is considered settled when the person sought has been located and the family and relevant authorities have been duly informed.
- 2) In case a missing person is declared dead and his/her remains are not found, the tracing procedure shall not be terminated unless requested by the person who submitted the tracing request.

### COMMENTARY

- A tracing request may be settled in the following cases.
  - The person sought has been located. A missing person should be deemed identified when the identification procedure clearly establishes that physical or biological characteristics of the person, corpse or human remains match those of the missing person or his/her whereabouts are established. The identification procedure should be carried out pursuant to the legislation in force.
  - The inquirer has been informed that the missing person has been located, whether or not contact can be re-established.
  - In case of death, reliable information on the death of the person has been transmitted to the family and the human remains have been returned, if possible, or handled with dignity and respect with a proper burial. In the absence of human remains, the official transmission of all reliable information to interested parties is essential.
  - Upon settlement of a tracing request, all personal data collected with a view to settling the case should be treated in accordance with the law on the protection of personal data, including their deletion or destruction, as the case may be.

# ARTICLE 17

## Accessing information on missing persons

- 1) State authorities in charge of foreign affairs, defence, justice, the interior and local governments within their respective competence shall cooperate with, provide available information to and afford necessary assistance to the [authority] in the performance of its tasks, in particular in tracing and identifying missing persons.
- 2) Access to the information should be granted to the individual to whom the information relates, relatives and legal representatives of the missing persons, State authorities and other organizations authorized to trace and recover missing persons. The data shall be made available in accordance with the relevant legislation on data protection.
- 3) The information shall not be subject to any restrictions except those which are provided by law and necessary to protect national security or public order. Where the requested authorities refuse to provide information on such grounds, all available cooperative means shall be undertaken so as to provide to the [authority] the information strictly required to trace the missing person or identify human remains.
- 4) The [authority] and other concerned State authorities shall cooperate with the ICRC and the National Red Cross/Red Crescent Society, in accordance with their mandates, with a view to tracing the missing persons and protecting the rights of their families.

- 5) A request for the data on the missing person may be submitted to the [authority] by a relative of the person or by State authorities. The [authority] shall study and decide on such a request within 30 days from the date of its submission.
- 6) A person unsatisfied with the decision of the [authority] on his/her request may refer this decision to the court within 30 days from the date of its adoption.

#### COMMENTARY

- In order for the [authority] to fulfil its tasks, it is essential that cooperation with other public agencies and bodies be effective. Much of the information that is relative to the tracing and identification of missing persons and to be provided to the inquirer will come from various governmental agencies/ministries at the national or local level. There must be a clear commitment and active support of all relevant ministries to fulfil their clearly defined roles to collect and process information related to missing persons.
- Access to personal data should be granted to the individual to whom the information relates. All persons have to be informed of the existence, use and disclosure of personal information relating to them, and this includes the missing persons and their relatives. The right to obtain a copy and to challenge the accuracy and completeness of the data and to have details amended as appropriate should also be provided for.
- The controller of the files should be allowed to deny access, in part or totally, where the information sought contains references to other individuals or sources of information received in confidence, including information protected by confidentiality agreements concluded for a humanitarian purpose. Access may also be regulated when it can be expected to seriously threaten an important public interest (national security, public order, etc.), be seriously detrimental to the interests of other persons or impede or jeopardize the purpose for which the information was collected, including humanitarian purposes.

## ARTICLE 18

### Protection of data

- 1) The data kept in the Registry may not be disclosed or transferred to persons for purposes other than those for which they were collected in accordance with the present law.
- 2) Procedures for the use, entry, exclusion and exchange of data, their verification and management shall be determined by Regulations on the Registry.

#### COMMENTARY

- Information relating to the missing person must be handled appropriately with respect to the privacy of that person and his/her family. Appropriate data protection rules and practices at the national level can ensure that all personal information remains sufficiently protected in terms of who has access and for what purpose and that access to it is permitted when the humanitarian need requires. Rules regarding data protection need to balance these potentially conflicting needs and will require an explicit or inherent flexibility in any measures, administrative or legal, that operate at the national level.
- In many national systems, elaborate legal provisions for the protection of personal data and privacy already exist. However, often the most sophisticated systems are uncertain about how to address issues relating to missing persons and their families and few specific provisions exist in this regard. While some national laws specifically protect the data of living people only, when dealing with missing people it is to be assumed that they are alive and that their data should be protected. Where national law does not protect the information on dead people, special consideration may be due in the case of death following a period of being missing, as the information may continue to be deemed personal by the family.

- Measures must ensure protection of information and the privacy of missing persons and their relatives, as well as ensure that the data are not used for any purpose other than that intended. The use for which data are being collected should be clearly established at the time of collection. The consent of the individual concerned, whether it is the missing person or person providing the information, is understood as also comprising consent to the specific purpose for which the collection of the data is intended. Such purposes include: establishing the identity, location, conditions and fate of persons reported missing; establishing the identity of unidentified human remains; providing information to families concerning a missing or deceased relative; and, as the case may be, contributing to the administration of justice. Information deemed to be sensitive, such as DNA information collected from family members for matching human remains, is increasingly used in relation to criminal investigations and proceedings as well as in situations of natural disaster, accidents, and the search for missing persons. National legislation should normally provide for the situations in which DNA samples may be taken, the method for doing so and the processing of the data in the framework of the intended purpose. It is important to ensure that a DNA analysis performed for the purpose of identification of a missing person be separated from any other use, for example, in criminal proceedings, otherwise it may inhibit recourse to this form of information-gathering on the part of relatives and interested parties.
- At the same time, these measures of protection must not in any way serve as an obstacle to locating or identifying the missing person. It is imperative, therefore, that within organizations that collect, process or store personal data, clear procedures be put in place to ensure respect for privacy together with a system of accountability and control. Implementing measures must include provisions addressing a failure to comply that outline significant consequences.
- Any transfer of personal data to a third party will have to be assessed in light of the specific purpose for which the data were obtained, of the specific purpose of the data collection or information request by the third party, and of the guarantees of protection that the third party can offer. Whether the data subjects would have given such information to the third party and whether the consent to the collection and processing of the data comprised an implicit consent or otherwise for such a transfer should be also assessed.
- Personal data that have served the purpose for which they were collected should be deleted or destroyed, thus preventing any improper or inappropriate use in the future. Specific information collected or processed for the purpose of locating a missing person or identifying human remains is no longer necessary once the person has been located or the remains identified. It should therefore be destroyed unless there is an overwhelming humanitarian need to retain it for a further and definite period of time. Alternatively, the information can be depersonalized so that it is no longer possible to identify an individual on the basis of it. This may be done for statistical or historical purposes. Personal data that have lost their personal character are no longer protected as personal data.

# PART V – SEARCH FOR, RECOVERY AND TREATMENT OF THE DEAD

## ARTICLE 19

### Obligation for proper search and recovery of the dead

Once the fate of a missing person has been determined to be death, all available means must be undertaken to ensure recovery of the body and any personal effects.

#### COMMENTARY

- The death of a missing person may be determined through the discovery of human remains or presumed as a result of other evidence, events or certain defined situations, or may be presumed after the passage of time. It is not generally desirable to provide for an automatic presumption of death except in clearly defined circumstances which suggest that death was inevitable. In such cases, a reasonable period of time should have passed since the registration of the missing person. Death may be presumed after the passage of a certain time period (probably a few years) and at the request of the legal representative or spouse/family, or the competent authority. For reasons of certainty, testamentary and otherwise, it is probably not desirable for a legal status of missing to be indefinite and there should be some provision for the determination of the status, if not by request then perhaps when the missing person would have reached a particularly old age.
- In situations of internal violence, domestic law and regulations must provide for an effective official investigation into the circumstances of death when any person is killed or appears to have been killed as a result of the use of force by agents of the State. In international and non-international armed conflicts, the competent authorities must adopt adequate procedures for providing information on identity, location and cause of death to the appropriate authorities or to the families.
- The change in status from a missing person to a confirmed case of death obliges the State authority to undertake all necessary measures available to recover the human remains. This process can also extend to the personal effects that may be associated with the victim.
- The [authority] should identify the deceased and inform the relatives of the discovery. All records should be brought up to date and synchronized, including the NIB and the Registry, with reference information about persons deceased under their authority or control, whether identified or not, the location of human remains and graves, and the issuance of death certificates. At this time, the legal status, related rights and need for financial assistance of the dependents of the deceased may need to be re-evaluated.
- A declaration of death should not be issued before all available measures or actions to ascertain the fate of the missing person have been taken, including public notifications that a declaration of death is to be issued. Provision should be made for the consequences of the return of missing persons who have been legally declared dead.
- All necessary measures should be taken to ensure proper handling of the remains and personal effects of the deceased. Maintaining dignity and respect is of utmost importance. The remains should be returned to the family, if possible. If not, a proper burial should be ensured.

# ARTICLE 20

## Declaration of death

- 1) A declaration of death shall be issued at the request of any interested person or of a competent State authority by [competent national, administrative or military authority], if it is established that a person has been missing or declared absent for a period of over [...] year(s). If someone other than the relatives requests a declaration of death, the relatives may oppose such a declaration with the competent national authority.
- 2) A declaration of death shall not be issued until such time as all available measures or actions to ascertain the fate of missing persons have been taken, including public notifications that a declaration of death is to be issued.

### COMMENTARY

- A declaration of death may be issued at the request of any interested person or the competent authority. If someone other than the family requests a declaration of death, the relatives should be allowed to oppose such a declaration. Such a declaration should not be issued before all available measures or actions to ascertain the fate of the missing person have been taken, including public notifications that a declaration of death is to be issued.
- A declaration of death and a death certificate should be issued by a designated judicial or other competent authority. The courts in the missing person's place of residence or in the family's current place of residence should be competent to hear a request for a declaration of death. Account must also be taken of the particular difficulty of accessing the court and gathering and furnishing the necessary evidence/documentation in times of armed conflict or internal violence, and in post-conflict situations. Hence, additional provision should be made for circumstances where a medical practitioner or other competent person can issue a death certificate within a reasonable time. Also, provision should be made for the presentation of substitute or alternate evidence/documentation and it may be appropriate for attestations of absence/death established by military units, reliable local institutions or the ICRC to be given probative value (e.g. ICRC attestations based on tracing requests).
- A death certificate issued following a finding of actual or presumed death should have all of the effects with regard to a missing person as it does with regard to any other person. It should also bring to an end any special legal arrangements made to address the fact that a person was missing. For example, a spouse should be free to remarry and inheritance provisions may take their normal course. A provision should be made in the event of a missing person's return with regard to compensation/reparation, restitution, assistance and social care.
- A model death certificate is provided in Annex 2 of this document.

# ARTICLE 21

## Treatment of human remains

- 1) The competent authority shall ensure that the dead are treated with respect and dignity. The dead must be identified and buried in individually marked graves in sites that are identified and registered.
- 2) If exhumations are required, the competent authority shall ensure that the identity of human remains and cause of death are established with due diligence by an official qualified to perform exhumations and post-mortem examinations and to make a final determination.
- 3) In situations of international armed conflict, exhumations shall be permitted only:
  - (a) to facilitate the identification and return of the remains of the deceased and of personal effects to the home country upon its request or upon the request of the next of kin;

- (b) where exhumation is a matter of overriding public necessity, including cases of medical and investigative necessity, notice shall be given to the home country of the intention to exhume the remains together with details of the intended place of reburial.
- 4) Human remains and personal effects shall be returned to the families.

## COMMENTARY

- The treatment of death is normally subject to legal regulation within the domestic framework. However, this national legislation should contain provisions that cover the situation of the dead and human remains in the case of missing persons. The law adopted to address the missing should subsequently contain a provision referring to this national legislation.
- Questions concerning the circumstances of death, or at times the number of possible dead, or the fact that the deaths may have occurred many years ago, may lead some to suggest that the normal rules may not apply. While these are factors that must be taken into account, the basic proposition should be that normal handling is appropriate except where the authorities can invoke a well-founded reason to act differently. Any separate procedure must still take into account the rules of international law and the basic need to ensure respect for the dead and the needs of their families.
- In addition, the domestic rules of criminal procedure and investigation should provide that information collected during exhumations that might help identify the victims of armed conflict or internal violence is forwarded to the authorities responsible for identifying the victims. Such rules should also ensure that all information/evidence gathered on deceased persons during judicial proceedings or investigations is forwarded directly to the family or to the ICRC, the latter acting either as an intermediary or to ensure that the information is properly stored pending transmission to the families.
- When following up the discovery of unidentified bodies and human remains, however old and wherever found, there should be an awareness that their identities may subsequently be confirmed and their treatment should as far as possible be the same as for an identified corpse.
- The discovery of burial sites can be important not only in tracing missing persons but also in the identification of the commission of crimes and their possible subsequent prosecution. As such, exhumations should be performed only with the proper authorizations, and according to the conditions specified in law. Normally, the skills of a fully qualified forensic specialist should be employed and a framework provided for the type of professional qualifications necessary to carry out or supervise any activities that involve the handling of human remains.
- Ethical rules of conduct commonly accepted by the international community on the use of means of identification, in particular for investigations carried out in an international context, must be upheld and should be promoted and/or adopted by the competent authorities. The procedures of exhumation and post-mortem examination should respect the following principles.
  - At all times, the dignity, honour, reputation and privacy of the deceased must be respected.
  - The known religious beliefs and opinions of the deceased and his/her relatives should be taken into consideration.
  - Families should be kept informed of the decisions in relation to exhumations and post-mortem examinations, and of the results of any such examination. When circumstances permit, consideration should be given to the presence of the families or of family representatives.
  - After post-mortem examination, the remains should be released to the family at the earliest time possible.
  - It is essential that all information be collected for the purpose of identification whenever exhumations are performed; regulations and procedures should be in conformity with the principles governing the protection of personal data and genetic information; it is important to preserve evidence conducive to identification and that may be required for any criminal investigation, whether under national or international law.
- Depending on the apparent circumstances of the death or deaths concerned, overall responsibility for the protection and recovery of the remains should be allocated to a specific authority, in cooperation with others as appropriate. In this way, it is more likely that a clear chain of responsibility, authority and accountability will be established. There should be a clear form of authorization for the operation of recovery, including appropriate health and safety regulations.

# ARTICLE 22

## Burial and exhumation

- 1) Missing persons' relatives shall have the right to demand that the places of burial and exhumation of the missing persons be marked.
- 2) The marking of the place of burial or exhumation shall be within the competence of the [authority] after establishing the identity of buried persons or their remains.
- 3) The [authority] shall issue a permit for putting up a memorial plaque or some other commemorative mark. Issues concerning the marking of burial or exhumation sites shall be governed by regulations adopted by the [authority] within 60 days from the date of entry into force of the present law.
- 4) The [authority] shall ensure the existence and functioning of an official graves registration service to record the particulars of the dead and their burial. This service should extend to the information regarding protected persons in international armed conflicts.

### COMMENTARY

- The remains of those who have been killed in action and of other dead persons must be disposed of in compliance with the rules of international law, in particular with regard to the search, collection, identification, transportation, disposal or burial, and repatriation of the deceased.
- In all circumstances, applicable procedures, directives and instructions should respect *inter alia* the following principles.
  - The dead must be treated with respect and dignity.
  - The identity of human remains and the cause of death should be established with due diligence, and all available information should be recorded prior to the disposal of the remains. A public official or competent person, preferably a trained forensic specialist, is to be designated to perform post-mortem examinations and to make the final determination as to identity and cause of death. Commonly recognized international ethical standards of practice must be adhered to during this process.
  - The burial should be preceded where possible by a medical examination and a report should be prepared.
  - Burial should be in individual graves, unless circumstances require the use of collective graves.
  - The dead should be buried where possible according to the rites of the religion to which they belonged.
  - Cremation should be avoided, except where necessary (e.g. for reasons of public health) and a record of the reason for it kept, as well as the ashes.
  - All graves must be marked.
- For the benefit of members of the armed forces, including those involved in peace-keeping or peace-enforcement operations, of armed groups, and of civilian auxiliary services or other organisms involved in the collection and management of the dead, standard operating procedures, directives or instructions should include:
  - the search, collection, and identification of the dead without distinction;
  - the exhumation, collection, transportation, temporary storage or burial, and repatriation of human remains and corpses;
  - training and information on means of identification and the treatment of the dead.
- In international armed conflicts, the authorities must see to it that the dead, including their burials, are recorded as well as the particulars of graves and those interred there. This task might be efficiently covered by the State's official graves registration service; if not, it would require the establishment and functioning of a complementary system to record the details of the death and interment of protected persons.

# ARTICLE 23

## Unidentified dead

- 1) Any unidentified human remains shall be treated in accordance with Articles 19 to 22 of the present law.
- 2) A record shall be kept with the Registry and access to the relevant information facilitated to ensure that the unidentified dead receive due attention until their identity is ascertained and the family and interested parties are informed.

### COMMENTARY

- All available means must be employed to identify human remains.
- If the remains of a person are found, yet not identified or identifiable, the body and all personal effects must still benefit from all measures that ensure dignified handling and burial.
- A record should necessarily be kept **active** in order to allow for future identification and subsequent notification to relatives and interested parties, including State authorities.



# PART VI – CRIMINAL RESPONSIBILITY

## ARTICLE 24

### Criminal acts

- 1) The following acts, when committed in violation of the present law or any other applicable penal law, shall be prosecuted and punished according to prescribed penalties:
  - (a) illegal arrest, detention or internment;
  - (b) unjustified refusal by an official to provide data on a missing person when requested by the missing person's relative, the [authority] or any other State authorities;
  - (c) undue refusal to provide or delay in furnishing information on a missing person by an official requested to provide such data in accordance with the present law and the Regulations of the Registry;
  - (d) intentional provision of false and unverified data on the missing person by an official that impedes the tracing of such a person;
  - (e) unlawful use and disclosure of personal data;
  - (f) the systematic and deliberate denial of the right to inform relatives of one's capture/arrest, address and state of health in contravention of Article 4, paragraph 5 of the present law;
  - (g) the systematic and deliberate denial of the right to exchange news with relatives in contravention of Article 4, paragraph 5 of the present Law;
  - (h) intentional mutilation, despoliation and desecration of the dead;
  - (i) causing enforced disappearance.
- 2) The failure by an authorized official to uphold the provisions of this law and related legislation, including the administrative laws and regulations governing the State authoritative bodies described herein, shall be subject to penalties prescribed in the [reference to domestic penal legislation] with regard to acts which constitute violations thereof.
- 3) The present law is supplemented by [reference to domestic penal legislation] with regard to acts which constitute violations of international humanitarian law or other crimes under international law.

### COMMENTARY

- The systematic and deliberate denial of the right to know the fate of one's relative should be punished as a criminal offence under domestic law. Penalties should be defined that are appropriate to the gravity of the offence.
- The systematic and deliberate denial of the right to inform relatives of one's capture/arrest, address and state of health should be punished as a criminal offence under domestic law. Penalties should be defined that are appropriate to the gravity of the offence.
- Consistent with most religious and cultural traditions, IHL prohibits the despoliation and mutilation of the dead. National measures should exist in most legal systems to ensure that this prohibition is respected through the criminalization of all acts of mutilation and despoliation. The act of mutilating or despoiling the dead can lead to complications in the identification of the dead and is therefore likely to increase the chances of a person being considered missing when in fact they have been killed. It therefore directly affects the ability of the family to know the fate of the missing person.
- Similar offences should exist for the non-respect of burial sites, and the desecration of graves. The act of mutilating or despoiling the dead can constitute the war crime of committing outrages upon personal dignity, in particular humiliating or degrading treatment as identified in Articles 8(2)(b)(xxi) and 8 (2)(c)(ii) of the Rome Statute of the International Criminal Court. National law should ensure that the crimes of despoliation and desecration of the dead are punishable as criminal offences. Intentional mutilation should also constitute a criminal offence, and may additionally be an element of concealing separate criminal offences which resulted in the deaths.

- The current law must contain a reference to the criminality of serious violations of IHL and other crimes under international law and the penal sanctions associated with these crimes as provided for in domestic legislation. If such national provisions implementing IHL do not yet exist, the [authority] must promote and incorporate IHL principles on a national level and retain the power to initiate criminal proceedings with respect to violations when necessary.
- The failure by an authorized official to uphold the provisions of this law is subject to penalties prescribed in domestic penal legislation. The responsibility of the officials extends to those acts committed by their subordinates.

## ARTICLE 25

### Prosecuting criminal acts

- 1) State authorities shall adopt legislation in order to ensure that crimes enumerated in Article 24 of the present Law are criminalized under domestic law and that criminal proceedings can be initiated by the missing person or his/her legal representative, family members, interested parties or the State authority.
- 2) An amnesty for acts may be granted to individuals and under certain conditions. No form of amnesty may be granted for crimes under international law or serious violations of international humanitarian law.

### COMMENTARY

- The national authorities must take the necessary measures to establish their jurisdiction over the offences listed in Article 24.
- The person or group of persons on trial for the crimes defined in Article 24 are entitled to all the judicial guarantees normally granted to any ordinary person being tried.
- If a crime has been committed and the designated State authority (e.g. Minister of Public Affairs) is not prosecuting the penal acts, then the State should oblige it to enforce the law and prosecute the crime.
- If amnesty is granted by a legislative act, it must clearly specify who and which cases at law can and cannot benefit from such a provision, and under what circumstances. For example, amnesty must not:
  - cover persons who committed crimes under IHL, including war crimes, genocide and crimes against humanity;
  - preclude the initiation of civil proceedings or have a legal effect on the victims' right to reparations;
  - circumvent any guarantees of due process;
  - eliminate the opportunity for identifiable victims to question and challenge the decision.

## PART VII – SUPERVISION

### ARTICLE 26

#### **Supervision**

Monitoring of the execution of the present law shall be the responsibility of the supervisory authority of the [authority].

# PART VIII – CONCLUDING PROVISION

## ARTICLE 27

### **Entry into force**

The present law shall enter into force in accordance with the domestic legislation of [*name of the State*].

# ANNEX 1 – MODEL CERTIFICATE OF ABSENCE

(Title of relevant authority)

## CERTIFICATE OF ABSENCE

Reference number.....

Name and first names.....

Place and date of birth .....

Address .....

Citizenship..... Sex .....

Occupation .....

Type and number of document .....

Father's name .....

Mother's name .....

Name of spouse .....

Dependents .....

Date and place of last sighting .....

Name of the reporting person .....

Address of the reporting person .....

## REPRESENTATIVE OF THE MISSING PERSON

Authority .....

or

Name and first name .....

Address .....

Citizenship .....

Type and number of document .....

Duration of the validity of the declaration of absence .....

(Date, seal and signature of the relevant authority)

# ANNEX 2 – MODEL DEATH CERTIFICATE

(Title of relevant authority)

## CERTIFICATE OF DEATH

Reference number .....

Name and first names .....

Place and date of birth .....

Last address .....

Citizenship ..... Sex .....

Occupation .....

Type and number of document .....

Father's name .....

Mother's name .....

Name of spouse .....

Dependents .....

Authority .....

# ANNEX 3

## IHL provisions

Extract from the ICRC report *The missing and their families*, published following the International Conference of Governmental and Non-Governmental Experts held from 19 to 21 February 2003.

### Foreword

International humanitarian law and international human rights law are concurrently applicable in armed conflicts. Human rights treaties apply at all times and in all circumstances to all persons subject to the jurisdiction of a State Party. They therefore continue to apply in times of armed conflict, except to the extent that a State Party may have legitimately derogated from some of its obligations under a treaty. Stringent conditions must be met for a derogation to be legitimate. International humanitarian law is applicable in situations of armed conflict and is non-derogable.

In order to spare the reader unnecessary repetition, the provisions of international human rights law are cited as references only in respect of the rules applicable in internal violence; only those provisions that specifically mention armed conflicts or refer to a non-derogable obligation are cited as references in respect of the rules applicable in international and non-international armed conflicts.

Neither this list of international humanitarian law rules applicable in armed conflicts nor that of the international human rights rules applicable in internal violence is by any means exhaustive.

## A. International law

### International law applicable in international armed conflicts

- [1] The State Parties undertake to respect and ensure respect for the Geneva Conventions and Additional Protocol I in all circumstances, and, in situations of serious violations of the Geneva Conventions or Additional Protocol I, the State Parties undertake to act, jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter.

#### *Knowing the fate of relatives*

- [2] Families have the right to know the fate of their relatives.
- [3] Each party to the conflict must take all feasible measures to account for persons reported missing as a result of an armed conflict.

#### *General protection*

- [4] All protected persons have the right to respect for their family life.
- [5] The life of every combatant *hors de combat* and civilian must be respected and protected.
- [6] Whenever circumstances permit, and particularly after an engagement, all possible measures must be taken, without delay, to search for and collect the wounded, sick and shipwrecked, without adverse distinction.
- [7] Every combatant *hors de combat* and civilian must be treated humanely.
- [8] Torture and other cruel, inhuman or degrading treatment or punishment are prohibited.
- [9] Hostage-taking is prohibited.
- [10] The arbitrary deprivation of liberty is prohibited.

- [11] Enforced disappearance is prohibited.
- [12] Discrimination based on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria is prohibited.
- [13] Everyone has the right to a fair trial by an independent, impartial and regularly constituted court respecting all internationally recognized judicial guarantees.
- [14] Without prejudice to more favourable treatment, neutral States must apply by analogy the relevant provisions of the four Geneva Conventions and Additional Protocol I to protected persons they receive or intern in their territory.
- [15] Each party to the conflict must allow the free passage of and not arbitrarily impede the delivery of relief supplies of an exclusively humanitarian nature intended for civilians in need in areas under its control; humanitarian relief personnel must have the freedom of movement essential to guarantee the exercise of their functions, unless imperative military reasons demand otherwise.

#### *Conduct of hostilities*

- [16] The parties to the conflict must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly must direct their operations only against military objectives.
- [17] Indiscriminate attacks are prohibited.
- [18] In the conduct of military operations, precautions in attack and against the effects of attack must be taken to spare the civilian population, civilians and civilian objects.
- [19] Combatants *hors de combat* and civilians must not be used to shield military operations.

#### *Protection of civilians*

- [20] The parties to the conflict must not order the displacement of or forcibly displace the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand and then only for the time necessary; civilians thus evacuated must be transferred back to their homes as soon as hostilities in the area in question have ceased.
- [21] Where displacement occurs, the basic needs of the civilian population must be met, its security ensured and family unity maintained.
- [22] The voluntary and safe return and reintegration of displaced persons must be facilitated.
- [23] Returned displaced persons must not be discriminated against.
- [24] 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 is prohibited.
- [25] Women, the elderly and the disabled affected by armed conflict are entitled to special protection.
- [26] Children affected by armed conflict are entitled to special protection.

#### *Protection of protected persons deprived of their liberty for reasons related to the conflict*

- [27] The personal data of protected persons deprived of their liberty for reasons related to the conflict must be recorded.



- [28] The information recorded on protected persons deprived of their liberty for reasons related to the conflict must be of such a character as to make it possible to identify the person exactly and to advise the next-of-kin quickly.
- [29] *Internment of civilians*
- A. Protected persons on the territory of a party to the conflict may be interned or placed in assigned residence only if the security of the Detaining Power makes this absolutely necessary. This action must be reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose; if internment or placing in assigned residence is maintained, the court or administrative board must review the action periodically, and at least twice yearly, with a view to the favourable amendment of the initial decision, if circumstances permit.
  - B. If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. Decisions regarding such assigned residence or internment must be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of GC IV, including the right of appeal. The appeal must be decided with the least possible delay and, if the decision is upheld, it must be subject to periodic review, if possible every six months.
  - C. Protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of interment or imprisonment is proportionate to the offence committed.
  - D. Each interned protected person must be released by the Detaining Power as soon as the reasons which necessitated his/her internment no longer exist.
- [30] Interned members of the same family must be lodged together in the same place of internment.
- [31] Women deprived of their liberty must be separated from detained men, unless they are members of the same family, and must be guarded by women.
- [32] Every civilian internee must be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible.
- [33] Accused prisoners of war, accused persons in occupied territory, and accused civilian internees must be allowed to receive visits from their legal counsel.
- [34] The ICRC must be granted access to all protected persons deprived of their liberty for reasons related to the conflict.
- [35] Protected persons deprived of their liberty for reasons related to an international armed conflict must be released and repatriated in accordance with the Geneva Conventions.

#### *Communication between family members*

- [36] All persons in the territory of a party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them. This correspondence shall be forwarded speedily and without undue delay.
- [37] Prisoners of war and civilian internees must be allowed to send and receive letters and cards; the censoring of correspondence addressed to prisoners of war or civilian internees or dispatched by them must be done as quickly as possible and only by the appropriate authorities.
- [38] Correspondence addressed to prisoners of war or civilian internees or dispatched by them through the post office, either direct or through the Information Bureaux, must be exempt from any postal dues.

- [39] Should military operations prevent the Powers concerned from fulfilling their obligation to ensure the conveyance of mail and relief shipments, the Protecting Power, the ICRC, or any other organization duly approved by the parties to the conflict may undertake to ensure the conveyance of such shipments by suitable means.

*Treatment of the dead and graves*

- [40] Whenever circumstances permit, and particularly after an engagement, all possible measures must be taken, without delay, to search for and collect the dead, without adverse distinction.
- [41] Each party to the conflict must treat the dead with respect and dignity and prevent their being despoiled.
- [42] Each party to the conflict must take measures to identify the dead before disposing of their remains.
- [43] The dead must be disposed of in a respectful manner and their graves respected.
- [44] Burial should be in individual graves, unless unavoidable circumstances require the use of collective graves. All graves must be marked.
- [45] Each party to the conflict must take all possible measures to provide information to the appropriate authorities or to the family of the deceased regarding the deceased's identity, location and cause of death.
- [46] Each party to the conflict must endeavour to facilitate the return of the deceased's remains and personal effects to the home country at its request or at the request of the next-of-kin.

*Collecting and forwarding information*

- [47] Upon the outbreak of a conflict and in all cases of occupation, each party to the conflict must establish an official Information Bureau:
- A. to centralize, without adverse distinction, all information on the wounded, sick, shipwrecked, dead, protected persons deprived of their liberty, children whose identity is in doubt and persons who have been reported missing and to provide this information to the appropriate authorities, through the intermediary of the Protecting Powers and likewise of the ICRC Central Tracing Agency;
  - B. to be responsible for replying to all enquiries concerning protected persons and for making any enquiries necessary to obtain information which is asked for if this is not in its possession;
  - C. to act as an intermediary for the free transport of matter, including correspondence, sent to and by protected persons (and whenever requested through the ICRC Central Tracing Agency).
- [48] Information recorded on protected persons deprived of their liberty or on deceased persons must be of such a character as to make it possible to identify the person exactly and to advise the next-of-kin quickly.
- [49] Each party to the conflict must furnish the persons under its jurisdiction liable to become prisoners of war with an identity card showing :
- full name,
  - rank, army, regimental, personal or serial number or equivalent information,
  - date of birth.

- [50] Medical and religious personnel must carry a special identity card embossed with the stamp of the military authority showing:
- A. the distinctive emblem;
  - B. full name;
  - C. rank and service number;
  - D. date of birth;
  - E. the capacity in which he/she is entitled to protection;
  - F. photograph;
  - G. signature and/or fingerprints.
- [51] Within the shortest possible period, each of the parties to the conflict must transmit to the Information Bureau the following information, when available, on each prisoner of war (and medical and religious personnel):
- A. full name;
  - B. rank, army, regimental, personal or serial number;
  - C. place and date of birth;
  - D. indication of the Power on which the POW depends;
  - E. first name of father;
  - F. maiden name of mother;
  - G. name and address of the person to be informed;
  - H. address at which correspondence may be sent to the POW;
  - I. information regarding transfers, releases, repatriations, escapes, admissions to hospital and death;
  - J. if the POW is seriously ill or wounded, the state of health (to be supplied regularly, every week if possible).
- [52] Within the shortest possible period, each of the parties to the conflict must transmit to the Information Bureau at least the following information on other protected persons deprived of their liberty for reasons related to the conflict:
- A. full name;
  - B. place and date of birth;
  - C. nationality;
  - D. last known place of residence;
  - E. distinguishing characteristics;
  - F. first name of father;
  - G. maiden name of mother;
  - H. date, place, and nature of the action taken with regard to the individual;
  - I. address at which correspondence may be sent to the person deprived of liberty;
  - J. name and address of the person to be informed;
  - K. information regarding transfers, releases, repatriations, escapes, admissions to hospital and death;
  - L. if the protected person deprived of his/her liberty is seriously ill or wounded, the state of health (to be supplied regularly, every week if possible).
- [53] Within the shortest possible period, each of the parties to the conflict must transmit to the Information Bureau the following information, when available, on each wounded, sick, shipwrecked or dead person:
- A. full name;
  - B. army, regimental, personal or serial number;
  - C. date of birth;
  - D. any other particulars figuring on the identity card or disc;
  - E. date and place of capture or death;
  - F. particulars concerning wounds or illnesses, or cause of death.

- [54] In case of death, the following must be collected and transmitted to the Information Bureau:
- A. date and place of (capture and) death;
  - B. particulars concerning wounds/illnesses or cause of death;
  - C. all other personal effects;
  - D. date and place of burial with particulars to identify the grave,
  - E. when applicable, half of the identity disc must remain with the body and the other half must be transmitted.
- [55] At the commencement of hostilities, the parties to the conflict must establish an official graves registration service to see to the dead, including burials, and to record the particulars for identification of graves and those there interred.
- [56] The authorities of the party to the conflict arranging for the evacuation of children to a foreign country and, as appropriate, the authorities of the receiving country must establish for each child a card with photographs, which they must send to the ICRC Central Tracing Agency. Each card must bear, whenever possible and whenever it involves no risk of harm to the child, the following information:
- A. full name;
  - B. sex;
  - C. place and date of birth (or, if that date is not known, the approximate age);
  - D. father's full name;
  - E. mother's full name and maiden name;
  - F. next-of-kin;
  - G. nationality;
  - H. native language, and any other language spoken by the child;
  - I. address of the child's family;
  - J. any identification number attributed to the child;
  - K. state of health;
  - L. blood group;
  - M. any distinguishing features;
  - N. date on which and place where the child was found;
  - O. date on which and place from which the child left the country;
  - P. religion, if any;
  - Q. present address in the receiving country;
  - R. should the child die before returning, the date, place and circumstances of death and the place of interment.
- [57] Information the transmission of which might be detrimental to the person concerned or to his/her relatives must be forwarded to the ICRC Central Tracing Agency only.
- [58] The Information Bureau and the ICRC Central Tracing Agency must enjoy free postage for all mail and, as far as possible, exemption from telegraphic charges or, at least, greatly reduced rates.

*Customary international law*

Whereas the customary law status is uncertain at the time of writing, all other rules mentioned above are widely recognized as representing customary international law applicable in international armed conflicts.

## International law applicable in non-international armed conflicts

### *General protection*

- [1] All persons have the right to respect for their family life.
- [2] The life of every person not or no longer directly participating in the hostilities must be respected and protected.
- [3] Whenever circumstances permit, and particularly after an engagement, all possible measures must be taken, without delay, to search for and collect the wounded, sick and shipwrecked, without adverse distinction.
- [4] Every person not or no longer directly participating in the hostilities must be treated humanely.
- [5] Torture and other cruel, inhuman or degrading treatment or punishment are prohibited.
- [6] Hostage-taking is prohibited.
- [7] Discrimination based on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria is prohibited.
- [8] Everyone has the right to a fair trial by an independent, impartial and regularly constituted court respecting all internationally recognized judicial guarantees.
- [9] Each party to the conflict must allow the free passage of and not arbitrarily impede the delivery of relief supplies of an exclusively humanitarian nature intended for civilians in need in areas under its control; humanitarian relief personnel must have the freedom of movement essential to guarantee the exercise of their functions, unless imperative military reasons demand otherwise.

### *Conduct of hostilities*

- [10] The parties to the conflict must at all times distinguish between the civilian population and persons participating directly in the hostilities and between civilian objects and military objectives and accordingly must direct their operations only against military objectives.
- [11] Indiscriminate attacks are prohibited.
- [12] In the conduct of military operations, precautions in attack and against the effects of attack must be taken to spare the civilian population, civilians and civilian objects.
- [13] Persons not or no longer directly participating in the hostilities must not be used to shield military operations.

### *Protection of civilians*

- [14] The parties to the conflict must not order the displacement of or forcibly displace the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand and then only for the time necessary.
- [15] Where displacement occurs, the basic needs of the civilian population must be met, its security ensured and family unity maintained.
- [16] Children affected by armed conflict are entitled to special protection.

### *Protection of persons deprived of their liberty for reasons related to the conflict*

- [17] Women deprived of their liberty must be separated from detained men, unless they are members of the same family, and must be guarded by women.

[18] The ICRC should be granted access to all persons deprived of their liberty for reasons related to the conflict.

[19] At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who participated in the armed conflict or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

#### *Communication between family members*

[20] Persons deprived of their liberty for reasons related to the armed conflict must be allowed to send and receive letters and cards, the number of which may be limited by the competent authority if it deems necessary.

#### *Treatment of the dead and graves*

[21] Whenever circumstances permit, and particularly after an engagement, all possible measures must be taken, without delay, to search for and collect the dead, without adverse distinction.

[22] Each party to the conflict must treat the dead with respect and dignity and prevent their being despoiled.

[23] The dead must be disposed of in a respectful manner and their graves respected.

#### *Customary international law*

[24] It is widely recognized that, the abovementioned rules represent customary international law. It is also recognized that rules mentioned under 1 to 3, 10, 11, 22, 23, 25, 27, 42, 44 and 45 in respect of international armed conflicts are also applicable *mutatis mutandis* in non-international armed conflicts.

### **International law applicable in internal violence**

#### *General protection*

[1] All persons have the right to respect for their family life.

[2] The arbitrary deprivation of life is prohibited.

[3] All persons must be treated with humanity and with respect for the inherent dignity of the human person.

[4] All persons have a right to adequate food, clothing and housing and to the enjoyment of the highest attainable standard of physical and mental health.

[5] Torture and other cruel, inhuman or degrading treatment or punishment is prohibited.

[6] Hostage-taking is prohibited.

[7] Everyone has the right to liberty and security of person; the arbitrary deprivation of liberty is prohibited.

[8] *Incommunicado* detention or detention in a secret location is prohibited.

[9] Enforced disappearance is prohibited.

[10] Discrimination based on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria is prohibited.

[11] Everyone has the right to a fair trial by an independent, impartial and regularly constituted court respecting all internationally recognized judicial guarantees.

*Protection of the population*

- [12] The deportation or forcible transfer of any civilian population committed as part of a widespread or systematic attack directed against that population, with knowledge of the attack, is prohibited.
- [13] All persons have the right to leave any country, including their own, and to return to their country.
- [14] The principle of *non-refoulement* must be respected.
- [15] Returned displaced persons must not be discriminated against.
- [16] Children are entitled to special protection.

*Protection of persons deprived of their liberty*

- [17] Official up-to-date registries of persons deprived of their liberty must be established and maintained and, in accordance with domestic law, must be made available to relatives, judges, attorneys, any other person having a legitimate interest and other authorities.
- [18] Persons deprived of their liberty should be allowed to receive visitors.

*Communication between family members*

- [19] All persons have the right to correspond with members of their families.

**References: International law**

1. GC I-IV: common Art. 1; AP I: Arts 1(1), 89.
2. AP I: Art. 32.
3. AP I: Arts 32, 33; GC IV: Arts 136-141.
4. GC IV: Arts 26, 27(1), 49(3), 82(2), 116; AP I: Arts 74, 75(5), 77(4); HRIV: Art. 46; ACHR: Arts 17(1), 27(2).
5. GC I: Arts 12, 50; GC II: Arts 12, 51; GC III: Arts 13, 130; GC IV: Arts 27, 147; AP I: Arts 75(2), 85; Rome Statute: Arts 6(a), 7(1)(a), 8(2)(a)(i), 8(2)(b)(vi); ICCPR: Arts 4, 6; ECHR: Art. 2, 15(2); ACHR: Arts 4, 27(2); ACHPR: Art. 4.
6. GC I: Art. 15; GC II: Art. 18; GC IV: Art. 16; AP I: Art. 10.
7. GC I: Art. 12; GC II: Art. 12; GC III: Art. 13; GC IV: Arts 5(3), 27(1); AP I: Arts 10(2), 75(1); HRIV: Art. 4.
8. GC I: Arts 12(2), 50; GC II: Arts 12(2), 51; GC III: Arts 17(4), 87(3), 89, 130; GC IV: Arts 32, 147; AP I: Arts 75(2), 85; Rome Statute: Arts 7(1)(f), 7(2)(e), 8(2)(a)(ii), 55(1)(b); 1984 Conv. against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Arts 1, 2; ICCPR: Arts 4(2), 7; ECHR: Arts 3, 15(2); ACHR: Arts 5(2), 27(2); ACHPR: Art. 5; 1985 Inter-American Conv. to Prevent and Punish Torture: Arts 1, 5; 1989 Conv. on the Rights of the Child: Art. 37.
9. GC IV: Arts 34, 147; AP I: Arts 75(2)(c), 85; Rome Statute: Art. 8(2)(a)(viii).
10. GC IV: Arts 43, 78; AP I: Art. 75(1); Rome Statute: Arts 55(1)(d), 59(2).
11. Rome Statute: Arts 7(1)(i), 7(2)(i); 1994 Inter-American Conv. on the Forced Disappearance of Persons: Art. X. This rule is not formulated as such in international humanitarian treaty law, but the practice of enforced disappearance would violate other rules stated above (e.g. rules 2, 5, 8 to 11, 13 and 29).

12. GC I: Arts 12(2), 31; GC II: Arts 12(2), 30; GC III: Arts 14, 16, 43, 61, 88; GC IV: Arts 13, 27, 54, 98, 118; AP I: Preamble, Arts 9(1), 69(1), 70(1), 75(1), 85(4)(c); Rome Statute: Arts 7(1)(h), 7(1)(j).
13. GC I: Art. 49(4); GC II: Art. 50(4); GC III: Arts 84(2), 86, 96(3)-(4), 99, 102-108, 129(4), 130; GC IV: Arts 5, 33, 66, 67, 71-78, 117-126, 146(4), 147; AP I: Arts 75(4), (7), 85(1), (4)(e); HRIV: Art. 50; Rome Statute: Arts 8(2)(a)(vi), 20(2), 25, 55, 60, 63(1), 64, 66, 67-69, 76; Second Protocol (1999) to the 1954 Hague Convention: Art. 17(2).
14. GC I: Art. 4; GC II: Art. 5; GC III: Arts 4B, 109(2), 110, 111, 114-116; GC IV: Arts 24(2), 36(1), 132(2); AP I: Art. 19; 1907 Hague Conv. (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land: Arts 11, 12, 14.
15. GC III: Arts 72, 73; GC IV: Arts 23, 59, 108, 109; AP I: Art. 70.
16. AP I: Arts 48, 51, 52, 85(3)(a); Rome Statute: Arts 8(2)(b)(i), 8(2)(b)(ii); Protocol II (amended 1996) to the 1980 CCW: Arts 1(2), 3(7); Protocol III (1980) to the 1980 CCW: Art. 2; 1954 Hague Convention: Art. 4; Second Protocol (1999) to the 1954 Hague Convention: Art. 6.
17. AP I: Arts 51(4)-(5), 85(3)(b); Protocol II (amended 1996) to the 1980 CCW: Arts 1(2), 3(8)-(9); Protocol III (1980) to the 1980 CCW: Art. 2.
18. AP I: Arts 57, 58; HRIV: Art. 26; Protocol II (amended 1996) to the 1980 CCW: Arts 1(2), 3(10)-(11); Second Protocol (1999) to the 1954 Hague Convention: Arts 6(d), 7, 8.
19. GC I: Art. 19; GC III: Art. 23; GC IV: Art. 28; AP I: Arts 12(4), 51(7); Rome Statute: Art. 8(2)(b)(xxiii).
20. GC IV: Arts 49, 147; AP I: Art. 85(4)(a); Rome Statute: Arts 7(1)(d), 8(2)(a)(vii), 8(2)(b)(viii).
21. GC IV: Art. 49(3); AP I: Art. 78.
22. GC IV: Arts 45, 49(2).
23. This is in application of the general rule of non-discrimination.
24. GC IV: Arts 49, 147; AP I: Art. 85(4)(a); Rome Statute: Arts 8(2)(a)(vii), 8(2)(b)(viii).
25. GC I: Art. 12(4); GC II: Art. 12(4); GC III: Arts 14(2), 16, 25, 44, 45, 49, 88(2)-(3); GC IV: Arts 14(1), 17, 27, 76(4), 82, 85, 119; AP I: Arts 8(a), 70(1), 75(5), 76; AP II: Arts 4(2)(e), 5(2)(a), 6(4).
26. GC IV: Arts 23(1), 24(1), 38(5), 50, 76(5), 89(5); AP I: Arts 8(a), 70(1), 77(1); 1989 Conv. on the Rights of the Child: Art. 38; 1990 African Charter on the Rights and Welfare of the Child: Art. 22; Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child: Arts 1-4, 6; ACHR: Arts 19, 27(2).
27. GC III: Arts 122, 123; GC IV: Arts 136, 137, 140; HRIV: Art. 14(1).
28. GC III: Art. 122(4); GC IV: Art. 138(1).
29. GC IV: Art. 79.
30. GC IV: Arts 41-43.
31. GC IV: Art. 78.
32. GC IV: Art. 68.



33. GC IV: Art. 132(1).
34. GC IV: Art. 82(2)-(3); AP I: Art. 77(4).
35. GC III: Arts 25(4), 29(2), 97(4), 108(2); GC IV: Arts 76(4), 82, 85(4), 124(3); AP I: Art. 75(5).
36. GC IV: Art. 116.
37. GC III: Art. 105; GC IV: Arts 72, 126.
38. GC III: Arts 56(3), 126; GC IV: Arts 76(6), 96, 143; Art. 56(3) of GC III and Art. 96 of GC IV state that delegates of the Protecting Power, the ICRC or other agencies providing relief to POWs may visit labour detachments.
39. HRIV: Art. 20; GC III: Arts 109-117 (direct repatriation and accommodation in neutral countries of prisoners of war with special needs), Arts 118-119 (release and repatriation of prisoners of war at the close of hostilities); GC IV: Arts 35, 45(4), 132-135 (release, repatriation and accommodation in neutral countries of civilian internees); AP I: Art. 85(4)(b).
40. GC IV: Art. 25.
41. GC III: Arts 35, 70, 71, 76; GC IV: Arts 25(3), 93, 106, 107, 112.
42. GC III: Art. 74(1); GC IV: Art. 110; HRIV: Art. 16.
43. GC III: Art. 75; GC IV: Art. 111.
44. GC I: Art. 15; GC II: Art. 18; GC IV: Art. 16; AP I: Art. 33.
45. GC I: Art. 15; GC II: Art. 18; GC IV: Art. 16; AP I: Art. 34.
46. GC I: Arts 16, 17; GC II: Arts 19, 20; GC III: Arts 120, 121; GC IV: Arts 129, 131.
47. GC I: Art. 17; GC II: Art. 20; GC III: Art. 120; GC IV: Art. 130; AP I: Art. 34(1).
48. GC I: Art. 17; GC II: Art. 20; GC III: Art. 120; GC IV: Art. 130; AP I: Art. 34.
49. GC I: Arts 16, 17; GC II: Art. 19; GC III: Art. 120; GC IV: Art. 130; AP I: Art. 33.
50. AP I: Art. 34(2)(c).
51. GC I: Arts 16, 17(4); GC II: Arts 19(2), 20; GC III: Arts 120, 122, 123; GC IV: Arts 130, 136-138, 140; AP I: Art. 33(3); HRIV: Arts 14, 16.
52. GC III: Art. 122(7); GC IV: Art. 137(1); AP I: Art. 33(3); HRIV: Art. 14.
53. GC III: Art. 74; GC IV: Art. 110; HRIV: Art. 14.
54. GC I: Art. 16; GC II: Art. 19; GC III: Arts 120, 122; GC IV: Arts 129, 138(1), 139; AP I: Art. 34.
55. GC III: Art. 17, Annex IV.A.
56. GC I: Art. 40(2)-(4), 41(2), Annex II; GC II: Art. 42(2)-(4), Annex. For the definition of medical and religious personnel, see Arts 24, 26, 27 of GC I, Arts 36, 37 of GC II and Art. 8(c)-(d) of AP I.
57. GC I: Art. 16; GC II: Art. 19; GC III: Arts 17, 70, 122, Annex IV.B.
58. GC IV: Arts 136-138; HRIV: Art. 14.

59. GC I: Art. 16; GC II: Art. 19.
60. GC I: Arts 16, 17, 40(2); GC II: Arts 19, 20, 42(2); GC III: Art. 120; GC IV: Arts 129, 130, 139; HRIV: Arts 14, 19; AP I: Art. 34.
61. GC I: Art. 17(3); GC II: Art. 20(2); GC III: Art. 120(6); GC IV: Art. 130(3).
62. AP I: Art. 78(3).
63. GC IV: Arts 137(2), 140(2).
64. GC III: Arts 74, 124; GC IV: Arts 110, 141; HRIV: Art. 16; 1994 Universal Postal Convention: Art. 7(3).
65. AP II: Arts 4(3)(b), 5(2)(a); ACHR: Arts 17(1), 27(2).
66. GC I-IV: common Art. 3; AP II: Art. 4(2); Rome Statute: Arts 6(a), 7(1)(a), 8(2)(c)(i); ICCPR: Arts 4, 6; ECHR: Arts 2, 15(2); ACHR: Arts 4, 27(2); ACHPR: Art. 4.
67. GC I-IV: common Art. 3; AP II: Arts 7, 8.
68. GC I-IV: common Art. 3; AP II: Arts 4, 5(3), 7(2).
69. GC I-IV: common Art. 3; AP II: Art. 4(2); Rome Statute: Arts 7(1)(f), 7(2)(e), 8(2)(c)(i), 55(1)(b); 1984 Conv. against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Arts 1, 2; ICCPR: Arts 4(2), 7; ECHR: Arts 3, 15(2); ACHR: Arts 5(2), 27(2); ACHPR: Art. 5; 1985 Inter-American Conv. to Prevent and Punish Torture: Arts 1, 5; 1989 Conv. on the Rights of the Child: Art. 37.
70. GC I-IV: common Art. 3; AP II: Art. 4(2)(c); Rome Statute: Art. 8(2)(c)(iii).
71. GC I-IV: common Art. 3; AP II: Arts 2(1), 4(1), 7(2), 18(2); Rome Statute: Arts 7(1)(h), 7(1)(j).
72. GC I-IV: common Art. 3; AP II: Art. 6(2)-(3); Rome Statute: Arts 8(2)(c)(iv), 20(2), 25, 55, 60, 63(1), 64, 66, 67-69, 76; Second Protocol (1999) to the 1954 Hague Convention: Art. 17(2).
73. AP II: Arts 5(1)(c), 18(2).
74. GC I-IV: common Art. 3; AP II: Arts 4, 13; Protocol II (amended 1996) to the 1980 CCW: Art. 1(2)-(3); Protocol III (1980) to the 1980 CCW: Art. 2; Rome Statute: Arts 8(2)(e)(i), 8(2)(e)(xii).
75. Protocol II (amended 1996) to the 1980 CCW: Arts 1(2)-(3), 3(8), 3(9); Protocol III (1980) to the 1980 CCW: Art. 2.
76. AP II: Art. 13(1); Protocol II (amended 1996) to the 1980 CCW: Arts 1(2)-(3), 3(10), 3(11); Second Protocol (1999) to the 1954 Hague Convention: Arts 6(d), 7, 8, 22.
77. AP II: Arts 4, 13(1).
78. AP II: Art. 17; Rome Statute: Arts 7(1)(d), 8(2)(e)(viii).
79. AP II: Arts 4(3)(b), 17(1).
80. AP II: Art. 4(3); 1989 Conv. on the Rights of the Child: Art. 38; 1990 African Charter on the Rights and Welfare of the Child: Art. 22; Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child: Arts 1-4, 6; ACHR: Arts 19, 27(2).
81. AP II: Art. 5(2)(a).

82. Although there are no specific treaty provisions requiring that the ICRC be granted access to persons deprived of their liberty in non-international armed conflicts, this rule is widely recognized as representing customary international law applicable in non-international armed conflicts.
83. AP II: Arts 5(4), 6(5).
84. AP II: Art. 5(2)(b).
85. AP II: Art. 8.
86. AP II: Art. 8.
87. AP II: Art. 8.
88. 1948 Universal Declaration of Human Rights: Art. 12; ECHR: Art. 8; ICCPR: Arts 17, 23(1); ICESCR: Art. 10(1); ACHR: Arts 17, 27(2); ACHPR: Art. 18; Additional Protocol (1988) to the ACHR in the Area of Economic, Social and Cultural Rights: Art. 15(1); 1989 Conv. on the Rights of the Child: Arts 9, 10, 37; 1990 African Charter on the Rights and Welfare of the Child: Arts 18, 19, 25(2)(b).
89. ICCPR: Arts 4, 6(1); ECHR: Arts 2, 15(2); ACHR: Arts 4, 27(2); ACHPR: Art. 4; Rome Statute: Arts 6(a), 7(1)(a).
90. ACHPR: Art. 5; ICCPR: Art. 10(1); ACHR: Art. 5.
91. ICESCR: Arts 11, 12; 1948 Universal Declaration of Human Rights: Art. 25(1); Additional Protocol (1988) to the ACHR in the Area of Economic, Social and Cultural Rights: Arts 10, 12; ACHPR: Art. 16; 1951 Conv. Relating to the Status of Refugees: Arts 20, 21, 23; 1989 Conv. on the Rights of the Child: Art. 22; 1990 African Charter on the Rights and Welfare of the Child: Art. 23.
92. 1984 Conv. against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Arts 1, 2; ICCPR: Arts 4(2), 7; ECHR: Arts 3, 15(2); 1987 European Conv. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Preamble; ACHR: Arts 5(2), 27(2); 1985 Inter-American Conv. to Prevent and Punish Torture: Arts 1, 5; ACHPR: Art. 5; 1989 Conv. on the Rights of the Child: Art. 37; Rome Statute: Arts 7(1)(f), 7(2)(e), 55(1)(b).
93. ECHR: Art. 5; ICCPR: Arts 9, 12; ACHR: Arts 7, 22; ACHPR: Art. 6; 1973 Conv. on Crimes Against Internationally Protected Persons, including Diplomatic Agents: Art. 2; 1979 International Conv. against the Taking of Hostages: Arts 1, 8, 12.
94. 1948 Universal Declaration of Human Rights: Art. 3; ICCPR: Art. 9(1); ECHR: Art. 5(1); ACHR: Art. 7(2)-(3); ACHPR: Art. 6; 1989 Conv. on the Rights of the Child: Art. 37; Rome Statute: Art. 55(1)(d).
95. This rule is not formulated as such in international human rights treaty law, but its violation would constitute a violation of other rules stated above.
96. 1994 Inter-American Conv. on Forced Disappearance of Persons: Preamble, Arts I, II, X, XI, XII; Rome Statute: Arts 7(1)(i), 7(2)(i).
97. UN Charter: Art. 1(3); 1948 Universal Declaration of Human Rights: Arts 2, 7; ICCPR: Arts 2, 4; ECHR: Arts 14, 15; ACHR: Arts 1, 27; ACHPR: Art. 2; 1965 Convention on the Elimination of Racial Discrimination: Arts 2, 5; 1989 Conv. on the Rights of the Child: Art. 2(1); 1973 International Convention on the Suppression and Punishment of Apartheid: Art. I; Rome Statute: Arts 7(1)(h), 7(1)(j).
98. ICCPR: Arts 9(3), 14; ECHR: Arts 5(3), 6, 40(1); Protocol No. 7 (1984) to the ECHR: Arts 2, 4; ACHR: Arts 7, 8; ACHPR: Art. 7; 1989 Conv. on the Rights of the Child: Art. 40(2)(b); Rome Statute: Arts 20(2), 55, 60, 63(1), 64, 66, 67-69, 76; 1994 Inter-American Conv. on Forced Disappearance of Persons: Art. X.

99. Rome Statute: Art. 7(1)(d) (“For the purposes of paragraph 1, ‘attack directed against the civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such an attack.” Rome Statute: Art. 7(2)(a.); ICCPR: Art. 13; Protocol No. 4 (1963) to the ECHR: Arts 3, 4; Protocol No. 7 (1984) to the ECHR: Art. 1; ACHR: Art. 22; ACHPR: Art. 12(5); 1984 Conv. against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Art. 3; 1989 Indigenous and Tribal Peoples Convention: Art. 16.
100. 1948 Universal Declaration of Human Rights: Art. 13(2); ICCPR: Art. 12(4); Protocol No. 4 (1963) to the ECHR: Art. 3; ACHR: Art. 22(5); ACHPR: Art. 12(2); 1984 Conv. against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Art. 3; 1969 Conv. Governing the Specific Aspects of Refugee Problems in Africa: Art. 5; 1989 Indigenous and Tribal Peoples Conv.: Art. 16.
101. 1951 Conv. Relating to the Status of Refugees: Arts 32, 33; 1969 Conv. Governing the Specific Aspects of Refugee Problems in Africa: Art. 2(3); 1984 Conv. against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Art. 3.
102. This is in application of the general rule of non-discrimination; 1969 Conv. Governing the Specific Aspects of Refugee Problems in Africa: Arts 4, 5; 1951 Conv. Relating to the Status of Refugees: Art. 3.
103. 1948 Universal Declaration of Human Rights: Art. 25(2); ICCPR: Art. 24; ACHR: Art. 19, 27(2); ICESCR: Art. 10; ACHPR: Art. 18(3); 1989 Conv. on the Rights of the Child: Arts 3, 20; 1990 African Charter on the Rights and Welfare of the Child: Art. 4.
104. 1994 Inter-American Conv. on Forced Disappearance of Persons: Art. XI.
105. 1987 European Conv. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Arts 1-2; 1994 Inter-American Conv. on Forced Disappearance of Persons: Art. X.
106. 1948 Universal Declaration of Human Rights: Art. 12; ICCPR: Art. 17(1); ACHR: Art. 11(2); ECHR: Art. 8(1).

### **Additional references**

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Basic Principles for the Treatment of Prisoners (1990).

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Inter-American Commission: Report No. 136/99, 22 December 1999, *Case of Ignacio Ellacuría et al*, Case No. 10.488, paras 221 and 224.

– *Lucio Parada Cea et al*, Report 1/99, 27 January 1999, Case No. 10.480, para. 151.

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– *Godínez Cruz Case*, Judgment of 20 January 1989, Series C: Decisions and Judgments, No. 5, para. 191.

– *Castillo Paéz Case*, Judgment of 3 November 1997, Series C: Decisions and Judgments, No. 34, para. 90.

– *Blake Case*, Judgment of 24 January 1998, Series C: Decisions and Judgments, No. 36, paras 66, 97, 103.

– *Bámaca Velázquez Case*, Judgment of 25 November 2000, Series C: Decisions and Judgments, No. 70, paras 129, 145(f), 160-166, 182(a), (c), (g), 197-202.

– *Las Palmeras Case*, Judgment of 6 December 2001, Series C: Decisions and Judgments, No. 90, paras 58-61, 65, 69.

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## B. Special protection to which children are entitled

### Special protection to which children are entitled: international law applicable in international armed conflicts

- Children are protected by GC IV relative to the protection of civilian persons in time of war and AP I; they are protected by the fundamental guarantees that these treaties provide, in particular the right to life, the prohibitions on corporal punishment, torture, collective punishment and reprisals, and by the rules of AP I on the conduct of hostilities, including both the principle that a distinction must be made between civilians and combatants and the prohibition on attacks against civilians.
- Children affected by armed conflict are entitled to special protection. GC IV guarantees special care for children, but it is AP I that lays down the principle of special protection: "Children shall be the object of special respect and shall be protected against any form of indecent assault. The parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason."

The provisions setting out this protection are summarized in the rules that follow.

- Evacuation, special zones: evacuation must be temporary and only arranged where compelling reasons of health or medical treatment of the child so require or from areas of combat for safety reasons; special zones may be established by the parties in order to protect from the effects of war children under 15, expectant mothers and mothers of children under 7. (4)
- Assistance and care: children must be given priority access to food and health care; children under 15 years of age must be given additional food, in proportion to their physiological needs. (5)
- Education and cultural environment: the education of children must be facilitated and their cultural environment preserved. (6)
- Identification, family reunification and unaccompanied children :
  - The parties to the conflict must endeavour to arrange for all children under 12 to be identified by the wearing of identity discs, or by some other means. (7)
  - The parties to the conflict must take the necessary measures to ensure that children under 15, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances and as far as possible entrusted to persons of a similar cultural tradition. (8)
  - All protected persons have the right to correspond with members of their families. (9)
  - Each party to the conflict must facilitate enquiries made by the members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. (10)
  - Where displacement occurs, the basic needs of the population must be met, its security ensured and family unity maintained. (11)
  - Information on unaccompanied children and children who have been separated from their families must be centralized and provided to the ICRC Central Tracing Agency. (12)
- Arrested, detained or interned children:
  - Proper regard must be paid to the special treatment due to minors. (13)
  - If arrested, detained or interned for reasons related to the conflict, children must be held in quarters separate from those of adults, except where families are accommodated as family units. (14)
  - The cases of pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict must be considered with the utmost priority. (15)
- Exemption from the death penalty: the death penalty for an offence related to the armed conflict must not be carried out on persons who had not attained the age of 18 years at the time the offence was committed. (16)

- Recruitment and participation in hostilities:
  - Conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities is prohibited. (17)
  - If, in exceptional cases, children who have not attained the age of 15 years take a direct part in hostilities and fall into the power of an adverse party, they continue to benefit from the special protection accorded by international humanitarian law, whether or not they are prisoners of war. (18)
  - In recruiting among persons who have attained the age of 15 years but not the age of 18 years, priority should be given to those who are oldest. (19)
  - States must take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities. (20)
  - Children under the age of 18 must not be compulsorily recruited into the armed forces. (21)
  - States that permit voluntary recruitment into their national armed forces under the age of 18 years must maintain safeguards to ensure, as a minimum, that:
    - such recruitment is genuinely voluntary;
    - such recruitment is carried out with the informed consent of the person's parents or legal guardians;
    - such persons are fully informed of the duties involved in such military service;
    - such persons provide reliable proof of age prior to acceptance into national military service. (22)
  - Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years. (23)
- All protected persons have the right to respect for their family life. (24)
- It is widely recognized that **rules 1 to 16, 17, 18** represent customary international law applicable in international armed conflicts.

#### **Special protection to which children are entitled: international law applicable in non-international armed conflicts**

- Children are covered by the fundamental guarantees for persons not or no longer directly participating in hostilities (25); they are further protected by the principle: "The civilian population as such, as well as individual civilians, shall not be the object of attack." (26)
- Children affected by armed conflict are entitled to special protection: "Children shall be provided with the care and aid they require . . ." (27) The provisions setting out this protection are summarized in the rules that follow.
- Evacuation, special zones: measures must be taken, if necessary and whenever possible with the consent of their parents or persons who are responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country. (28)
- Assistance and care: children must be provided with the care and aid they require. (29)
- Identification, family reunification and unaccompanied children: all appropriate steps must be taken to facilitate the reunion of families temporarily separated. (30)
- Where displacement occurs, the basic needs of the population must be met, its security ensured and family unity maintained. (31)
- Education, cultural environment: children must receive an education, including religious and moral education. (32)
- Arrested, detained or interned children:
  - Detained children should be separated from detained adults, unless they are members of the same family. (33)



- Exemption from the death penalty: the death penalty may not be pronounced on persons who were under the age of 18 years at the time of the offence and may not be carried out on pregnant women or mothers of young children. (34)
- Recruitment and participation in hostilities:
  - Conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities is prohibited. (35)
  - The special protection provided by international humanitarian law to children who have not attained the age of 15 years remains applicable to them if they take a direct part in hostilities. (36)
  - In recruiting among persons who have attained the age of 15 years but not the age of 18 years, priority should be given to those who are oldest. (37)
  - States must take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities. (38)
  - Children under the age of 18 must not be compulsorily recruited into the armed forces. (39)
  - States that permit voluntary recruitment into their national armed forces under the age of 18 years must maintain safeguards to ensure, as a minimum, that:
    - such recruitment is genuinely voluntary;
    - such recruitment is carried out with the informed consent of the person's parents or legal guardians;
    - such persons are fully informed of the duties involved in such military service;
    - such persons provide reliable proof of age prior to acceptance into national military service. (40)
  - Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years. (41)
- All persons have the right to respect for their family life. (42)
- It is widely recognized that, in addition to rules 25 to 33, 35, 36 and 42, rule 9 also represents customary international law applicable *mutatis mutandis* in non-international armed conflicts.

### **Special protection to which children are entitled: international law applicable in internal violence**

- Children are entitled to special protection. (43)
- Everyone has the right to education. (44)
- Arrested, detained or interned children:
  - Every child deprived of liberty must be separated from adults unless it is considered in the child's best interest not to do so. (45)
  - Juvenile offenders must be accorded treatment according to their age and legal status. (46)
- Sentence of death must not be imposed for crimes committed by persons below the age of 18 years. (47)
- All persons have the right to correspond with members of their families. (48)
- All persons have the right to respect for their family life. (49)
- Recruitment:
  - Conscripting or enlisting children under the age of 15 years into the national armed forces is prohibited. (50)
  - In recruiting among persons who have attained the age of 15 years but not the age of 18 years, priority should be given to those who are oldest. (51)
  - Children under the age of 18 must not be compulsorily recruited into the armed forces. (52)

- States that permit voluntary recruitment into their national armed forces under the age of 18 years must maintain safeguards to ensure, as a minimum, that:
  - such recruitment is genuinely voluntary;
  - such recruitment is carried out with the informed consent of the person's parents or legal guardians;
  - such persons are fully informed of the duties involved in such military service;
  - such persons provide reliable proof of age prior to acceptance into national military service. (53)
- States that recognize and/or permit the system of adoption must ensure that the best interests of the child is the paramount consideration and they must:
  - ensure that adoption is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
  - recognize that inter-country adoption may be considered as an alternative means of child care, if the child cannot be placed in a foster home or with an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
  - ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
  - take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
  - promote, where appropriate, the above objectives by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs. (54)

#### References: Special protection to which children are entitled

1. GC IV: Arts 27-34; AP I: Art. 75.
2. AP I: Arts 48, 51.
3. AP I: Art. 77; 1989 Conv. on the Rights of the Child: Art. 38; 1990 African Charter on the Rights and Welfare of the Child: Art. 22; ACHR: Arts 17, 19, 27(2).
4. GC IV: Arts 14 (safety zones), 17, 24(2), 49(3), 132(2); AP I: Art. 78.
5. GC IV: Arts 16, 23(1), 24(1), 38(5), 50, 81(3), 89(5); AP I: Arts 8(a), 70(1), 77(1).
6. GC IV: Arts 24(1), 50, 94; AP I: Art. 78(2).
7. GC IV: Art. 24(3).
8. GC IV: Art. 24(1).
9. GC III: Arts 35, 70, 71; GC IV: Arts 25, 93, 106, 107, 112.
10. GC IV: Arts 26, 50; AP I: Art. 74.
11. GC IV: Art. 49(3); AP I: Art. 78.
12. GC IV: Arts 25, 50, 136-140; AP I: Art. 78(3).
13. GC IV: Arts 76(5), 85(2), 89(5), 94, 119(2), 132.

14. GC IV: Arts 76(5), 82; AP I: Art. 77(4).
15. GC IV: Arts 89(5), 91, 127, 132; AP I: Arts 75(5), 76.
16. GC IV: Art. 68(4); AP I: Art. 77(5).
17. Rome Statute: Art. 8(2)(b)(xxvi); AP I: Art. 77(2); GC IV: Art. 50(2); 1989 Conv. on the Rights of the Child: Art. 38(2)-(3); 1990 African Charter on the Rights and Welfare of the Child: Arts 2, 22(2) (specifying that children may neither participate nor be recruited below 18 years); 1999 Conv. on the Worst Forms of Child Labour: Arts 1, 3.
18. AP I: Art. 77(3); GC III: Arts 16, 49.
19. AP I: Art. 77(2); 1989 Conv. on the Rights of the Child: Art. 38(3).
20. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child: Art. 1; 1990 African Charter on the Rights and Welfare of the Child: Arts 2, 22(2) (specifying that children may neither participate nor be recruited below 18 years).
21. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child: Art. 2; 1990 African Charter on the Rights and Welfare of the Child: Arts 2, 22(2).
22. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child on the involvement of children in armed conflict: Art. 3.
23. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child: Art. 4.
24. GC IV: Arts 26, 27(1), 49(3), 82(2), 116; AP I: Arts 74, 75(5), 77(4); HRIV: Art. 46; ACHR: Arts 17(1), 27(2).
25. GC I-IV: common Art. 3; AP II: Art. 4.
26. AP II: Art. 13.
27. AP II: Art. 4(3); 1989 Conv. on the Rights of the Child: Art. 38; 1990 African Charter on the Rights and Welfare of the Child: Art. 22; ACHR: Arts 17, 19, 27(2).
28. AP II: Art. 4(3)(e).
29. AP II: Art. 4(3).
30. AP II: Art. 4(3)(b).
31. AP II: Arts 4(3)(b), 17(1).
32. AP II: Art. 4(3)(a).
33. AP II: Art. 6(4).
34. Rome Statute: Art. 8(2)(e)(vii); AP II: Art. 4(3)(c); 1989 Conv. on the Rights of the Child: Art. 38(2)-(3); 1990 African Charter on the Rights and Welfare of the Child: Arts 2, 22(2) (specifying that children may neither participate nor be recruited below 18 years); 1999 Convention on the Worst Forms of Child Labour: Arts 1-3.
35. AP II: Art. 4(3)(d).
36. 1989 Conv. on the Rights of the Child: Art. 38(3).

37. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child: Art. 1; 1990 African Charter on the Rights and Welfare of the Child: Arts 2, 22(2) (specifying that children may neither participate nor be recruited below 18 years).
38. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child: Art. 2; 1990 African Charter on the Rights and Welfare of the Child: Arts 2, 22(2).
39. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child: Art. 3.
40. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child: Art. 4.
41. AP II: Arts 4(3)(b), 5(2)(a); ACHR: Arts 17(1), 27(2).
42. 1948 Universal Declaration of Human Rights: Art. 25(2); ICCPR: Art. 24; ICESCR: Art. 10; ACHR: Arts 17,19, 27(2); ACHPR: Art. 18(3); 1989 Conv. on the Rights of the Child: Arts 3, 20; 1990 African Charter on the Rights and Welfare of the Child: Art. 4.
43. 1948 Universal Declaration of Human Rights: Art. 26, ICESCR: Art. 13; ACHPR: Art. 17; 1989 Conv. on the Rights of the Child: Art. 28; 1990 African Charter on the Rights and Welfare of the Child: Art. 11.
44. 1989 Conv. on the Rights of the Child: Art. 37(c); ICCPR: Art. 10(2)(b), (3); ACHR: Art. 5(5); 1990 African Charter on the Rights and Welfare of the Child: Art. 17(2)(b).
45. ICCPR: Art. 10(3); 1989 Conv. on the Rights of the Child: Arts 20, 37, 40; ACHR: Art. 5(5); 1990 African Charter on the Rights and Welfare of the Child: Art. 17.
46. ICCPR: Art. 6(5); ACHR: Art. 4(5); Protocol to the ACHR to Abolish the Death Penalty (1990): Art. 1; Protocol No. 6 (1983) to the ECHR concerning the abolition of the death penalty: Arts 1, 2; Second Optional Protocol (1989) to the ICCPR, aiming at the abolition of the death penalty: Arts 1, 2(1).
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48. 1948 Universal Declaration of Human Rights: Art. 12; ECHR: Art. 8; ICCPR: Art. 23(1); ICESCR: Art. 10(1); ACHR: Art. 17; ACHPR: Art. 18; Additional Protocol (1988) to the ACHR in the Area of Economic, Social and Cultural Rights: Art. 15(1); 1989 Conv. on the Rights of the Child: Arts 8-10, 16, 37; 1990 African Charter on the Rights and Welfare of the Child: Arts 18, 19, 25(2)(b).
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52. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child: Art. 3.
53. 1989 Conv. on the Rights of the Child: Art. 21;
54. 1993 Hague Conv. on the Protection of Children and Cooperation in Respect of Intercountry Adoption: Arts 1(a), 4.

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Resolution II of the 24th International Conference of the Red Cross (Manila, 1981) – Forced or involuntary disappearances.

Resolution XV of the 25th International Conference of the Red Cross (Geneva, 1986) – Cooperation between National Red Cross and Red Crescent Societies and governments in the reuniting of dispersed families.

Resolution 2 of the 26th International Conference of the Red Cross and Red Crescent (Geneva, 1996) – Protection of the civilian population in period of armed conflict.

Plan of Action for the years 2000-2003, adopted by the 27th International Conference of the Red Cross and Red Crescent (Geneva, 1999).

Inter-Agency Guidelines on Unaccompanied and Separated Children – ICRC, UNHCR, UNICEF, International Rescue Committee, SCF-UK, World Vision International (draft, April 2002).

# **V** **MODEL MEANS OF IDENTIFICATION**

**First Geneva Convention 1949 – wounded and sick on land – Annex II**

Front

Reverse side

**Second Geneva Convention 1949 – wounded, sick and shipwrecked at sea – Annex I**

Front

Reverse side

**Additional Protocol I of 1977 – international armed conflicts – Annex I, Art. 2**

Front

|   |
|---|
| <br>(space reserved for the name<br>of the country and authority<br>issuing this card)<br>            |
| <b>IDENTITY CARD</b><br>for PERMANENT civilian medical<br>TEMPORARY religious personnel   |
| Name.....   |
| Date of birth (or age) .....  |
| Identity No. (if any).....  |
| The holder of this card is protected by the Geneva Conventions of 12 August 1949 and by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) in his capacity as |
| .....   |
| Date of issue ..... No. of card.....  |
| Signature of issuing authority  |
| Date of expiry.....   |

Reverse side

|  |   |           |
|--|---|-----------|
| Height.....  | Eyes.....                                 | Hair..... |
| Other distinguishing marks or information:<br>.....<br>..... |   |           |
| PHOTO OF HOLDER  |   |           |
| Stamp  | Signature of bearer or thumbprint or both |           |

**Third Geneva Convention 1949 – prisoners of war – Annex IV A**

|  |  |  |
|--|--|--|
| Date of issue .....<br><br>Signature of bearer .....   | Photograph<br>of the bearer  | (Name of the country and military authority issuing this card)<br><b>IDENTITY CARD</b><br><b>FOR A PERSON WHO ACCOMPANIES THE ARMED FORCES</b> |
| Name .....<br>First names.....<br>Date and place of birth.....<br>Accompanies the Armed Forces as .....  | Eyes<br>Blood type<br>Religion                                     | Hair<br>Official seal<br>Imprint   |
| Weight<br>Height   | Finger-prints (optional)<br>(Left forefinger)   (Right forefinger) |  |
| Any other mark of identification .....<br>.....  |  |  |
| NOTICE<br>This identity card is issued to persons who accompany the Armed Forces of ..... but are not part of them. The card must be carried at all times by the person to whom it is issued. If the bearer is taken prisoner, he shall at once hand the card to the Detaining Authorities, to assist in his identification. |  |  |

Remarks. It would be preferable to make out this card in two or three languages, one of which is in international use. Actual size of the card: 13 by 10 centimetres. It should be folded along the dotted line.



**Additional Protocol I of 1977 – international armed conflicts – Annex I, Art. 15**

Front

(space reserved for the name of the country and authority issuing this card)

**IDENTITY CARD**  
for civil defence personnel

Name.....

Date of birth (or age) .....

Identity No. (if any).....

The holder of this card is protected by the Geneva Conventions of 12 August 1949 and by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) in his capacity as

.....

Date of issue ..... No. of card.....

Signature of issuing authority

Date of expiry.....

Reverse side

|  |   |           |
|--|---|-----------|
| Height.....  | Eyes.....                                 | Hair..... |
| Other distinguishing marks or information:<br>.....<br>..... |   |           |
| Weapons.....   |   |           |
| PHOTO OF HOLDER  |   |           |
| Stamp  | Signature of holder or thumbprint or both |           |

**The 1954 Hague Convention – protection of cultural property – Regulations for the execution of the Convention, Annex**

Front

**IDENTITY CARD**  
for personnel engaged in the protection of cultural property

Surname.....

First names.....

Date of birth.....

Title or Rank.....

Function.....

is the bearer of this card under the terms of the Convention of The Hague, dated 14 May 1954, for the Protection of Cultural Property in the event of Armed Conflict.

Date of issue                      Number of Card

Reverse side

Photo of bearer

Signature of bearer or finger-prints or both

Embossed stamp of authority issuing card

|        |      |      |
|--------|------|------|
| Height | Eyes | Hair |
|--------|------|------|

Other distinguishing marks  
.....  
.....  
.....

## Additional Protocol I of 1977 – international armed conflicts – Annex II

Front

|  |   |
|--|---|
| <p style="text-align: center;">NOTICE</p> <p>This identity card is issued to journalists on dangerous professional missions in areas of armed conflicts. The holder is entitled to be treated as a civilian under the Geneva Conventions of 12 August 1949, and their Additional Protocol I. The card must be carried at all times by the bearer. If he is detained, he shall at once hand it to the Detaining Authorities, to assist in his identification.</p> <p style="text-align: center;">ملاحظة</p> <p>يصرف هذه البطاقة للمصنفين المهتمين بمهمات خطيرة في مناطق النزاع أثناء المسلحة ويعمل لصاحبها أن يعامل معاملة الشخص المدني وفقاً لاتفاقيات جنيف الموقعة 12 آب/أغسطس 1949 وملحقها (بروتوكولها) الإضافي الأول. ويجب أن يحفظ صاحب البطاقة بها دوماً وإذا اعتقل يجب أن يسلمها فوراً إلى سلطة الاعتقال لتساعده على تحديد هويته.</p> <p style="text-align: center;">NOTA</p> <p>La presente tarjeta de identidad se expide a los periodistas en misión profesional peligrosa en zonas de conflictos armados. Su titular tiene derecho a ser tratado como persona civil conforme a los Convenios de Ginebra del 12 de agosto de 1949 y su Protocolo adicional I. El titular debe llevar la tarjeta consigo, en todo momento. En caso de ser detenido, la entregará inmediatamente a las autoridades que lo detengan a fin de facilitar su identificación.</p> <p style="text-align: center;">AVIS</p> <p>La présente carte d'identité est délivrée aux journalistes en mission professionnelle périlleuse dans des zones de conflit armé. Le porteur a le droit d'être traité comme une personne civile aux termes des Conventions de Genève du 12 août 1949 et de leur Protocole additionnel I. La carte doit être portée en tout temps par son titulaire. Si celui-ci est arrêté, il la remettra immédiatement aux autorités qui le retiennent afin qu'elles puissent l'identifier.</p> <p style="text-align: center;">ПРИМЕЧАНИЕ</p> <p>Настоящее удостоверение выдается журналистам, выполняющим в опасных профессиональных командировках в районах вооруженных конфликтов. Его обладатель имеет право на обращение с ним как с гражданским лицом в соответствии с Женевскими Конвенциями от 12 августа 1949 г. и Дополнительным Протоколом I к ним. Выданный настоящий документ должен постоянно иметь его при себе. В случае задержания он немедленно вручает его задерживающим властям для содействия установлению его личности.</p> | <p style="text-align: center;">(Name of country issuing this card)<br/>(اسم القطر المصدر لهذه البطاقة)<br/>(Nombre del país que expide esta tarjeta)<br/>(Nom du pays qui a délivré cette carte)<br/>(Название страны, выдавшей настоящее удостоверение)</p> <p style="text-align: center;"><b>IDENTITY CARD FOR JOURNALISTS ON DANGEROUS PROFESSIONAL MISSIONS</b></p> <p style="text-align: center;">بطاقة الهوية الخاصة بالصحفيين<br/>المكلفين بمهمات مهنية خطيرة</p> <p style="text-align: center;"><b>TARJETA DE IDENTIDAD DE PERIODISTA EN MISION PELIGROSA</b></p> <p style="text-align: center;"><b>CARTE D'IDENTITÉ DE JOURNALISTE EN MISSION PÉRILLEUSE</b></p> <p style="text-align: center;"><b>УДОСТОВЕРЕНИЕ ЖУРНАЛИСТА,<br/>НАХОДЯЩЕГОСЯ В ОПАСНОЙ<br/>КОМАНДИРОВКЕ</b></p> |
|--|---|

Reverse side

|  |  |  |
|--|--|--|
| <p>Issued by (competent authority)<br/>(مصدر البطاقة المختصة)</p> <p>Expedite por (autoridad competente)<br/>Délivré par (autorité compétente)</p> <p>Выдана (компетентными властями)</p> <p>Photograph of bearer<br/>صور صاحب البطاقة<br/>Fotografía del titular<br/>Photographie du porteur<br/>Фотография предъявителя</p> <p>Place<br/>المكان<br/>Lugar<br/>Lieu<br/>Mesto<br/>Date<br/>التاريخ<br/>Date<br/>Дата</p> <p>(Official seal/imprint)<br/>(الختم الرسمي)<br/>(Sello oficial)<br/>(Timbre de l'autorité délivrant la carte)<br/>(Официальный печат)</p> <p>(Signature of bearer)<br/>(توقيع صاحب البطاقة)<br/>(Firma del titular)<br/>(Signature du porteur)<br/>(Подпись владельца)</p> <p>Name<br/>اسم الشخص<br/>Apellidos<br/>Noms<br/>Prénoms<br/>First names<br/>الاسم<br/>Nombre<br/>Прізвище<br/>Iban, Oversteer<br/>Place &amp; date of birth<br/>مكان وتاريخ الميلاد<br/>Lugar y fecha de nacimiento<br/>Lieu &amp; date de naissance<br/>Data u mesto rođenosti<br/>Correspondent of<br/>مترجم<br/>Correspondant de<br/>Korrespondent<br/>Specific occupation<br/>المهنة المحددة<br/>Categoría profesional<br/>Catégorie professionnelle<br/>Profession<br/>Valid for<br/>بالتى العمل بها في<br/>Válido por<br/>Date de validité<br/>Исполнители</p> | <p>Height<br/>الطول<br/>Estatura<br/>Taille<br/>Foot</p> <p>Weight<br/>الوزن<br/>Peso<br/>Poids<br/>Bce</p> <p>Blood type<br/>نوعية الدم<br/>Grupo sanguíneo<br/>Groupe sanguin<br/>Группа крови</p> <p>Religion (optional)<br/>الديانة (اختياري)<br/>Religion (optional)<br/>Religion (facultati)<br/>Religion (facultative)<br/>Религия (по желанию)</p> <p>Fingerprints (optional)<br/>البصمات (اختياري)<br/>Huellas dactilares (optional)<br/>Empreintes digitales (facultati)<br/>Отпечатки пальцев (по желанию)</p> <p>(Left forefinger)<br/>(اليد اليسرى)<br/>(Dedo índice izquierdo)<br/>(Index gauche)<br/>(Левый указательный палец)</p> <p>(Right forefinger)<br/>(اليد اليمنى)<br/>(Dedo índice derecho)<br/>(Index droit)<br/>(Правый указательный палец)</p> <p>Special marks of identification<br/>العلامات المميزة للهوية<br/>Selas particulares<br/>Signes particuliers<br/>Особые признаки</p> | <p>Eyes<br/>العيون<br/>Ojos<br/>Yeux<br/>Глаза</p> <p>Hair<br/>الشعر<br/>Cabello<br/>Cheveux<br/>Волосы</p> <p>Rh factor<br/>معدل الحمض<br/>Factor Rh<br/>Facteur Rh<br/>Rh-factor</p> |
|--|--|--|



# **VI**

# **A GUIDE TO THE LEGAL REVIEW OF NEW WEAPONS, MEANS AND METHODS OF WARFARE**

**Measures to implement Article 36  
of Additional Protocol I of 1977**

|                        |   |
|------------------------|---|
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| With contributions by: | Robin Coupland and Peter Herby, Arms Unit, Legal Division |

Revised November 2006

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## EXECUTIVE SUMMARY

This Guide aims to assist States in establishing or improving procedures to determine the legality of new weapons, means and methods of warfare in accordance with Article 36 of Protocol I additional to the 1949 Geneva Conventions. It was prepared further to an expert meeting hosted by the ICRC in January 2001 and the Agenda for Humanitarian Action adopted by the States Party to the Geneva Conventions at the 28<sup>th</sup> International Conference of the Red Cross and Red Crescent. The Agenda for Humanitarian Action commits States to ensure the legality of all new weapons, means and methods of warfare by subjecting them to rigorous and multidisciplinary review. Government experts from ten countries provided comments on previous drafts of this Guide.

Article 36 of Additional Protocol I requires each State Party to determine whether the employment of any new weapon, means or method of warfare that it studies, develops, acquires or adopts would, in some or all circumstances, be prohibited by international law. All States have an interest in assessing the legality of new weapons, regardless of whether they are party to Additional Protocol I. Assessing the legality of new weapons contributes to ensuring that a State's armed forces are capable of conducting hostilities in accordance with its international obligations. Carrying out legal reviews of proposed new weapons is of particular importance today in light of the rapid development of new technologies.

Article 36 of Additional Protocol I does not specify how a review of the legality of weapons, means and methods of warfare is to be carried out. Drawing on interpretations of the text of Article 36 and on State practice, this Guide highlights both the issues of substance and those of procedure to be considered in establishing a legal review mechanism.

The legal review applies to weapons in the widest sense as well as the ways in which they are used, bearing in mind that a means of warfare cannot be assessed in isolation from its expected method of use. The legal framework of the review is the international law applicable to the State, including international humanitarian law (IHL). In particular, this consists of the treaty and customary prohibitions and restrictions on specific weapons, as well as the general IHL rules applicable to all weapons, means and methods of warfare. General rules include the rules aimed at protecting civilians from the indiscriminate effects of weapons and combatants from unnecessary suffering. The assessment of a weapon in light of the relevant rules will require an examination of all relevant empirical information pertaining to the weapon, such as its technical description and actual performance, and its effects on health and the environment. This is the rationale for the involvement of experts of various disciplines in the review process.

Significant procedural issues that will merit consideration in establishing a review mechanism include determining which national authority is to be made responsible for the review, who should participate in the review process, the stages of the procurement process at which reviews should occur, and the procedures relating to decision-making and record-keeping. The Guide highlights the importance of ensuring that whatever the form of the mechanism, it is capable of taking an impartial and multidisciplinary approach to legal reviews of new weapons, and that States exchange information about their review procedures.

Therefore, those who are not thoroughly aware of the disadvantages in the use of arms cannot be thoroughly aware of the advantages in the use of arms.

– Sun Tzu, *The Art of War*, circa 500 BC

*If the new and frightful weapons of destruction which are now at the disposal of the nations seem destined to abridge the duration of future wars, it appears likely, on the other hand, that future battles will only become more and more murderous.*

– Henry Dunant, *Memory of Solferino*, 1862

[The International Military] Commission having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity...

– St. Petersburg Declaration, 1868

# INTRODUCTION

The right of combatants to choose their means and methods of warfare<sup>1</sup> is not unlimited.<sup>2</sup> This is a basic tenet of *international humanitarian law* (IHL), also known as the *law of armed conflict* or the *law of war*.

IHL consists of the body of rules that apply during armed conflict with the aim of protecting persons who do not, or no longer, participate in the hostilities (e.g. civilians and wounded, sick or captured combatants) and regulating the conduct of hostilities (i.e. the means and methods of warfare). IHL sets limits on armed violence in wartime in order to prevent, or at least reduce, suffering. It is based on norms as ancient as war itself, rooted in the traditions of all societies. The rules of IHL have been developed and codified over the last 150 years in international treaties, notably the 1949 Geneva Conventions and their Additional Protocols of 1977, complemented by a number of other treaties dealing with specific matters such as cultural property, child soldiers, international criminal justice, and use of certain weapons. Many of the rules of IHL are also considered part of *customary international law* based on widespread, representative and virtually uniform practice of States accepted as legal obligations and therefore mandatory for all parties to an armed conflict.

The combatants' right to choose their means and methods of warfare is limited by a number of basic IHL rules regarding the conduct of hostilities, many of which are found in Additional Protocol I on the protection of victims of international armed conflicts.<sup>3</sup> Other treaties prohibit or restrict the use of specific weapons such as biological and chemical weapons, incendiary weapons, blinding laser weapons and landmines. In addition, many of the basic rules and specific prohibitions and restrictions on means and methods of warfare may be found in customary international law.<sup>4</sup>

Reviewing the legality of new weapons, means and methods of warfare is not a novel concept. The first international instrument to refer to the legal assessment of emerging military technologies was the St Petersburg Declaration, adopted in 1868 by an International Military Commission. The Declaration addresses the development of future weapons in these terms:

“The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity.”<sup>5</sup>

The only other reference in international treaties to the need to carry out legal reviews of new weapons, means and methods of warfare is found in Article 36 of Additional Protocol I:

“In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.”

The aim of Article 36 is to prevent the use of weapons that would violate international law in all circumstances and to impose restrictions on the use of weapons that would violate international law in some circumstances, by determining their lawfulness before they are developed, acquired or otherwise incorporated into a State's arsenal.

<sup>1</sup> The terms “means and methods of warfare” designate the tools of war and the ways in which they are used. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 [hereinafter Additional Protocol I] refers alternately to “methods or means of warfare” (Art. 35(1) and (3), Art. 51(5)(a), Art. 55(1)), “methods and means of warfare” (titles of Part III and of Section I of Part III), “means and methods of attack” (Art. 57(2)(a)(iii)), and “weapon, means or method of warfare” (Art. 36).

<sup>2</sup> This principle is stipulated in e.g. Article 22 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land, and Article 35(1) of Additional Protocol I.

<sup>3</sup> Additional Protocol I includes provisions imposing limits on the use of weapons, means and methods of warfare and protecting civilians from the effects of hostilities. See in particular Part III, Section I, and Part IV, Section I, Chapters I to IV.

<sup>4</sup> For a list of the general and specific treaty and customary IHL rules applicable to weapons, means and methods of warfare, see section 1.2 of this Guide, below.

<sup>5</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St Petersburg, 29 November / 11 December 1868. The full text of the St Petersburg Declaration is reproduced in Annex II of this Guide.



The requirement that the legality of all new weapons, means and methods of warfare be systematically assessed is arguably one that applies to *all* States, regardless of whether or not they are party to Additional Protocol I. It flows logically from the truism that States are prohibited from using illegal weapons, means and methods of warfare or from using weapons, means and methods of warfare in an illegal manner. The faithful and responsible application of its international law obligations would require a State to ensure that the new weapons, means and methods of warfare it develops or acquires will not violate these obligations.<sup>6</sup> Carrying out legal reviews of new weapons is of particular importance today in light of the rapid development of new weapons technologies.

Article 36 is complemented by Article 82 of Additional Protocol I, which requires that legal advisers be available at all times to advise military commanders on IHL and “on the appropriate instruction to be given to the armed forces on this subject.” Both provisions establish a framework for ensuring that armed forces will be capable of conducting hostilities in strict accordance with IHL, through legal reviews of planned means and methods of warfare.

Article 36 does not specify how a determination of the legality of weapons, means and methods of warfare is to be carried out. A plain reading of Article 36 indicates that a State must assess the new weapon, means or method of warfare in light of the provisions of Additional Protocol I and of any other applicable rule of international law. According to the ICRC’s Commentary on the Additional Protocols, Article 36 “implies the obligation to establish internal procedures for the purpose of elucidating the issue of legality, and the other Contracting Parties can ask to be informed on this point.”<sup>7</sup> But there is little by way of State practice to indicate what kind of “internal procedures” should be established, as only a limited number of States are known to have put in place mechanisms or procedures to conduct legal reviews of weapons.<sup>8</sup>

The importance of the legal review of weapons has been highlighted in a number of international fora. In 1999, the 27<sup>th</sup> International Conference of the Red Cross and Red Crescent encouraged States “to establish mechanisms and procedures to determine whether the use of weapons, whether held in their inventories or being procured or developed, would conform to the obligations binding on them under international humanitarian law.” It also encouraged States “to promote, wherever possible, exchange of information and transparency in relation to these mechanisms, procedures and evaluations.”<sup>9</sup>

At the Second Review Conference of the Convention on Certain Conventional Weapons (CCW) in 2001, the States Parties urged “States which do not already do so, to conduct reviews such as that provided for in Article 36 of Protocol I additional to the 1949 Geneva Conventions, to determine whether any new weapon, means or methods of warfare would be prohibited by international humanitarian law or other rules of international law applicable to them.”<sup>10</sup>

<sup>6</sup> See, for example, the practice of Sweden and the United States, which established formal weapons review mechanisms as early as 1974, three years before the adoption of Additional Protocol I.

<sup>7</sup> Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 [hereinafter Commentary on the Additional Protocols], at paragraphs 1470 and 1482. States Parties would be required to share the procedures they adopt with other States Parties on the basis of Article 84 of Additional Protocol I: see below, note 96 and corresponding text.

<sup>8</sup> States that are known to have in place national mechanisms to review the legality of weapons and that have made the instruments setting up these mechanisms available to the ICRC are: **Australia:** *Legal review of new weapons*, Australian Department of Defence Instruction (General) OPS 44-1, 2 June 2005 [hereinafter Australian Instruction]; **Belgium:** Défense, Etat-Major de la Défense, Ordre Général – J/836 (18 July 2002), establishing *La Commission d’Evaluation Juridique des nouvelles armes, des nouveaux moyens et des nouvelles méthodes de guerre* (Committee for the Legal Review of New Weapons, New Means and New Methods of Warfare) [hereinafter Belgian General Order]; **the Netherlands:** *Beschikking van de Minister van Defensie* (Directive of the Minister of Defence) No. 458.614/A, 5 May 1978, establishing the *Adviescommissie Internationaal Recht en Conventioneel Wapengebruik* (Committee for International Law and the Use of Conventional Weapons) [hereinafter the Netherlands Directive]; **Norway:** *Direktiv om folkerettslig vurdering av vapen, krigforingsmetoder og krigforingsvirkemidler* (Directive on the Legal Review on Weapons, Methods and Means of Warfare), Ministry of Defence, 18 June 2003 [hereinafter Norwegian Directive]; **Sweden:** *Förordning om folkrättslig granskning av vapenprojekt* (Ordinance on international law review of arms projects), Swedish Code of Statutes, SFS 1994:536 [hereinafter Swedish Monitoring Ordinance]; **the United States:** *Review of Legality of Weapons under International Law*, US Department of Defense Instruction 5500.15, 16 October 1974; *Weapons Review*, US Department of Air Force Instruction 51-402, 13 May 1994 [hereinafter US Air Force Instruction]; *Legal Services: Review of Legality of Weapons under International Law*, US Department of Army Regulation 27-53, 1 January 1979 [hereinafter US Army Regulation]; *Implementation and Operation of the Defense Acquisition System and the Joint Capabilities Integration and Development System*, US Department of Navy, Secretary of the Navy Instruction 5000.2C, 19 November 2004 [hereinafter US Navy Instruction]; *Policy for Non-Lethal Weapons*, US Department of Defense Directive 3000.3, 9 July 1996 [hereinafter Non-lethal Weapons Directive]; *The Defense Acquisition System*, US Department of Defense Directive 5000.1, 12 May 2003 [hereinafter US Acquisition Directive]. France and the United Kingdom have indicated to the ICRC that they carry out reviews pursuant to Ministry of Defence instructions, but these have not been made available. The United Kingdom’s procedures are mentioned in UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, 2004, at p. 119, paragraph 6.20.1 [hereinafter UK Military Manual]. In Germany, the Federal Agency for Defence Procurement (BWB), upon instruction of the Defence Technology Department at the Federal Ministry of Defence, commissioned a “Manual regarding a test of compliance with international law at the initial point of procurement – International arms control obligations and international humanitarian law”, which was published in 2000: Rudolf Gridl, *Kriterienkatalog zur Überprüfung von Beschaffungsvorhaben im Geschäftsbereich des BWB/BMVG mit völkerrechtlichen Vereinbarungen: Internationale Rüstungskontrolle und humanitäres Völkerrecht*, Ebenhausen im Isartal: Stiftung Wissenschaft und Politik, 2000. For an overview of Article 36 and existing review mechanisms, see: Lt. Col. Justin McClelland, “The review of weapons in accordance with Article 36 of Additional Protocol I”, *International Review of the Red Cross*, Vol. 85, No. 850 (June 2003), pp. 397-415; I. Daoust, R. Couppland and R. Ishoey, “New wars, new weapons? The obligation of States to assess the legality of means and methods of warfare”, *International Review of the Red Cross*, Vol. 84, No. 846 (June 2002) at pp. 359-361; Danish Red Cross, *Reviewing the Legality of New Weapons*, December 2000.

<sup>9</sup> Section 21, Final Goal 1.5 of the Plan of Action for the years 2000-2003 adopted by the 27<sup>th</sup> International Conference of the Red Cross and Red Crescent, Geneva, 31 October to 6 November 1999. The Conference further stated that “States and the ICRC may engage consultations to promote these mechanisms (...)”.

<sup>10</sup> Final Declaration of the Second Review Conference of the States Parties to the Convention on Certain Conventional Weapons, Geneva, 11-21 December 2001, CCW/CONF.II/2, at p. 11. Available at <<http://disarmament.un.org:8080/ccw/ccwmeetings.html>>.

In December 2003, the 28<sup>th</sup> International Conference of the Red Cross and Red Crescent reaffirmed by consensus the goal of ensuring “the legality of new weapons under international law,” this “in light of the rapid development of weapons technology and in order to protect civilians from the indiscriminate effects of weapons and combatants from unnecessary suffering and prohibited weapons.”<sup>11</sup> The Conference stated that all new weapons, means and methods of warfare “should be subject to rigorous and multidisciplinary review”, and in particular that such review “should involve a multidisciplinary approach, including military, legal, environmental and health-related considerations.”<sup>12</sup> The Conference also encouraged States “to review with particular scrutiny all new weapons, means and methods of warfare that cause health effects with which medical personnel are unfamiliar.”<sup>13</sup> Finally, the Conference invited States that have review procedures in place to cooperate with the ICRC with a view to facilitating the voluntary exchange of experience on review procedures.<sup>14</sup>

In this Guide, the terms “weapons, means and methods of warfare” designate the means of warfare and the manner in which they are used. In order to lighten the text, the Guide will use the term “weapons” as shorthand, but the terms “means of warfare”, “methods of warfare”, “means and methods of warfare”, and “weapons, means and methods of warfare” will also be used as the context requires.<sup>15</sup>

## STRUCTURE

This Guide is divided into two parts: the first deals with the substantive aspects of an Article 36 review, i.e. relating to its material scope of application, and the second deals with functional considerations, i.e. those of form and procedure. The material scope of application is dealt with before the functional considerations because determining the latter requires an understanding of the former. For example, it is difficult to determine the expertise that will be needed to conduct the review in advance of understanding what the review is required to do.

**Part 1** on the review mechanism’s material scope of application addresses three questions:

- What types of weapons must be subjected to a legal review? (**section 1.1**)
- What rules must the legal review apply to these weapons? (**section 1.2**)
- What kind of factors and empirical data should the legal review consider? (**section 1.3**)

**Part 2** addresses the functional considerations of the review mechanism, in particular:

- The establishment of the review mechanism (**section 2.1**): by what type of constituent instrument and under whose authority?
- The structure and composition of the review mechanism (**section 2.2**): who is responsible for carrying out the review? what departments / sectors are represented? what kind of expertise should be considered in the review?
- The procedure for conducting a review (**section 2.3**): at what stage should the review of new weapons take place? how and by whom is the review procedure triggered? how is information about the weapon under review gathered?
- Decision-making (**section 2.4**): how are decisions reached? are decisions binding on the government or treated as recommendations? can decisions attach conditions to the approval of new weapons? is the review’s decision final or can it be appealed?
- Record-keeping (**section 2.5**): should records be kept of the reviews that have been carried out and the decisions reached? who can have access to such records and under what conditions?

<sup>11</sup> Final Goal 2.5 of the Agenda for Humanitarian Action adopted by the 28<sup>th</sup> International Conference of the Red Cross and Red Crescent, Geneva, 2-6 December 2003 [hereinafter Agenda for Humanitarian Action]. The full text of Final Goal 2.5 is reproduced in Annex I to this Guide. At the International Conference, two States – Canada and Denmark – made specific pledges to review their procedures concerning the development or acquisition of new weapons, means and methods of warfare.

<sup>12</sup> *Id.*, paragraph 2.5.1.

<sup>13</sup> *Id.*, paragraph 2.5.2.

<sup>14</sup> *Id.*, paragraph 2.5.3.

<sup>15</sup> See note 1 above and section 1.1 below.

## 1. Material scope of application of the review mechanism

### 1.1 Types of weapons to be subjected to legal review

Article 36 of Additional Protocol I refers to “*weapons, means or methods of warfare*”. According to the ICRC’s Commentary on the Additional Protocols:

“the words ‘methods and means’ *include weapons in the widest sense, as well as the way in which they are used*. The use that is made of a weapon can be unlawful in itself, or it can be unlawful only under certain conditions. For example, poison is unlawful in itself, as would be any weapon which would, by its very nature, be so imprecise that it would inevitably cause indiscriminate damage. (...) However, a weapon that can be used with precision can also be abusively used against the civilian population. In this case, it is not the weapon which is prohibited, but the method or the way in which it is used.”<sup>16</sup>

The material scope of the Article 36 legal review is therefore very broad. It would cover:

- weapons of all types – be they anti-personnel or anti-materiel, “lethal”, “non-lethal” or “less lethal” – and weapons systems;<sup>17</sup>
- the ways in which these weapons are to be used pursuant to military doctrine, tactics, rules of engagement, operating procedures and counter-measures;<sup>18</sup>
- all weapons to be acquired, be they procured further to research and development on the basis of military specifications, or purchased “off-the-shelf”;<sup>19</sup>
- a weapon which the State is intending to acquire for the first time, without necessarily being “new” in a technical sense;<sup>20</sup>
- an existing weapon that is modified in a way that alters its function, or a weapon that has already passed a legal review but that is subsequently modified;<sup>21</sup>
- an existing weapon where a State has joined a new international treaty which may affect the legality of the weapon.<sup>22</sup>

When in doubt as to whether the device or system proposed for study, development or acquisition is a “weapon”, legal advice should be sought from the weapons review authority.

A weapon or means of warfare cannot be assessed in isolation from the method of warfare by which it is to be used. It follows that the legality of a weapon does not depend solely on its design or intended purpose, but also on the manner in which it is expected to be used on the battlefield. In addition, a weapon used in one manner may “pass” the Article 36 “test”, but may fail it when used in another manner. This is why Article 36 requires a State “to determine whether its employment would, *in some or all circumstances*, be prohibited” by international law (emphasis added).

<sup>16</sup> Commentary on the Additional Protocols, paragraph 1402, emphasis added.

<sup>17</sup> Sub-section 3(a) of the Australian Instruction defines the term “weapon”, for the purposes of the Instruction, as “an offensive or defensive instrument of combat used to destroy, injure, defeat or threaten. It includes weapon systems, munitions, sub-munitions, ammunition, targeting devices, and other damaging or injuring mechanisms”. Sub-section 1(a) of the Belgian General Order defines the term “weapon” for the purposes of the General Order as “any type of weapon, weapon system, projectile, munition, powder or explosive designed to put out of combat persons and/or materiel” (unofficial translation from the French). Sub-section 1.4 of the Norwegian Directive defines the word “weapons”, for the purposes of the Directive, as “any means of warfare, weapons systems / project, substance, etc. which is particularly suited for use in combat, including ammunition and similar functional parts of a weapon”. In the US, review of all “weapons or weapons systems” is required: see US Army Regulation, sub-section 2(a); US Navy Instruction, p. 23, sub-section 2.6; US Acquisition Directive, p. 8, sub-section E.1.1.15. The US DOD Law of War Working Group has proposed standard definitions, pursuant to which the term “weapons” refers to “all arms, munitions, materiel, instruments, mechanisms, or devices that have an intended effect of injuring, damaging, destroying or disabling personnel or property”, and the term “weapon system” refers to “the weapon itself and those components required for its operation, including new, advanced or emerging technologies which may lead to development of weapons or weapon systems and which have significant legal and policy implications. Weapons systems are limited to those components or technologies having direct injury or damaging effect on people or property (including all munitions and technologies such as projectiles, small arms, mines, explosives, and all other devices and technologies that are physically destructive or injury producing)”. See W. Hays Parks, Office of The Judge Advocate General of the Army, “Weapons Review Programme of the United States”, presented at the Expert Meeting on Legal Reviews of Weapons and the SlrUS Project, Jongny sur Vevey, Switzerland, 29-31 January 2001 (both this presentation and the report of the meeting are on file with the ICRC).

<sup>18</sup> See for example Norwegian Directive, sub-sections 1.4 and 2.4.

<sup>19</sup> See also sub-section 2.3.1 below.

<sup>20</sup> Commentary on the Additional Protocols, paragraph 1472.

<sup>21</sup> See for example Australian Instruction, section 2 and sub-section 3(b) and footnote 3 thereof; Belgian General Order, sub-section 5(i) and (j); Norwegian Directive, sub-section 2.3 *in fine*; US Air Force Instruction, sub-sections 1.1.1, 1.1.2, 1.1.3; and US Army Regulation, sub-section 6(a)(3).

<sup>22</sup> See for example Norwegian Directive, sub-sections 2.2 (“To the extent necessary, legal review shall also be done with regard to existing weapons, methods and means of warfare, in particular when Norway commits to new international legal obligations.”) and 2.6 (“In addition, relevant rules of International Law that may be expected to enter into force for Norway in the near future shall also be taken into consideration. Furthermore, particular emphasis shall be put on views on International Law put forward by Norway internationally.”). See also US Air Force Instruction, sub-section 1.1.3.

As noted in the ICRC's Commentary on the Additional Protocols, a State need only determine "whether the employment of a weapon *for its normal or expected use* would be prohibited under some or all circumstances. A State is not required to foresee or analyse all possible misuses of a weapon, for almost any weapon can be misused in a way that would be prohibited."<sup>23</sup>

## 1.2 Legal framework: Rules to be applied to new weapons, means and methods of warfare

In determining the legality of a new weapon, the reviewing authority must apply existing international law rules which bind the State – be they treaty-based or customary. Article 36 of Additional Protocol I refers in particular to the Protocol and to "any other rule of international law applicable" to the State. The relevant rules include *general* rules of IHL applying to *all weapons, means and methods of warfare*, and *particular* rules of IHL and international law prohibiting the use of *specific weapons and means of warfare* or restricting the methods by which they can be used.

The first step is to determine whether employment of the particular weapon or means of warfare under review is prohibited or restricted by a treaty which binds the reviewing State or by customary international law (sub-section 1.2.1 below). If there is no such specific prohibition, the next step is to determine whether employment of the *weapon or means of warfare* under review and the normal or expected *methods* by which it is to be used would comply with the general rules applicable to all weapons, means and methods of warfare found in Additional Protocol I and other treaties that bind the reviewing State or in customary international law (sub-section 1.2.2 below). In the absence of relevant treaty or customary rules, the reviewing authority should consider the proposed weapon in light of the principles of humanity and the dictates of public conscience (sub-section 1.2.2.3 below).

Of those States that have established formal mechanisms to review the legality of new weapons, some have empowered the reviewing authority to take into consideration not only the law as it stands at the time of the review, but also likely future developments of the law.<sup>24</sup> This approach is meant to avoid the costly consequences of approving and procuring a weapon the use of which is likely to be restricted or prohibited in the near future.

The sections below list the relevant treaties and customary rules without specifying in which situations these apply – i.e. whether they apply in international or non-international armed conflicts, or in all situations. This is to be determined by reference to the relevant treaty or customary rule, bearing in mind that most of the rules apply to all types of armed conflict. Besides, as stated in the *Tadic* decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in relation to prohibited means and methods of warfare, "what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife."<sup>25</sup>

### 1.2.1 Prohibitions or restrictions on specific weapons

#### 1.2.1.1 Prohibitions or restrictions on specific weapons under international treaty law

In conducting reviews, a State must consider the international instruments to which it is a party that prohibit the use of specific weapons and means of warfare, or that impose limitations on the way in which specific weapons may be used. These instruments include (in chronological order):<sup>26</sup>

- Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St Petersburg, 29 November / 11 December 1868 (hereafter the 1868 St Petersburg Declaration);
- Declaration (2) concerning Asphyxiating Gases, The Hague, 29 July 1899;
- Declaration (3) concerning the Prohibition of Using Bullets which Expand or Flatten Easily in the Human Body, The Hague, 29 July 1899;

<sup>23</sup> Commentary on the Additional Protocols, paragraph 1469, emphasis added.

<sup>24</sup> See for example UK Military Manual, p. 119, paragraph 6.20.1, which states: "The review process takes into account not only the law as it stands at the time of the review but also attempts to take account of likely future developments in the law of armed conflict." See also Norwegian Directive, at paragraph 2.6, which states that "relevant rules of International Law that may be expected to enter into force for Norway in the near future shall also be taken into consideration." The same provision adds that "particular emphasis shall be put on views on International Law put forward by Norway internationally."

<sup>25</sup> ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, Case No. IT-94-1, paras 119 and 127.

<sup>26</sup> Reference is made only to the instruments and not to the specific prohibitions or restrictions contained therein, except in the case of the Rome Statute of the International Criminal Court.

- Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Article 23 (a), pursuant to which it is forbidden to employ poison or poisoned weapons;
- Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, The Hague, 18 October 1907;
- Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925;
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Opened for Signature at London, Moscow and Washington, 10 April 1972;
- Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques, 10 December 1976 (ENMOD Convention);
- 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 (CCW), Geneva, 10 October 1980, and amendment to Article 1, 21 December 2001. The Convention has five Protocols:
  - Protocol on Non-Detectable Fragments (Protocol I), Geneva, 10 October 1980;
  - Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II); Geneva, 10 October 1980; or Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996);
  - Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980;
  - Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995;
  - Protocol on Explosive Remnants of War (Protocol V), 28 November 2003;<sup>27</sup>
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993;
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997.
- Rome Statute of the International Criminal Court, 17 July 1998, Article 8(2)(b), paragraphs (xvii) to (xx), which include in the definition of war crimes for the purpose of the Statute the following acts committed in international armed conflicts:<sup>28</sup>

“(xvii) Employing poison or poisoned weapons;

“(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

“(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

“(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123.”<sup>29</sup>

### 1.2.1.2 Prohibitions or restrictions on specific weapons under customary international law

In conducting reviews, a State must also consider the prohibitions or restrictions on the use of specific weapons, means and methods of warfare pursuant to customary international law. According to the ICRC study on customary international humanitarian law,<sup>30</sup> these prohibitions or restrictions would include the following.

- The use of poison or poisoned weapons is prohibited.<sup>31</sup>
- The use of biological weapons is prohibited.<sup>32</sup>

<sup>27</sup> The Protocol on Explosive Remnants of War does not prohibit or restrict the use of weapons, but stipulates the responsibilities for dealing with the post-hostilities effects of weapons that are considered legal *per se*. However, Article 9 of the Protocol encourages each State Party to take “generic preventive measures aimed at minimizing the occurrence of explosive remnants of war, including, but not limited to, those referred to in Part 3 of the Technical Annex.”

<sup>28</sup> These are not new rules of IHL, but instead criminalize prohibitions that exist pursuant to other treaties and to customary international law.

<sup>29</sup> At the time of writing, there is no such annex to the Statute.

<sup>30</sup> J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, Cambridge: Cambridge University Press, 2005.

<sup>31</sup> *Id.*, Vol. I, Rule 72, at 251.

<sup>32</sup> *Id.*, Rule 73, at 256.

- The use of chemical weapons is prohibited.<sup>33</sup>
- The use of riot-control agents as a method of warfare is prohibited.<sup>34</sup>
- The use of herbicides as a method of warfare is prohibited under certain conditions.<sup>35</sup>
- The use of bullets which expand or flatten easily in the human body is prohibited.<sup>36</sup>
- The anti-personnel use of bullets which explode within the human body is prohibited.<sup>37</sup>
- The use of weapons, the primary effect of which is to injure by fragments which are not detectable by x-ray in the human body is prohibited.<sup>38</sup>
- The use of booby-traps which are in any way attached to or associated with objects or persons entitled to special protection under international humanitarian law or with objects that are likely to attract civilians is prohibited.<sup>39</sup>
- When landmines are used, particular care must be taken to minimize their indiscriminate effects. At the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal.<sup>40</sup>
- If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person *hors de combat*.<sup>41</sup>
- The use of laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited.<sup>42</sup>

### 1.2.2 General prohibitions or restrictions on weapons, means and methods of warfare

If no specific prohibition or restriction is found to apply, the weapon or means of warfare under review and the normal or expected methods by which it is to be used must be assessed in light of the general prohibitions or restrictions provided by treaties and by customary international law applying to all weapons, means and methods of warfare.

A number of the rules listed below are primarily context-dependent, in that their application is typically determined at field level by military commanders on a case-by-case basis taking into consideration the conflict environment in which they are operating at the time and the weapons, means and methods of warfare at their disposal. But these rules are also relevant to the assessment of the legality of a new weapon before it has been used on the battlefield, to the extent that the characteristics, expected use and foreseeable effects of the weapon allow the reviewing authority to determine whether or not the weapon will be capable of being used lawfully in certain foreseeable situations and under certain conditions. For example, if the weapon's destructive radius is very wide, it may be difficult to use it against one or several military targets located in a concentration of civilians without violating the prohibition on the use of indiscriminate means and methods of warfare<sup>43</sup> and/or the rule of proportionality.<sup>44</sup> In this regard, when approving such a weapon, the reviewing authority should attach conditions or comments to the approval, to be integrated into the rules of engagement or operating procedures associated with the weapon.

<sup>33</sup> *Id.*, Rule 74, at 259.

<sup>34</sup> *Id.*, Rule 75, at 263.

<sup>35</sup> *Id.*, Rule 76, at 265. The rule sets out the conditions under which the use of herbicides as a method of warfare is prohibited as follows: "if they: a) are of a nature to be prohibited chemical weapons; b) are of a nature to be prohibited biological weapons; c) are aimed at vegetation that is not a military objective; d) would cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which may be expected to be excessive in relation to the concrete and direct military advantage anticipated; or e) would cause widespread, long-term and severe damage to the natural environment"

<sup>36</sup> *Id.*, Rule 77, at 268.

<sup>37</sup> *Id.*, Rule 78, at 272.

<sup>38</sup> *Id.*, Rule 79, at 275.

<sup>39</sup> *Id.*, Rule 80, at 278.

<sup>40</sup> *Id.*, Rules 81-83, at 280, 283, and 285 respectively. Rule 82 specifies that a party to the conflict using landmines must record their placement as far as possible.

<sup>41</sup> *Id.*, Rules 84 and 85, at 287 and 289 respectively.

<sup>42</sup> *Id.*, Rule 86, at 292.

<sup>43</sup> See Additional Protocol I, Article 51(4)(b) and (c), referred to under sub-section 1.2.2.1 below, and the rule of customary international law prohibiting indiscriminate attacks, under sub-section 1.2.2.2 below.

<sup>44</sup> See Article 51(5)(b) of Additional Protocol I, referred to under sub-section 1.2.2.1 below, and the rule of proportionality under customary international law, under sub-section 1.2.2.2 below.



### 1.2.2.1 General prohibitions or restrictions on weapons, means and methods of warfare under international treaty law

A number of treaty-based general prohibitions or restrictions on weapons, means and methods of warfare must be considered. In particular, States party to Additional Protocol I must consider the rules under that treaty, as required by Article 36.

These include:<sup>45</sup>

- the prohibition to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering (Art. 35(2));
- the prohibition to employ methods or means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment (Arts 35(3) and 55);
- the prohibition to employ a method or means of warfare which cannot be directed at a specific military objective and consequently, that is of a nature to strike military objectives and civilians or civilian objects without distinction (Art. 51(4)(b));
- the prohibition to employ a method or means of warfare the effects of which cannot be limited as required by Additional Protocol I and consequently, that is of a nature to strike military objectives and civilians or civilian objects without distinction (Art. 51(4)(c));
- the prohibition of attacks by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects (Art. 51(5)(a));
- the prohibition of attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated (proportionality rule) (Art. 51(5)(b)).

### 1.2.2.2 General prohibitions or restrictions on weapons, means and methods of warfare under customary international law

General prohibitions or restrictions on the use of weapons, means and methods of warfare pursuant to customary international law must also be considered. These would include:

- the prohibition to use means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering;<sup>46</sup>
- the prohibition to use weapons which are by nature indiscriminate.<sup>47</sup> This includes means of warfare which cannot be directed at a specific military objective, and means of warfare the effects of which cannot be limited as required by IHL;<sup>48</sup>
- the prohibition of attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects;<sup>49</sup>
- the prohibition to use methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Destruction of the natural environment may not be used as a weapon;<sup>50</sup>
- the prohibition to launch an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated (proportionality rule).<sup>51</sup>

<sup>45</sup> Selected provisions of Additional Protocol I are reproduced in Annex III to this Guide.

<sup>46</sup> Henckaerts and Doswald-Beck (eds.), note 30 above, Rule 70, at 237.

<sup>47</sup> *Id.*, Rule 71, at 244. See also Rule 11, at 37.

<sup>48</sup> *Id.*, Rule 12, at 40.

<sup>49</sup> *Id.*, Rule 13, at 43.

<sup>50</sup> *Id.*, Rule 45, at 151. The summary of the rule notes that: "It appears that the United States is a 'persistent objector' to the first part of this rule. In addition, France, the United Kingdom and the United States are persistent objectors with regard to the application of the first part of this rule to the use of nuclear weapons." See also Rule 44.

<sup>51</sup> *Id.*, Rule 14, at 46.

### 1.2.2.3 Prohibitions or restrictions based on the principles of humanity and the dictates of public conscience (the “Martens clause”)

Consideration should be given to whether the weapon accords with the principles of humanity and the dictates of public conscience, as stipulated in Article 1(2) of Additional Protocol I, in the preamble to the 1907 Hague Convention (IV), and in the preamble to the 1899 Hague Convention (II). This refers to the so-called “Martens clause”, which Article 1(2) of Additional Protocol I formulates as follows:

“In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”

The International Court of Justice, in the case of the *Legality of the Threat or Use of Nuclear Weapons*, affirmed the importance of the Martens clause “whose continuing existence and applicability is not to be doubted”<sup>52</sup> and stated that it “had proved to be an effective means of addressing rapid evolution of military technology.”<sup>53</sup> The Court also found that the Martens clause represents customary international law.<sup>54</sup>

A weapon which is not covered by existing rules of IHL would be considered contrary to the Martens clause if it is determined *per se* to contravene the principles of humanity or the dictates of public conscience.

## 1.3 Empirical data to be considered by the review

In assessing the legality of a particular weapon, the reviewing authority must examine not only the weapon’s design and characteristics (the “means” of warfare) but also how it is to be used (the “method” of warfare), bearing in mind that the weapon’s effects will result from a combination of its design *and* the manner in which it is to be used.

In order to be capable of assessing whether the weapon under review is subject to specific prohibitions or restrictions (listed in sub-section 1.2.1 above) or whether it contravenes one or more of the general rules of IHL applicable to weapons, means and methods of warfare (listed in sub-section 1.2.2 above), the reviewing authority will have to take into consideration a wide range of military, technical, health and environmental factors. This is the rationale for the involvement of experts from various disciplines in the review process.<sup>55</sup>

For each category of factors described below, the relevant general rule of IHL is referred to, where appropriate.

### 1.3.1 Technical description of the weapon

An assessment will logically begin by considering the weapon’s technical description and characteristics, including:

- a full technical description of the weapon;<sup>56</sup>
- the use for which the weapon is designed or intended, including the types of targets (e.g. personnel or materiel; specific target or area; etc.);<sup>57</sup>
- its means of destruction, damage or injury.

<sup>52</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, paragraph 87.

<sup>53</sup> *Id.*, paragraph 78.

<sup>54</sup> *Id.*, paragraph 84.

<sup>55</sup> The importance of ensuring a multidisciplinary approach to the legal review of weapons is emphasized in Action 2.5.2 of the Agenda for Humanitarian Action adopted by the 28<sup>th</sup> International Conference of the Red Cross and Red Crescent and was noted by the Expert Meeting on Legal Reviews of Weapons and the SirUS Project referred to in note 17 above. See also section 2.2 below.

<sup>56</sup> In addition to the design, material composition and fusing system of the weapon, the technical description would include “range, speed, shape, materials, fragments, accuracy, desired effect, and nature of system or subsystem employed for firing, launching, releasing or dispensing”: see US Department of Air Force Instruction 51-402, Weapons Review, 13 May 1994 (implementing US Department of Air Force Policy Directive 51-4, Compliance with the Law of Armed Conflict, 26 April 1993 and US Department of Defence Directive 5100.77, DoD Law of War Program, 9 December 1998), at sub-section 1.2.1.

<sup>57</sup> This is referred to by some as the weapon’s “mission” or “military purpose”.



### 1.3.2 Technical performance of the weapon

The technical performance of the weapon under review is of particular relevance in determining whether its use may cause *indiscriminate effects*. The relevant factors would include:

- the accuracy and reliability of the targeting mechanism (including e.g. failure rates, sensitivity of unexploded ordnance, etc.);
- the area covered by the weapon;
- whether the weapon's foreseeable effects are capable of being limited to the target or of being controlled in time or space (including the degree to which a weapon will present a risk to the civilian population after its military purpose is served).

### 1.3.3 Health-related considerations

Directly related to the weapon's mechanism of injury (damage mechanism) is the question of what types of injuries the new weapon will be capable of inflicting. The factors to be considered in this regard could include:<sup>58</sup>

- the size of the wound expected when the weapon is used for its intended purpose (as determined by wound ballistics);
- the likely mortality rate among the victims when the weapon is used for its intended purpose;
- whether the weapon would cause anatomical injury or anatomical disability or disfigurement which are specific to the design of the weapon.

If a new weapon injures by means other than explosive or projectile force, or otherwise causes health effects that are qualitatively or quantitatively different from those of existing lawful weapons and means of warfare, additional factors to be considered could include:<sup>59</sup>

- whether all relevant scientific evidence pertaining to the foreseeable effects on humans has been gathered;
- how the mechanism of injury is expected to impact on the health of victims;
- when used in the context of armed conflict, what is the expected field mortality and whether the later mortality (in hospital) is expected to be high;
- whether there is any predictable or expected long-term or permanent alteration to the victims' psychology or physiology;
- whether the effects would be recognized by health professionals, be manageable under field conditions and be treatable in a reasonably equipped medical facility.

These and other health-related considerations are important to assist the reviewing authority in determining whether the weapon in question can be expected to cause *superfluous injury or unnecessary suffering*. Assessing the legality of a weapon in light of this rule involves weighing the relevant health factors together against the intended military purpose or expected military advantage of the new weapon.<sup>60</sup>

<sup>58</sup> See, for example, US Air Force Instruction, sub-section 1.2.1, which requires that the reviewer be provided with information *inter alia* on the "nature of the expected injury to persons (including medical data, as available)".

<sup>59</sup> The 28<sup>th</sup> International Conference of the Red Cross and Red Crescent encouraged States "to review with particular scrutiny all new weapons, means and methods of warfare that cause health effects with which medical personnel are unfamiliar": paragraph 2.5.2 of the Agenda for Humanitarian Action. In addition, the Expert Meeting on Legal Reviews of Weapons and the SirUS Project noted that "we are familiar with the effects of weapons which injure by explosives, projectile force or burns and weapons causing these effects need to be reviewed accordingly" and that "there is a need for particularly rigorous legal reviews of weapons which injure by means and cause effects with which we are not familiar" (report of the meeting at p. 8, note 17 above).

<sup>60</sup> According to the ICRC study on customary international humanitarian law, "The prohibition of means of warfare which are of a nature to cause superfluous injury or unnecessary suffering refers to the effect of a weapon on combatants. Although there is general agreement on the existence of the rule, views differ on how it can actually be determined that a weapon causes superfluous injury or unnecessary suffering. States generally agree that suffering that has no military purpose violates this rule. Many States point out that the rule requires that a balance be struck between military necessity, on the one hand, and the expected injury or suffering inflicted on a person, on the other hand, and that excessive injury or suffering, i.e. that which is out of proportion to the military advantage sought, therefore violates the rule. Some States also refer to the availability of alternative means as an element that has to go into the assessment of whether a weapon causes unnecessary suffering or superfluous injury." Henckaerts and Doswald-Beck (eds.), note 30 above, under Rule 70, at 240 (footnotes omitted).

### 1.3.4 Environment-related considerations

In determining the effects of the weapon under review on the natural environment, and in particular whether they are expected to cause excessive incidental damage to the natural environment or widespread, long-term and severe damage to the natural environment,<sup>61</sup> the relevant questions to be considered would include:

- have adequate scientific studies on the effects on the natural environment been conducted and examined?
- what type and extent of damage are expected to be directly or indirectly caused to the natural environment?
- for how long is the damage expected to last; is it practically/economically possible to reverse the damage, i.e. to restore the environment to its original state; and what would be the time needed to do so?
- what is the direct or indirect impact of the environmental damage on the civilian population?
- is the weapon specifically designed to destroy or damage the natural environment,<sup>62</sup> or to cause environmental modification?<sup>63</sup>

## 2. Functional aspects of the review mechanism

In setting up a weapons review mechanism, a number of decisions need to be made relating to the manner in which it is to be established, its structure and composition, the procedure for conducting a review, decision-making and record-keeping.

The following questions are indicative of the elements to be considered. Reference to State practice is limited to published procedures only.

### 2.1 How should the review mechanism be established?

#### 2.1.1 By legislation, regulation, administrative order, instruction or guidelines?

Article 36 of Additional Protocol I does not specify in what manner and under what authority reviews of the legality of new weapons are to be constituted. It is the responsibility of each State to adopt legislative, administrative, regulatory and/or other appropriate measures to effectively implement this obligation. At a minimum, Article 36 requires that each State Party set up a formal procedure and, in accordance with Article 84 of Additional Protocol I, other States party to the Protocol may ask to be informed about this procedure.<sup>64</sup> The establishment of a formal procedure implies that there be a standing mechanism ready to carry out reviews of new weapons whenever these are being studied, developed, acquired or adopted.

Of the six States that have made available their weapons review procedures, one has established its review mechanism pursuant to a government ordinance<sup>65</sup> and five have done so pursuant to instructions, directives or orders of their Ministry of Defence.<sup>66</sup>

#### 2.1.2 Under which authority should the review mechanism be established?

The review mechanism can be established by, and made accountable to, the government department responsible for the study, development, acquisition or adoption of new weapons, typically the Ministry of Defence or its equivalent. This has the advantage that the Ministry of Defence is also the same authority that issues weapon handling instructions. Most States that have established review mechanisms have done so under the authority of their Ministry of Defence.

<sup>61</sup> See Articles 35(3) and 55 of Additional Protocol I, referred to above under sub-section 1.2.2.1, and rules of customary international law under sub-section 1.2.2.2. Of relevance to the consideration of environmental factors is Rule 44 of the ICRC study on customary international humanitarian law, which states *inter alia*: "Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking" all feasible precautions "to avoid, and in any event to minimize, incidental damage to the environment". See Henckaerts and Doswald-Beck (eds.), note 30 above.

<sup>62</sup> See customary international law rule referenced in note 50 above.

<sup>63</sup> See ENMOD Convention, listed under sub-section 1.2.1.1 above.

<sup>64</sup> See note 7 above and note 96 below.

<sup>65</sup> See Swedish Monitoring Ordinance.

<sup>66</sup> The Ministries of Defence of the Netherlands and Norway and the Department of Defense of the United States have adopted "Directives" to establish their legal review mechanisms. The US Directive has been implemented through separate instructions by each of the three military departments (Army, Navy and Air Force). The Ministry of Defence of Belgium has adopted a "General Order" to establish its legal review mechanism. The Department of Defence of Australia has adopted a general "Defence Instruction" to establish its legal review mechanism. See note 8 above for complete references.

Alternatively, the review mechanism could be established by the government itself and implemented by an inter-departmental entity, which is the option preferred by one State.<sup>67</sup> It is also conceivable that another relevant department be entrusted with the establishment of the review mechanism, such as the authority responsible for government procurement.

Whatever the establishing authority, care should be taken to ensure that the reviewing body is capable of carrying out its work in an impartial manner, based on the law and on relevant expertise.<sup>68</sup>

## 2.2 Structure and composition of the review mechanism

### 2.2.1 Who should be responsible for carrying out the review?

The responsibility for carrying out the legal review may be entrusted to a special body or committee made up of permanent representatives of relevant sectors and departments. This is the option taken by four of the States that have made known their review mechanisms.<sup>69</sup> Two of these have adopted a “mixed” system, whereby a single official – the head of defence – is advised by a standing committee that carries out the review.<sup>70</sup>

In the two other States, the review is the responsibility of a single official (the Director-General of the Defence Force Legal Service in one State, and the Judge-Advocate General of the military department responsible for acquiring a given weapon in the other State). In carrying out the review, the official consults the concerned sectors and relevant experts.<sup>71</sup>

The material scope of the review requires that it consider a wide range of expertise and viewpoints. The review of weapons by a committee may have the advantage of ensuring that the relevant sectors and fields of expertise are involved in the assessment.<sup>72</sup>

Whether the reviewing authority is an individual or a committee, it must have the appropriate qualifications, and in particular a thorough knowledge and understanding of IHL. In this regard, it would be appropriate for the legal advisers appointed to the armed forces to take part in the review, or to head the committee responsible for the review.

### 2.2.2 What departments or sectors should be involved in the review?

#### What kinds of experts should participate in the review?

Whether it is conducted by a committee or by an individual, the review should draw on the views of the relevant sectors and departments, and a wide range of expertise. As seen under section 1 of this Guide, a multidisciplinary approach, including the relevant legal, military, health, arms technology and environmental experts, is essential in order to assess fully the information relating to the new weapon and make a determination on its legality.<sup>73</sup> In this regard, in addition to the relevant sectors of the Ministry of Defence and the Armed Forces, the review may need to draw on experts from the departments of foreign affairs (in particular international law experts), health, and the environment, and possibly on expert advice from outside the administration.

In three of the States that have made available their review mechanisms, the permanent membership is taken from the relevant sectors of the Ministry of Defence or equivalent. In addition to legal officers responsible for advising the Ministry (e.g. from the Judge-Advocate General’s office), permanent members include a military doctor from the medical services

<sup>67</sup> In Sweden, the Delegation for international law monitoring of arms projects is established by the government, which also appoints its members. See section 8 of the Swedish Monitoring Ordinance.

<sup>68</sup> See sub-section 2.2.2 below.

<sup>69</sup> Belgium, the Netherlands, Norway and Sweden: see note 8 above.

<sup>70</sup> Belgium has a committee that advises the Head of Defence, who is responsible for “taking action required by international law” based on the committee’s advice: see Belgian General Order, at section 2(b). Norway has a committee that advises the Chief of Defence, who in turn is responsible for advising and reporting to the Defence Military Organisation: see Norwegian Directive, at section 2.1.

<sup>71</sup> See Australian Instruction, section 6, and US, Department of Defense Instruction 5500.15, sub-section IV.A. In the US, when the Office of the Judge Advocate General of one military department conducts a legal review of a new weapon, it generally coordinates the legal review with the other military departments and services, as well as the office of General Counsel, Department of Defense, to ensure consistency in interpretation.

<sup>72</sup> See Lt. Col. McClelland, “The review of weapons in accordance with Article 36 of Additional Protocol I”, note 8 above, at p. 403.

<sup>73</sup> See note 55 above and corresponding text.

of the armed forces,<sup>74</sup> and representatives of the departments responsible for operative planning, logistics and military engineering.<sup>75</sup> These mechanisms also provide the possibility for ad hoc participation by experts drawn from other Ministries or external experts.<sup>76</sup>

Another State has included as permanent members of its review body officials outside the Ministry of Defence – in particular researchers in weapons technology, members of the Surgeon-General's office and an international law expert of the Ministry of Foreign Affairs.<sup>77</sup>

Of the two States that vest the authority to review weapons in a single official, one requires defence agencies responsible for health, capability development, and science and technology (among other fields) to provide the official with “technical guidance, ballistics information, analysis and assessments of weapons effects, and appropriate... experts”, while in the other State, the reviewing authority may consult with medical officers and other relevant experts.<sup>78</sup>

## 2.3 Review process

### 2.3.1 At what stage should the review of the new weapon take place?

The temporal application of Article 36 is very broad. It requires an assessment of the legality of new weapons at the stages of their “*study, development, acquisition or adoption*”. This covers all stages of the weapons procurement process, in particular the initial stages of the research phase (i.e. conception, study), the development phase (i.e. development and testing of prototypes) and the acquisition phase (including “off-the-shelf” procurement).<sup>79</sup>

In practical terms this means that:

- For a State producing weapons itself, be it for its own use or for export, reviews should take place at the stage of the conception/design of the weapon, and thereafter at the stages of its technological development (development of prototypes and testing), and in any case before entering into the production contract.<sup>80</sup>
- For a State purchasing weapons, either from another State or from the commercial market, including through “off the shelf” procurement, the review should take place at the stage of the study of the weapon proposed for purchase, and in any case before entering into the purchasing agreement. It should be emphasized that the purchasing State is under an obligation to conduct its own review of the weapon it is considering acquiring, and cannot simply rely on the vendor or manufacturer's position as to the legality of the weapon, nor on another State's evaluation.<sup>81</sup> For this purpose, all relevant information and data about the weapon should be obtained from the vendor prior to purchasing the weapon.
- For a State adopting a technical modification or a field modification to an existing weapon,<sup>82</sup> a review of the proposed modification should also take place at the earliest stage.

<sup>74</sup> See, for example, Belgian General Order, sub-section 4(a)(1).

<sup>75</sup> For example, the Norwegian Committee, which includes in the Committee representatives of the Section for Operative Planning of the Department of Operational and Emergency Response Planning, the Joint Operative Headquarters, the Defence Staff College, the Defence Logistical Organization and the Defence Research Institute: see Norwegian Directive, sub-section 4.2.

<sup>76</sup> See, for example, Belgian General Order, sub-section 4(c) and Norwegian Directive, sub-section 4.3.

<sup>77</sup> Sweden: see Danish Red Cross, note 8 above, at p. 28 and website of “Government Offices of Sweden” at [www.sweden.gov.se](http://www.sweden.gov.se).

<sup>78</sup> See Australian Instruction, section 6, and for the US, see for example US Army Regulation, sub-section 5(d) (“Upon request of [the Judge Advocate General], [the Surgeon General] provides the medical consultation needed to complete the legal review of weapons or weapon systems”).

<sup>79</sup> See, for example, Australian Instruction, section 7 (“For Major Capital Investment Projects, [the Chief of Capability Development Group] is responsible for requesting legal reviews as these projects progress through the major project approval process.”); Belgian General Order, sub-section 5(a) (“When the Armed Forces study, develop, or wish to acquire or adopt a new weapon, a new means or a new method of warfare, this weapon, means or method must be submitted to the Committee for a legal review at the earliest possible stage and in any case before the acquisition or adoption” (unofficial translation)); Norwegian Directive, sub-section 2.3 (“The reviews shall be made as early as possible, normally already in the concept / study phase, when operational needs are identified, the military objectives are defined, the technical resources and financial conditions are settled”); UK Military Manual at p. 119, paragraph 6.20.1 (“In the UK the weapons review process is conducted in a progressive manner as concepts for new means and methods of warfare are developed and as the conceptual process moves towards procurement”); US Air Force Instruction 51-402, at sub-sections 1.1.1 (“The Judge Advocate General (TJAG) will ensure all weapons being developed, bought, built or otherwise acquired, and those modified by the Air Force are reviewed for legality under international law prior to use in a conflict”) and 1.1.2 (“at the earliest possible stage of the acquisition process, including the research and development stage”).

<sup>80</sup> See, for example, Belgian General Order, sub-section 5(a) (“...at the earliest possible stage and in any case before the acquisition or adoption”); US Department of Defense Directive 5500.15 at sub-section IV.A.1 (“The legal review will take place prior to the award of an initial contract for production”).

<sup>81</sup> See Commentary on the Additional Protocols, paragraph 1473. See also UK Military Manual at p. 119, paragraph 6.20.1 (“This obligation [Article 36 of Additional Protocol I] is imposed on all states party, not only those that produce weapons”).

<sup>82</sup> See for example US Air Force Instruction, at sub-section 1.1.1: the Judge Advocate General “will ensure all weapons being developed, bought, built, or otherwise acquired, and those *modified* by the Air Force are reviewed for legality under international law prior to use in a conflict” (emphasis added). See also Australian Instruction, section 10 (“Any proposal to make field modifications to weapons shall be vetted in accordance with this instruction”). See also note 21 above.

At each stage of the review, the reviewing authority should take into consideration how the weapon is proposed or expected to be used, i.e. the methods of warfare associated with the weapon.

In addition to being required by Article 36, the rationale for conducting legal reviews at the earliest possible stage is to avoid costly advances in the procurement process (which can take several years) for a weapon which may end up being unusable because illegal. The same rationale underlies the need for conducting reviews at different stages of the procurement process, bearing in mind that the technical characteristics of the weapon and its expected uses can change in the course of the weapon's development. In this connection, a new review should be carried out when new evidence comes to light on the operational performance or effects of the weapon both during and after the procurement process.<sup>83</sup>

### 2.3.2 How and by whom is the legal review mechanism triggered?

Each of the authorities responsible for the study, development, acquisition, modification or adoption of a weapon should be required to submit the matter to the reviewing authority for a legal review at the stages identified above. This can be done through, for example, a notification<sup>84</sup> or a request for an advisory opinion<sup>85</sup> or for a legal review.<sup>86</sup>

In addition, the reviewing authority could itself be empowered to undertake assessments of its own initiative.<sup>87</sup>

### 2.3.3 How does the review mechanism obtain information on the weapon in question, and from what sources?

At each stage of any given case, the authorities responsible for studying, developing, acquiring or adopting the new weapon should make available to the reviewing authority all relevant information on the weapon, in particular the information described in section 1.3 above.

The reviewing authority should be empowered to request and obtain any additional information and to order any tests or experiments needed to carry out and complete the review, from the relevant government departments or external actors as appropriate.<sup>88</sup>

## 2.4 Decision-making

### 2.4.1 How does the review mechanism reach decisions?

This question is relevant to cases where the reviewing authority is a committee. Ideally, decisions should be reached by consensus, but another decision-making procedure should be provided in cases where consensus is not possible, either through a voting system, majority and minority reports, or by vesting in the chair of the committee final decision-making authority.

### 2.4.2 Should the reviewing authority's decision be binding or should it be treated only as a recommendation?

As the reviewing authority is making a determination on the conformity of the new weapon with the State's international legal obligations, it is difficult to justify the proposition that acquisition of a new weapon can proceed without a favourable determination by the reviewing authority. For example, if the reviewing authority finds that the new weapon is prohibited by IHL applicable to the concerned State, the development or acquisition of the weapon should be halted on this basis as a matter of law.<sup>89</sup>

<sup>83</sup> See, for example, Belgian General Order, sub-section 5(i) ("If new relevant information is made known after the file has been processed by the Committee, the weapon, means or method of warfare shall be re-submitted to the Committee for legal review pursuant to the above-mentioned procedure" (unofficial translation)) and Norwegian Directive, sub-section 2.3 *in fine* ("Should circumstances at a later stage change significantly, the international legal aspects shall be re-assessed").

<sup>84</sup> See, for example, Swedish Monitoring Ordinance, section 9.

<sup>85</sup> See, for example, Norwegian Directive, sub-section 4.6.

<sup>86</sup> See, for example, Australian Instruction, sections 7 and 8, and Belgian General Order, sub-section 5(b).

<sup>87</sup> As in the case of Norwegian Directive, sub-section 4.3. The Swedish reviewing body also has a right of initiative: see Danish Red Cross, note 8 above, at p. 28 and I. Daoust et al., *id.*, at p. 355.

<sup>88</sup> See, for example, US Army Regulation, sub-sections 5(b)(3) and (5), which require the Materiel Developer, when requested by the Judge Advocate General, to provide "specific additional information pertaining to each weapon or weapon system", and to conduct "experiments, including wound ballistics studies, on weapons or weapons systems subject to review...". See also Australian Instruction, sections 6 to 8, and Belgian General Order, sub-section 5(e).

<sup>89</sup> In the United States, a weapon cannot be acquired unless it has been subjected to a legal review: see, for example, US Navy Instruction, section 2.6 ("No weapon or weapon system may be acquired or fielded without a legal review"). See also Australian Instruction, sections 5 and 11.

### 2.4.3 May the reviewing authority attach conditions to its approval of a new weapon?

The reviewing authority is required by the terms of Article 36 to determine whether the employment of the weapon under consideration would “in some or all circumstances” be legal.<sup>90</sup> Therefore it may find that the use of the new weapon is prohibited in certain situations. In such a case the authority could either approve the weapon on condition that restrictions be placed on its operational use, in which case such restrictions should be incorporated into the rules of engagement or standard operating procedures relevant to the weapon, or it could request modifications to the weapon which must be met before approval can be granted.<sup>91</sup>

### 2.4.4 Should the reviewing authority’s decision be final or should it be subject to appeal or review?

Of the States that have made known their review mechanisms, two expressly provide for the possibility of appeal or review of its decisions.<sup>92</sup> If an appeal mechanism is provided, care should be taken to ensure that the appellate or reviewing body is also qualified in IHL and conducts its review on the basis of legal considerations, taking into account the relevant multidisciplinary elements.

## 2.5 Record-keeping

### 2.5.1 Should records be kept of the decisions of the review mechanism?

The reviewing authority’s work will be more effective over time if it maintains an archive of all its opinions and decisions on the weapons it has reviewed. By enabling the reviewing authority to refer to its previous decisions, the archive also facilitates consistency in decision-making. It is also particularly useful where the weapon under review is a modified version of a weapon previously reviewed.

Of the States that have made known their review mechanisms, two require the reviewing authority to maintain permanent files of the legal reviews.<sup>93</sup> At least one other has an obligation to maintain permanent files under a general obligation of the administration to archive decisions.<sup>94</sup>

### 2.5.2 To whom and under what conditions should these records be accessible?

It is up to each State to decide whether to allow access to the review records, in whole or in part, and to whom. The State’s decision will be influenced by whether in a given case the weapon itself is considered confidential.

Amongst others, the following factors could be taken into account when deciding on whether to disclose reviews, and to whom:

- the value of transparency among different government departments, and towards external experts and the public;
- the value of sharing experience with other States;
- the obligation for all States to ensure respect for IHL in all circumstances, in particular in cases where it is determined that the use of the weapon under review would contravene IHL.

<sup>90</sup> See section 1.1 above.

<sup>91</sup> For example, section 7 of the Swedish Review Ordinance states: “If the arms project does not meet the requirement of international humanitarian law, the Delegation shall urge the party that has submitted the matter to the Delegation to undertake construction changes, consider alternative arms projects or issue limitations on the operative use of weapons.”

<sup>92</sup> See US Department of Defense Directive 5500.15, at sub-section IV.C, pursuant to which an opinion of the Judge Advocate General will be reviewed by the General Counsel of the Department of Defense when requested by the Secretary of Defense, the Secretary of a Military Department, the Director of Defense Research and Engineering, the Assistant Secretary of Defense (Installations and Logistics) or any Judge Advocate General; see also Swedish Monitoring Ordinance, section 10, which provides that a decision may be appealed “to the Government”.

<sup>93</sup> See Australian Instruction, section 13, which requires the Director-General of the Australian Defence Force Legal Service to “maintain a Weapons Review Register [that] will include a copy of all legal reviews and be the formal record of all weapons that have been reviewed”, and US Department of Defense Instruction 5500.15, sub-section IV.A.2, which requires each Judge Advocate General to “maintain permanent files or opinions issued by him”. See in this regard paragraph 1.1.3 of US Air Force Instruction, paragraph 5(e)(2) of US Army Regulation, and paragraph 2.6 of US Navy Instruction.

<sup>94</sup> See Belgium, Law on Archives, 24 June 1955.

In at least four of the States that have made known their review mechanisms, decisions of the reviewing authority are known to be subject to legislation governing public access to information, which applies equally to other governmental bodies.<sup>95</sup> Pursuant to such legislation, access to information is subject to exemptions which include the non-disclosure of sensitive information affecting national security.

While there is no obligation on the reviewing State to make the substantive findings of its review public nor to share them with other States, it would be required to share its review procedures with other States Party to Additional Protocol I, in accordance with Article 84 of the Protocol.<sup>96</sup> In this regard, both the 27<sup>th</sup> and the 28<sup>th</sup> International Conferences of the Red Cross and Red Crescent, which included all of the States Party to the Geneva Conventions, have encouraged States to exchange information on their review mechanisms and procedures, and have called upon the ICRC to facilitate such exchanges.<sup>97</sup>

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<sup>95</sup> In the US, the majority of review reports are unclassified and accessible to the public pursuant to the Freedom of Information Act: see H. Parks, note 17 above. In Sweden, the reports of the Delegation are subject to the Freedom of the Press Act: see Danish Red Cross, note 8 above, at p. 28 and I. Daoust et al., *id.* at p. 355. See also Belgium, Law of 11 April 1994 regarding publicity of the Administration, and Australia, Freedom of Information Act 1982.

<sup>96</sup> See Commentary on the Additional Protocols, paragraph 1470 and footnote 12 thereof. Article 84 reads: "The High Contracting Parties shall communicate to one another, as soon as possible, through the depositary and, as appropriate, through the Protecting Powers, their official translations of this Protocol, as well as the laws and regulations which they may adopt to ensure its application."

<sup>97</sup> See Agenda for Humanitarian Action, paragraph 2.5.3.

# CONTACTS

The ICRC provides advice, support and documentation to governments on national implementation of IHL. It can be contacted through the nearest delegation or at the address given below.

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Email: [weapons.gva@icrc.org](mailto:weapons.gva@icrc.org)

<http://www.icrc.org>



# ANNEX I

## **28<sup>th</sup> International Conference of the Red Cross and Red Crescent, Geneva, 2-6 December 2003, Agenda for Humanitarian Action, Final Goal 2.5**

### **Final Goal 2.5 – Ensure the legality of new weapons under international law**

In light of the rapid development of weapons technology and in order to protect civilians from the indiscriminate effects of weapons and combatants from unnecessary suffering and prohibited weapons, all new weapons, means and methods of warfare should be subject to rigorous and multidisciplinary review.

### **Actions proposed**

- 2.5.1** In accordance with 1977 Additional Protocol I (Article 36), States Parties are urged to establish review procedures to determine the legality of new weapons, means and methods of warfare. Other States should consider establishing such review procedures. Reviews should involve a multidisciplinary approach, including military, legal, environmental and health-related considerations.
- 2.5.2** States are encouraged to review with particular scrutiny all new weapons, means and methods of warfare that cause health effects with which medical personnel are unfamiliar.
- 2.5.3** The ICRC will facilitate the voluntary exchange of experience on review procedures. States that have review procedures in place are invited to cooperate with the ICRC in this regard. The ICRC will organize, in cooperation with government experts, a training workshop for States that do not yet have review procedures.

## ANNEX II

### **Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November / 11 December 1868**

On the proposition of the Imperial Cabinet of Russia, an International Military Commission having assembled at St Petersburg in order to examine the expediency of forbidding the use of certain projectiles in time of war between civilized nations, and that Commission having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity, the Undersigned are authorized by the orders of their Governments to declare as follows:

Considering:

- That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;
- That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
- That for this purpose it is sufficient to disable the greatest possible number of men;
- That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
- That the employment of such arms would, therefore, be contrary to the laws of humanity;

The Contracting Parties engage mutually to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances.

They will invite all the States which have not taken part in the deliberations of the International Military Commission assembled at St Petersburg by sending Delegates thereto, to accede to the present engagement.

This engagement is compulsory only upon the Contracting or Acceding Parties thereto in case of war between two or more of themselves; it is not applicable to non-Contracting Parties, or Parties who shall not have acceded to it.

It will also cease to be compulsory from the moment when, in a war between Contracting or Acceding Parties, a non-Contracting Party or a non-Acceding Party shall join one of the belligerents.

The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity.

# ANNEX III

## **Selected provisions of Additional Protocol I (Protocol additional I to the Geneva Conventions of 1949 and relating to the protection of victims of international armed conflict (Protocol I), 8 June 1977)**

### **Article 1, paragraph 2 [the “Martens clause”]**

2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity, and from the dictates of public conscience.

### **Article 35 – Basic rules**

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

### **Article 36 – New weapons**

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

### **Article 48 – Basic rule**

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

### **Article 51 – Protection of the civilian population**

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

(...)

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
  - (a) those which are not directed at a specific military objective;
  - (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
  - (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:
- (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
  - (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
- (...)

#### **Article 55 – Protection of the natural environment**

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

(...)



# **VII**

# **MODEL DECLARATION OF RECOGNITION OF THE COMPETENCE OF THE INTERNATIONAL FACT-FINDING COMMISSION**

# International Fact-Finding Commission

(Protocol I, Article 90)

## Optional Clause

The Government of [name of the country] declares that it recognizes *ipso facto* and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the International Fact-Finding Commission to enquire into allegations by such other Party, as authorized by Article 90 of Protocol I additional to the Geneva Conventions of 12 August 1949.

IN WITNESS THEREOF, I have signed and sealed this instrument.

Done at ... [place], on this ... day of ... [date] ...

[Signature]

.....  
Head of State or Prime Minister or Minister for Foreign Affairs  
[Seal]

# VIII MODEL BIOLOGICAL AND TOXIN WEAPONS CRIMES ACT

**An act to implement obligations under the  
1972 Biological and Toxin Weapons Convention  
and the 1925 Geneva Protocol**



# INTRODUCTION

2005 marks the 80th anniversary of the 1925 Geneva Protocol<sup>1</sup> and the 30th anniversary of the entry into force in 1975 of the 1972 Biological and Toxin Weapons Convention<sup>2</sup>. These instruments are relatively widely accepted: 133 States are party to the Protocol and 155 to the Convention. It was thus felt opportune to draft the following model legislation, not only in light of the anniversaries but also in view of the fact that domestic implementation of the Convention has been relatively weak,<sup>3</sup> and in response to a growing number of requests to the International Committee of the Red Cross (ICRC) by States Parties for assistance in fulfilling their obligations. Interest in the implementation of these instruments has further increased as a result of the adoption of United Nations Security Council Resolution 1540 in April 2004,<sup>4</sup> which requires States to adopt certain legislation regarding non-State actors and biological, chemical and nuclear weapons and calls upon States to comply with their commitments under the 1972 Convention.

The ICRC had previously issued an appeal in September 2002 entitled “Biotechnology, Weapons and Humanity.” In particular, this appeal urged all political authorities to adopt stringent national legislation, where it does not yet exist, for implementation of the 1925 Protocol and the 1972 Convention. It also called on scientists and industry to assume a range of responsibilities for preventing the hostile use of biological agents.

The proposed model law below is intended for States with a common-law legal tradition. Our experience has shown, however, that States with different legal traditions may also find some of the provisions relevant. There are many ways in which the obligations inherent in the above international agreements may be implemented, and this model law provides but one possible approach. Some States may also feel that they do not need all the elements it contains and may wish to choose those appropriate to their needs. Efforts have been made to base it on the current legislation of States party to the 1972 Convention. The model law does not formulate internal regulations, which States may wish to develop themselves and which are necessary to fulfil their obligations as outlined in the 1972 Convention. Separate administrative measures that arise from implementation of the 1972 Convention and Resolution 1540 are likewise not covered by it.

The provisions it contains are largely taken from existing legislation of the following countries: Australia, Canada, Mauritius, New Zealand, South Africa, St. Kitts and Nevis and the United Kingdom. These common-law States have enacted national laws for implementation of the 1972 Convention and/or the 1925 Protocol. Legislation by civil-law States was also consulted. These instruments are available at <[www.icrc.org/ihl-nat](http://www.icrc.org/ihl-nat)> and at <[www.vertic.org](http://www.vertic.org)> (both last visited on 14 September 2005).

The main emphasis in this model law is placed on the prohibition, backed up by penal sanctions, of the weapons and acts defined in the 1972 Convention and the 1925 Protocol. Thus Part II spells out the criminal offence of violating the terms of Article I of the 1972 Convention, including acts committed by State agents. The definitions also encompass the terms of prohibition mentioned in the other two instruments cited above. In addition, Part II sets up an optional licensing scheme.

Part III of the model law provides for measures of domestic enforcement through the powers of inspectors. Some States may already have inspector systems in place, or alternatively may use the police or other law enforcement officials. Related provisions on search and seizure and on warrants are included, as are crimes of non-cooperation with State officials. Provision is also made for possible extra territorial application of the law.

<sup>1</sup> Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925.

<sup>2</sup> Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, opened for signature on 10 April 1972, and entered into force in 1975, (1976) UNTS Vol. 1015, p. 164 (No. 14860).

<sup>3</sup> For example, fewer than 10 of the 53 Commonwealth countries had, at the time of writing, enacted specific legislation covering the obligations in the Convention, although 41 of them were party to it.

<sup>4</sup> UN Doc. S/RES/1540 (28 April 2004).

Part IV provides for an information collection system, which States have indicated is useful in obtaining information for reporting internally and to other States party to the Convention and/or Protocol, and now to the Committee established under Resolution 1540.

Parts V and VI provide for regulation-making powers and contain the procedural elements normally found in similar common law legislation.

This model legislation has been drawn up jointly by the ICRC and the Verification Research, Training and Information Centre (VERTIC) based in London. Each has taken primary responsibility for elements of the law that fall within its mandate and expertise: criminalization of prohibited acts, in the case of the ICRC; and inspection, verification and reporting regimes, in the case of the Verification Research, Training and Information Centre. It is hoped that the model law will provide States with a tool enabling them to increase respect for and implementation of this area of international humanitarian law. As noted, it is merely the first step in assisting States to comply with their obligations under the 1972 Convention and the 1925 Protocol.

Both the ICRC and the Verification Research, Training and Information Centre encourage States to assess their current legislation and stand ready to assist them in developing appropriate domestic legislation.

# The Biological and Toxin Weapons Crimes Act

**A model law drafted by the International Committee of the Red Cross (ICRC) and  
the Verification Research, Training and Information Centre (VERTIC)**

Act No. *[INSERT ACT NUMBER AND YEAR]*

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Schedule 1 – Text of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 10 April 1972.

Schedule 2 – Text of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925.

An Act to prohibit the development, production, manufacture, possession, stockpiling, other acquisition or retention, importation, exportation, re-exportation, transportation, transit, trans-shipment, transfer or use of certain biological agents and toxins and of biological weapons, and to implement in [COUNTRY NAME] the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 10 April 1972 and the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare of 17 June 1925 (the texts of which are set out in Schedules 1 and 2 to this Act) as amended from time to time.

## PART I – SHORT TITLE

### 1. Short title

This Act may be cited as the *Biological and Toxin Weapons Crimes Act* [INSERT YEAR OF ADOPTION]

## PART II – IMPLEMENTATION OF THE CONVENTION

### 2. Interpretation

In this Act:

- (a) ‘Convention’ means the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction;
- (b) ‘Minister’ means [INSERT MINISTER RESPONSIBLE];
- (c) ‘Protocol’ means the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Terms that are not defined in the Act are accorded their Convention meaning.

### 3. Purpose

The purpose of this Act is to fulfil [COUNTRY NAME] obligations under the Convention and the Protocol as amended from time to time.

### 4. Publication of amendments

The Minister shall, as soon as practicable after any amendment to the Convention is made pursuant to the relevant Articles in the Convention, cause a copy of the amendments to be published in the [INSERT NAME OF OFFICIAL GAZETTE].

### 5. Act to bind the State

This Act is binding on [COUNTRY NAME].

## 6. Prohibitions

No person shall develop, produce, manufacture, possess, stockpile, otherwise acquire or retain, import, export, re-export, transport, transit, trans-ship, transfer to any recipient directly or indirectly, or use:

- (a) any microbial or other biological agent, or any toxin whatever its origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; or
- (b) any weapon, equipment or means of delivery designed to use such an agent or toxin for hostile purposes or in armed conflict.

## 7. Assisting and attempting

No person shall aid, abet, encourage, assist, counsel, procure, incite or finance the commission of, or attempt or conspire to commit, an offence under Section 6.

## 8. Licensing

(1) Except as authorized under regulation of this or any other Act, no person shall develop, produce, manufacture, possess, stockpile, otherwise acquire or retain, transport, transfer or use any microbial or other biological agent, any toxin or any related equipment identified in the regulations.

(2) Except as authorized under *[INSERT NAME OF EXPORT CONTROL ACT]* or any other Act, no person shall import, export, transit, trans-ship or re-export a microbial or other biological agent or toxin identified in the regulations made under this Act.

(3) No person shall aid, abet, encourage, assist, counsel, procure, incite or finance the commission of, or attempt or conspire to commit, an offence under this Section.

# PART III – ENFORCEMENT

## 9. Responsible authority

### *Designation*

(1) The Minister may designate any person or class of persons to be the responsible authority for the purposes of this Act.

### *Representatives of responsible authority*

(2) The Minister may designate persons or classes of persons to act as representatives of the responsible authority.

## 10. Designation of inspectors

The Minister may designate persons or classes of persons as inspectors for the purpose of the enforcement of this Act, and set conditions applicable to the person's inspection activities, after consulting any other Minister who has powers in relation to inspections for biological agents or toxins.

## 11. Certificates

### *Certificates of designation*

(1) An inspector or a representative of the responsible authority shall be given a certificate of designation, which must state the privileges and immunities applicable to the person and, in the case of an inspector, any conditions applicable under Section 10.

### *Production on entry*

(2) An inspector or a representative of the responsible authority shall, on entering any place under this Act, produce the certificate of designation at the request of any individual in charge of that place.

## 12. Entry and inspection

(1) Subject to Sub-section (5), for the purpose of ensuring compliance with this Act, an inspector may enter and inspect, at any reasonable time, any place in which the inspector believes on reasonable grounds there is:

- (a) any microbial or other biological agent, or any toxin;
- (b) any weapon, equipment or means of delivery designed to use such an agent or toxin; or
- (c) any information relevant to the administration of this Act.

### *Powers of inspectors*

(2) An inspector carrying out an inspection may:

- (a) require the attendance of and question any person who the inspector considers will be able to assist in the inspection;
- (b) examine, take samples of, detain or remove any thing referred to in Sub-section (1);
- (c) require any person to produce for inspection, or to copy, any document that the inspector believes contains any information relevant to the administration of this Act; and
- (d) require that any individual in charge of the place take any measures that the inspector considers appropriate.

### *Operation of computer and copying equipment*

(3) An inspector carrying out an inspection may:

- (a) use or cause to be used any computer or data-processing system to examine any data contained in or available to the computer or system;
- (b) reproduce or cause to be reproduced any record from the data, in the form of a printout or other intelligible output, and remove the printout or other output for examination or copying; and
- (c) use or cause to be used any equipment at the place to make copies of any data or any record, book of account or other document.

### *Inspector may be accompanied*

(4) An inspector carrying out an inspection may be accompanied by any other person chosen by the inspector.

### *Warrant to enter dwelling-house*

(5) An inspector may not enter a dwelling-house except with the consent of the occupant or under the authority of a warrant issued under Sub-section (6).

### *Authority to issue warrant*

(6) If on *ex parte* application a justice of the peace is satisfied by information on oath that

- (a) the conditions for entry described in Sub-section (1) exist in relation to a dwelling-house,
- (b) entry into the dwelling-house is necessary for any purpose relating to the administration of this Act or the regulations, and
- (c) entry into the dwelling-house has been refused or there are reasonable grounds to believe that entry will be refused,

the justice may issue a warrant authorizing the inspector named in the warrant to enter the dwelling-house, subject to any conditions that may be specified in the warrant.

### *Use of force*

(7) The inspector may not use force to execute the warrant unless its use is specifically authorized in the warrant.

### 13. Search and seizure

#### *Where warrant not necessary*

(1) An inspector may exercise without a warrant any of the powers conferred by virtue of this Act if the conditions for obtaining a warrant exist but, by reason of exigent circumstances, it would not be practical to obtain a warrant.

#### *Notice of reason for seizure*

(2) An inspector who seizes and detains anything shall, as soon as practicable, advise its owner or the person having the possession, care or control of it at the time of its seizure of the reason for the seizure.

### 14. Obstruction and false statements

(1) No person shall obstruct or hinder, or knowingly make any false or misleading statement either orally or in writing, to an inspector or a representative of the responsible authority engaged in carrying out duties under this Act.

#### *Assistance to inspectors*

(2) The owner or person in charge of a place entered under Section 12 and every person present in that place shall give the inspector all reasonable assistance to enable the inspector to perform his or her duties, and shall furnish the inspector with any information related to the administration of this Act that the inspector reasonably requests.

#### *Interference*

(3) Except with the authority of an inspector, no person shall remove, alter or interfere in any way with any thing seized under this Act.

### 15. Directions requiring security measures

(1) An inspector may give directions to the occupier of any relevant premises requiring him to take such measures to ensure the security of any dangerous substance kept or used there as are specified or described in the directions by a time so specified.

(2) The directions may:

- (a) specify or describe the substances in relation to the security of which the measures relate; and
- (b) require the occupier to give a notice to the chief officer of police before any other dangerous substance specified or described in the directions is kept or used in the premises.

### 16. Directions requiring disposal of dangerous substances

(1) Where the Minister has reasonable grounds for believing that adequate measures to ensure the security of any dangerous substance kept or used in any relevant premises are not being taken and are unlikely to be taken, he may give a direction to the occupier of the premises requiring him to dispose of the substance.

(2) The direction must:

- (a) specify the manner in which, and time by which, the dangerous substance must be disposed of; or
- (b) require the occupier to produce the dangerous substance to a person specified or described in the notice in a manner and by a time so specified for him to dispose of it.

### 17. Punishment

(1) Every person who contravenes Section 6 or 7 is guilty of an offence and liable upon conviction to:

- (a) in the case of an individual, imprisonment for a term not exceeding [ ] years or to a fine not exceeding [ ] or both;
- (b) in the case of a body corporate, a fine not exceeding [ ].

(2) Where an offence under Sub-section (1) which is committed by a body corporate is proved to have been committed with the consent and connivance of, or to be attributable to any negligence on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished in accordance with Sub-section (1)(a).

(3) Every person who contravenes Sections 8, 14, 16, or 20, Sub-section 21(2) or Section 22 or any provision of the regulations is guilty of an offence and liable on conviction to:

- (a) in the case of an individual, imprisonment for a term not exceeding [ ] years or to a fine not exceeding [ ] or both;
- (b) in the case of a body corporate, a fine not exceeding [ ].

(4) Where an offence under Sub-section (3) which is committed by a body corporate is proved to have been committed with the consent and connivance of, or to be attributable to any negligence on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished in accordance with Sub-section (3)(a).

## 18. Extra territorial application

(1) A person who is alleged to have committed an offence under Sections 6, 7, 8, 14, 16, 20, Sub-section 21(2) and Section 22 outside the territory of [COUNTRY NAME], may be prosecuted for that offence if

- (a) at the time the offence is alleged to have been committed,
  - (i) the person was a citizen of [COUNTRY NAME] or was employed in a civilian or military capacity, or
  - (ii) the person was a citizen of a State that engaged in an armed conflict against [COUNTRY NAME], or was employed in a civilian or military capacity by such a State, or
  - (iii) the victim of the alleged offence was a citizen of [COUNTRY NAME], or
  - (iv) the victim of the alleged offence was a citizen of a State that was allied with [COUNTRY NAME] in an armed conflict, or
  - (v) the person is a stateless person whose habitual residence is in [COUNTRY NAME], or
- (b) after the time of the offence is alleged to have been committed, the person is present in [COUNTRY NAME].

(2) 'Person' in Sub-section 1 includes bodies corporate and partnerships registered under the laws of [COUNTRY NAME].

## 19. Continuing offence

Where an offence under this Act is committed or continued on more than one day, the person who committed the offence is liable to be convicted for a separate offence for each day on which the offence is committed or continued.

# PART IV – INFORMATION AND DOCUMENTS

## 20. Information and documents

Every person who develops, produces, manufactures, possesses, stockpiles, otherwise acquires or retains, transports, transfers, uses, exports or imports any microbial or other biological agent, any toxin or any related equipment identified in the regulations shall:

- (a) provide such information, at such times and in such form as may be specified by the regulations, to the responsible authority or to any other authority specified by the regulations; and
- (b) keep and maintain the documents specified by the regulations, at the person's place of business or at such other place as may be designated by the Minister, in the manner and for the period that is specified by the regulations and, on request by the Minister or the responsible authority, provide the documents to the responsible authority or to any other authority designated by the regulations.



## 21. Notice for disclosure of information

(1) The Minister may send a notice to any person who the Minister believes on reasonable grounds has information or documents relevant to the enforcement of this Act, requesting the person to provide the information or documents to the Minister.

### *Compliance with notice*

(2) A person who receives a notice referred to in Sub-section (1) shall provide the requested information and documents that are under the person's care or control to the Minister in the form and within the time specified in the notice.

## 22. Confidential information

No person who obtains information or documents pursuant to this Act or the Convention from a person who consistently treated them in a confidential manner shall knowingly, without the written consent of that person, communicate them or allow them to be communicated to any person, or allow any person to have access to them, except:

- (a) for the purpose of the enforcement or application of this Act or any other Act;
- (b) pursuant to an obligation of [COUNTRY NAME] under the Convention; or
- (c) to the extent that they are required to be disclosed or communicated in the interest of public safety.

## 23. Evidence of analyst

(1) The Minister may appoint a person to be an analyst for the purposes of this Act.

(2) Subject to Sub-section (4), a certificate signed by an analyst appointed under Sub-section (1) setting out, in relation to a substance, one or more of the following:

- (a) when and from whom the substance was received;
- (b) what labels or other means of identifying the substance accompanied it when it was received;
- (c) what container the substance was in when it was received;
- (d) a description of the substance received;
- (e) that he or she has analysed or examined the substance;
- (f) the date on which the analysis or examination was carried out;
- (g) the method used in conducting the analysis or examination;
- (h) the results of the analysis or examination; is admissible in any proceedings for an offence referred to in Sections 6, 7, 8, 14, 16, 20, Sub-section 21(2) and Section 22 as evidence of the matters in the certificate and the correctness of the results of the analysis or examination.

(3) For the purposes of this Section, a document purporting to be a certificate referred to in Sub-section (2) shall, unless the contrary is established, be deemed to be such a certificate and to have been duly given.

(4) A certificate shall not be received in evidence in pursuance of Sub-section (2) in a proceeding for an offence unless the person charged with the offence has been given a copy of the certificate together with reasonable notice of the intention to produce the certificate as evidence in the proceeding.

(5) Where, in pursuance of Sub-section (2), a certificate of an analyst is admitted in evidence in a proceeding for an offence, the person charged with the offence may require the analyst to be called as a witness for the prosecution and the analyst may be cross-examined as if he had given evidence of the matters stated in the certificate.

(6) Sub-section (5) does not entitle a person to require an analyst to be called as a witness for the prosecution unless:

- (a) the prosecutor has been given at least 5 days notice of the person's intention to require the analyst to be so called; or
- (b) the Court, by order, allows the person to require the analyst to be so called.

## PART V – REGULATIONS

### 24. Regulations

The Minister, and any other Minister who has powers in relation to biological agents or toxins, may make regulations:

- (a) defining 'biological agent', 'microbial agent', 'toxin' and 'equipment' for the purposes of this Act;
- (b) respecting conditions under which activities referred to in Sub-section 8(1) may be carried out, providing for the issue, suspension and cancellation of authorizations governing the carrying on of any such activity and prescribing the fees or the manner of calculating the fees to be paid in respect of any such authorizations;
- (c) identifying microbial or other biological agents, toxins and related equipment for the purposes of Sub-sections 8(1) or (2);
- (d) respecting the powers, privileges, immunities and obligations of representatives of the responsible authority who are designated under Sub-section 9(2) and respecting the privileges and immunities of inspectors;
- (e) respecting the detention, storage, transfer, restoration, forfeiture and disposal – including destruction – of things removed by inspectors under this Act;
- (f) for the purposes of Section 20, identifying microbial or other biological agents and toxins and related equipment, and specifying anything that is to be specified by the regulations; and
- (g) generally for carrying out the purposes and provisions of the Convention and the Protocol.

## PART VI – FINAL PROVISIONS

### 25. Commencement

This Act shall come into effect on *[DATE]*.

### 26. Saving and transitional arrangements

#### *SCHEDULE 1*

Text of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 10 April 1972.

#### *SCHEDULE 2*

Text of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925.



# **IX**

# **MODEL LAW ON THE CONVENTION ON CERTAIN CONVENTIONAL WEAPONS**

**Legislation for common-law States on  
the 1980 Convention on Prohibitions or  
Restrictions on the Use of Certain Conventional  
Weapons which may be Deemed to be Excessively  
Injurious or to have Indiscriminate Effects  
and on its Protocols**

# MODEL LEGISLATION

for common-law States

## CONVENTIONAL WEAPONS CONVENTION ACT 20XX

**An act to implement the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects and its Protocols**

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# CONVENTIONAL WEAPONS CONVENTION ACT 20XX

**An act to implement the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons  
Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects**

ENACTED by the Parliament of [COUNTRY], as follows—

## PART I – PRELIMINARY

### 1. Short title

This Act may be cited as the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects Act of [YEAR].

### 2. Interpretation

In this Act:

**“amended Protocol II”** means the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention, as amended on 3 May 1996), as set out in the Third Schedule to this Act;

**“anti-handling device”** has the same meaning as in the Anti-Personnel Mines (Prohibition) Act 2001;

**“anti-personnel mine”** has the same meaning as in the Anti-Personnel Mines (Prohibition) Act 2001;

**“armed conflict”** means situations referred to in Articles 2 and 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article 1 of Additional Protocol I to those Conventions;

**“blinding laser weapon”** means a weapon specifically designed, as its sole combat function or as one of its combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices;

**“booby-trap”** means any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act;

**“civilian object”** means an object which is not a military objective;

**“component part”** means any identifiable component designed or adapted to form an essential and integral part of any weapon prohibited by this Act;

**“Convention”** means the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980, which is set out in the First Schedule to this Act;

**“explosive remnants of war”** means unexploded ordnance and abandoned explosive ordnance;

**“feasible precautions”** means those precautions which are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations;

**“incendiary weapon”:**

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

**“military objective”** means any object which, by its nature, location, purpose or use, makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage, on the understanding that several clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are not to be treated as a single military objective;

**“mine”:**

- (a) means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle;
- (b) includes any mine laid to interdict beaches, waterway crossings or river crossings;
- (c) does not include an anti-ship mine used at sea;

**“Minister”** means the Minister to whom responsibility for the subject of defence is assigned;

**“permanent blindness”** means irreversible and uncorrectable loss of vision which is seriously disabling with no prospect of recovery;

**“Protocol I”** means the Protocol on Non-detectable Fragments (Protocol I), 10 October 1980, as set out in the Second Schedule to this Act;

**“Protocol II”** means the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 10 October 1980, as set out in the Third Schedule to this Act;

**“Protocol III”** means the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 10 October 1980, as set out in the Fourth Schedule to this Act;

**“Protocol IV”** means the Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995, as set out in the Fifth Schedule to this Act;

**“Protocol V”** means the Protocol on Explosive Remnants of War, as set out in the Sixth Schedule to this Act;

**“remotely-delivered mine”**:

- (d) means a mine not directly emplaced but delivered by artillery, missile, rocket, mortar, or similar means, or dropped from an aircraft;
- (e) does not include mines delivered from a land-based system from less than 500 metres, provided that they are used in accordance with Article 6 and other relevant Articles of amended Protocol II;

**“self-deactivating”** means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component that is essential to the operation of the munition;

**“self-destruction mechanism”** means an incorporated or externally attached automatically functioning mechanism which secures the destruction of the munition into which it is incorporated or to which it is attached;

**“self-neutralization mechanism”** means an incorporated automatically functioning mechanism which renders inoperable the munition into which it is incorporated;

**“serious disability”** means visual acuity of less than 20/200 Snellen measured using both eyes.

### 3. Application of the Act

This Act shall bind the State.

### 4. Convention and Protocols to have force of law

Notwithstanding any other enactment, the Convention, Protocol I, the amended Protocol II, Protocol III, Protocol IV and Protocol V shall have force of law in [COUNTRY].

## PART II - PROHIBITIONS OR RESTRICTIONS

### 5. Non-detectable fragments

No person shall:

- (a) use, develop, produce, otherwise acquire, stockpile, retain, transfer to anyone, directly or indirectly, import or export any weapon, the primary effect of which is to injure by fragments which in the human body escape detection by X-rays;
- (b) possess, develop, produce, otherwise acquire, stockpile, retain, transfer to anyone, directly or indirectly, import or export a component part of such weapon.

### 6. Mines, booby-traps and other devices

Without prejudice to the [MINE BAN CONVENTION LEGISLATION], no person shall:

- (a) use or direct any mine, booby-trap or other device:
  - (i) which is designed or of a nature to cause superfluous injury or unnecessary suffering;
  - (ii) which employs a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations;



- (iii) in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:
  - (A) they are placed on or in the close vicinity of a military objective; or
  - (B) measures are taken to protect civilians from their effects under section 10;
- (iv) either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians or civilian objects;
- (v) in an indiscriminate manner:
  - (A) which is not on, or directed against, a military objective;
  - (B) which employs a method or means of delivery which cannot be directed at a specific military objective; or
  - (C) which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
- (b) use booby-traps and other devices:
  - (i) which are in any way attached to or associated with:
    - (A) international recognised protective emblems, signs or signals;
    - (B) sick, wounded or dead persons;
    - (C) burial or cremation sites or graves;
    - (D) medical facilities, medical equipment, medical supplies or medical transportation;
    - (E) children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
    - (F) food or drink;
    - (G) kitchen utensils or appliances except in military establishments, military locations or military supply depots;
    - (H) objects clearly of a religious nature;
    - (I) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or
    - (J) animals or their carcasses;
  - (ii) in the form of apparently harmless portable objects which are specifically designed and constructed to contain explosive material;
- (c) use a self-deactivating mine equipped with an anti-handling device that is designed in such a manner that the anti-handling device is capable of functioning after the mine has ceased to be capable of functioning;

- (d) use remotely-delivered mines, unless:
  - (i) they are recorded in accordance with the provisions of Protocol II; or,
  - (ii) to the extent feasible, they are equipped with an effective self-destruction or self-neutralization mechanism and have a back-up self-deactivation feature, which is designed so that the mine will no longer function as a mine when it no longer serves the military purpose for which it was placed in position;
- (e) transfer a mine.

## **7. Incendiary weapons**

No person shall:

- (a) make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons;
- (b) make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons;
- (c) make any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
- (d) make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.

## **8. Blinding laser weapons**

(1) No person shall:

- (a) use, possess, procure, manufacture, stockpile, transfer, deal in, import or export blinding laser weapons;
- (b) possess, procure, manufacture, stockpile, transfer, deal in, import or export a component part of such a weapon.

(2) Every person employing laser systems shall take all feasible precautions to avoid the incidence of permanent blindness to unenhanced vision.

# PART III - PROTECTION OF CIVILIANS AND CIVILIAN POPULATIONS AND POST-ARMED CONFLICT MEASURES

## 9. Military activities

The members of an armed force of another State visiting [COUNTRY] in terms of an international obligation or an agreement between that State and [COUNTRY] shall be bound by this Act.

## 10. Measures to protect civilians and civilian populations

- (1) The Minister shall ensure that all feasible precautions are taken to protect civilians from the effects of weapons to which this Act applies, in particular but not limited to minimising the risks and effects of explosive remnants of war in post-conflict situations, in accordance with the Sixth Schedule to this Act.
- (2) For the purposes of sub-section (1), the Minister may make such regulations as he thinks fit.

# PART IV - GENERAL PROVISIONS

## 11. Offences and penalties

- (1) Any individual who contravenes sections 5 to 8 shall commit an offence and shall, on conviction, be liable -
  - (a) where the offence involves the intentional causing of death of another human being, to penal servitude for a term not exceeding [MAXIMUM PERIOD OF IMPRISONMENT];
  - (b) in any other case, to imprisonment for a term not exceeding 20 years and to a fine not exceeding [MAXIMUM AMOUNT OF FINE].
- (2) Any corporate body which contravenes sections 5 to 8 shall commit an offence and shall, on conviction, be liable to a fine not exceeding [MAXIMUM AMOUNT OF FINE].
- (3) The court convicting a person of an offence under this Act may, in addition to any other penalty imposed in respect of that offence, order that any weapon, vehicle, uniform, equipment or other property or object in respect of which the offence was committed or which was used for, in or in connection with the commission of the offence, be forfeited to the State.

## 12. Surrender of prohibited weapons and forfeiture to State

- (1) Every person who is in possession of a prohibited weapon or a component part on the commencement of this Act shall, within 3 months of the commencement of this Act, notify the [POLICE COMMISSIONER] that he is in possession of such weapon or part.
- (2) In the event of any military operational deployment outside [COUNTRY], any person in possession of any prohibited weapon or a component part shall notify the [POLICE COMMISSIONER] forthwith that he is in possession of such weapon or part.
- (3) The [POLICE COMMISSIONER] shall register any notification made under this section, in such manner as may be prescribed and shall cause the prohibited weapon or component part to be seized without delay.
- (4) All weapons or component parts seized pursuant to this section shall be forfeited.

### **13. Jurisdiction**

- (1) A [NAME OF COURT] shall have jurisdiction to try an offence under this Act where the act or omission constituting the offence under this Act was committed in [COUNTRY] or when the offence is alleged to have been committed by:
- (a) a citizen of [COUNTRY];
  - (b) a person who is ordinarily resident in [COUNTRY]; or
  - (c) a company incorporated, or registered as such under any law, in [COUNTRY], outside [COUNTRY].
- (2) No proceedings for an offence under this Act shall be instituted without the consent of the [DIRECTOR OF PUBLIC PROSECUTIONS].

### **14. Power to require information**

- (1) The Minister may, by written notice, require from any person such information as he deems necessary for the administration and enforcement of this Act and compliance with the Convention and its Protocols, within such period and in such manner and form as may be specified in the notice.
- (2) Any person who:
- (a) without reasonable excuse, fails to comply with a notice referred to in sub-section (1);
  - (b) knowingly or recklessly provides false information in relation to such notice,

shall commit an offence and shall, on conviction, be liable to imprisonment for a term not exceeding [MAXIMUM PERIOD OF IMPRISONMENT] and a fine not exceeding [MAXIMUM AMOUNT OF FINE].

### **15. Guidelines for training**

The Minister shall issue general guidelines in respect of the training of any official performing a function pursuant to this Act or the Convention and its Protocols.

### **16. Regulations**

- (1) The Minister may make such regulations as he thinks fit for the purposes of this Act.
- (2) Regulations made under sub-section (1) may provide for:
- (a) the amendment of any of the Schedules, in order to reflect any changes made to the Convention or its Protocols, or to provide for any other subsequent Protocol which may be ratified or acceded to by the [COUNTRY];
  - (b) the prescription of any matter which may be prescribed under this Act.

### **17. Commencement**

This Act shall come into operation on a day to be fixed by proclamation.

## FIRST SCHEDULE

*(section 2)*

*(set out Convention)*

## SECOND SCHEDULE

*(section 2)*

*(set out First Protocol)*

## THIRD SCHEDULE

*(section 2)*

*(set out Second Protocol)*

## FOURTH SCHEDULE

*(section 2)*

*(set out Third Protocol)*

## FIFTH SCHEDULE

*(section 2)*

*(set out Fourth Protocol)*

## SIXTH SCHEDULE

*(section 10)*

*(set out Fifth Protocol)*

# **X** **NATIONAL LEGISLATION IMPLEMENTATION KIT FOR THE CHEMICAL WEAPONS CONVENTION<sup>©</sup>**

ORGANIZATION FOR THE PROHIBITION OF CHEMICAL WEAPONS

# Legal Notice

The provisions contained in this document are not meant as model provisions for inclusion in national drafts of legislation, but shall rather serve as illustration of how legal mechanisms on the national level can implement requirements of the Chemical Weapons Convention (CWC).

The Office of the Legal Adviser reminds users that the text of the CWC and decisions adopted thereunder by the Policy-Making Organs of the OPCW are the only authentic legal reference. The provisions in this document do not constitute legal advice. The OPCW does not accept any liability with regard to the contents of this document.

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August 2010

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# National Legislation Implementation Kit for the Chemical Weapons Convention<sup>1</sup>

## 1. Main CWC-related definitions

### 1.1 Definition of “chemical weapon”

“Chemical weapon” means the following, together or separately—

- (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under the Convention, as long as the types and quantities are consistent with such purposes;
- (b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;
- (c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).<sup>2</sup>

### 1.2 Definition of “toxic chemical”

- (1) “Toxic chemical” means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.
- (2) The definition in paragraph (1) includes all such chemicals therein, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.<sup>3</sup>
- (3) Toxic chemicals which have been identified for the application of verification measures by the Organisation are listed in the Schedules contained in the Annex on Chemicals to [the Convention / this [Act, Statute, Ordinance, etc.]].

### 1.3 Definition of “precursor”

- (1) “Precursor” means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system.<sup>4</sup>
- (2) Precursors which have been identified for the application of verification measures by the Organisation are listed in the Schedules contained in the Annex on Chemicals to [the Convention / this [Act, Statute, Ordinance, etc.]].

### 1.4 Definition of “purposes not prohibited under the Convention”

“Purposes not prohibited under the Convention” means—

- (a) Industrial, agricultural, research, medical, pharmaceutical, or other peaceful purposes;
- (b) Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;
- (c) Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare; and
- (d) Law enforcement including domestic riot control purposes.<sup>5</sup>

### 1.5 Definition of “riot control agent”

“Riot control agent” means any chemical not listed in Schedule 1, 2 or 3, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.<sup>6</sup>

<sup>1</sup> The aim of this document is to address issues possibly faced by all States Parties. Special considerations to be addressed by States Parties which have declared chemical weapons and are engaged in chemical weapons destruction activities are not covered here.

<sup>2</sup> As defined in Article II(1) of the Convention.

<sup>3</sup> As defined in Article II(2) of the Convention.

<sup>4</sup> As defined in Article II(3) of the Convention.

<sup>5</sup> As defined in Article II(9) of the Convention.

<sup>6</sup> As defined in Article II(7) of the Convention. The use of riot control agents as a method of warfare is prohibited by Article I(5) of the Convention. Such prohibition is criminalized in provision 6.5 of this Implementation Kit. It is also recalled that pursuant to Article III of the Convention, “Each State Party shall submit to the Organization, not later than 30 days after this Convention enters into force for it, [...] declarations [...] (e) With respect to riot control agents [...]. This declaration shall be updated not later than 30 days after any change becomes effective.”

## 1.6 Definition of “chemical weapons production facility”

- (1) “Chemical weapons production facility” means any equipment, as well as any building housing such equipment, that was designed, constructed or used at any time since 1 January 1946:
- (a) As part of the stage in the production of chemicals (“final technological stage”) where the material flows would contain, when the equipment is in operation:
    - (i) Any Schedule 1 chemical; or
    - (ii) Any other chemical that has no use, above 1 tonne per year on the territory of [State Party] or in any other place under the jurisdiction or control of [State Party], for purposes not prohibited under this Convention, but can be used for chemical weapons purposes;
- or
- (b) For filling chemical weapons, including, *inter alia*, the filling of Schedule 1 chemicals into munitions, devices or bulk storage containers; the filling of chemicals into containers that form part of assembled binary munitions and devices or into chemical submunitions that form part of assembled unitary munitions and devices, and the loading of the containers and chemical submunitions into the respective munitions and devices;
- (2) As an exception to paragraph (1) the term “chemical weapons production facility” does not include:
- (a) Any facility having a production capacity for synthesis of chemicals specified in paragraph (1) subparagraph (a) that is less than 1 tonne;
  - (b) Any facility in which a chemical specified in paragraph (1) subparagraph (a) is or was produced as an unavoidable by-product of activities for purposes not prohibited under the Convention, provided that the chemical does not exceed 3 per cent of the total product and that the facility is subject to declaration and inspection under the Verification Annex; or
  - (c) The single small-scale facility for production of Schedule 1 chemicals for purposes not prohibited under the Convention as referred to in Part VI of the Verification Annex.<sup>7</sup>

## 1.7 Definition of “Schedule 1, 2 and 3 chemicals”

“Schedule 1, 2 and 3 chemicals” means those chemicals listed respectively in Schedule 1, Schedule 2 and Schedule 3 of the Annex on Chemicals to [the Convention / this [Act, Statute, Ordinance, etc.]] regardless of whether the chemical is pure or contained in a mixture.

## 1.8 Definition of “discrete organic chemical”

“Discrete organic chemical” means any chemical belonging to the class of chemical compounds consisting of all compounds of carbon except for its oxides, sulfides and metal carbonates.<sup>8</sup>

## 1.9 Definition of “international inspection”

“International inspection” means inspections or visits carried out by International Inspectors in accordance with the Convention.

## 1.10 Definition of “international inspectors”

“International inspectors” means all individuals designated by the Organisation according to the procedures as set forth in Part II, Section A of the Verification Annex to carry out activities to verify compliance with obligations under the Convention, including its declaration requirements or to assist carrying out such activities.<sup>9</sup>

## 1.11 Definition of “inspection site”

“Inspection site” means any facility or area at which an international inspection is carried out and which is specifically defined in the respective facility agreement or inspection request or mandate or inspection request as expanded by the alternative or final perimeter.

<sup>7</sup> As defined by Article II(8) of the Convention. Under Article III(1)(c), and Article I(4) of the Convention States Parties must declare and destroy any chemical weapons production facilities they own or possess, or that are located under their jurisdiction or control. These provisions are implemented in provisions 5.1 and 5.3 of this Implementation Kit. To prevent proliferation of chemical weapons, Article V(5) of the Convention also prohibits construction of any new chemical production facilities and modification of any existing facilities for the purpose of chemical weapons production. Such prohibition is criminalized in provision 6.6 of this Implementation Kit.

<sup>8</sup> As defined by paragraph 4 of Part I of the Verification Annex.

<sup>9</sup> The proposed definition comes from paragraphs 13 and 18 of Part I of the Verification Annex, and aims at covering both inspectors and inspection assistants designated to carry out international inspections.

**1.12 Definition of “Convention”**

“Convention” means the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, adopted on 13 January 1993,<sup>10</sup> and includes any amendments to that Convention or the Annexes that are, or will become, binding on [State Party].

**1.13 Definition of “Verification Annex”**

“Verification Annex” means the Annex on Implementation and Verification to the Convention.

**1.14 Definition of “Organisation”**

“Organisation” means the Organisation for the Prohibition of Chemical Weapons established pursuant to Article VIII of the Convention.

**1.15 Definition of “State Party”**

“State Party” means a State which has consented to be bound by the Convention and for which the Convention is in force.<sup>11</sup>

**1.16 Specifications and other definitions in the Convention**

- (1) The definitions shall be interpreted in light of the Convention, including its Annexes, and the decisions adopted thereunder. Such specifications can be laid down by regulations.
- (2) Terms and expressions used and not defined in this [Act, Statute, Ordinance, etc.] but defined in the Convention shall, unless the context otherwise requires, have the same meaning as in the Convention.

**2. National Authority**

- (1) The [competent authority] shall by means of regulations designate or establish a National Authority to serve as the national focal point for effective liaison with the Organisation and other States Parties and for coordination of all national measures to be taken to fully and effectively implement the Convention.
- (2) In these regulations the [competent authority] shall direct or assign to the National Authority such powers and budget as may be necessary to coordinate the implementation and enforcement of the Convention, this law and its implementing regulations.
- (3) The [competent authority] may designate or establish further authorities to which it may assign specific duties with regard to the implementation of the Convention, this law and its implementing regulations.<sup>12</sup>

**3. Control regime for scheduled chemicals and discrete organic chemicals****3.1 Control regimes for categories of chemicals<sup>13</sup>****3.1.1 Control regime for Schedule 1 chemicals**

- (1) The acquisition, retention, in-country-transfer, import, export and the use of Schedule 1 chemicals are prohibited unless the chemicals are exclusively applied to research, medical, pharmaceutical or protective purposes<sup>14</sup> and the types and quantities of chemicals are strictly limited to those which can be justified for such purposes. These activities are subject to prior declaration in accordance with regulations established under this [Act, Statute, Ordinance, etc.].<sup>15</sup>

Activities except for  
production  
Prohibition and  
declaration  
requirements

<sup>10</sup> States Parties may wish to consider adding references to the ratification instrument of the Convention by the State Party and, if applicable, to the Official Gazette that published the Convention.

<sup>11</sup> The model language reflects the language used in the 1969 Vienna Convention on the Law of Treaties.

<sup>12</sup> Such authorities may include a licensing authority and an advisory committee. Specific duties to be assigned may include the inspection of facilities or transferred goods.

<sup>13</sup> In addition to provisions 3.1.1 to 3.1.4 it is suggested considering the following provision:

**Trade in toxic chemicals and their precursors**

Traders of chemicals shall inform the National Authority when they have doubts of whether a purchaser of toxic chemicals or their precursors intends to use these chemicals for purposes not prohibited under the Convention. An indication of such intent is that it is improbable that the purchaser will use the full quantity of the purchased types of toxic chemicals and their precursors for purposes not prohibited under the Convention.

<sup>14</sup> It can be noted that these purposes are more restrictive than the purposes not prohibited as defined by provision 1.4 of this Implementation Kit, as far as Schedule 1 chemicals are concerned.

<sup>15</sup> The establishment of a prior declaration regime, as suggested in this provision, aims at allowing States Parties to ensure that the activities referred to in this provision will be conducted in compliance with the prohibitions and restrictions set out in Part VI of the Verification Annex, and allowing them to fulfil their obligation to make the prior notification of transfers of Schedule 1 chemicals as required by paragraph 5 of Part VI of the Verification Annex.

If the prior declaration shows that the activity reported would conflict with the obligations of [State Party] under the Convention,<sup>16</sup> the [competent authority] shall prohibit or limit the activity.<sup>17</sup>

- (2) The production of Schedule 1 chemicals is prohibited unless carried out for research, medical, pharmaceutical or protective purposes and in a facility licensed by the [competent authority] in accordance with regulations established under this [Act, Statute, Ordinance, etc.].<sup>18</sup>

Production  
Prohibitions, licensing  
and exemptions

Exemptions from this licensing requirement may be granted in the regulations under this [Act, Statute, Ordinance, etc.] in strict accordance with the Convention.<sup>19</sup>

Further activities regarding Schedule 1 chemicals that shall only be carried out in licensed facilities may be identified in regulations established under this [Act, Statute, Ordinance, etc.] in strict accordance with the Convention.<sup>20</sup>

- (3) The export and the import of Schedule 1 chemicals to or from a State not Party to the Convention, including transit through such State, are prohibited.<sup>21</sup>
- (4) Any person having performed any activity that is covered by this section, or having operated a facility in which such activity was carried out, or anticipating carrying out such an activity in the future shall make declarations in accordance with the regime established in the regulations issued under this [Act, Statute, Ordinance, etc.].<sup>22</sup>

Exports/imports  
(States not Party)  
Prohibition

General declaration  
requirements

- (5) Any person carrying out any activity that is covered by this provision shall adopt measures to physically secure the chemicals from access of unauthorised persons,<sup>23</sup> to ensure the safety of people and to protect the environment. Such appropriate measures may be identified in regulations under this [Act, Statute, Ordinance, etc.].

Safety and security  
regulations

### 3.1.2 Control regime for Schedule 2 chemicals<sup>24</sup>

- (1) Any person having performed an activity involving the production, processing or consumption of Schedule 2 chemicals, or having operated a facility in which such activity was carried out, or anticipating carrying out such an activity in the future shall make declarations in accordance with the regime established in the regulations issued under this [Act, Statute, Ordinance, etc.].<sup>25</sup>
- (2) The export and the import of Schedule 2 chemicals to or from the territory of a State Party to the Convention shall be declared in accordance with the regime established in the regulations issued under this [Act, Statute, Ordinance, etc.].<sup>26</sup>

Production,  
processing and  
consumption  
Declaration  
requirements

Export/import  
Declaration  
requirements

<sup>16</sup> One such case could be for example that the aggregate amount of Schedule 1 chemicals imported into the territory of the State Party or acquired by it in the year would exceed the 1 tonne limit set out in paragraph 2(c) and (d) of Part VI of the Verification Annex.

<sup>17</sup> States Parties may also wish to consider issuing clearance certificates, so as to ensure legal certainty for concerned natural and legal persons.

<sup>18</sup> In developing the licensing regime for Schedule 1 chemicals production facilities, States Parties shall take into consideration the specifications and restrictions found in paragraphs 8 to 12 of Part VI of the Verification Annex.

<sup>19</sup> States parties may consider granting such exemption to laboratories producing by synthesis Schedule 1 chemicals for research, medical or pharmaceutical purposes in aggregate quantities less than 100 g per year per facility in accordance with paragraph 12 of Part VI of the Verification Annex.

<sup>20</sup> See operative paragraph (b) of C-/DEC.43, dated 16 May 1997.

<sup>21</sup> As prescribed by paragraph 3 of Part VI of the Verification Annex.

<sup>22</sup> This provision aims at ensuring that States Parties will be in a position to comply with their reporting obligations with respect to Schedule 1 chemicals. See Article VI(2) and (8) of the Convention and paragraph 6 of Part VI(B) and Part VI(D) of the Verification Annex.

<sup>23</sup> While not explicitly mentioned in the Convention the requirement to physically protect Schedule 1 chemicals aims at implementing the obligation of Article VI(2) of the Convention to ensure that activities relating to toxic chemicals and their precursors be carried out for purposes not prohibited under the Convention.

<sup>24</sup> States Parties may consider establishing a licensing regime for Schedule 2 chemicals.

<sup>25</sup> See Article VI(2), (4) and (8) of the Convention and Part VII(A) of the Verification Annex.

<sup>26</sup> This provision aims at allowing States Parties to collect the information and data required to comply with its obligation to declare aggregate national data as prescribed by paragraph 1 of Part VII of the Verification Annex. States Parties may also wish to require reporting before the import respectively export, so as to be in a position to issue a clearance certificate, which would facilitate the procedures at customs.

- |  |   |
|--|---|
| (3) The export and the import of Schedule 2 chemicals to or from the territory of a State not party to the Convention, including transit through such State, are prohibited <sup>27</sup> unless an exemption that is provided for in regulations is applicable; <sup>28</sup> in case such an exemption is applicable, the export and the import shall be subject to declaration in accordance with the regime established in the regulations under this [Act, Statute, Ordinance, etc.]. | Exports/imports<br>(States not Party)<br><br>Prohibition,<br>exemption and<br>declaration |
|--|---|

### 3.1.3 Control regime for Schedule 3 chemicals

- |  |  |
|--|--|
| (1) Any person who has produced Schedule 3 chemicals, or who operates a facility in which such an activity was carried out, or who anticipates carrying out this activity in the future shall make declarations in accordance with the regime established in the regulations under this [Act, Statute, Ordinance, etc.]. <sup>29</sup>   | Production<br><br>Declaration<br>requirements                                |
| (2) The export and the import of Schedule 3 chemicals shall be declared in accordance with the regime established in regulations issued under this [Act Statute, Ordinance, etc.]. <sup>30</sup>   | Export/import<br><br>Declaration<br>requirements                             |
| (3) Without prejudice of the requirement set out in paragraph (2) above, and except when exempted by regulations, <sup>31</sup> the export of Schedule 3 chemicals to the territory of a State not Party is prohibited unless licensed by the [competent authority] in accordance with regulations established under this [Act, Statute, Ordinance, etc.]. The license may only be granted after it has been ensured that the transferred chemicals shall only be used for purposes not prohibited under the Convention. No license shall be granted without first having received an end-use certificate from the competent authorities of the recipient State. | Export to States<br>not Party<br><br>Prohibition, licensing<br>and exemption |

### 3.1.4 Control regime for unscheduled discrete organic chemicals

Any person operating a facility producing unscheduled discrete organic chemicals shall make declarations in accordance with the regime established in the regulations issued under this [Act, Statute, Ordinance, etc.].<sup>32</sup>

### 3.1.5 Record-keeping

|   |   |
|---|---|
| Any person carrying out an activity referred to in provisions 3.1.1 to 3.1.4 above, or operating a facility where such activity is carried out, shall keep records in accordance with regulations established under this [Act, Statute, Ordinance, etc.]. | Production<br><br>Declaration<br>requirements |
|---|---|

### 3.1.6 Loss, theft or discovery of scheduled chemicals

- |  |  |
|--|--|
| (1) Any person carrying out an activity referred to in provisions 3.1.1 to 3.1.3 above, or operating a facility where such activity is carried out, shall report without delay any loss or theft of scheduled chemicals to the National Authority. |  |
| (2) Any person discovering scheduled chemicals on the territory of [State Party] shall inform without delay the [competent authority] <sup>33</sup> which shall inform the National Authority].  |  |

<sup>27</sup> As provided for in paragraph 31 of Part VII of the Verification Annex.

<sup>28</sup> States Parties may consider exempting from this prohibition the export and import to States not party of products containing low concentration of Schedule 2 chemicals to the extent allowed by C-V/DEC.16, dated 17 May 2000.

<sup>29</sup> See Article VI(2), (5) and (8) of the Convention and Part VIII(A) of the Verification Annex.

<sup>30</sup> This provision aims at allowing States Parties to collect the information and data required to comply with their obligation to declare aggregate national data as prescribed by paragraph 1 of Part VIII of the Verification Annex. States Parties may also wish to require reporting before the import respectively export, so as to be in a position to issue a clearance certificate, which would facilitate the procedures at customs.

<sup>31</sup> States Parties may consider exempting from restrictions applying to transfers of Schedule 3 chemicals to States not party those products containing low concentration of Schedule 3 chemicals to the extent allowed by C-VI/DEC.10, dated 17 May 2001.

<sup>32</sup> See Article VI(2), (6) and (8) of the Convention and Part IX(A) of the Verification Annex. In C-I/DEC.39 dated 16 May 1997 the Conference of the States Parties has adopted the understanding that discrete organic chemicals are not covered by the definition, when:

a) they are an oligomer or polymer, whether or not they contain phosphorus, sulphur or fluorine; or  
b) they contain only carbon and metal.

Instead of changing the national definition of discrete organic chemicals, States Parties may – in the regulations – simply not require the making of declarations from natural and legal persons, when the unscheduled discrete organic chemicals fulfil the conditions of paragraphs a) and b) above.

<sup>33</sup> E.g. the police.

### 3.2 Other relevant activities and facts

- (1) The [competent authority] may in regulations identify further declarable past or anticipated activities and facts relevant to the Convention.
- (2) In the event that the [competent authority] has reason to believe that any natural or legal person has information that is relevant for a declaration required to be made by [State Party] to the Organisation, or that is relevant for the implementation of the Convention or for the enforcement of this [Act, Statute, Ordinance, etc.], it may by notice require the person to provide such information.

### 3.3 Basis for implementing regulations<sup>34</sup>

#### 3.3.1 Legal basis for establishing a licensing regime

- (1) The [competent authority] shall make regulations establishing a licensing regime for all licenses to be granted under this chapter.
- (2) The regulations on licenses shall, *inter alia*,
  - (a) provide for different types of licenses with different requirements;
  - (b) prescribe procedures for applying for licenses;
  - (c) establish procedures for processing the applications for licenses;
  - (d) establish procedures for the granting or refusal of licenses;
  - (e) prescribe terms and conditions for the grant of licenses;
  - (f) provide for a regime according to which granted licenses may be suspended, revoked, extended, renewed, transferred, or replaced;
  - (g) establish fees payable by applicants for or holders of licences; and
  - (h) prescribe a record-keeping regime for licence applicants or holders.
- (3) In case the licensed activity is not or only partially carried out, the [competent authority] shall be informed without delay.

#### 3.3.2 Legal basis for establishing a declaration regime

- (1) The [competent authority] shall make regulations establishing a declaration regime for all declarations to be made under this chapter.
- (2) The Regulations on declarations shall, *inter alia*,
  - (a) specify which past, present or anticipated activities and which relevant facts shall be declared;
  - (b) prescribe procedures for making such declarations;
  - (c) specify which documents shall be provided along with the declaration.
- (3) The regulations may identify cases in which declarations are not required.
- (4) The regulations shall prescribe a record-keeping regime for persons required to make declarations under this [Act, Statute, Ordinance, etc.].

#### 3.3.3 Common rules for the licensing and the declaration regime

The regulations establishing a licensing and a declaration regime shall ensure that the [competent authority] is enabled to

- (a) prevent prohibited activities and comply with the requirements of the Convention;
- (b) gather all information as required under Article VI of the Convention; and
- (c) make all declarations to the Organisation under Article VI of the Convention in a comprehensive and timely manner.

<sup>34</sup> This chapter provides a list of issues that may need to be dealt with by such Regulations. In addition, since some legal systems may require that legislation implementing the Convention provides a legal basis for further implementing Regulations, this chapter also gives an example of how such a legal basis can be formulated.

## 4. International inspections<sup>35</sup>

### 4.1 General rule

- (1) International inspections can be carried out in any place under the jurisdiction of [State Party] when required by the Convention.
- (2) International inspections shall only be carried out in facilities that produced, processed or consumed scheduled chemicals or discrete organic chemicals in the past and facilities in which the production, processing or consumption of scheduled chemicals is anticipated unless the international inspection qualifies as a challenge inspection<sup>36</sup> or an investigation in a case of alleged use of chemical weapons,<sup>37</sup> or as part of the verification activities related to chemical weapons production facilities and their destruction<sup>38</sup> under the Convention.
- (3) In performing their duties international inspectors have the powers, privileges and immunities as laid down in the Convention.

### 4.2 Escort team

- (1) At each international inspection, the [competent authority] shall appoint an escort team, each member of which shall be authorised to act as an escort.
- (2) Escorts shall meet the inspectors at the point of entry to the territory, be present during their operations and accompany them back to the point of exit from the territory.
- (3) Escorts shall ensure that the international inspectors abide by the rules established in the Convention. They shall ensure that the inspected persons comply with their duties under this [Act, Statute, Ordinance, etc.] and the regulations to be established thereunder.
- (4) The responsibility of the head of the escort team includes representing [State Party] vis-à-vis the head of the inspection team and the persons subject to international verification.
- (5) Further rights and duties of the escort team and the head of the escort team shall be established in regulations to be established under this [Act, Statute, Ordinance, etc.].

### 4.3 Inspected persons and personnel

- (1) Inspected persons and their personnel shall
  - (a) facilitate the international inspection; and
  - (b) cooperate with the international inspectors and the escort team during the preparation and performance of, and follow-up to the inspection.
- (2) *Inter alia*, they shall –
  - (a) grant access to the inspection site to the international inspectors and the escort team and – in case of a challenge inspection – to any observer;
  - (b) grant access to relevant records to the international inspectors and the escort team;
  - (c) provide all relevant information and data requested by the international inspectors;
  - (d) take and analyse samples [and/or] tolerate the taking and analysis of samples and the taking of photos in accordance with the Convention, this law and its implementing regulations;
  - (e) tolerate the installation and use of continuous monitoring instruments and systems and seals, and notify the National Authority immediately if an event occurs or may occur which may have an impact on the monitoring system.
- (3) Further rights and duties of inspected persons and their personnel may be specified in regulations to be established under this [Act, Statute, Ordinance, etc.].

<sup>35</sup> Most States Parties also establish a regime for national inspections. The rights and obligations of inspected persons and national inspectors in case of national inspections can be similar to the rights and obligations of inspected persons and international inspectors in international inspections. However there are two major differences:

- (1) While in international inspections there are three parties involved (i.e. the inspected person, the State Party and the Organisation) in national inspections only two parties are involved (the inspected person and the State Party). This will result in the absence of an escort team.
- (2) National inspections can be more flexible in their planning than international inspections, which allows for an even more flexible approach with regard to the interests of the inspected person (in particular with regard to the timing of the inspection: appeals may have suspensive effect).

<sup>36</sup> As provided for in Article IX of the Convention and Part X of the Verification Annex.

<sup>37</sup> As provided for in Articles IX and X of the Convention and Part XI of the Verification Annex.

<sup>38</sup> As provided for in Article V of the Convention and Part V(C) of the Verification Annex.



#### 4.4 Procedures

- (1) The [competent authority] shall notify the international inspection to the inspected person as soon as possible.
- (2) The inspected person shall be assumed to have granted its consent, unless it informs the National Authority of the opposite within a timeline indicated in the notification in accordance with paragraph 1.
- (3) In the event that the inspected person does not consent to the inspection, the National Authority shall apply for a search warrant on behalf of the international inspectors and the members of the escort team. The warrant shall be granted if the conditions for carrying out an international inspection under the Convention are fulfilled.
- (4) An appeal by the inspected person against a search warrant shall not have suspensive effect on the carrying out of the international inspection.

### 5. Further implementing provisions: forfeiture, confidentiality and legal assistance<sup>39</sup>

#### 5.1 Declaration of chemical weapons production facilities

Any person holding any information that is related to a chemical weapons production facility in [State Party] or that is suspected to be related to such a facility shall inform without delay the [competent authority]<sup>40</sup> which shall inform the National Authority].

#### 5.2 Forfeiture of chemical weapons<sup>41</sup>

- (1) If any chemical weapon, or old or abandoned chemical weapon is found in any place under the jurisdiction of [State Party], the weapon—
  - (a) is forfeited to the State; and
  - (b) may be seized without warrant by any [competent officer] of the State; and
  - (c) shall be stored pending disposal, and disposed of in a manner determined by [the competent authority] in accordance with the Convention.<sup>42</sup>
- (2) Any chemical weapon discovered on the territory of [State Party] shall be reported to the Organisation by [competent authority] in accordance with the Convention.
- (3) Any chemical that is being used in the development or production of a chemical weapon may be seized by the State.

#### 5.3 Seizure of a chemical weapons production facility

- (1) If the [competent authority] has reasonable cause to believe that any equipment or building is a chemical weapons production facility, or is being constructed or modified to be used as a chemical weapons production facility, the [competent authority] shall:
  - (a) seize such equipment or building;
  - (b) as the case may be, order immediate suspension of all activities at the facility, except safety and physical security activities at the facility.<sup>43</sup>
- (2) Upon determination that the equipment or building is a chemical weapons production facility, or is being constructed or modified to be used as a chemical weapons production facility—
  - (a) the facility shall be closed;
  - (b) cessation of all activities at the facility shall be ordered, except activities required for closure and safety and physical security activities at the facility;
  - (c) the facility shall be destroyed or converted in accordance with the Convention,<sup>44</sup> and at the expense of [...].
- (3) The [competent authority] shall declare the facility and report any other information as may be required to the Organisation in accordance with the Convention.<sup>45</sup>

<sup>39</sup> States Parties are required under Article VIII(50) of the Convention, to enter into a Privileges and Immunities Agreement with the Organisation that clearly delineates the scope of the privileges and immunities of the Organisation and its officials and experts. No legislation is required in this regard.

<sup>40</sup> E.g. the police.

<sup>41</sup> This Section closely relates to the Penal Provisions chapter. Accordingly some States Parties have included this provision in their penal implementing provisions.

<sup>42</sup> The relevant provisions are found in Article I(2) in conjunction with Article IV of the Convention and with Part IV(A) of the Verification Annex.

<sup>43</sup> See paragraph 14 of Part V of the Verification Annex.

<sup>44</sup> The relevant provisions are found in Article V and Part V(B) and (D) of the Verification Annex.

<sup>45</sup> The relevant provisions are found in Article III(1)(c) and Part V(A) of the Verification Annex.

#### 5.4 Protection of confidential information<sup>46</sup>

- (1) All information and documents given to or obtained by [the National Authority] pursuant to the Convention, this law or its implementing regulations shall be evaluated in order to establish whether they contain confidential information. Information shall be considered confidential if it is so designated by the natural or legal person to whom it relates or from whom it has been received. It shall also be considered confidential if its disclosure could reasonably be expected to cause damage to the person it relates to or from whom it has been received or to the mechanisms for implementation of the Convention.
- (2) All information and documents given to or obtained by any other person pursuant to the Convention, this law or its implementing regulations shall be treated as confidential information, unless such information or document is publicly available.
- (3) Disclosure of confidential information or documents is only allowed with the consent of the person to whose affairs it relates or for the purpose of—
  - (a) implementing the Convention;
  - (b) enforcing of this [Act, Statute, Ordinance, etc.]; or
  - (c) dealing with an emergency involving public safety.<sup>47</sup>

#### 5.5 Enabling legal assistance to other States Parties

- (1) Without prejudice to the confidentiality regime, the [competent authorities] for crime prevention, criminal proceedings, and implementation of the Convention may collaborate with competent authorities of other States and international organisations and entities, and coordinate their actions to the extent required by the implementation of this [Act, Statute, Ordinance, etc.] or of the equivalent foreign statute(s).
- (2) The [competent authorities] may request other State authorities and international organisations or entities, under paragraph (1), to provide relevant data or information. The [competent authorities] are authorized to receive data or information concerning—
  - (a) the nature, quantity, and utilisation of scheduled chemicals and related technologies, and the places of consignment and consignees for such scheduled chemicals, and related technologies, or
  - (b) persons taking part in the production, delivery, or trade of the scheduled chemicals, or related technologies in subparagraph (a).
- (3) If a State has entered into a reciprocity agreement with [State Party], the [competent authorities] may provide, on their own initiative or on request, the data or information described in paragraph (2) to that State so long as the competent authority of the other State provides assurances that such data or information shall—
  - (a) only be utilized for purposes consistent with this [Act, Statute, Ordinance, etc.] and
  - (b) only be used in criminal proceedings on the condition that they are obtained in accordance with those provisions governing international judicial cooperation.
- (4) The [competent authorities of State Party] may provide the data or information described in paragraph (2) to international organisations or entities if the conditions set forth in paragraph (3) are fulfilled, in which case the requirement for a reciprocity agreement is waived.

## 6. Penal provisions

### 6.1 Acquisition or possession of chemical weapons

Any person<sup>48</sup> [level of intent]<sup>49</sup> developing, producing, manufacturing, otherwise acquiring, possessing, stockpiling or retaining a chemical weapon, commits an offence and shall be punished upon conviction by [period of time] imprisonment [and/or] fined an amount ranging from [currency; amount] to [currency; amount].

### 6.2 Transportation or transfer of chemical weapons

Any person [level of intent] transporting, transiting, trans-shipping or transferring directly or indirectly a chemical weapon to any other person, commits an offence and shall be punished upon conviction by [period of time] imprisonment [and/or] fined an amount ranging from [currency; amount] to [currency; amount].

<sup>46</sup> See Article VII(6) of the Convention and C-I/DEC.13/Rev.1 dated 2 February 2006, in particular section 2.1 of Chapter IV of its Annex.

<sup>47</sup> States Parties may consider that breach of confidentiality may cause financial damage and ensure that its tort law provides for a legal basis for claiming compensation.

<sup>48</sup> States Parties should ensure that the term "person" includes natural and legal persons.

<sup>49</sup> E.g. "intentionally, knowingly, recklessly, or with gross negligence".

**6.3 Use of chemical weapons**

Any person [level of intent] using a chemical weapon, commits an offence and shall be punished upon conviction by [period of time] imprisonment [and/or] fined an amount ranging from [currency; amount] to [currency; amount].

**6.4 Engagement in military preparations to use of chemical weapons**

Any person [level of intent] engaging in any military preparations to use a chemical weapon, commits an offence and shall be punished upon conviction by [period of time] imprisonment [and/or] fined an amount ranging from [currency; amount] to [currency; amount].

**6.5 Use of riot control agents as a method of warfare**

Any person [level of intent] using riot control agents as a method of warfare commits an offence and shall be punished upon conviction by [period of time] imprisonment [and/or] fined an amount ranging from [currency; amount] to [currency; amount].

**6.6 Construction of new chemical weapons production facilities**

Any person [level of intent] owning or possessing a chemical weapons production facility, constructing any new chemical weapons production facility or modifying any existing facility for the purpose of transforming it into a chemical weapons production facility commits an offence and shall be punished upon conviction by [period of time] imprisonment [and/or] fined an amount ranging from [currency; amount] to [currency; amount].

**6.7 Producing, acquiring, retaining, using or in-country transferring Schedule 1 chemicals**

Any person [level of intent]

- (a) producing, otherwise acquiring, retaining, using or in-country transferring a Schedule 1 chemical in the territory of a State not Party to the Convention, commits an offence and shall be punished upon conviction by [period of time] imprisonment [and/or] fined an amount ranging from [currency; amount] to [currency; amount].
- (b) illegally producing, otherwise acquiring, retaining, using or in-country transferring a Schedule 1 chemical commits an offence and shall be punished upon conviction by [period of time] imprisonment [and/or] fined an amount ranging from [currency; amount] to [currency; amount].

**6.8 Re-exportation of Schedule 1 chemicals**

Any person [level of intent] exporting a Schedule 1 chemical previously imported into [State Party] to a third state, commits an offence and shall be punished upon conviction by [period of time] imprisonment [and/or] fined an amount ranging from [currency; amount] to [currency; amount].

**6.9 Export or import of Schedule 1 and 2 chemicals**

Any person [level of intent] illegally exporting to, or importing from, a State not party to the Convention, a Schedule 1 or 2 chemical commits an offence and shall be punished upon conviction by [period of time] imprisonment [and/or] fined an amount ranging from [currency; amount] to [currency; amount].

**6.10 Export of Schedule 3 chemicals**

Any person [level of intent] illegally exporting a Schedule 3 chemical to a State not party to the Convention commits an offence and shall be punished upon conviction by [period of time] imprisonment [and/or] fined an amount ranging from [currency; amount] to [currency; amount].

**6.11 Obstruction of verification and enforcement measures<sup>50</sup>**

- (1) Any person [level of intent] obstructing measures of verification or enforcement under the Convention [and/or] this law and its implementing regulations, commits an offence and shall be punished upon conviction by [period of time] imprisonment [and/or] fined an amount ranging from [currency; amount] to [currency; amount].
- (2) Paragraph 1 does not apply to a person that has not granted its consent to the carrying out of the international inspection, unless a search warrant has been issued.

<sup>50</sup> This provision covers various kinds of behaviours and accordingly States Parties may wish to provide for a wide range of penal sanctions.

**6.12 Failure to comply with the licensing or declaration regime<sup>51</sup>**

Any person [level of intent] failing to comply with the licensing or the declaration regime including the record-keeping regime or any other requirement to provide information established by this law and its implementing regulations, commits an offence and shall be punished upon conviction by [period of time] imprisonment [and/or] fined an amount ranging from [currency; amount] to [currency; amount].

**6.13 Failure to protect confidential information**

Any person who [level of intent] fails to comply with the provision of this law and its implementing regulations to protect confidential information commits an offence and shall be punished upon conviction by imprisonment for a term of [period of time] [and/or] with a fine not exceeding [amount].

**6.14 Accessory offence, conspiracy and attempt**

Any person–

- (a) [level of intent] assisting, encouraging or inducing anyone to commit an offence under this [Act, Statute, Ordinance, etc.];
  - (b) conspiring to commit an offence under this [Act, Statute, Ordinance, etc.]; or
  - (c) attempting to commit an offence under this [Act, Statute, Ordinance, etc.]
- shall be deemed to have committed the like offence.

**6.15 Extraterritorial application**

Any natural person who, in a place outside the jurisdiction of [State Party], commits an act or omission that would, if committed in a place under the jurisdiction of [State Party], constitute an offence under this [Act, Statute, Ordinance, etc.] is deemed to have committed it in a place under the jurisdiction of [State Party] if –

- (a) the person is a [State Party's] national; or
- (b) the place was under the control of [State Party].

**7. Final provisions****7.1 Primacy of the Convention**

Where there is any inconsistency between any other law and this [Act, Statute, Ordinance, etc.] or the Convention, this [Act, Statute, Ordinance, etc.] and the Convention shall prevail.

**7.2 Additional regulations**

Further regulations shall be adopted as required for effective implementation of this [Act, Statute, Ordinance, etc.] and the Convention.

**[7.3 Amendment of the Annex on Chemicals to this [Act, Statute, Ordinance, etc.]**

In case the Annex on Chemicals to the Convention is amended the Annex on Chemicals to this [Act, Statute, Ordinance, etc.] shall be adjusted and for this purpose be amendable by regulations.]

<sup>51</sup> *Ibidem*. While not explicitly mentioned, this provision for example covers the submission of false or misleading information in licensing and declaration.



# **XI**

# **MODEL LAW ON THE MINE BAN CONVENTION**

**Legislation for common-law States  
to Implement the 1997 Ottawa Convention  
on the Prohibition of the Use, Stockpiling,  
Production and Transfer of Anti-personnel  
Mines and on their Destruction**

# MODEL LEGISLATION

for common-law States

## MINE BAN CONVENTION ACT 20XX

An act to implement the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction in [INSERT COUNTRY NAME]

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# MINE BAN CONVENTION ACT 20XX

## MODEL LAW

An act to give effect to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction in [INSERT COUNTRY NAME]

## PART I - PRELIMINARY

### 1. Short title and commencement

(1) This Act may be cited as the Mine Ban Convention Act [YEAR].

(2) This Act comes into force on [DATE/PROCEDURE].

### 2. Interpretation

In this Act:

- (a) **'anti-handling device'** means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine;
- (b) **'anti-personnel mine'** means a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person and that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped;
- (c) **'Convention'** means the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997, set out in the schedule to this Act, as amended from time to time in accordance with Article 13 of the Convention;
- (d) **'mine'** means a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle;
- (e) **'mined area'** means an area which is dangerous due to the presence or suspected presence of mines;
- (f) **'Minister'** means the Minister of [INSERT MINISTER WITH RESPONSIBILITY FOR THIS ACT];
- (g) **'occupier'** includes a person present at the premises who is in apparent control of the premises;
- (h) **'transfer'** involves, in addition to the physical movement of anti-personnel mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced anti-personnel mines.



## PART II - PROHIBITIONS AND OFFENCES

### 3. Prohibited conduct

(1) Subject to section 6, no person shall use an anti-personnel mine.

(2) Subject to section 6, no person shall;

- (a) develop or produce an anti-personnel mine;
- (b) acquire an anti-personnel mine;
- (c) possess, retain or stockpile an anti-personnel mine;
- (d) transfer to anyone, either directly or indirectly, an anti-personnel mine.

(3) Subject to section 6, no person shall assist, encourage or induce, in any way, anyone to engage in conduct referred to in sub-section (1) above.

### 4. Offences and penalties

(1) Any person who contravenes section 3 shall be guilty of an offence and liable upon conviction to:

- (a) in the case of an individual, imprisonment for a term not exceeding [ ] years or to a fine not exceeding [ ] or both;
- (b) in the case of a body corporate, a fine not exceeding [ ].

(2) Where an offence under sub-section (1) which is committed by a body corporate is proved to have been committed with the consent and connivance of, or to be attributable to any negligence on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished in accordance with sub-section (1)(a).

(3) Any court which convicts a person under sub-sections 1(a) and (b) may order that an anti-personnel mine or component part used or otherwise involved in the commission of the offence be forfeited to the State.

### 5. Extra-territorial application<sup>1</sup>

Section 3 extends to conduct outside the territory of [COUNTRY NAME] of citizens of [COUNTRY NAME] and bodies corporate incorporated under the laws of [COUNTRY NAME]

<sup>1</sup> Article 9 of the Convention requires States Parties to "take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control". It is clear from the negotiating history that Article 9 does not require extra-territorial jurisdiction for prohibited acts; it is also clear, however, that the use of the term "appropriate" in "all appropriate legal, administrative and other measures" leaves States Parties a wide margin of discretion when drafting implementing legislation, and in practice many States Parties have provided for extra-territorial jurisdiction in their domestic implementing legislation. Given the likely cross-border nature of crimes committed in breach of this Convention, the ICRC is of the opinion that it is "appropriate" to provide for extra territorial jurisdiction in the model legislation.

## 6. Exceptions: conduct which is permitted

Section 3 does not apply to:

- (a) the placement, possession, retention or transfer of an anti-personnel mine in accordance with a permission in force under section 10;
- (b) the possession, retention or transfer of an anti-personnel mine by a member of the [NAME OF ARMED FORCES], a police officer, a court official, a customs official or any other such person appointed by the Minister by notice in writing in the course of that person's duties for the purpose of:
  - (i) the conduct of criminal proceedings;
  - (ii) rendering an anti-personnel mine harmless;
  - (iii) retaining an anti-personnel mine for future destruction; and
  - (iv) delivering an anti-personnel mine to [NAME OF AUTHORITY/PERSON DESIGNATED BY THE MINISTER] for destruction.

# PART III - DESTRUCTION OF ANTI-PERSONNEL MINES

## 7. Delivery or notification of anti-personnel mines

Any person who knowingly possesses an anti-personnel mine otherwise than in accordance with section 6, must, without delay, deliver it to [NAME OF AUTHORITY/PERSON DESIGNATED BY THE MINISTER] for destruction or notify [NAME OF AUTHORITY/PERSON DESIGNATED BY THE MINISTER] to enable arrangements to be made for collection and destruction.

## 8. Destruction of anti-personnel mines

Subject to section 10, the Minister shall ensure the destruction of:

- (a) all stockpiled anti-personnel mines owned or possessed by [COUNTRY NAME] or under its jurisdiction or control;
- (b) all anti-personnel mines in mined areas under the jurisdiction or control of [COUNTRY NAME];
- (c) all anti-personnel mines notified or delivered for destruction under section 7.

## 9. Marking, monitoring and protection

Where an area is identified as a mined area or is suspected to be a mined area, the Minister shall, as soon as possible, ensure that such area is perimeter-marked and protected by fencing or otherwise employ such means as are necessary to notify civilians of the presence of anti-personnel mines until all anti-personnel mines contained therein are destroyed.

## 10. Permission to retain or transfer

The Minister may, in writing, grant permission for a specified number of anti-personnel mines to be placed, possessed, retained, or transferred, for the development of, or training in, mine detection, mine clearance or mine destruction techniques, but the number of such mines shall not exceed the minimum number absolutely necessary for these purposes.

## PART IV - FACT-FINDING MISSIONS<sup>2</sup>

### 11. Fact-finding missions

If a fact-finding mission to [COUNTRY NAME] is authorized under Article 8 of the Convention, the Minister shall:

- (a) issue to every member of the mission an identity card:
  - (i) identifying the member by name, containing a recent photograph of the member, and indicating the member's status and authority to conduct a fact-finding mission to [COUNTRY NAME];
  - (ii) stating that the member enjoys the privileges and immunities under Article VI of the Convention on the Privileges and Immunities of the United Nations;
- (b) take the necessary measures to receive, transport and accommodate the mission;
- (c) be responsible for ensuring the security of the mission to the maximum extent possible during their presence;
- (d) make all efforts to ensure that opportunity is given to the mission to speak with all relevant persons who may be able to provide information relevant to the alleged compliance issue; and
- (e) grant the mission access to all areas and installations under the control of the State where facts relevant to the alleged compliance issue could be expected to be collected.

### 12. General powers of fact-finding missions in relation to premises

(1) A fact-finding mission authorized under Article 8 of the Convention may enter [COUNTRY NAME] to collect information relevant to the alleged compliance issue and in particular shall have the power to:

- (a) search the premises and anything on the premises;
- (b) inspect, examine, take measurements of, or conduct tests (including taking samples) concerning anything on the premises that relates to an anti-personnel mine;
- (c) take photographs or make video or audio recordings or sketches of the premises or anything on the premises;
- (d) inspect any book, record or document on the premises;
- (e) take extracts from or make copies of any such book, record or document;
- (f) take any equipment and materials onto premises as required to exercise powers in relation to the premises;
- (g) require the occupier or any persons present on the premises to answer any questions put by the member of the fact-finding mission or produce any book, record or document requested by the member of the fact-finding mission.

(2) The Minister may designate a person to accompany any member of a fact-finding mission in order to facilitate the carrying out of the functions of the mission.

<sup>2</sup> Part IV of the model legislation gives effect to Article 8 of the Convention concerning the operation of fact-finding missions. It is based on a review of existing legislation in common-law jurisdictions and is suggested as an appropriate means of implementing in a domestic context the requirements on States Parties of paragraphs 11, 12, 13 and 14 of Article 8.

### **13. Power of a member of a fact-finding mission to enter premises**

(1) For the purpose of collecting information relevant to the alleged compliance issue, a member of a fact-finding mission may, subject to sub-section (2):

- (a) enter any premises; and
- (b) exercise therein the powers set out in section 12 (1).

(2) A member of a fact-finding mission is not authorized to enter premises under sub-section (1) unless:

- (a) the occupier of the premises has consented to the entry; or
- (b) the entry is made under a warrant issued under section 17.

### **14. Member of a fact-finding mission must produce identity card on request**

Subject to section 15, a member of a fact-finding mission is not entitled to exercise any powers under this part of the Act in relation to premises if:

- (a) the occupier of the premises has required the member of the fact-finding mission to produce his or her identity card for inspection by the occupier; and
- (b) the member of the fact-finding mission fails to comply with the requirement.

### **15. Announcement before entry**

(1) A member of a fact-finding mission must, before entering the premises under a warrant issued under section 17:

- (a) announce that he or she is authorized to enter the premises;
- (b) identify himself or herself by producing his or her identity card to the occupier;
- (c) make available to the occupier or another person who apparently represents the occupier and who is present on the premises, a copy of the warrant; and
- (d) give any person at the premises an opportunity to allow entry to the premises.

(2) A member of a fact-finding mission is not required to comply with sub-section (1) if he or she believes on reasonable grounds that immediate entry to the premises is required:

- (a) to ensure the safety of a person; or
- (b) to prevent serious damage to the environment; or
- (c) to ensure that the effective execution of the warrant is not frustrated.

### **16. Occupier entitled to be present during search**

(1) If a warrant in relation to premises is being executed and the occupier of the premises or another person who apparently represents the occupier is present on the premises, the person is entitled to observe the search being conducted.

(2) The right to observe the search being conducted ceases if the person impedes the search.

(3) This section does not prevent two or more areas of the premises being searched at the same time.

## 17. Monitoring warrants

(1) A member of a fact-finding mission may apply to a magistrate for a warrant to enter premises under this section.

(2) The magistrate may issue the warrant if the magistrate is satisfied, on information given on oath, that it is reasonably necessary that one or more members of a fact-finding mission should have access to the premises for purposes relevant to the alleged compliance issue. This sub-section has effect subject to sub-section (3).

(3) The magistrate must not issue the warrant unless the member of the fact-finding mission or some other person has given to the magistrate, either orally or by affidavit, such further information (if any) as the magistrate requires concerning the grounds on which the issue of the warrant is being sought.

(4) The warrant must:

- (a) authorize one or more members of a fact-finding mission (whether or not named in the warrant), with such assistance and by such force as is necessary and reasonable:
  - (i) to enter the premises; and
  - (ii) to exercise the powers set out in sub-section 12(1) in relation to the premises; and
- (b) state whether the entry is authorized to be made at any time of the day or night or during specified hours of the day or night; and
- (c) specify the day (not more than 6 months after the issue of the warrant) on which the warrant ceases to have effect; and
- (d) state the purpose for which the warrant is issued.

## 18. Equipment for fact-finding missions

A member of a fact-finding mission authorized under Article 8 of the Convention may import on written notice to the Minister the necessary equipment to be used exclusively in carrying out the fact-finding mission, and may export the equipment at the end of the mission. Such import and export shall be exempt from duty and tax.

## 19. Offences and penalties

(1) Any person who knowingly makes a false or misleading statement in an application for a warrant under section 17 commits an offence and is liable on conviction to imprisonment for a term not exceeding [ ] or a fine not exceeding [ ] or both.

(2) Any person who wilfully obstructs, hinders, resists or deceives any member of a fact-finding mission undertaking an inspection in [COUNTRY NAME] commits an offence and is liable on conviction to imprisonment for a term not exceeding [ ] or a fine not exceeding [ ] or both.

## PART V - INFORMATION-GATHERING POWERS

### 20. Obtaining information and documents

The Minister may, by written notice served on any person, require him or her to give the Minister such information or documents as is specified in the notice if the Minister has reason to believe that he or she has information or a document relevant to:

- (a) the administration or enforcement of this Act;
- (b) [COUNTRY's] obligation to report under Article 7 of the Convention; or
- (c) [COUNTRY's] obligation to provide information under Article 8 of the Convention.

### 21. Failure to comply and providing false information

Any person who:

- (a) without reasonable excuse fails to comply with a notice served on him or her by the Minister; or
- (b) knowingly makes a false or misleading statement in response to a notice served on him or her,

shall be guilty of an offence and liable, on conviction, to imprisonment not exceeding [ ] years or a fine of [ ] or both.

## PART VI - ADMINISTRATION OF THE ACT

### 22. Regulations

The [NAME OF REGULATION-MAKING AUTHORITY] may make regulations providing for such other matters as are required or permitted to be prescribed, or that are necessary or convenient to be prescribed, for carrying out or giving effect to this Act.

### 23. Act binding on the State

This Act binds the State.

## SCHEDULE

**Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction**



# **XII**

# **MODEL LAW ON THE CONVENTION ON CLUSTER MUNITIONS**

**Legislation for common-law States on  
the 2008 Convention on Cluster Munitions**



# MODEL LEGISLATION

## CLUSTER MUNITIONS ACT 20XX

An act to implement the Convention on Cluster Munitions in [COUNTRY NAME]

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# MODEL

## PART I - PRELIMINARY

### 1. Short title and commencement

(1) This Act may be cited as the Cluster Munitions Act [YEAR].

(2) This Act comes into force on [DATE/PROCEDURE].

### 2. Interpretation

In this Act:

(1) “abandoned cluster munitions” means cluster munitions or explosive submunitions that have not been used and that have been left behind or dumped, and that are no longer under the control of the party that left them behind or dumped them. They may or may not have been prepared for use;

(2) “cluster munition” means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions. It does not mean the following:

(a) a munition or submunition designed to disperse flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;

(b) a munition or submunition designed to produce electrical or electronic effects;

(c) a munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:

(i) each munition contains fewer than ten explosive submunitions;

(ii) each explosive submunition weighs more than four kilograms;

(iii) each explosive submunition is designed to detect and engage a single target object;

(iv) each explosive submunition is equipped with an electronic self-destruction mechanism;

(v) each explosive submunition is equipped with an electronic self-deactivating feature;

(3) “cluster munition contaminated area” means an area known or suspected to contain cluster munition remnants;

(4) “cluster munition remnants” means failed cluster munitions, abandoned cluster munitions, unexploded submunitions and unexploded bomblets;

(5) “cluster munition victims” means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalization or substantial impairment of the realization of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities;

(6) “convention” means the 2008 Convention on Cluster Munitions;

(7) “dispenser” means a container that is designed to disperse or release explosive bomblets and which is affixed to an aircraft at the time of dispersal or release;

(8) “explosive submunition” means a conventional munition that in order to perform its task is dispersed or released by a cluster munition and is designed to function by detonating an explosive charge prior to, on or after impact;

(9) “explosive bomblet” means a conventional munition, weighing less than 20 kilograms, which is not self-propelled and which, in order to perform its task, is dispersed or released by a dispenser, and is designed to function by detonating an explosive charge prior to, on or after impact;

(10) “failed cluster munition” means a cluster munition that has been fired, dropped, launched, projected or otherwise delivered and which should have dispersed or released its explosive submunitions but failed to do so;

(11) “mine” means a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle;

(12) “self-destruction mechanism” means an incorporated automatically functioning mechanism which is in addition to the primary initiating mechanism of the munition and which secures the destruction of the munition into which it is incorporated;

(13) “transfer” involves, in addition to the physical movement of cluster munitions into or from national territory, the transfer of title to and control over cluster munitions, but does not involve the transfer of territory containing cluster munition remnants;

(14) “unexploded bomblet” means an explosive bomblet that has been dispersed, released or otherwise separated from a dispenser and has failed to explode as intended;

(15) “unexploded submunition” means an explosive submunition that has been dispersed or released by, or otherwise separated from, a cluster munition and has failed to explode as intended.

## PART II - PROHIBITIONS AND OFFENCES

### 3. Prohibited conduct

(1) Subject to section 6, no person shall use cluster munitions.

(2) Subject to section 6, no person shall, directly or indirectly:

- (a) develop or produce cluster munitions;
- (b) acquire cluster munitions;
- (c) possess, retain or stockpile cluster munitions;
- (d) transfer cluster munitions to anyone.

(3) Subject to section 6, no person shall assist, encourage or induce anyone to engage in any activity referred to in paragraphs (1) and (2) above.

(4) Paragraphs (1) and (2) of this section apply, *mutatis mutandis*, to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft.

(5) This Act does not apply to mines.

#### 4. Offences and penalties

(1) Any person who contravenes section 3 shall be guilty of an offence and liable upon conviction to:

- (a) in the case of an individual, imprisonment for a term not exceeding [ ] years or to a fine not exceeding [ ] or both;
- (b) in the case of a body corporate, a fine not exceeding [ ].

(2) Where an offence under paragraph (1) of this section, committed by a body corporate is proved to have been committed with the consent and connivance of, or to be attributable to any negligence on the part of, any director, manager or other similar officer of the body corporate, or any person who was purporting to act in such capacity, such person, as well as the body corporate, shall be guilty of that offence and shall be liable to be proceeded against and punished in accordance with paragraph (1)(a) of this section.

(3) Any court, convicting a person under paragraphs 1(a) or (b), may order that cluster munitions used or otherwise involved in the commission of the offence be forfeited to the State.

#### 5. Extra territorial application <sup>1</sup>

Section 3 extends to conduct outside the territory of [COUNTRY NAME] by citizens of [COUNTRY NAME] and bodies corporate incorporated under the laws of [COUNTRY NAME].

#### 6. Exceptions: permitted conduct <sup>2</sup>

Section 3 does not apply to:

- (1) acquisition, possession, retention or transfer of cluster munitions, explosive submunitions and explosive bomblets in accordance with a permission in force under section 11;
- (2) the possession, retention or transfer of cluster munitions, explosive submunitions and explosive bomblets by a member of the [NAME OF ARMED FORCES], a police officer, a court official, a customs official or any other such person appointed by the Minister by notice in writing in the course of that person's duties for the purpose of:
  - (a) the conduct of criminal proceedings;
  - (b) rendering cluster munitions harmless;
  - (c) retaining cluster munitions for future destruction; and
  - (d) delivering cluster munitions to [NAME OF AUTHORITY/PERSON DESIGNATED BY THE MINISTER] for destruction.

<sup>1</sup> Article 9 of the Convention requires States Parties to "take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control". It was widely understood in the negotiations that Article 9 does not explicitly require extraterritorial jurisdiction for prohibited acts; it is also clear, however, that the use of the term "appropriate" in "all appropriate legal, administrative and other measures" leaves States Parties discretion in determining the types of measures to be taken. In developing implementing legislation on other prohibited weapons (e.g. anti-personnel mines, chemical weapons), many States Parties have provided for extraterritorial jurisdiction. Given the likely cross-border nature of crimes committed in breach of this Convention, the ICRC encourages States to provide for extra territorial jurisdiction in the model legislation.

<sup>2</sup> States may wish to expressly provide for situations of military cooperation and operations with States not party to the Convention. If so, then States should consider including a section dealing with Article 21 of the Convention.

# PART III - COLLECTION AND DESTRUCTION OF CLUSTER MUNITIONS

## 7. Notification of cluster munitions

Any person who knowingly possesses cluster munitions and/or explosive bomblets, explosive submunitions or cluster munition remnants otherwise than in accordance with section 6, must, without delay, notify [NAME OF AUTHORITY/PERSON DESIGNATED BY THE MINISTER] to enable arrangements to be made for collection and destruction.

## 8. Destruction of cluster munitions

Subject to section 10, the Minister shall ensure:

(1) the destruction of all stockpiled cluster munitions, explosive bomblets and explosive submunitions owned or possessed by [COUNTRY NAME] or under its jurisdiction and control;

(2) the collection and destruction of all cluster munitions notified under section 7.

## 9. Cluster munition contaminated areas

Where an area is identified as a cluster munition contaminated area or is suspected to be a cluster munition contaminated area, the Minister shall ensure the following, as soon as possible, in areas under the State's jurisdiction or control:

(1) a survey, assessment and recording of the threat posed by cluster munition remnants, making every effort to identify all cluster munition contaminated areas;

(2) an assessment and prioritization of needs in terms of marking, protection of civilians, clearance and destruction, and the taking of steps to mobilize resources and develop a national plan to carry out these activities;

(3) the taking of all feasible steps to ensure that all cluster munition contaminated areas are perimeter-marked, monitored and protected by fencing or other means to ensure the effective exclusion of civilians;

(4) the clearance and destruction of all cluster munition remnants; and

(5) the conduct of risk-reduction education to ensure awareness among civilians living in or around cluster munition contaminated areas of the risks posed by such remnants.

## 10. Victim assistance

In consultation with the relevant Ministries, the Minister shall ensure compliance with the obligations of the Convention regarding risk education and victim assistance, in particular to:

(1) assess the needs of cluster munition victims;

(2) develop, implement and enforce any necessary national laws and policies;

(3) develop a national plan and budget, including timeframes to carry out these activities, with a view to incorporating them within the existing national disability, development and human rights frameworks and mechanisms, while respecting the specific role and contribution of relevant actors;

(4) take steps to mobilize national and international resources;

(5) not discriminate against or among cluster munition victims, or between cluster munition victims and those who have suffered injuries or disabilities from other causes; differences in treatment should be based only on medical, rehabilitative, psychological or socio-economic needs;

(6) closely consult with and actively involve cluster munition victims and their representative organizations;

(7) designate a focal point within the government for coordination of matters relating to the implementation of this section; and

(8) strive to incorporate relevant guidelines and good practices including in the areas of medical care, rehabilitation and psychological support, as well as social and economic inclusion.

### **11. Permission to acquire, retain or transfer**

(1) The Minister may, in writing, grant permission for a specified number of cluster munitions, explosive bomblets and explosive submunitions to be retained or acquired for the development of, or training in, techniques for the detection, clearance or destruction of cluster munitions, explosive bomblets and explosive submunitions, or for the development of cluster munition counter-measures, but the number of such items shall not exceed the minimum number absolutely necessary for these purposes.

(2) The transfer of cluster munitions to another State Party for the purpose of destruction, as well as for the purposes described in paragraph 1 of this section, is permitted.

## **PART IV - INFORMATION-GATHERING POWERS**

### **12. Request for clarification**

The Minister, if in receipt of a request for clarification by another State Party relating to a matter of compliance with the provisions of the Convention, shall provide, through the secretary-general of the United Nations, within 28 days, all information that would assist in clarifying the matter.

### **13. Obtaining information and documents**

The Minister may, by written notice served on any person, require such person to give the Minister such information or documents as is specified in the notice if the Minister has reason to believe that he or she has information or a document relevant to:

(1) the administration or enforcement of this Act;

(2) [COUNTRY's] obligation to report under Article 7 of the Convention; or

(3) [COUNTRY's] obligation to provide information under Article 8 of the Convention.

### **14. Failure to comply and providing false information**

Any person who:

(1) without reasonable excuse fails to comply with a notice served on him or her by the Minister; or

(2) knowingly makes a false or misleading statement in response to a notice served on him or her,

shall be guilty of an offence and liable, on conviction, to imprisonment not exceeding [ ] years or a fine of [ ] or both.

## PART V - ADMINISTRATION OF THE ACT

### 15. Regulations

The [NAME OF REGULATION-MAKING AUTHORITY] may make regulations providing for such other matters as are required or permitted to be prescribed, or that are necessary or convenient to be prescribed, for carrying out or giving effect to this Act.

### 16. Act binding on the State

This Act binds the State.

## SCHEDULE

Convention on Cluster Munitions

# **XIII WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT AND THEIR SOURCES IN INTERNATIONAL HUMANITARIAN LAW**

**Comparative table**



## NOTE

The present table seeks to provide the war crimes over which the International Criminal Court (ICC) has jurisdiction, together with the definition of such offences as found in other sources of international humanitarian law (IHL). The table aims, on the one hand, **to identify the origin of the terms used in the Statute's definitions of war crimes** and, on the other, **to highlight the differences in wording and content between those definitions and the obligations arising under IHL instruments**.

More specifically, crimes under the ICC Statute are compared with the following:

- Grave breaches of the Geneva Conventions of 1949 and their Additional Protocol I;
- Other serious violations of the laws and customs of war applicable in international armed conflicts (based primarily on the 1899 Hague Declaration, the 1907 Regulations annexed to the Hague Convention No. IV, the 1925 Geneva Protocol, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols, the 1989 Convention on the Rights of the Child, the 1994 Convention on the Safety of United Nations and Associated Personnel, and the Statute of the International Criminal Tribunal for the former Yugoslavia);
- Serious violations of the laws and customs of war applicable in non-international armed conflicts (based primarily on Article 3 common to the four Geneva Conventions of 1949, their Additional Protocol II of 1977, the 1999 Optional Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the 1989 Convention on the Rights of the Child, the 1994 Convention on the Safety of United Nations and Associated Personnel, the Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia, and the Statute of the Special Court for Sierra Leone).

**List of abbreviations** (treaties and other documents)

|                        |   |
|------------------------|---|
| 1899 Hague Declaration | Declaration concerning the prohibition of using bullets which expand or flatten easily in the human body (International Peace Conference, The Hague, 1899)                        |
| HR IV                  | Regulations respecting the laws and customs of war on land, annexed to the Hague Convention of 18 October 1907 respecting the Laws and Customs of War on Land (Convention No. IV) |
| 1925 Geneva Protocol   | Geneva Protocol of 17 June 1925 for the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of warfare                         |
| GC I                   | Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949   |
| GC II                  | Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949                                   |
| GC III                 | Geneva Convention (III) relative to the Treatment of Prisoners of War, of 12 August 1949  |
| GC IV                  | Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, of 12 August 1949   |
| AP I                   | Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977          |
| AP II                  | Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977     |
| 1954 CCP               | Convention for the Protection of Cultural Property in the Event of Armed Conflict, of 14 May 1954   |
| Child Convention       | United Nations Convention on the Rights of the Child, of 20 November 1989   |
| ICTY Statute           | Statute of the International Criminal Tribunal for the former Yugoslavia, of 25 May 1993  |
| ICTR Statute           | Statute of the International Criminal Tribunal for Rwanda, of 8 November 1994   |
| 1994 UN Convention     | Convention on the Safety of United Nations and Associated Personnel, of 9 December 1994   |
| ICC Statute            | Rome Statute of the International Criminal Court, of 17 July 1998   |
| 1999 CCP OP            | Optional Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, of 26 March 1999   |
| SCSL Statute           | Statute of the Special Court for Sierra Leone, of 16 January 2002   |
| CIHL Study             | ICRC study on customary international humanitarian law, 2005 edition  |

| <b>COMPARATIVE TABLE</b>   |   |   |  |
|--|---|---|--|
| <b>WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT AND THEIR SOURCES IN INTERNATIONAL HUMANITARIAN LAW</b> |   |   |  |
| <b>WAR CRIMES UNDER THE ICC STATUTE</b>  |   | <b>SOURCES OF IHL AND PROVISIONS FOUND IN SOURCES</b>   |  |
| <b>ICC Statute</b>   | <b>Art. 8 (2) (a)</b><br>(committed against protected persons)  | <b>GRAVE BREACHES OF THE 1949 GENEVA CONVENTIONS</b><br>(committed against protected persons)   | <b>Source of IHL</b>                         |
| Art. 8 (2) (a) (i)   | Wilful killing  | Wilful killing  | Art. 50/51/130/147 GC I to IV, respectively  |
| Art. 8 (2) (a) (ii)  | Torture or inhuman treatment, including biological experiments  | Torture or inhuman treatment, including biological experiments  |  |
| Art. 8 (2) (a) (iii)   | Wilfully causing great suffering, or serious injury to body or health   | Wilfully causing great suffering or serious injury to body or health  |  |
| Art. 8 (2) (a) (iv)  | Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly  | Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly  | Art. 50/51/147 GC I, II and IV, respectively |
| Art. 8 (2) (a) (v)   | Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power  | Compelling a prisoner of war [or a protected person] to serve in the forces of the hostile Power  | Art. 130 and 147 GC III and IV, respectively |
| Art. 8 (2) (a) (vi)  | Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial  | Wilfully depriving a prisoner of war [or a protected person] of the rights of fair and regular trial prescribed in this Convention  | Art. 130 and 147 GC III and IV, respectively |
| Art. 8 (2) (a) (vii)   | Unlawful deportation or transfer or unlawful confinement  | Unlawful deportation or transfer or unlawful confinement  | Art. 147 GC IV                               |
| Art. 8 (2) (a) (viii)  | Taking of hostages  | Taking of hostages  | Art. 147 GC IV                               |
|  | <b>Art. 8 (2) (b)</b>   | <b>GRAVE BREACHES OF ADDITIONAL PROTOCOL I AND OTHER RELEVANT TEXTS</b>   |  |
| Art. 8 (2) (b) (i)   | Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities   | [When committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health]<br><br>Making the civilian population or individual civilians the object of attack | Art. 85 (3) (a), and Art. 51(2) AP I         |
| Art. 8 (2) (b) (ii)  | Intentionally directing attacks against civilian objects, that is, objects which are not military objectives  | Civilian objects shall not be the object of attack or of reprisals.   | Art. 52 (1) AP I                             |
| Art. 8 (2) (b) (iii)<br><br><i>See also Art. 8 (2) (b) (xxiv)</i>  | Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict | <b>[Peacekeeping missions:]</b><br><br>United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate.       | Art. 7 (1) 1994 UN Convention                |

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|                     |  | <p>1. The intentional commission of:</p> <p>(a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel</p> <p>(b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty</p> <p>(c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act</p> <p>(d) An attempt to commit any such attack</p> <p>(e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack, shall be made by each State Party a crime under its national law.</p> <p>2. Each State Party shall make the crimes set out in paragraph 1 punishable by appropriate penalties which shall take into account their grave nature.</p> | Art. 9<br>1994 UN<br>Convention          |
|                     |  | <p><b>[Humanitarian assistance:]</b></p> <p>[Personnel participating in relief actions] shall be respected and protected</p>   | Art. 71 (2) AP I                         |
| Art. 8 (2) (b) (iv) | Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated | <p><b>[Indiscriminate attacks:]</b></p> <p>[When committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health]</p> <p>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) [of PI]</p>  | Art. 85 (3) (b) AP I                     |
|                     |  | Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.   | Rule 14 CIHL Study                       |
|                     |  | <p><b>[Damage to the natural environment:]</b></p> <p>It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment</p> <p>[...] and thereby to prejudice the health or survival of the population.</p>   | Art. 35 (3) AP I<br><br>Art. 55 (1) AP I |
|                     |  | Attacks against the natural environment by way of reprisals are prohibited.  | Art. 55 (2) AP I                         |
| Art. 8 (2) (b) (v)  | Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives   | <p>[When committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health]</p> <p>Making non-defended localities and demilitarized zones the object of attack</p>   | Art. 85 (3) (d) AP I                     |
|                     |  | The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.  | Art. 25 HR IV                            |
|                     |  | Directing an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities; directing an attack against a demilitarized zone agreed upon between the parties to the conflict; and directing an attack against a non-defended locality is prohibited.  | Rules 35, 36 and 37 CIHL Study           |

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| Art. 8 (2) (b) (vi)   | Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion   | [When committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health]<br><br>Making a person the object of attack in the knowledge that he is <i>hors de combat</i>  | Art. 85 (3) (e) AP I                       |
|                       |  | [It is especially forbidden:]<br><br>(c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion  | Art. 23 (c) HR IV                          |
| Art. 8 (2) (b) (vii)  | Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury                | [When committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health]<br><br>The perfidious use, in violation of Article 37 [of P I], 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   | Art. 85 (3) (f) AP I                       |
|                       |  | It is especially forbidden: [...] To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention  | Art. 23 (f) HR IV                          |
|                       |  | The improper use of the white flag of truce; the distinctive emblems of the Geneva Conventions; the United Nations emblem and uniform, except as authorized by the organization; other internationally recognized emblems; the flags or military emblems, insignia or uniforms of the adversary; the flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict, is prohibited.   | Rules 58, 59, 60, 61, 62 and 63 CIHL Study |
| Art. 8 (2) (b) (viii) | The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory | [When committed wilfully and in violation of the Conventions or the Protocol]<br><br>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   | Art. 85 (4) (a) AP I                       |
|                       |  | Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand.   | Rule 129A CIHL Study                       |
|                       |  | States may not deport or transfer parts of their own civilian population into a territory they occupy.  | Rule 130 CIHL Study                        |
| Art. 8 (2) (b) (ix)   | Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives            | Making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b) [of P I], and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives | Art. 85 (4) (d) AP I                       |
|                       |  | [... It is prohibited]:<br><br>(a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples<br><br>(c) to make such objects the object of reprisals.   | Art. 53 (a) and (c) AP I                   |

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|  |  | In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.  | Art. 27 (1) HR IV       |
|  |  | The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.  | Art. 56 HR IV           |
|  |  | The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.   | Art. 4 (1) 1954 CCP     |
|  |  | <p>1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:</p> <p>a. making cultural property under enhanced protection the object of attack</p> <p>b. using cultural property under enhanced protection or its immediate surroundings in support of military action</p> <p>c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol</p> <p>d. making cultural property protected under the Convention and this Protocol the object of attack</p> <p>e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.</p> <p>2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.</p> | Art. 15 1999 CCP OP     |
|  |  | <p>[The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:]</p> <p>Seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science</p>  | Art. 3 (d) ICTY Statute |
|  |  | <p>Each party to the conflict must respect cultural property:</p> <p>A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives</p> <p>B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.</p>   | Rule 38 CIHL Study      |

|                       |   |   |  |
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|                       |   | <p>Each party to the conflict must protect cultural property:</p> <p>A. All seizure of or destruction or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited.</p> <p>B. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.</p>        | Rule 40 CIHL Study                                     |
| Art. 8 (2) (b) (x)    | Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons | <p><b>[Physical mutilations:]</b></p> <p>It is, in particular, prohibited to carry out on such persons, even with their consent:</p> <p>(a) physical mutilations</p>  | Art. 11 (2) (a) in connection with 11 (4) AP I (below) |
|                       |   | <p><b>[Medical and scientific experiments:]</b></p> <p>[...]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[...]</p>   | Art. 11 (1) AP I                                       |
|                       |   | <p>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 2 [of P I, Art. 11] or fails to comply with the requirements of paragraph 3 [of P I, Art. 11] (includes physical mutilations, medical or scientific experiments and removal of tissue or organs for transplantation)</p> | Art. 11 (4) AP I                                       |
|                       |   | <p>Mutilation, medical or scientific experiments or any other medical procedure not indicated by the state of health of the person concerned and not consistent with generally accepted medical standards are prohibited.</p>   | Rule 92 CIHL Study                                     |
| Art. 8 (2) (b) (xi)   | Killing or wounding treacherously individuals belonging to the hostile nation or army   | <p>It is prohibited to kill, injure or capture an adversary by resort to perfidy.</p>   | Art. 37 (1) AP I                                       |
|                       |   | <p>It is especially forbidden: [...] To kill or wound treacherously individuals belonging to the hostile nation or army</p>   | Art. 23 (b) HR IV                                      |
|                       |   | <p>Killing, injuring or capturing an adversary by resort to perfidy is prohibited.</p>  | Rule 65 CIHL Study                                     |
| Art. 8 (2) (b) (xii)  | Declaring that no quarter will be given   | <p>It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.</p>  | Art. 40 AP I   |
|                       |   | <p>It is especially forbidden: [...] To declare that no quarter will be given</p>   | Art. 23 (d) HR IV                                      |
|                       |   | <p>Ordering that no quarter will be given, threatening an adversary therewith or conducting hostilities on this basis is prohibited.</p>  | Rule 46 CIHL Study                                     |
| Art. 8 (2) (b) (xiii) | Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war  | <p>It is especially forbidden: [...] To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war</p>  | Art. 23 (g) HR IV                                      |
|                       |   | <p>[The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:]</p> <p>Wanton destruction of cities, towns or villages, or devastation not justified by military necessity</p>  | Art. 3 (b) ICTY Statute                                |
|                       |   | <p>The destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity.</p>  | Rule 50 CIHL Study                                     |

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|                        |   | <p>In occupied territory:</p> <p>(a) movable public property that can be used for military operations may be confiscated</p> <p>(b) immovable public property must be administered according to the rule of usufruct</p> <p>(c) private property must be respected and may not be confiscated</p> <p>except where destruction or seizure of such property is required by imperative military necessity.</p>   | Rule 51 CIHL Study             |
| Art. 8 (2) (b) (xiv)   | Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party   | It is especially forbidden: [...] To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party   | Art. 23 (h) HR IV              |
| Art. 8 (2) (b) (xv)    | Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war | A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.   | Art. 23 (h) HR IV              |
| Art. 8 (2) (b) (xvi)   | Pillaging a town or place, even when taken by assault   | The pillage of a town or place, even when taken by assault, is prohibited.  | Art. 28 HR IV                  |
|                        |   | [The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:]<br><br>Plunder of public or private property   | Art. 3 (e) ICTY Statute        |
|                        |   | Pillage is prohibited.  | Rule 52 CIHL Study             |
| Art. 8 (2) (b) (xvii)  | Employing poison or poisoned weapons  | It is especially forbidden: [...] To employ poison or poisoned weapons  | Art. 23 (a) HR IV              |
|                        |   | [The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:]<br><br>Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering  | Art. 3 (a) ICTY Statute        |
|                        |   | The use of poison or poisoned weapons is prohibited.  | Rule 72 CIHL Study             |
| Art. 8 (2) (b) (xviii) | Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices   | The High Contracting Parties accept the prohibition of the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, and agree to extend this prohibition to the use of bacteriological methods of warfare  | 1925 Geneva Protocol, summary  |
|                        |   | The use of biological weapons; the use of chemical weapons; and the use of riot-control agents as a method of warfare, is prohibited.   | Rules 73, 74 and 75 CIHL Study |
|                        |   | <p>The use of herbicides as a method of warfare is prohibited if they:</p> <p>(a) are of a nature to be prohibited chemical weapons</p> <p>(b) are of a nature to be prohibited biological weapons</p> <p>(c) are aimed at vegetation that is not a military objective</p> <p>(d) would cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which may be expected to be excessive in relation to the concrete and direct military advantage anticipated</p> <p>(e) would cause widespread, long-term and severe damage to the natural environment.</p> | Rule 76 CIHL Study             |



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| Art. 8 (2) (b) (xix)   | Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions  | The Contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.   | 1899 Hague Declaration (IV, 3) |
|                        |   | The use of bullets which expand or flatten easily in the human body is prohibited.   | Rule 77 CIHL Study             |
| Art. 8 (2) (b) (xx)    | Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123 | It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.  | Art. 35 (2) AP I               |
|                        |   | It is especially forbidden: [...] to employ arms, projectiles, or material calculated to cause unnecessary suffering   | Art. 23 (e) HR IV              |
|                        |   | [The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:]<br><br>Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering                       | Art. 3 (a) ICTY Statute        |
|                        |   | The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited.  | Rule 70 CIHL Study             |
|                        |   | The use of weapons which are by nature indiscriminate is prohibited.   | Rule 71 CIHL Study             |
| Art. 8 (2) (b) (xxi)   | Committing outrages upon personal dignity, in particular humiliating and degrading treatment  | The following acts are and shall remain prohibited [...]: [...] outrages upon personal dignity, in particular humiliating and degrading treatment [...]  | Art. 75 (2) (b) AP I           |
|                        |   | [When committed wilfully and in violation of the Conventions or the Protocol]<br><br>Practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination   | Art. 85 (4) (c) AP I           |
|                        |   | Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited.   | Rule 90 CIHL Study             |
|                        |   | Corporal punishment is prohibited.   | Rule 91 CIHL Study             |
| Art. 8 (2) (b) (xxii)  | Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions   | The following acts are and shall remain prohibited [...]: [...] outrages upon personal dignity, in particular [...] enforced prostitution and any form of indecent assault   | Art. 75 (2) (b) AP I           |
|                        |   | Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.  | Art. 27 (2) GC IV              |
|                        |   | Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.  | Art. 76 (1) AP I               |
|                        |   | Rape and other forms of sexual violence are prohibited.  | Rule 93 CIHL Study             |
| Art. 8 (2) (b) (xxiii) | Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations   | [...] Nor may [the presence of a prisoner of war] be used to render certain points or areas immune from military operations  | Art. 23 (1) GC III             |
|                        |   | The presence of a protected person may not be used to render certain points or areas immune from military operations.  | Art. 28 GC IV                  |
|                        |   | The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. | Art. 51 (7) AP I               |

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|                       |  | The Parties to the conflict shall [...] endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives   | Art. 58 (a) AP I          |
|                       |  | The use of human shields is prohibited.   | Rule 97 CIHL Study        |
| Art. 8 (2) (b) (xxiv) | Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law | <b>[Military and civilian medical units, including medical and religious personnel:]</b>  |                           |
|                       |  | Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked  | Art. 19 (1) GC I          |
|                       |  | Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, [...] staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.   | Art. 24 GC I              |
|                       |  | Establishments ashore entitled to the protection [of GC I] shall be protected from bombardment or attack from the sea.  | Art. 23 GC II             |
|                       |  | The religious, medical and hospital personnel of hospital ships and their crews shall be respected and protected  | Art. 36 GC II             |
|                       |  | Civilian hospitals [...] may in no circumstances be the object of attack. [...] Civilian hospitals shall be marked by means of the emblem provided for in Article 38 [of GC I]  | Art. 18 (1) and (3) GC IV |
|                       |  | Persons regularly and solely engaged in the operation and administration of civilian hospitals [...] shall be respected and protected. [...] The above personnel shall be recognizable [...] by means of a stamped, water-resistant armband [...] issued by the State and shall bear the emblem provided for in Article 38 [of GC I].   | Art. 20 (1) and (2) GC IV |
|                       |  | 1. Medical units shall be respected and protected at all times and shall not be the object of attack.<br>2. Paragraph 1 shall apply to civilian medical units, provided that they:<br>(a) belong to one of the Parties to the conflict<br>(b) are recognized and authorized by the competent authority of one of the Parties to the conflict;<br>(c) are authorized in conformity with Article 9 (2) of this Protocol | Art. 12 (1) and (2) AP I  |
|                       |  | Civilian medical personnel shall be respected and protected [...]<br>Civilian religious personnel shall be respected and protected [...]  | Art. 15 (1) and (5) AP I  |
|                       |  | Medical units exclusively assigned to medical purposes must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy.   | Rule 28 CIHL Study        |
|                       |  | Attacks directed against medical and religious personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law are prohibited.  | Rule 30 CIHL Study        |
|                       |  | Medical units exclusively assigned to medical purposes must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy  | Rule 28 CIHL Study        |
|                       |  | <b>[Hospital ships and other craft:]</b><br>Hospital ships entitled to the protection [of GC II] shall not be attacked from the land.   | Art. 20 GC I              |

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|                      |   | Military hospital ships [...] may in no circumstances be attacked or captured   | Art. 22 (1) GC II         |
|                      |   | Hospital ships utilized by National Red Cross Societies [...] shall have the same protection as military hospital ships   | Art. 24 (1) GC II         |
|                      |   | Small craft [...] for coastal rescue operations shall also be respected and protected, so far as operational requirements permit.   | Art. 27 (1) GC II         |
|                      |   | Medical ships and craft other than those referred to in Article 22 of this Protocol and Article 38 [of GC II] shall, whether at sea or in other waters, be respected and protected in the same way as mobile medical units under the Conventions and this Protocol. | Art. 23 (1) AP I          |
|                      |   | <b>[Medical transports:]</b><br>Transports of wounded and sick or of medical equipment shall be respected and protected in the same way as mobile medical units.  | Art. 35 (1) GC I          |
|                      |   | Convoys of vehicles or hospital trains on land or specially provided vessels on sea, [...] shall be respected and protected   | Art. 21 GC IV             |
|                      |   | Medical vehicles shall be respected and protected in the same way as mobile medical units under the Conventions and this Protocol.  | Art. 21 AP I              |
|                      |   | Medical transports assigned exclusively to medical transportation must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy.                | Rule 29 CIHL Study        |
|                      |   | <b>[Medical aircraft:]</b><br>Medical aircraft [...] shall not be attacked [...]. They shall bear, clearly marked, the distinctive emblem prescribed in Article 38 [...]  | Art. 36 (1) GC I          |
|                      |   | Aircraft exclusively employed for the removal of wounded and sick civilians [...] shall not be attacked<br><br>[...] They may be marked with the distinctive emblem provided for in Article 38 [of GC I].   | Art. 22 (1) and (2) GC IV |
|                      |   | Medical aircraft shall be respected and protected subject to the provisions of this Part.   | Art. 24 AP I              |
| Art. 8 (2) (b) (xxv) | Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions | Each High Contracting Party shall allow the free passage of all consignments [...] of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.   | Art. 23 (1) GC IV         |
|                      |   | To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population [...]  | Art. 55 (1) GC IV         |
|                      |   | If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.                           | Art. 59 (1) GC IV         |
|                      |   | Starvation of civilians as a method of warfare is prohibited.   | Art. 54 (1) AP I          |
|                      |   | It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population [...] for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party [...]   | Art. 54 (2) AP I          |
|                      |   | The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.                   | Rule 55 CIHL Study        |

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|                       |   | The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted.  | Rule 56 CIHL Study                   |
| Art. 8 (2) (b) (xxvi) | Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities | The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.  | Art. 77 (2) AP I                     |
|                       |   | States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.<br><br>State Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.  | Art. 38 (2) and (3) Child Convention |
|                       |   | Children must not be recruited into armed forces or armed groups.   | Rule 136 CIHL Study                  |
|                       |   | Children must not be allowed to take part in hostilities.   | Rule 137 CIHL Study                  |
|                       |   | <b>GRAVE BREACHES OF AP I NOT FOUND IN THE ROME STATUTE</b>   |                                      |
| --                    |   | [When committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health]<br><br>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) [of P I] | Art. 85 (3) (c) AP I                 |
| --                    |   | [When committed wilfully and in violation of the Conventions or the Protocol]<br><br>Unjustifiable delay in the repatriation of prisoners of war or civilians   | Art. 85 (4) (b) AP I                 |
| --                    | <i>Apartheid is considered a crime against humanity under Art. 7 of the ICC Statute.</i>  | [When committed wilfully and in violation of the Conventions or the Protocol]<br><br>Practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination  | Art. 85 (4) (c) AP I                 |
|                       | <b>Art. 8 (2) (c)</b>   | <b>VIOLATIONS OF ARTICLE 3 COMMON TO THE FOUR GENEVA CONVENTIONS IN NON-INTERNATIONAL ARMED CONFLICTS</b>   |                                      |
| Art. 8 (2) (c) (i)    | Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture   | The following acts are and shall remain prohibited [...]:<br><br>Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture  | Common Article 3 (1) (a) GC I to IV  |
|                       |   | Murder is prohibited.   | Rule 89 CIHL Study                   |
|                       |   | Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited.  | Rule 90 CIHL Study                   |
| Art. 8 (2) (c) (ii)   | Committing outrages upon personal dignity, in particular humiliating and degrading treatment  | The following acts are and shall remain prohibited [...]:<br><br>Outrages upon personal dignity, in particular humiliating and degrading treatment  | Common Article 3 (1) (c) GC I to IV  |
|                       |   | Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited.  | Rule 90 CIHL Study                   |
|                       |   | Corporal punishment is prohibited.  | Rule 91 CIHL Study                   |

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| Art. 8 (2) (c) (iii) | Taking of hostages  | The following acts are and shall remain prohibited [...]:<br>Taking of hostages  | Common Article 3 (1) (b) GC I to IV, reiterated in Art. 4 (2) (c) AP II                  |
|                      |   | The taking of hostages is prohibited.  | Rule 96 CIHL Study   |
| Art. 8 (2) (c) (iv)  | The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable | The following acts are and shall remain prohibited [...]:<br>The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.   | Common Article 3 (1) (d) GC I to IV  |
|                      |   | No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees.   | Rule 100 CIHL Study  |
|                      | <b>Art. 8 (2) (e)</b>   | <b>OTHER SERIOUS VIOLATIONS OF THE LAWS OF ARMED CONFLICT APPLICABLE TO NON-INTERNATIONAL ARMED CONFLICTS</b>  |  |
| Art. 8 (2) (e) (i)   | Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities   | The civilian population as such, as well as individual civilians, shall not be the object of attack.   | Art. 13 (2) AP II  |
|                      |   | [The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:]<br><br>Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities | Art. 4 (a) SCSL Statute  |
|                      |   | [Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:]<br><br>Acts of terrorism  | Art. 4 (2) (d) AP II<br><br>See also Art. 4 (d) ICTR Statute and Art. 3 (d) SCSL Statute |
| Art. 8 (2) (e) (ii)  | Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law                  | Medical and religious personnel shall be respected and protected   | Art. 9 (1) AP II   |
|                      |   | Medical units and transports shall be respected and protected at all times and shall not be the object of attack.  | Art. 11 (1) AP II  |
|                      |   | Medical units exclusively assigned to medical purposes must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy.  | Rule 28 CIHL Study   |
|                      |   | Medical transports assigned exclusively to medical transportation must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy.   | Rule 29 CIHL Study   |
|                      |   | Attacks directed against medical and religious personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law are prohibited.   | Rule 30 CIHL Study   |
|                      |   | Medical units exclusively assigned to medical purposes must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy.  | Rule 28 CIHL Study   |

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| Art. 8 (2) (e)<br>(iii)   | Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict | <b>[Peacekeeping missions:]</b>   |                               |
|   |   | United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate.                        | Art. 7 (1) 1994 UN Convention |
|   |   | 1. The intentional commission of:   | Art. 9 1994 UN Convention     |
|   |   | (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel   |                               |
|   |   | (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty |                               |
| (c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act   |   |   |                               |
| (d) An attempt to commit any such attack  |   |   |                               |
| (e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack, shall be made by each State Party a crime under its national law. |   |   |                               |
| 2. Each State Party shall make the crimes set out in paragraph 1 punishable by appropriate penalties which shall take into account their grave nature.  |   |   |                               |
|   | [The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:]   |   |                               |
|   | Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict |   | Art. 4 (b) SCSL Statute       |
|   | <b>[Humanitarian assistance:]</b>   |   |                               |
|   | Medical and religious personnel shall be respected and protected  |   | Art. 9 AP II                  |
|   | Medical units and transports shall be respected and protected at all times and shall not be the object of attack.   |   | Art. 11 (1) AP II             |

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| Art. 8 (2) (e) (iv) | Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives | It is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples  | Art. 16 AP II   |
|                     |   | <p>1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:</p> <p>a. making cultural property under enhanced protection the object of attack</p> <p>b. using cultural property under enhanced protection or its immediate surroundings in support of military action</p> <p>c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol</p> <p>d. making cultural property protected under the Convention and this Protocol the object of attack</p> <p>e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention</p> <p>2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.</p> | Art. 15 1999 CCP OP   |
|                     |   | <p>[The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:]</p> <p>Seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science</p>   | Art. 3 (d) ICTY Statute   |
|                     |   | <p>Each party to the conflict must respect cultural property:</p> <p>A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.</p> <p>B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.</p>   | Rule 38 CIHL Study  |
|                     |   | <p>Each party to the conflict must protect cultural property:</p> <p>A. All seizure of or destruction or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited.</p> <p>B. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.</p>  | Rule 40 CIHL Study  |
| Art. 8 (2) (e) (v)  | Pillaging a town or place, even when taken by assault   | <p>[Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:]</p> <p>[...]</p> <p>(g) pillage;</p>  | <p>Art. 4 (2) (g) AP II</p> <p>See also Art. 4 (f) ICTR Statute and Art. 3 (f) SCSL Statute</p> |



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|                       |  | [The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:]<br><br>(e) plunder of public or private property   | Art. 3 (e) ICTY Statute              |
|                       |  | Pillage is prohibited.  | Rule 52 CIHL Study                   |
| Art. 8 (2) (e) (vi)   | Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions | [Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:]<br><br>Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault | Art. 4 (2) (e) AP II                 |
|                       |  | [Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:]<br><br>Slavery and the slave trade in all their forms  | Art. 4 (2) (f) AP II                 |
|                       |  | Rape and other forms of sexual violence are prohibited.   | Rule 93 CIHL Study                   |
| Art. 8 (2) (e) (vii)  | Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities   | 1. Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities   | Art. 4 (3) (c) AP II                 |
|                       |  | 2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.  | Art. 38 (2) and (3) Child Convention |
|                       |  | 3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.              |                                      |
|                       |  | The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:]<br><br>Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.  | Art. 4 (c) SCSL Statute              |
|                       |  | Children must not be recruited into armed forces or armed groups.   | Rule 136 CIHL Study                  |
|                       |  | Children must not be allowed to take part in hostilities.   | Rule 137 CIHL Study                  |
| Art. 8 (2) (e) (viii) | Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand   | The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand.  | Art. 17 (1) AP II                    |
|                       |  | Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.  | Rule 129B CIHL Study                 |
| Art. 8 (2) (e) (ix)   | Killing or wounding treacherously a combatant adversary  | Killing, injuring or capturing an adversary by resort to perfidy is prohibited.   | Rule 65 CIHL Study                   |
| Art. 8 (2) (e) (x)    | Declaring that no quarter will be given  | It is prohibited to order that there shall be no survivors.   | Art. 4 (1) AP II                     |
|                       |  | Ordering that no quarter will be given, threatening an adversary therewith or conducting hostilities on this basis is prohibited.   | Rule 46 CIHL Study                   |



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| Art. 8 (2) (e) (xi)   | Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons | [The] physical or mental health and integrity [of persons deprived of their liberty for reasons related to the armed conflict] 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 the generally accepted medical standards applied to free persons under similar medical circumstances.  | Art. 5 (2) (e) AP II           |
|                       |  | Mutilation, medical or scientific experiments or any other medical procedure not indicated by the state of health of the person concerned and not consistent with generally accepted medical standards are prohibited.  | Rule 92 CIHL Study             |
| Art. 8 (2) (e) (xii)  | Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict  | [The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:]<br><br>Wanton destruction of cities, towns or villages, or devastation not justified by military necessity   | Art. 3 (b) ICTY Statute        |
|                       |  | The destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity.   | Rule 50 CIHL Study             |
| Art. 8 (2) (e) (xiii) | Employing poison or poisoned weapons   | [...] it is especially prohibited [...] To employ poison or poisoned weapons  | Art. 23 (a) HR IV              |
|                       |  | [The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:]<br><br>(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering  | Art. 3 (a) ICTY Statute        |
|                       |  | The use of poison or poisoned weapons is prohibited.  | Rule 72 CIHL Study             |
| Art. 8 (2) (e) (xiv)  | Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices  | The High Contracting Parties accept the prohibition of the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, and agree to extend this prohibition to the use of bacteriological methods of warfare  | 1925 Geneva Protocol, summary  |
|                       |  | The use of biological weapons is prohibited. The use of chemical weapons is prohibited. The use of riot-control agents as a method of warfare is prohibited.  | Rules 73, 74 and 75 CIHL Study |
|                       |  | The use of herbicides as a method of warfare is prohibited if they:<br><br>(a) are of a nature to be prohibited chemical weapons;<br>(b) are of a nature to be prohibited biological weapons;<br>(c) are aimed at vegetation that is not a military objective;<br><br>(d) would cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which may be expected to be excessive in relation to the concrete and direct military advantage anticipated; or<br><br>(e) would cause widespread, long-term and severe damage to the natural environment. | Rule 76 CIHL Study             |
| Art. 8 (2) (e) (xv)   | Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions   | The Contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.  | 1899 Hague Declaration (IV, 3) |
|                       |  | The use of bullets which expand or flatten easily in the human body is prohibited.  | Rule 77, CIHL Study            |

# **XIV**

## **ISSUES RAISED REGARDING THE ICC BY NATIONAL CONSTITUTIONAL COURTS, SUPREME COURTS AND COUNCILS OF STATE**

This document contains a summary of methods that have been used by States to incorporate the 1998 Rome Statute of the International Criminal Court in full accordance with their respective constitutional frameworks governing criminal proceedings. Examples relate to judicial interpretation (Part A) and constitutional provisions (Part B).

## PART A

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# FRANCE

Decision 98-408 DC of 22 January 1999 (Treaty on the Statute of the International Criminal Court) [*Décision 98-408 DC du 22 janvier 1999 (Traité portant statut de la Cour pénale internationale)*], *Journal officiel*, 24 January 1999, p. 1317.

## INTRODUCTION

The president and the prime minister jointly requested the French Constitutional Council to rule whether ratification of the Rome Statute required revision of the constitution. Under Article 54 of the French constitution, if the Council declares that a provision of an international agreement is contrary to the constitution, the ratification or approval of the agreement may be authorized only after the constitution has been amended.

The French Constitutional Council examined a number of issues and concluded that ratification of the Statute required a revision of the constitution. The constitution was subsequently amended by inserting a new article stipulating that “the Republic may recognize the jurisdiction of the International Criminal Court as provided for in the treaty signed on 18 July 1998”. France ratified the Rome Statute on 9 June 2000.

## SUMMARY OF THE CONSTITUTIONAL COUNCIL’S OPINION

### Irrelevance of official capacity (Art. 27 Rome Statute)

The Constitutional Council found that given the particular regimes for penal responsibility on the part of the French president, members of government and members of the Assembly as set out in Articles 26, 68 and 68-1 of France’s constitution, Article 27 of the Rome Statute was incompatible with the constitution.

### Complementary jurisdiction of the ICC (Arts 1, 17 and 20 Rome Statute)

The Council examined the provisions of the Rome Statute restricting application of the principle of “complementarity”, in particular Article 17, which stipulates that the Court may hear cases where the State is unwilling or genuinely unable to carry out the investigation or prosecution. It considered that the restriction of the principle of “complementarity” to cases where a State deliberately evaded its obligations was derived from the *pacta sunt servanda* rule (a treaty is binding on the parties and must be executed in good faith) and was clear and well defined. As a result of those limitations, the principle did not infringe national sovereignty. Other circumstances, such as the collapse or unavailability of the national judicial system (Art. 17[3]), were similarly deemed not to infringe the exercise of national sovereignty.

### Statutory limitations and amnesty

With regard to statutory limitations and amnesty, the Constitutional Council determined that since the Rome Statute allows the Court to hear cases because the application of a time bar or an amnesty has impeded prosecution at the national level, France (in circumstances other than an unwillingness or inability to investigate or prosecute) would be obliged to arrest and surrender a person for acts covered under French law by the time bar or an amnesty. Such an obligation would restrict the exercise of national sovereignty.

### The ICC prosecutor’s powers of investigation in the territory of a State Party (Arts 54 and 99 Rome Statute)

The Council examined the provisions of the Rome Statute on State cooperation and assistance and judged that the provisions of Chapter IX did not infringe the exercise of national sovereignty. It was also of the opinion that Article 57(3), which allows the prosecutor to take investigative steps within the territory of a State party when, in the opinion of the pre-trial Chamber, the State is clearly unable to execute a request for cooperation, does not infringe the exercise of national sovereignty. However, it considered that the powers of investigation on national territory assigned to the prosecutor under Article 99(4) were incompatible with the exercise of national sovereignty to the extent that the investigations may be carried out without the presence of French judicial authorities, even in the absence of circumstances justifying this.

## Enforcement of sentences (Art. 103 Rome Statute)

Since the Rome Statute allows States to attach conditions to their acceptance of sentenced persons for imprisonment, the Constitutional Council considered that France would be able to make its acceptance conditional on the application of national legislation on the enforcement of sentences and to state the possibility of a total or partial exemption of a sentence derived from the right of pardon. The Rome Statute's provisions on the enforcement of sentences therefore did not infringe the exercise of national sovereignty.

# BELGIUM

Opinion of the Council of State of 21 April 1999 on a bill approving the Rome Statute of the International Criminal Court [*Avis du Conseil d'Etat du 21 avril 1999 sur un projet de loi "portant assentiment au Statut de Rome de la Cour pénale internationale, fait à Rome le 17 juillet 1998"*], Parliamentary Document 2-239 (1999/2000), p. 94.

## INTRODUCTION

Except for certain specific cases, ministers are required by law to request the opinion of the Council of State on all legislative proposals. The opinions rendered by the Council are not, however, binding in law. The opinion on the bill to approve the Rome Statute was issued following a request from the minister of foreign affairs. The proposal under review contained a provision stating that "the Rome Statute of the International Criminal Court, adopted in Rome on 17 July 1998, shall have full and complete effect" [*Le Statut de Rome de la Cour pénale internationale, fait à Rome le 17 juillet 1998, sortira son plein et entier effet*]. In its opinion, the Council of State examined several constitutional issues raised by the ratification of the Rome Statute and concluded that it was inconsistent with a number of constitutional provisions. In order to avoid amending several scattered provisions which would render the constitution difficult to understand, it suggested adding a new provision: "The State embraces the Statute of the International Criminal Court adopted in Rome on 17 July 1998."

The Belgian Government chose to ratify the Rome Statute before the constitution was amended. It felt that since ratification by 60 States was required for the entry into force of the Statute, it had time to make the necessary constitutional and legislative adaptations if needed and that, in any case, if Belgium ratified the Statute, its provisions would have direct effect in domestic law and would prevail over any contrary legal provisions, including constitutional provisions (*Rapport fait au nom de la Commission des relations extérieures et de la défense, Exposé introductif du Vice-premier Ministre et Ministre des Affaires étrangères*, Doc. Parl. 2-329/2 [1999/2000], pp. 1-5).

The Law approving the Rome Statute of the International Criminal Court adopted in Rome on 17 July 1998 [*Loi portant assentiment au Statut de Rome de la Cour pénale internationale, fait à Rome le 17 juillet 1998*] was adopted on 25 May 1998. Belgium ratified the Rome Statute on 28 June 2000.

## SUMMARY OF THE OPINION OF THE COUNCIL OF STATE

### Complementary jurisdiction of the ICC (Art. 1 Rome Statute)

The Council of State noted at the outset that under Belgium's constitution a Belgian court cannot relinquish its competence in favour of the ICC. The constitution stipulates that no one may be removed against his will from the jurisdiction that the law has assigned to him ("*Nul ne peut être distrait, contre son gré, du juge que la loi lui assigne.*" [Art. 13]).

### Deferral of an investigation by a decision of the United Nations Security Council (Art. 16 Rome Statute)

The Council of State was of the opinion that if the power of the Security Council to request the deferral of an investigation or prosecution before the ICC for a renewable period of 12 months under Article 16 of the Rome Statute was construed as extending to investigation and prosecution by national authorities, it would be contrary to the principle of judicial independence. It would be contrary to that principle if a non-judicial body could intervene to prevent Belgian judicial authorities from investigating or prosecuting cases. In addition, such deferral could irremediably compromise the public prosecution (in particular with regard to the collection of evidence) and imperil the right of the accused to be tried within a reasonable period.

In its explanatory notes on the draft law (*Exposé des motifs*, Doc. parl. 2-329/1, 1999/2000, p. 7), the Belgian Government stated that Article 16 was not to be interpreted as applicable to proceedings before national courts. On the contrary, if proceedings before the ICC were suspended, nothing would prevent the competent national authorities from acting in its place.

### Limitation on the prosecution of other offences (Art. 108 Rome Statute)

Similarly, the Council of State held that if Article 108 of the Rome Statute was to be construed as submitting for approval by the ICC the prosecution and conviction of persons already convicted by the ICC for offences committed before their trial, that provision would be contrary to the principle of judicial independence, which is protected by Article 14 of the International Covenant on Civil and Political Rights (1966) and Article 151 of the Belgian constitution.

In its explanatory notes on the draft law (*Exposé des motifs*, Doc. parl. 2-329/1, 1999/2000, p. 7), the Belgian Government noted that this difficulty could be overcome by adding a provision to the constitution to the effect that the State adheres to the Rome Statute.

### Irrelevance of official capacity (Art. 27 Rome Statute)

The Council of State also examined the compatibility of Article 27 of the Rome Statute (irrelevance of official capacity) with the immunity regimes for the King and for members of parliament, and the special procedures established for the arrest and prosecution of a member of parliament or of government (*privilèges de juridiction*). Under Belgian constitutional law, the immunity of the King is absolute. It covers both acts performed in the course of his duties and those performed outside the framework of those duties (Art. 88 of the constitution states that "*la personne du Roi est inviolable ...*"). Members of parliament enjoy immunity from civil and criminal responsibility for the opinions they express or votes they cast in the performance of their duties. The Council judged that Article 27 of the Rome Statute was contrary to the immunities established by the Belgian constitution.

As for the *privilèges de juridiction*, the Council pointed out that the constitution required that prosecuting a member of the Chamber of Representatives or of the government must be authorized by parliament. Article 27 of the Rome Statute would be inconsistent with such constitutional requirements. With regard to the penal responsibility of ministers, the Council observed that ICC Article 27 was not contrary to the constitutional provision (Art. 103) requiring that ministers be tried before the Court of Appeal, since such jurisdiction could be transferred to an institution of public international law. Nonetheless, the arrest of a minister or a summons for him to appear before the Court of Appeal required authorization by the Chamber of Representatives. It was practically equivalent to perpetual immunity, and thus would prevent the trial of a minister before the ICC.

In its explanatory notes on the draft law (*Exposé des motifs*, Doc. parl. 2-329/1, 1999/2000, p. 7), the Belgian Government noted that adapting the constitution to accommodate Article 27 of the Rome Statute could be included in the next constitutional revision, the difficulty being overcome by adding a provision to the constitution stating that the State accedes to the Rome Statute.

### Enforcement of sentences: the right of pardon

The Council considered that the King's right of pardon, as provided for in Articles 110 and 111 of the Belgian constitution, was not inconsistent with the Rome Statute. Royal pardon is territorial in nature: the King may exercise his right only with regard to penalties imposed by Belgian courts.

# LUXEMBOURG

Opinion of the Council of State on the draft law concerning the approval of the Rome Statute on the International Criminal Court [*Avis du Conseil d'Etat portant sur un projet de loi portant approbation du Statut de Rome de la Cour pénale internationale, fait à Rome le 17 juillet 1998*], 4 May 1999, No. 44.088 Doc. parl. 4502.

## INTRODUCTION

The opinion on the draft law concerning the approval of the Rome Statute was issued pursuant to a request from the prime minister. The Council of State's opinion is required by law on all legislative proposals (except for urgent matters) but is not binding.

The law under review was drafted by the Ministry of Foreign Affairs and contained a single provision: "The Rome Statute of the International Criminal Court, done in Rome on 17 July 1998, is approved" [*Est approuvé le Statut de Rome de la Cour Pénale Internationale, fait à Rome, le 17 juillet 1998*]. In setting out its opinion, the Council of State examined several constitutional issues raised by ratification of the Statute and concluded that some of its provisions were contrary to the constitution. The Statute could only be ratified after a constitutional revision.

The constitution of Luxembourg was revised by the Law of 8 August 2000, on which the Council of State had issued a positive opinion on 21 March 2000. A new provision was added, stipulating that "the provisions of the constitution do not hinder approval of the Statute of the International Criminal Court, done in Rome on 17 July 1998, or actions to meet the obligations arising from the Statute according to the conditions provided therein". The law approving the Rome Statute was adopted on 14 August 2000 (*Loi du 14 août 2000 portant approbation du Statut de Rome de la Cour pénale internationale, fait à Rome, le 17 juillet 1998, Mémorial [Journal officiel du Grand-Duché de Luxembourg]*, A - No. 84, 25 August 2000, p. 1968). The Rome Statute was ratified on 8 September 2000.

## SUMMARY OF THE OPINION OF THE COUNCIL OF STATE

### Irrelevance of official capacity (Art. 27 Rome Statute)

The first issue addressed by the Council of State relates to the compatibility of Article 27 of the Rome Statute (irrelevance of official capacity) with the immunity granted to the Grand Duke and members of parliament (*immunités*) and the special procedures for the arrest and prosecution of a member of parliament or government set forth in the constitution (*privilèges de juridiction*). With regard to the *privilèges de juridiction*, the Council pointed out the constitution's stipulation that the arrest or prosecution of a member of parliament or of government must be authorized by parliament, thus creating a potential conflict with the Rome Statute if parliament were to refuse to authorize his/her arrest or prosecution. A revision of those constitutional procedures would thus be required. With regard to the immunity of the Grand Duke, which is absolute, the Council was not entirely convinced by the view that the Grand Duke not holding powers of decision was sufficient to ensure conformity with the Rome Statute. The same would hold for the immunity of members of parliament in respect of opinions or votes expressed in the performance of their duties.

### Powers of investigation of the prosecutor in the territory of a State Party (Arts 54 and 99 of the Rome Statute)

Unlike the French Constitutional Council, Luxembourg's Council of State was of the opinion that, given that the prosecutor's powers of investigation are based on consultations with the State concerned and in particular involve voluntary interviews, there was no incompatibility between the constitution and the Rome Statute.

### Amendments to the Rome Statute (Art. 122 of the Rome Statute)

With regard to the amendment procedure provided for in Article 122 of the Rome Statute, which does not require that amendments adopted by the Assembly of State Parties be ratified for their entry into force, the Council held that this was not incompatible with the assignment of legislative power as established in the constitution since Article 122 lists exactly which provisions can be amended, and they are of an institutional nature.



# SPAIN

Opinion of the Council of State of 22 August 1999 (on the Rome Statute) [*Dictamen del Consejo de Estado de 22 de Agosto de 1999 (sobre el Estatuto de Roma)*], No. 1.37499/99/MM.

## INTRODUCTION

The opinion was rendered by the Standing Commission of the Council of State. The opinions of the Council of State are not binding. Under Article 95 of the Spanish constitution, the constitution must be revised before any treaty is concluded that contains provisions contrary to it.

The Council of State was of the opinion that the constitution did not constitute an obstacle to ratification of the Rome Statute, but that the *Cortes Generales* (Congress) had to authorize ratification by adopting an organic law. An organic law authorizing ratification of the Rome Statute was adopted on 4 October 2000 (*Ley orgánica 6/2000 del 4 de octubre, por la que se autoriza la ratificación por España del Estatuto de la Corte Penal Internacional*). Spain ratified the Statute on 24 October 2000.

## SUMMARY OF THE OPINION OF THE COUNCIL OF STATE

### *Ne bis in idem* (Arts 17 and 20 Rome Statute)

The ICC can determine that a case is admissible where the State is unwilling or unable to genuinely carry out the investigation or prosecution. The Council of State considered that this could be considered a transfer to the ICC of the jurisdictional powers which are the exclusive domain of the national judges and courts under the Spanish constitution. Such transfer, which is provided for in Article 93 of the Spanish constitution, implies recognition of international intervention in the exercising of the powers derived from the constitution. In particular with regard to the transfer of judicial powers, this amounts to acknowledging the existence of a jurisdiction superior to that of Spanish jurisdictional bodies, which previously had ultimate power to state the law ("*decir el derecho*").

The Council raised the issue of the application of the principle of *ne bis in idem*. This principle is considered to be protected under Article 24(1) of the Spanish constitution, which stipulates that everyone has the right to effective judicial protection for the exercise of their rights and legitimate interests. According to the Council, that right is not limited to the protection afforded by the Spanish courts but extends to jurisdictional bodies whose competence is recognized in Spain. The transfer of judicial competence to the ICC enables the ICC, in the circumstances and for the reasons provided in its governing law (duly incorporated into the Spanish legal order), to modify the decisions of Spanish bodies without infringing the constitutional right to judicial protection.

### Irrelevance of official capacity (Art. 27 Rome Statute)

With regard to Article 27 of the Rome Statute, the Council distinguished between immunities and privileges of jurisdiction. Regarding privileges, the Council considered that transferring the exercise of jurisdictional powers to an international institution was permitted under Article 93 of the constitution. It therefore felt that non-application of the special procedural rules attached to the official capacity of persons was not contrary to the constitution, in particular Article 71, which establishes the legal status of members of the Assembly. Concerning the immunity of Assembly members with respect to their opinions expressed or votes cast within the Assembly, the Council of State judged that there was little likelihood of a clash given the nature of the crimes over which the ICC has jurisdiction, with the possible exception of direct and public incitement to genocide.

The Spanish constitution stipulates that the person of the King is inviolable and cannot incur responsibility (Art. 56). The Council observed that while the King is relieved of responsibility, all public acts performed by him have to be countersigned. It is the countersigning official who bears individual penal responsibility. Parliamentary monarchies should not, the Council felt, be seen to depart from the objectives and purposes of the Rome Statute or from the terms defining the ICC's jurisdiction. Those terms should be applied in the context of the political system of each State Party.

### Life imprisonment (Arts 77, 80, 103 and 110 of the Rome Statute)

Article 77 of the Rome Statute stipulates that the ICC may impose a sentence of life imprisonment when this is justified by the extreme gravity of the crime and the individual circumstances of the convicted person. That provision could be considered contrary to Article 25(2) of the Spanish constitution, which stipulates that sentences restricting personal liberty must be oriented towards rehabilitation and social reintegration.

At the outset, the Council observed that Article 80 of the Rome Statute stipulates that the Statute's provisions on penalties do not preclude the application of the penalties as prescribed by national law. In the case of a sentence being enforced in Spain, this clause would ensure that the constitutional principles set forth in Article 25(2) of the constitution remained unaffected. Further, Article 103 of the Rome Statute allows a State to attach conditions to its acceptance of sentenced persons.

It was doubtful that the application of these precepts would prevent life sentences being handed down on Spanish nationals, especially if Spain was not the enforcing State. Nonetheless, the mechanism established in Article 110 of the Rome Statute for the review of sentences denoted a general principle tending to put a temporal limit on penalties. Thus, the constitutional requirements were met.

### Powers of investigation of the prosecutor in the territory of a State Party (Arts 54 and 99 Rome Statute)

The Council considered that the powers of the prosecutor as defined in Articles 99(4), 54(2) 93 and 96 of the Rome Statute were the prerogative of the national judicial authorities. The transfer of those powers to an international organization or institution was permitted under Article 93 of the constitution.

## COSTA RICA

Mandatory review of the constitutionality of the bill to approve the Rome Statute of the International Criminal Court [*Consulta preceptiva de constitucionalidad sobre el proyecto de ley de aprobación del "Estatuto de Roma de la Corte Penal Internacional"*], Exp. 00-008325-0007-CO, Res. 2000-09685, 1 November 2000.

### INTRODUCTION

The Supreme Court's opinion was requested by the president of the Legislative Assembly pursuant to Article 96 of the *Ley de la Jurisdicción Constitucional*. The Supreme Court's opinion is mandatory for draft constitutional amendments and draft laws ratifying international treaties.

The Court examined several ICC provisions that raised constitutionality issues. It concluded that the Rome Statute was consistent with the constitution of Costa Rica. The Statute was approved by the Legislative Assembly in March 2001 (*La Gaceta, Diario oficial*, 20 March 2001), and Costa Rica ratified the Rome Statute on 7 June 2001.

### SUMMARY OF THE SUPREME COURT'S OPINION

#### Extradition of nationals (Art. 89 of the Rome Statute)

The Court first examined the question of extraditing nationals. Under Article 32 of the constitution of Costa Rica: "no Costa Rican may be compelled to leave the national territory." The Court asserted that while the detention or extradition of aliens did not violate the constitution, the constitutionality of extraditing nationals was more doubtful. It nonetheless held that the constitutional guarantee laid down by Article 32 of the constitution was not absolute and that to determine its extent, it must be established what would be reasonable and proportionate to uphold the guarantee. In the spirit of the constitution, recognition of this guarantee should be compatible with the development of international human rights law, and the constitution should not be seen as in opposition to new developments but rather as an instrument for their promotion. The Court concluded that the new international order established by the Rome Statute to protect human rights was not incompatible with the constitutional guarantee in Article 32.

### Irrelevance of official capacity (Art. 27 Rome Statute)

The second issue examined by the Court concerned the immunity enjoyed by members of the Legislative Assembly regarding the opinions that they express there (Art. 110[f] of the constitution) and the required authorization of the Assembly for the prosecution of members of government for acts carried out in the performance of their duties (Art. 121[9] of the constitution). The Court held that, given the nature of the crimes contemplated in the Statute, these constitutional provisions could not be considered so sacrosanct as to impede the proceedings of an international tribunal such as the ICC. Thus, there would be no need to wait for a pronouncement by the Legislative Assembly to initiate proceedings. The Court therefore concluded that Article 27 of the Rome Statute did not run counter to the constitution.

### Life imprisonment (Arts 77 and 78 Rome Statute)

The third issue addressed by the Court concerned the sentence of life imprisonment. Article 40 of the Costa Rican constitution states that no one may be subject to lifetime punishments. Articles 77 and 78 of the Rome Statute would, at first sight, contradict Article 40 of the constitution. However, Article 80 of the Rome Statute also states that “nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.” Since the application of the penalties regulated by the Rome Statute are thus subject to national domestic law, the constitutionality of Articles 77 and 78 of the Rome Statute can be maintained. However, the extradition of a person likely to be sentenced to life imprisonment would violate constitutional principles and thus would not be possible.

## ECUADOR

Report by Dr Hernan Salgado Pesante in Case No. 0005-2000-CI regarding the Rome Statute of the International Criminal Court [*Informe del Dr. Hernan Salgado Pesante en el caso No. 0005-2000-CI sobre el “Estatuto de Roma de la Corte Penal Internacional”*], 21 February 2001.

### INTRODUCTION

The request that the constitutionality of the Rome Statute be examined was presented on the basis of Articles 276(5) and 277(5) of the constitution. On 6 March 2001, the Court issued a decision stating that the Statute was compatible with the constitution. The report presented by a member of the first chamber of the Court was adopted by the Court.

### SUMMARY OF REPORT PRESENTED TO THE COURT

#### *Ne bis in idem* (Art. 20 Rome Statute)

The principle of *ne bis in idem* is protected under Article 24(16) of the Ecuadorian constitution, which states that “no one shall be tried more than once for the same cause.” The rapporteur was of the opinion that Article 20(3) of the Rome Statute, which in certain circumstances allows a person tried before a national court to be retried before the ICC, did not contradict the constitutional principle involved. It was considered that the general principles underlying the Rome Statute support the principle of *ne bis in idem* while opposing impunity. An accused who had been tried according to the rules of due process would be tried a second time by the ICC only in exceptional circumstances, i.e. those cases provided for in Article 20.

#### Life imprisonment (Arts 77, 78 and 110 Rome Statute)

The second issue examined was that of life imprisonment. The Ecuadorian constitution does not explicitly prohibit the imposition of life sentences. However, such a penalty could be regarded as contrary to Article 208 of the constitution, which states that the main objectives of the penal system are to reform convicts, rehabilitate them and make possible their reintegration into society. The rapporteur considered that, since Article 110 of the Rome Statute provided for an “automatic” review of sentences, the sentences imposed would not be, in practice, for life or indefinite. The rapporteur also felt that,

pursuant to its Statute, the ICC would have to consider treaties, principles and norms of applicable international law and interpret the Statute in accordance with human rights law. In particular, it would have to take into account the International Covenant on Civil and Political Rights, which establishes the principle that the main objective of a prison system is to rehabilitate. The report concluded that these provisions of the Rome Statute were compatible with the constitution of Ecuador.

### **Extradition of nationals (Art. 89)**

Article 25 of the Ecuadorian constitution prohibits the extradition of nationals. The report noted that the main objective of this prohibition was to protect the accused. It was better for an accused person to be tried before a court in his own country than before a foreign court. Nonetheless, the ICC was not a foreign court – it was an international tribunal which represented the international community and had been set up with the consent of the States party to its Statute. Furthermore, the surrender of persons and their extradition were different legal processes. Article 89 of the Rome Statute therefore did not contradict the constitution.

### **The prosecutor's powers of investigation in the territory of a State Party (Art. 54 Rome Statute)**

The report noted that, as a general rule, the Rome Statute considers the investigation and prosecution of crimes as belonging to the duties of the public prosecutor. The powers of the ICC Prosecutor to investigate in the territory of a State Party could be viewed as a transfer to an international authority of the powers of the public prosecutor. Nonetheless, the report concluded that the prosecutor's powers of investigation must be considered as a form of international judicial cooperation.

## **UKRAINE**

Opinion of the Constitutional Court on the conformity of the Rome Statute with the Constitution of Ukraine, Case No. 1-35/2001, 11 July 2001.

### **INTRODUCTION**

The request for an examination of the Rome Statute's constitutionality was made by the president of Ukraine pursuant to Article 151 of that country's constitution. The president contended that several provisions of the Rome Statute were not in conformity with the Ukrainian constitution, in particular the provisions concerning the principle of complementarity, the irrelevance of official capacity, the transfer of Ukrainian citizens to the Court and the enforcement of sentences in third States. In contrast, the Ministry of Foreign Affairs argued that the Rome Statute did not contradict the constitution.

The Court concluded that most provisions of the Rome Statute were in conformity with the constitution, except for paragraph 10 of the Preamble and Article 1, which states that the jurisdiction of the ICC "shall be complementary to national criminal jurisdictions". Under Article 9 of the constitution, the conclusion of international treaties not in conformity with the constitution can take place only after the constitution's amendment.

### **SUMMARY OF THE CONSTITUTIONAL COURT'S OPINION**

#### **Complementary jurisdiction of the ICC (Arts 1, 17 and 20 Rome Statute)**

Article 124 of the Ukrainian constitution states that the administration of justice is the exclusive competence of the courts and that judicial functions cannot be delegated to other bodies or officials. The Constitutional Court noted that the jurisdiction of the ICC under the Rome Statute was complementary to national judicial systems. However, under Article 4(2) of the Rome Statute, the ICC could exercise its functions and powers on the territory of any State Party, and under Article 17 the ICC could find a case to be admissible if the State was unwilling or unable genuinely to carry out the investigation or prosecution. The Court concluded that jurisdiction supplementary to the national system was not contemplated by the Ukrainian constitution. The constitution must therefore be amended before the Statute could be ratified.

Article 125 of the Ukrainian constitution prohibits the creation of “extraordinary and special courts”. The Court held that, given that the Rome Statute was based on respect for individual rights and freedoms and included mechanisms to ensure impartial justice, the ICC could not be viewed as an “extraordinary or special court”, the latter being national courts which replace ordinary courts and which do not apply established legal procedures.

The Court also held that the Rome Statute was not contrary to Article 121 of the Ukrainian constitution, which entrusts the public prosecution service with prosecuting cases on behalf of the State, since that provision concerned only the prosecution of cases before the national courts. There was no need for constitutional amendment since the provisions of the Rome Statute on cooperation and assistance could be implemented through ordinary legislation.

### **Irrelevance of official capacity (Art. 27 Rome Statute)**

The Ukrainian constitution sets forth immunities from prosecution for the president, members of the Assembly and judges. The Court was of the opinion that Article 27 of the Rome Statute was not contrary to the immunities granted by the constitution, since the crimes subject to the jurisdiction of the ICC were crimes under international law recognized by customary law or provided for in international treaties binding on Ukraine. The immunities granted by the constitution were applicable only before national jurisdictions and did not constitute obstacles to the jurisdiction of the ICC.

### **Surrender of nationals (Art. 89 Rome Statute)**

Article 25 of the Ukrainian constitution prohibits the surrender of nationals to another State. The Court noted that international practice distinguished between the extradition to a State and the transfer to an international tribunal. Article 25 prohibits only the surrender of a national to another State and is not applicable to a transfer to an international court, which could not be considered as a foreign court. The aim of the prohibition – the guarantee of a fair and unbiased trial – was met in the case of the ICC by means of the Statute’s provisions, which were largely based on international human rights instruments and ensured a fair trial.

### **Enforcement of prison sentences (Arts 103, 124 Rome Statute)**

Lastly, the Court examined the possibility that Ukrainian citizens serving sentences in another State may enjoy fewer human rights guarantees than those provided by the Ukrainian constitution. Article 65 of the Ukrainian constitution states that “constitutional human and citizens’ rights and freedoms shall not be restricted, except in cases envisaged by the constitution of Ukraine.” The Court was of the opinion that the risk of the rights and freedoms of Ukrainian citizens serving sentences in another State being more limited than those guaranteed by the Ukrainian constitution could be diminished by means of a declaration stating Ukraine’s willingness to have sentenced Ukrainian citizens serve their sentences in Ukraine. It also noted the criteria to be taken into account by the Court in designating the enforcing State: the application of widely accepted international treaty standards governing the treatment of prisoners, and the views and the nationality of the sentenced person.

## **HONDURAS**

Opinion of the Supreme Court of Justice of 24 January 2002 [*Dictamen de la Corte Suprema de Justicia del 24 de enero de 2002*].

### **INTRODUCTION**

The opinion of the Supreme Court of Justice was issued at the request of the minister of foreign affairs.

The Court examined several provisions of the Rome Statute to determine their conformity with the constitution of Honduras, in particular the surrender of nationals, the principle of *ne bis in idem* and the immunities granted to State officials. It concluded that none of the provisions stood in the way of approval and ratification of the Rome Statute, concerning which it consequently expressed a favourable view.

## SUMMARY OF THE OPINION OF THE SUPREME COURT OF JUSTICE

The Court began by highlighting the development of international justice since the First World War and the significance of establishing the ICC, in particular with regard to the principle of *nullum crimen sine lege*. The adoption of the Rome Statute would ensure that those who in future committed acts subject to the jurisdiction of the ICC would do so in full cognizance of the unlawfulness of their conduct and would be tried pursuant to rules that were known and well established. It further observed that the crimes that came under the ICC's jurisdiction were of such gravity that they could be punished by any State regardless of the place where they had been committed, provided domestic law allowed this. If no proceedings were initiated at the national level owing to a lack of resources or political will, the crimes in question would be subject to the jurisdiction of the ICC.

### Surrender of nationals (ICC Art. 89)

Article 102 of the constitution of Honduras stipulates that no Honduran national may be exiled or surrendered by the authorities to a foreign State.<sup>1</sup> The Court examined whether the surrender of a Honduran national to the ICC under Article 89 of the Rome Statute would violate that provision. It concluded that it would not, since Article 89 concerned the surrender of an individual to a supranational court to whose jurisdiction Honduras would be subject after ratification of the Statute, and not the surrender of an individual to another State. In that sense, surrender of an individual to the Court could not be considered as a form of extradition.

### *Ne bis in idem* (Art. 20 Rome Statute)

Article 95 of the Honduran constitution stipulates that no one may be tried twice for the same offence.<sup>2</sup> The Court examined whether there was any antinomy between that provision and Article 20(3) of the Rome Rome Statute, which in specified circumstances allows for trial by the ICC even if the person has already been prosecuted by a national court. It concluded that there was no antinomy, noting that the constitution clearly prohibited trial of a person twice for the same offence by a national court, but not trial by a supranational court, whose jurisdiction was different. It added that, under the Rome Statute, prosecution for an offence already tried by a national court could only take place in the cases specified in the Statute, i.e. where the proceedings had not been conducted independently or impartially in accordance with the norms of due process and had been conducted in a manner, precisely, to elude justice.

### Irrelevance of official capacity (Art. 27 Rome Statute)

The Court noted that although Article 27 of the Rome Statute appeared to contradict the immunities granted to public officials by the Honduran constitution, this was not necessarily the case. If a public official was present in Honduras and was handed over after all the procedures for prosecution under domestic law had been followed, there would be no constitutional breach.

<sup>1</sup> Ningún hondureño podrá ser expatriado ni entregado por las autoridades a un Estado extranjero.

<sup>2</sup> Ninguna persona será sancionada con penas no establecidas previamente en la Ley, ni podrá ser juzgada otra vez por los mismos hechos punibles que motivaron anteriores enjuiciamientos.

# GUATEMALA

Advisory opinion of the Constitutional Court of 25 March 2002 [*Opinión consultiva de la Corte de Constitucionalidad del 25 de marzo de 2002*] Case No. 171-2002.

## INTRODUCTION

In view of Guatemala's desire to ratify the Rome Statute, the Guatemalan president asked the Constitutional Court to issue an advisory opinion as to whether the Statute was in any way contrary to the country's constitution or to any other provision of domestic public law. The opinion issued by the Court was based on Articles 171 and 172 of the *Ley de Amparo, Exhibición Personal y de Constitucionalidad*.

The Court concluded that the Statute did not contain any provisions that could be considered incompatible with the constitution of Guatemala, in particular since the ICC was based on the principle of complementarity with national jurisdictions and its purpose was to punish anyone who undermined the peace and security of mankind, the twin pillars on which the international community – including Guatemala as an active member of that community – was founded.

## SUMMARY OF THE OPINION OF THE CONSTITUTIONAL COURT

The Court noted at the outset that one of the main features of the Rome Statute was that it covered violations of both international humanitarian law and human rights law. As a multilateral treaty relating to human rights, the Statute would become part of domestic law upon its ratification and, as stipulated in Article 46 of the Guatemalan constitution, would then take precedence over all other domestic law. Thus the Statute's conformity with domestic law was entirely a matter of its compatibility with the constitution. An opinion on the compatibility of the Statute with any other norms would be irrelevant.

### Complementary jurisdiction, legal status and powers (Arts 1, 4, 17 and 20 Rome Statute)

The first issue examined by the Court was the apparent contradiction between the Rome Statute and Article 203 of the constitution stipulating the exclusive exercise of judicial power by the Supreme Court of Justice and other courts set up by law.

If Guatemala accepted the possibility that it might come under the jurisdiction of an international court, it would indeed relinquish part of its sovereignty as defined in Article 171(I, 5) of the constitution. The fact that the States had empowered the ICC to exercise its jurisdiction over individuals constituted a small step forward in the development of international criminal law. However, the possibility of Guatemala coming under the jurisdiction of an international court must be construed in a manner acknowledging the fact that the State is not only a subject of international law but also a separate society, with all the accompanying features, including the system whereby justice is administered. Moreover, under the principle of complementarity laid down in its Statute, the ICC would have jurisdiction only in cases where a State was unable or unwilling to prosecute. In other words, if Guatemala duly complied with its obligation to administer justice as laid down in its constitution, the ICC would have no reason to exercise jurisdiction over it.

With regard to Article 4(2) of the Rome Statute, the Court noted that by allowing a subject of international law, in this case the ICC, to carry out its functions in the national territory, States voluntarily gave up a measure of their sovereignty. Therefore, the issue could be examined only to the extent that Guatemala was not a party to the Rome Statute, that the Statute was in force and that a crime that came under the ICC's jurisdiction had been committed. The Court added that the ICC's jurisdiction was complementary to national jurisdictions and thus did not replace them. Article 149 of the constitution was also relevant since it stated that Guatemala must conduct its relations with other States in conformity with international principles, rules and practice.<sup>3</sup> Among those was recognition of subjects of public international law other than States.

<sup>3</sup> **ARTICULO 149. De las relaciones internacionales.** Guatemala normará sus relaciones con otros Estados, de conformidad con los principios, reglas y prácticas internacionales con el propósito de contribuir al mantenimiento de la paz y la libertad, al respeto y defensa de los derechos humanos, al fortalecimiento de los procesos democráticos e instituciones internacionales que garanticen el beneficio mutuo y equitativo entre los Estados.



### Jurisdiction of the ICC and the principle of legality (Arts 5, 11 and 23 Rome Statute)

The Constitutional Court noted at the outset that its opinion concerned only the crime of genocide, crimes against humanity and war crimes, and not the crime of aggression, since the latter would come under the jurisdiction of the ICC only once its definition had been agreed on by the Assembly of States Parties and the Rome Statute consequently amended.

The crime of genocide, crimes against humanity and war crimes were outlawed and regarded by society as reprehensible in both the international and domestic realms. The Court did not feel the need to assess whether crimes falling within the jurisdiction of the Court were punishable under Guatemalan law since the Rome Statute guaranteed the principle of legality. The ICC would only have jurisdiction over cases arising after the entry into force of the Statute. Thus, the Rome Statute was perfectly compatible with Articles 15 and 17 of Guatemala's constitution, which guaranteed the non-retroactivity of criminal law and the principle of legality.

### Judicial guarantees (Arts 11, 20, 22, 23 and 66 Rome Statute)

The Court then examined whether the judicial guarantees provided by the ICC were comparable to those granted under the constitution to all persons residing in Guatemala. It noted that the Rome Statute included the principles of *ne bis in idem*, *nullum crimen sine lege*, *nulla poena sine lege*, *in dubio pro reo*, non-retroactivity, the presumption of innocence, the right to cross-examine witnesses and other rights afforded the accused in order to ensure a genuine and effective defence, and guarantees of due process. Those provisions were in line with the rights protected under the constitution. Furthermore, the guarantees and rights incorporated into the Statute corresponded to those established in international human rights treaties which Guatemala had ratified and which expanded on the rights recognized under Article 44 of the constitution.

### Enforcement of sentences (Arts 77, 79 and 103 Rome Statute)

It was argued before the Court that the provisions of the Rome Statute empowering the ICC to order the forfeiture of proceeds, property and assets deriving directly or indirectly from a crime and their transfer to the Trust Fund were contrary to Article 41 of Guatemala's constitution,<sup>4</sup> which prohibited the confiscation of property for reasons related to political activities or offences.

The Court considered, however, that those provisions of the Rome Statute were not contrary to Article 41, since domestic law recognized that the commission of a crime gave rise to civil responsibility. On that account, the forfeiture of proceeds, property and assets deriving from a crime did not constitute a limitation on the right to property enshrined in the constitution. Similarly, the power of the ICC to transfer to the Trust Fund such proceeds, property and assets on behalf of the victims was no more than a simple way to ensure reparation of injury or prejudice suffered as the result of a crime.

### Surrender of nationals (Art. 89 Rome Statute)

Although it did not refer to the "surrender" of persons to an international tribunal, the constitution did state the following in Article 27: "Extradition is governed by the provisions of international treaties. Guatemalan nationals may not be extradited for political offences. In no circumstances shall they be handed over to a foreign government, except in cases provided for in treaties and conventions with regard to crimes against humanity or breaches of international law."<sup>5</sup> The provisions of the Rome Statute were not, therefore, incompatible with the constitution.

### Availability of procedures under domestic law (Art. 88 Rome Statute)

Article 88 of the Rome Statute requires the States to ensure that there are procedures available under domestic law for all the forms of cooperation with the ICC specified in the Statute. The Court felt that such a provision was not unusual in the realm of international customs and practices. States frequently agreed to adopt legislation with respect to specialized international organizations such as the WTO and WHO. They also concluded such agreements at the national level, as Guatemala had during the peace process. Therefore, such a provision – which came as no surprise – was not contrary to the constitution.

<sup>4</sup> **ARTICULO 41. Protección al derecho de propiedad.** Por causa de actividad o delito político no puede limitarse el derecho de propiedad en forma alguna. Se prohíbe la confiscación de bienes y la imposición de multas confiscatorias. Las multas en ningún caso podrán exceder del valor del impuesto omitido.

<sup>5</sup> **ARTICULO 27. Derecho de asilo.** Guatemala reconoce el derecho de asilo y lo otorga de acuerdo con las prácticas internacionales. La extradición se rige por lo dispuesto en tratados internacionales. Por delitos políticos no se intentará la extradición de guatemaltecos, quienes en ningún caso serán entregados a gobierno extranjero, salvo lo dispuesto en tratados y convenciones con respecto a los delitos de lesa humanidad o contra el derecho internacional. No se acordará la expulsión del territorio nacional de un refugiado político, con destino al país que lo persigue.



# CHILE

Decision of the Constitutional Court of 7 April 2002 regarding the constitutionality of the Rome Statute of the International Criminal Court [*Decisión del Tribunal Constitucional respecto de la constitucionalidad del Estatuto de Roma de la Corte Penal Internacional, 7 de abril de 2002*].

## INTRODUCTION

The Constitutional Court handed down its decision following a request submitted by 35 members of parliament representing more than one fourth of the Assembly, as provided for in Article 82(2) of the Chilean constitution. The Court had been asked to declare the Rome Statute as a whole unconstitutional.

With regard to the status of human rights treaties under domestic law, the Court reaffirmed, on the basis of a systematic and coherent examination of the relevant constitutional norms, that there was no validity to the argument that such treaties had the effect of amending provisions of the constitution that were incompatible with them or of providing an equal counterweight to such provisions. If a treaty contained provisions contrary to the constitution, it could only be validly incorporated into domestic law by means of constitutional reform.

Having concluded that the Rome Statute contained provisions that were incompatible with the Chilean constitution, the Court ruled that constitutional reform was required before the Statute could be approved by the National Congress and ratified by the president.

## SUMMARY OF THE OPINION OF THE CONSTITUTIONAL COURT

### Complementary jurisdiction (Arts 1, 17 and 20 Rome Statute)

The Court noted that, although Article 1 of the Rome Statute stated that the ICC's jurisdiction was complementary to national criminal jurisdictions, the Statute did not define the nature of that complementarity. It was argued before the Court that the principle of complementarity meant that the Rome Statute gave preference to States which, in accordance with the principles of nationality or territoriality, were in a position to exercise their domestic criminal jurisdiction to punish the crimes mentioned in the Statute. The Court noted, however, that a close examination of the Rome Statute showed that the ICC could challenge the findings of national courts and, consequently, overturn their decisions and, in certain specific circumstances where national courts were not genuinely prosecuting, act as a substitute.

The Court therefore concluded that the jurisdiction established by the Rome Statute, which entitles the ICC to review national court decisions or substitute for national jurisdictions, was more than complementary. In fact, the Rome Statute had set up a new jurisdiction that was not provided for in the Chilean constitution. Other international courts, set up by treaties, such as the American Convention on Human Rights and the Statute of the International Court of Justice, did not exercise any supervisory powers over the decisions of national courts. It therefore appeared that the ICC's characteristics were those of a supranational court. For the ICC to be considered a court competent to try crimes committed in Chile, therefore, its powers should be incorporated into domestic law through a constitutional amendment.

### Pardon and amnesty

The Court noted that Chile's constitution expressly designated the authorities empowered to grant pardons and amnesties. In that respect, the Rome Statute was incompatible with the Chilean constitution since it restricted the power of the country's president to grant individual pardons and deprived the legislature of its ability to adopt laws granting general pardons or amnesties in connection with war crimes that were subject to the ICC's jurisdiction. A constitutional breach could thus occur if the ICC did not recognize pardons or amnesties granted or decreed by the competent national authorities.

### **Irrelevance of official capacity (Art. 27 Rome Statute)**

Regarding the constitution's provisions on the privileges of parliamentarians and the prerogatives of both magistrates of superior courts and the public prosecutor (and his regional representatives), the Court found that these would be without effect under the Rome Statute since the system of privileges and prerogatives would disappear if proceedings took place directly before the ICC. Such a result would be incompatible with the Chilean constitution.

### **Powers of investigation of the prosecutor in the territory of a State Party (Arts 54 and 99 Rome Statute)**

The Court found that the Rome Statute gave the ICC prosecutor certain powers to investigate in the territory of a State Party, to collect and examine evidence, to summon and question victims, witnesses and any other persons whose testimony was relevant to the investigation. Those provisions were contrary to the provisions of the constitution, which vested the public prosecutor's office with the sole and exclusive power to direct investigations of acts that constituted criminal offences.

## **ALBANIA**

Decision No. 186 of 23 September 2002 of the Constitutional Court of the Republic of Albania.

### **INTRODUCTION**

The Constitutional Court of the Republic of Albania decided that the constitution was in conformity with the Rome Statute of the International Criminal Court. It analysed issues pertaining to sovereignty, complementarity, immunity and the principle *ne bis in idem*. Albania ratified the Rome Statute on 31 March 2003.

### **SUMMARY OF THE CONSTITUTIONAL COURT'S OPINION**

#### **Irrelevance of official capacity (Art. 27 Rome Statute)**

Immunities for the head of State and other State employees exist in the Albanian constitution, and even though the Rome Statute does not allow such immunities, the Constitutional Court found that the Statute did not contradict the Albanian constitution in this respect. The immunity provided in the constitution was intended to protect government officials only from domestic jurisdiction. Therefore the Constitutional Court saw no problem in the ICC exercising jurisdiction for crimes covered by the Rome Statute over people enjoying immunities under national law.

The Constitutional Court added that the generally accepted rules of international law were implicitly part of the domestic law of Albania. Absence of immunity for the most heinous crimes now being recognized by international jurisprudence and by the Rome Statute, such absence was consequently and implicitly part of Albanian legislation.

#### **Complementary jurisdiction of the ICC (Arts 1, 17 and 20 Rome Statute)**

The Constitutional Court stated that the Rome Statute did not undermine the sovereignty of the Republic of Albania. In fact, the Court affirmed that the power to contract international constitutional commitments was an attribute of the exercise of State sovereignty. In Albanian constitutional law, international treaties ratified by the State were directly incorporated into national law and these treaties had priority over domestic law where the two were incompatible (Art. 122 of Albania's constitution). The Constitutional Court added that the transfer of some legal capabilities to a specific field of international interest (prosecution of serious crimes such as genocide, war crimes and crimes against humanity) did not infringe Albania's sovereignty, especially since Albania was continuously making efforts to be part of international and "European-Atlantic structures".

### ***Ne bis in idem* (Art. 20 Rome Statute)**

The Constitutional Court found that the principle *ne bis in idem*, which was reflected in the Rome Statute, was compatible with Albania's constitution. In fact, the same principle was present in Article 34 of the constitution. Even though this article stipulated that a person could be tried again if so decided in a lawful manner by a higher court, the Constitutional Court concluded that the ICC had the character of a court of review (Art. 20 [3], a and b) and therefore constituted the highest court with regard to the crimes under its jurisdiction.

## COLOMBIA

Ruling C-578/02 – Review of Law 742 of 5 June 2002 “ratifying the Rome Statute of the International Criminal Court, adopted in Rome on the 17th day of July of 1998” [*Sentencia C-578/02 - Revisión de la Ley 742 del 5 de junio de 2002 "Por medio de la cual se aprueba el Estatuto de Roma de la Corte Penal Internacional, hecho en Roma el día diecisiete (17) de julio de mil novecientos noventa y ocho (1998)"*].

### **INTRODUCTION**

Under Article 241/10 of Colombia's constitution, the Constitutional Court must examine all international treaties signed by the executive and their respective approval laws passed by Congress. The Court exercises this function before ratification, but also after approval by Congress and the executive. It is a necessary step for the final ratification by Colombia of any international treaty.

In the case of the Rome Statute, this constitutional supervision was affected by Congress, when – as part of the process towards ratification – it decided to amend the constitution, passing Legislative Act No. 2 of 2001 (27 December 2001). The Act accepts the jurisdiction of the ICC and amends Article 93 of the constitution of 1991 as follows:

“The Colombian State recognizes the jurisdiction of the International Criminal Court in the terms provided for in the Rome Statute adopted on 17 July 1998 by the United Nations Conference of Plenipotentiaries and, consequently, ratifies this treaty in accordance with the procedure laid down in this constitution.

The different approach taken by the Rome Statute to substantial matters relating to constitutional guarantees shall be accepted only in the areas governed by the Statute”.

[“El Estado Colombiano puede reconocer la jurisdicción de la Corte Penal Internacional en los términos previstos en el Estatuto de Roma adoptado el 17 de julio de 1998 por la Conferencia de Plenipotenciarios de las Naciones Unidas y, consecuentemente, ratificar este tratado de conformidad con el procedimiento establecido en esta Constitución. “La admisión de un tratamiento diferente en materias sustanciales por parte del Estatuto de Roma con respecto a las garantías contenidas en la Constitución tendrá efectos exclusivamente dentro del ámbito de la materia regulada en él”].

The effect of this provision is that any differences in substance between the Rome Statute and the constitution, as long as they fall within the ambit regulated by the Statute, must be deemed acceptable under Colombian law. In its judgment, therefore, the Court found it unnecessary to dwell on potential conflict between norms, but limited itself to identifying and describing those provisions in the Statute that take a “different approach” to certain constitutional guarantees, followed by confirmation of their lawfulness on the basis of Legislative Act No. 2 of 2001. The Court identified seven such differences, as follows.

## SUMMARY OF THE CONSTITUTIONAL COURT'S OPINION

### The principle of legality

Articles 6, 7 and 8 of the Rome Statute, which establish the international crimes over which the ICC has jurisdiction, were found to lack the “precision, certainty and clarity” required by Colombian law in order to satisfy the requirements of the principle of legality. The Constitutional Court acknowledged that this standard was lower in international law than it was in national systems. It also noted that the Elements of Crimes, not yet published at the time, would provide some of this detail.

### Irrelevance of official capacity (Art. 27 Rome Statute)

Under Article 27 of the Rome Statute, no public official may enjoy immunities before the ICC. This provision was deemed to take a “different approach” to that found in the laws on immunities enjoyed by congressmen as well as those relating to the investigation and prosecution of other high officials.

### Command responsibility (Art. 28 Rome Statute)

Article 28 of the Rome Statute established criminal responsibility for superiors, for acts or omissions, and extended that responsibility to both military and civilian authorities, *de jure* or *de facto*. This extended the command responsibility doctrine beyond the scope attained by Colombian law, which explicitly provided only for direct responsibility, and then only for official military commanders. The Court found a basis in case law for accepting the application of command responsibility to omissions, and in Legislative Act 2 for extending it to civilian authorities.

### Statute of limitations (Art. 29 Rome Statute)

Crimes under the jurisdiction of the ICC may not be subject to statutes of limitations. The Court found that this rule contradicted Article 28 of the constitution and decided that such “different approach” must be applicable only when the ICC exercises its jurisdiction over such crimes, even if those same crimes would be covered by the statutes of limitations under domestic law.

### Defences (Art. 31[1c] and 33 Rome Statute)

The Court found differences in Article 31(1c) – specifically on the defence of property as grounds for excluding criminal responsibility for war crimes – and Article 33 of the Rome Statute on superior orders. Regarding the former, the Court referred to the four conditions set out in the Rome Statute for its applicability: (1) the act in question must be a war crime; (2) the property defended must be “essential” for the survival of the person accused or another person or for the success of a military mission; (3) the defence must be against an unlawful and imminent use of force; and (4) the defence must be proportionate. These were found to be compatible with international humanitarian law.

As for Article 33 of the Rome Statute on superior orders, Article 91 of the constitution explicitly exonerates military personnel from criminal responsibility arising out of following an order to act. In such cases, responsibility will be borne only by the person giving the order. The Court noted, however, that Colombian jurisprudence had previously stated that Article 91 does not apply to international crimes, as this would be incompatible with international humanitarian law.

### Life sentences (Art. 77 [1b] Rome Statute)

Article 34 of the constitution prohibits the imposition of life sentences. Article 77(1b) of the Rome Statute allows such penalties. Although authorized for the ICC, the Court ruled that Legislative Act No. 2 must not be interpreted to allow national judges to impose life sentences for crimes falling under ICC jurisdiction.

### Legal counsel (Art. 61[2b] and 67[1d] Rome Statute)

The Court interpreted Articles 61(2b) and 67(1d) of the Rome Statute as meaning that the ICC could determine whether it was in the interests of justice for an accused person to be represented by legal counsel or not. Under the Colombian constitution, however, all persons had the right to have legal counsel at all times during proceedings.

# CÔTE D'IVOIRE

Constitutional Council Decision No. 002/CC/SG of 17 December 2003 on the compatibility with the Constitution of the Rome Statute of the International Criminal Court [*Décision Conseil Constitutionnel N°002/CC/SG du 17 décembre 2003 relative à la conformité à la Constitution du Statut de Rome de la Cour pénale internationale*].

## INTRODUCTION

Côte d'Ivoire signed the Rome Statute on 30 November 1998. On 11 June 2003, pursuant to Article 95 of the constitution, the president of Côte d'Ivoire sent a letter to the Constitutional Council requesting its opinion as to the compatibility of the Rome Statute with the constitution of 1 August 2002. According to Article 86 of the constitution, if the Constitutional Council declares that an international agreement contains a provision contrary to the constitution, a constitutional review is required before authorization to ratify it can be given.

After reviewing the provisions of the Rome Statute, the Constitutional Council concluded that the Statute was not compatible with the constitution of 1 August 2002. Consequently, the treaty could be ratified by Côte d'Ivoire only after amendment of the constitution to incorporate the Rome Statute into national law.

## SUMMARY OF THE CONSTITUTIONAL COURT'S OPINION

### Irrelevance of official capacity (Art. 27 Rome Statute)

The Constitutional Council took the view that Article 27 of the Rome Statute was contrary to the country's constitution. According to the Constitutional Council, since the Rome Statute was applicable to everyone without any distinction based on official capacity, it was incompatible with Articles 68, 93, 109, 110 and 117 of the constitution, which provide immunities from prosecution, privileges of jurisdiction or special procedures on the basis of a person's official capacity.

### Complementary jurisdiction of the ICC, statutes of limitation and amnesty (Art. 17[2] Rome Statute)

The Constitutional Council took the view that the ICC's ability to declare admissible and try a case already pending before a national court if the ICC found that the State authorities were unable to institute proceedings (ICC Art. 17[2]) was a violation of State sovereignty. The Constitutional Council found that this provision constituted a restriction of national sovereignty since such an inability on the part of the State to prosecute might arise from the sheer legal impossibility of prosecuting, owing, for example, to an amnesty or a statute of limitations.

### Powers of investigation of the prosecutor in the territory of a State Party (Arts 54 and 99[4] Rome Statute)

The Constitutional Council took the view that the powers conferred on the ICC prosecutor in Articles 54(2) and 99(4) of the Rome Statute to carry out investigations on the territory of a State, interview persons being investigated and visit places within that State without the knowledge of that State's authorities would deprive the laws of that State of all effect on its own territory. Moreover, it held that this provision potentially deprived the State of any initiative and the opportunity to act in certain criminal proceedings, and that the provision therefore interfered with the exercise of national sovereignty.

### Ad hoc recognition of the ICC's competence

Côte d'Ivoire has not ratified the Rome Statute. Nevertheless, in September 2003 it recognized the competence of the International Criminal Court in respect of crimes falling under its purview committed in Côte d'Ivoire since 19 September 2002. This date corresponds to the start of the armed conflict in that country. Recognition of the ICC's competence was an act performed by the executive and occurred after 11 June 2003, the date on which the president had sought the opinion of the Constitutional Council, and before 17 December 2003, when the Council issued its decision.

# ARMENIA

Decision DCC-502 of 13 August 2004 taken by the Constitutional Court of the Republic of Armenia on the conformity of the obligations laid down in the Statute of the International Criminal Court, signed on 17 July 1998 in Rome, with the constitution of the Republic of Armenia.

## INTRODUCTION

Armenia's president asked the country's Constitutional Court to review the constitution's conformity with the obligations laid down in the Rome Statute. Armenia signed the Statute on 2 October 1999 but has yet to ratify it.

The Constitutional Court ruled that in order to be able to comply with the obligations stated in the Rome Statute, Armenia needed to amend its constitution. Consequently, the constitution was amended on 27 November 2005. However, the president of Armenia retained the power to grant pardons and the National Assembly the power to declare amnesty. As a result, Armenia has still not ratified the Rome Statute.

## SUMMARY OF THE CONSTITUTIONAL COURT'S OPINION

### Complementary jurisdiction of the ICC (Preamble, Part 10, and Art. 1 Rome Statute)

Chapter 6 of Armenia's 1995 constitution contains provisions on the country's judicial organization. Article 91 stipulates that the judicial system must be administered solely by the courts in accordance with the constitution and the laws. Article 92 states that these courts are the courts of first instance, the Courts of Appeal and the Court of Cassation. The Constitutional Court therefore concluded that the 1995 constitution did not allow "an international treaty to complement the system of judicial bodies exercising criminal jurisdiction with an international judicial body exercising criminal jurisdiction." Under the 1995 constitution, therefore, the ICC could not constitute a jurisdiction complementary to the Armenia courts. The Constitutional Court concluded that the constitution needed to be amended, and this was done on 27 November 2005. Article 92 was amended to include the complementarity of national courts with the ICC.

### Enforcement of sentences and amnesty (Arts 103 and 105 Rome Statute)

The Constitutional Court found that the 1995 constitution was not compatible with the Rome Statute regarding amnesty and the enforcement of sentences.

Armenia's 1995 constitution empowers the president to grant pardons and the National Assembly to declare amnesty (Art. 55[17] and Art. 81[1]). Under the Rome Statute, the States are bound by the sentence given by the Court and may under no circumstances amend it. Therefore, the Constitutional Court concluded that persons under the territorial jurisdiction of Armenia but convicted by the ICC could not enjoy the right to pardon, reduced sentence or amnesty, and that it was therefore contrary to the Armenian constitution, whereas persons convicted for crimes existing in the Rome Statute but convicted by Armenian courts could enjoy such privileges.

Even though the constitution was amended on 27 November 2005, the Armenian president still has power to grant pardons (Art. 55 [17]) and the National Assembly to declare amnesty (Art. 81 [1]).

### Powers of investigation of the prosecutor in the territory of a State Party (Arts 54, 57[3b] and 99 Rome Statute)

The Constitutional Court concluded that the Rome Statute did not endanger Armenia's national sovereignty and that even though the ICC prosecutor had fairly wide powers, sufficient guarantees were provided to prevent any kind of abuse.

# MADAGASCAR

Decision No. 11-HCC/D1 of 21 March 2006 regarding Law No. 2005-35 authorizing ratification of the Rome Statute of the International Criminal Court [*Décision n°11-HCC/D1 du 21 mars 2006 relative à la loi n°2005-035 autorisant la ratification du Statut de Rome de la Cour Pénale Internationale*].

## INTRODUCTION

The president of Madagascar asked the High Constitutional Court to examine the conformity of the Rome Statute with Madagascar's constitution before promulgation of Law No. 2005-035 authorizing the ratification of the Rome Statute.

The High Constitutional Court concluded that there was a need to review the constitution of Madagascar in order for it to be in conformity with the Rome Statute. It suggested either that the incompatible articles be changed or that an additional article be added prescribing that the Rome Statute is entirely applicable in Madagascar for crimes under the jurisdiction of the ICC.

The High Constitutional Court decided that the prescriptions not in conformity with the constitution were those related to immunity and statute of limitations. The constitution was therefore amended on 27 April 2007 and Madagascar ratified the Rome Statute on 14 March 2008.

## SUMMARY OF THE HIGH CONSTITUTIONAL COURT'S OPINION

### Irrelevance of official capacity (Art. 27 Rome Statute)

The High Constitutional Court decided that Article 27 of the Rome Statute was not in compliance with Madagascar's constitution because the latter stipulates immunities for those acting in official capacity (Arts 69, 81, 113 and 114 of the 1998 constitution). The 1998 constitution, therefore, needed to be amended in order to remove those immunities. This was done on 27 April 2007.

### Statute of limitations (Art. 29 Rome Statute)

The High Constitutional Court considered that the setting aside of statutes of limitation stipulated in Art. 29 of the Rome Statute was not contrary to the constitution's spirit and that since it applied only to the crimes falling under the jurisdiction of the ICC, it was not incompatible with the constitution and did not require any change.

# REPUBLIC OF MOLDOVA

Decision for the control of the conformity with the constitution with certain provisions of the International Criminal Court, No. 22, of 2 October 2007 [*Hotarire pentru controlul constitutionalitatii unor prevederi din Statutul Curtii Penale Internationale nr. 22 din 02.10.2007*].

## INTRODUCTION

The Government of the Republic of Moldova asked the Constitutional Court on 16 July 2007 to give an opinion on whether certain provisions of the Rome Statute were in accordance with the country's constitution. The Court therefore limited its opinion to the issues it was asked to consider.

After comparing the provisions of the Rome Statute with the constitution, the Constitutional Court concluded that the Rome Statute was compatible with the country's constitution.

## **SUMMARY OF THE CONSTITUTIONAL COURT'S OPINION**

### **Complementarity (Arts 1, 4[2], 27, 81[1] Rome Statute)**

The Republic of Moldova's constitution does not permit extraordinary courts. However, the Constitutional Court concluded that the ICC was not an extraordinary court. The ICC had jurisdiction over international crimes, but this did not prohibit the Republic of Moldova from prosecuting the same crimes at a national level. The ICC was complementary to the national courts and would prosecute the crimes set out in the Rome Statute only if the country's justice system was unable or unwilling to do so. Article 18(2) of the Rome Statute also allows the State Party to ask the ICC prosecutor to hand over a case.

### **Irrelevance of official capacity (Art. 27 Rome Statute)**

The constitution stipulates that the Republic of Moldova's president, judges and members of parliament all enjoy immunity (Art. 81[2], 70[3] and 116). Nevertheless, the Constitutional Court found that the Rome Statute did not exclude or limit immunities in national law for the period during which those officials were in office or for crimes not covered by the ICC's jurisdiction.

### **Extradition (Art. 89[1] Rome Statute)**

The Republic of Moldova's constitution does not allow the country's citizens to be extradited. Nevertheless, the Constitutional Court drew a distinction between extradition and surrender: since the States Parties did not have to extradite people but surrender them to the ICC, this was not incompatible with the constitution.



# SUMMARY TABLE

| Issues raised regarding the Rome Statute                                  | State                       | Point-by-point summary of the opinions rendered   |
|---|-----------------------------|---|
| <p><i>Complementary jurisdiction of the ICC (Art. 1 Rome Statute)</i></p> | <b>Belgium:</b>             | The Council of State observed that a Belgian court could not relinquish its competence to the ICC since the Belgian constitution stipulated that no one may be removed against his will from the judge that the law assigned to him.  |
|   | <b>France:</b>              | <b>Compatible.</b> That the ICC may prosecute cases in the event of a State being unwilling or unable to prosecute itself did not infringe national sovereignty.  |
|   | <b>Ukraine:</b>             | <b>Incompatible.</b> The administration of justice was the exclusive preserve of the courts and judicial functions could not be delegated to other bodies or officials. An ICC jurisdiction supplementary to the national system was not contemplated by the Ukrainian constitution. Therefore, an amendment of the constitution was required before the Statute could be ratified.   |
|   | <b>Guatemala:</b>           | <b>Compatible.</b> Under the principle of complementarity laid down in its Statute, the ICC would have jurisdiction only in cases where a State was unable or unwilling to prosecute. If Guatemala duly complied with its obligation to administer justice as provided for in its constitution, the ICC would have no reason to exercise jurisdiction over it.  |
|   | <b>Chile:</b>               | <b>Incompatible.</b> The Rome Statute had set up a new jurisdiction that was not provided for in the Chilean constitution. It appeared that the characteristics of the ICC were those of a supranational court. Therefore, for the ICC to be considered as a court competent to try crimes committed in Chile, its powers should be incorporated into domestic law by means of a constitutional amendment.  |
|   | <b>Albania:</b>             | <b>Compatible.</b> The Court affirmed that the power to contract international constitutional commitments was an attribute of the exercise of State sovereignty. In Albanian constitutional law, international treaties ratified by the State were directly incorporated into national law and these treaties had priority over domestic law where the two were incompatible (Art. 122 of Albania's constitution). The Constitutional Court added that the transfer of some legal capabilities to a specific field of international interest (prosecution of serious crimes such as genocide, war crimes and crimes against humanity) did not infringe Albania's sovereignty. |
|   | <b>Côte d'Ivoire:</b>       | <b>Incompatible.</b> The ICC's ability to declare admissible and try a case already pending before a national court if it found that the State authorities were unable to carry out the proceedings (Article 17[2] Rome Statute) was a violation of State sovereignty. It constituted a restriction on national sovereignty because such an inability to prosecute might be due to legal impossibility caused, for example, by an amnesty or a statute of limitations.  |
|   | <b>Armenia:</b>             | <b>Incompatible.</b> The 1995 constitution did not allow "an international treaty to complement the system of judicial bodies exercising criminal jurisdiction with an international judicial body exercising criminal jurisdiction." The constitution therefore needed to be amended, and the new constitution of 27 November 2005 was amended to specify the complementarity of national courts with the ICC.   |
|   | <b>Republic of Moldova:</b> | <b>Compatible: The Republic of Moldova's</b> constitution did not permit extraordinary courts. However, the ICC was not an extraordinary court. It had jurisdiction over international crimes but this did not prevent the country from prosecuting the same crimes at the national level. The ICC was complementary to the national courts and would prosecute the crimes set out in the Rome Statute only if those courts were unable or unwilling to do so. Article 18(2) of the Rome Statute also allowed the State Party to ask the ICC prosecutor to hand over a case.  |
| <p><i>Irrelevance of official capacity (Art. 27 Rome Statute)</i></p>     | <b>Belgium:</b>             | <b>Incompatible.</b> Article 27 of the Rome Statute contradicted the immunity regimes laid down by the constitution for the King and for members of parliament, as well as the penal responsibility regime for ministers.   |
|   | <b>Costa Rica:</b>          | <b>Compatible.</b> Given the nature of the crimes covered by the ICC's jurisdiction, the penal immunity established in the constitution for members of parliament could not prevent a court such as the ICC from instituting proceedings.   |
|   | <b>France:</b>              | <b>Incompatible.</b> Article 27 of the Rome Statute was contrary to the particular penal responsibility regimes provided for the president and members of government and of the Assembly.   |

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|  | <b>Luxembourg:</b>          | <b>Incompatible.</b> Article 27 of the Statute was contrary to the constitution's provisions concerning arrest of members of parliament and penal immunity for the Grand Duke.  |
|  | <b>Spain:</b>               | <b>Compatible.</b> Article 27 did not affect the exercise of immunity privileges for members of parliament, but was rather a transfer of powers to the ICC. This was permitted by the constitution. The King's immunity should not be regarded as contrary to the Statute since official acts had to be countersigned to become effective. The countersigning officials would bear individual responsibility. Parliamentary monarchies should not be viewed as departing from the objectives and purposes of the Rome Statute nor from the terms defining the ICC's jurisdiction. Those terms should be applied in the context of the political system of each State Party. |
|  | <b>Ukraine:</b>             | <b>Compatible.</b> Article 27 was not contrary to the immunities of the president, members of the Assembly and judges, since the crimes covered the Rome Statute were crimes under international law and the immunities granted by the constitution were applicable only vis-à-vis national jurisdictions. They did not constitute obstacles to the ICC's jurisdiction.   |
|  | <b>Honduras:</b>            | <b>Compatible.</b> If an official was present in Honduras and was handed over after all the procedures for prosecution under domestic law had been followed, there would be no breach of the constitution.  |
|  | <b>Chile:</b>               | <b>Incompatible.</b> The constitution's provisions on the privileges of parliamentarians and the prerogatives of superior court judges and the public prosecutor would be without effect under the Rome Statute since that system would disappear if proceedings took place directly before the ICC. Such a result would be incompatible with the Chilean constitution.   |
|  | <b>Albania:</b>             | <b>Compatible.</b> The immunity provided in the constitution provided protection only from domestic jurisdiction. Therefore, there was no problem with the ICC exercising jurisdiction for crimes set out in the Rome Statute over people enjoying immunities under national law.   |
|  | <b>Colombia:</b>            | Article 27 provided a "different approach" vis-à-vis the one found in the laws on immunity enjoyed by congressmen as well as laws governing the investigation and prosecution of other high officials. The Court did not rule on the compatibility of Article 27 owing to a previous ad hoc amendment of the constitution passed by Congress.   |
|  | <b>Côte d'Ivoire:</b>       | <b>Incompatible.</b> Since the Rome Statute was applicable to everyone without any distinction based on official capacity, it was incompatible with Articles 68, 93, 109, 110 and 117 of the constitution, which provided for immunities from prosecution, privileges of jurisdiction and special procedures on the basis of a person's official capacity.  |
|  | <b>Madagascar:</b>          | <b>Incompatible.</b> The Rome Statute was incompatible with the 1998 Madagascar constitution because the latter prescribed immunities for those acting in an official capacity. The 1998 constitution therefore had to be amended to abolish those immunities. This was done on 27 April 2007.  |
|  | <b>Republic of Moldova:</b> | <b>Compatible.</b> The constitution stated that Republic of Moldova's president, judges and members of parliament all enjoyed immunity. Nevertheless, the Rome Statute did not exclude or limit immunities in national law for the period during which those officials were in office and for crimes not covered by the ICC's jurisdiction.   |

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| <i>Surrender of persons to the ICC (Art. 89 Rome Statute)</i> | <b>Costa Rica:</b>          | <b>Compatible.</b> The constitutional guarantee that prohibited compelling a Costa Rican to leave the national territory against his will was not absolute. To determine the extent of its validity, it must be established what measures were reasonable and proportionate to uphold the guarantee.                                     |
|   | <b>Ecuador:</b>             | <b>Compatible.</b> The extradition of nationals was prohibited under the constitution, but surrendering persons to an international tribunal was a different legal process.  |
|   | <b>Ukraine:</b>             | <b>Compatible.</b> The surrender of nationals to another State was prohibited under the constitution. This was not, however, applicable to a person's transfer to the ICC. International practice distinguished between extradition to another State and transfer to an international court.   |
|   | <b>Honduras:</b>            | <b>Compatible.</b> Since Article 89 concerned the surrender of an individual to a supranational court to whose jurisdiction Honduras would be subject after ratification of the Rome Statute, and not the surrender of an individual to another State, surrender to the ICC could not be considered a form of extradition.               |
|   | <b>Guatemala:</b>           | <b>Compatible.</b> The constitution did not refer to the "surrender" of persons to an international court. Therefore the provisions of the Rome Statute were not incompatible with the constitution.   |
|   | <b>Republic of Moldova:</b> | <b>Compatible:</b> The Republic of Moldova's constitution did not allow the country's citizens to be extradited. However, there was a difference between extradition and surrender. Since States Parties were not required to extradite people to the ICC but rather to surrender them, this was not incompatible with the constitution. |

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| <i>Life imprisonment (Arts 77, 80, 103 and 110 Rome Statute)</i>   | <b>Costa Rica:</b>   | <b>Compatible.</b> Since application of the penalties regulated by the Rome Statute were subject to national domestic law, the constitutionality of ICC Articles 77 and 78 could be maintained. However, the extradition of a person likely to be sentenced to life imprisonment would violate constitutional principles and would thus not be possible.  |
|  | <b>Ecuador:</b>      | <b>Compatible.</b> Article 110 of the Rome Statute allowed an automatic review of the penalties, thus avoiding in practice the imposition of life or indefinite imprisonment.   |
|  | <b>Spain:</b>        | <b>Compatible.</b> Article 80 of the Rome Statute stipulated that the Statute's provisions on penalties did not preclude the application of the penalties prescribed by national law. In addition, Article 103 of the Rome Statute allowed a State to attach conditions to its acceptance of sentenced persons. The mechanism established in Article 110 for the review of sentences denoted a general principle tending to put a temporal limit on penalties.  |
|  | <b>Colombia:</b>     | <b>Compatible.</b> Article 34 of the constitution prohibited life sentences whereas Article 77(1b) of the Rome Statute allowed them. Colombia's Legislative Act No. 2 could therefore not be interpreted to allow national judges to impose life sentences for crimes falling under the jurisdiction of the ICC.  |
| <i>Powers of investigation of the ICC prosecutor in the territory of a State Party (Arts 54 and 99 Rome Statute)</i> | <b>Ecuador:</b>      | <b>Compatible.</b> Investigations by the ICC prosecutor must be considered as a form of international judicial co-operation.  |
|  | <b>France:</b>       | <b>Incompatible.</b> The ICC prosecutor's powers of investigation on the national territory were incompatible with the constitution to the extent that the investigations could be carried out without the presence of French judicial authorities, even without circumstances that justified that absence.   |
|  | <b>Luxembourg:</b>   | <b>Compatible.</b> The ICC prosecutor's powers of investigation on the national territory were compatible with the constitution to the extent that they were carried out after consultation between the ICC prosecutor and the authorities of the State Party.  |
|  | <b>Spain:</b>        | <b>Compatible.</b> Although the powers of the ICC prosecutor as defined in Articles 99(4), 54(2) 93 and 96 of the Rome Statute were similar to those of the national judicial authorities, Article 93 of the constitution allowed the transfer of such powers to international institutions.  |
|  | <b>Chile:</b>        | <b>Incompatible.</b> The ICC prosecutor's powers of investigation were contrary to the provisions of the constitution, which vested the public prosecutor's office with the sole and exclusive power to direct investigations of acts constituting criminal offences.   |
|  | <b>Côte d'Ivoire</b> | <b>Incompatible.</b> The powers conferred on the ICC prosecutor by Articles 54(2) and 99(4) of the Rome Statute to carry out investigations on the territory of a State, interview persons being investigated and visit places within that State without the knowledge of that State's authorities would deprive the laws of that State of all effect on its own territory. Moreover, these provisions potentially deprived the State of any initiative and the opportunity to act in certain criminal procedures. They therefore interfered with the exercise of national sovereignty. |
|  | <b>Armenia:</b>      | <b>Compatible.</b> The Rome Statute did not pose a danger for Armenian sovereignty, and even though the ICC prosecutor had fairly broad powers, sufficient guarantees were provided to prevent any kind of abuse.   |
| <i>Review of the Statute (Art. 122 Rome Statute)</i>   | <b>Luxembourg:</b>   | <b>Compatible.</b> Article 122 of the Rome Statute listed precisely which provisions could be amended, and they were of an institutional nature.  |
| <i>Statute of limitations (Art. 29 Rome Statute)</i>   | <b>France:</b>       | <b>Incompatible.</b> That cases could be brought before the ICC involving acts which were time-barred under national law – and without the failure to prosecute before that time bar took effect resulting from lack of will or ability to act on the State's part – constituted a basic infringement of national sovereignty.  |
|  | <b>Colombia:</b>     | <b>Compatible.</b> Even though Article 29 of the Rome Statute contradicted Article 28 of the constitution, this "different approach" would be applicable only when the ICC exercised its jurisdiction over such crimes, even if they were covered by the statutes of limitations in domestic law.   |
|  | <b>Madagascar:</b>   | <b>Compatible.</b> Despite the fact that the exclusion of a statute of limitations infringed both Madagascar's sovereignty and the constitutional and legal protection of the human rights and freedoms of its citizens, this exclusion applied only to crimes under the ICC's jurisdiction and therefore was not contrary to the spirit of Madagascar's constitution, which recognized the primacy of human rights and the need for impartial international justice.   |
| <i>Amnesty</i>   | <b>France:</b>       | <b>Incompatible.</b> That cases could be brought before the ICC involving acts which were subject to amnesty under national law – and without that amnesty being due to any lack of will or ability to act on the State's part – constituted a basic infringement of national sovereignty.  |

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|  | <p><b>Chile:</b> <b>Incompatible.</b> The Statute was incompatible with the Chilean constitution since it restricted the president's power to grant individual pardons and deprived the legislature of its ability to adopt laws granting general pardons or amnesties regarding war crimes that came under the ICC's jurisdiction.</p> <p><b>Armenia:</b> <b>Incompatible.</b> Persons under Armenian territorial jurisdiction but convicted by the ICC could not enjoy both amnesty and pardon. This was contrary to Armenia's constitution, whereas persons convicted for crimes set out in the Rome Statute but convicted by national courts could enjoy those privileges. Even though the constitution was amended on 27 November 2005, the Armenian president still had power to grant pardon, while the National Assembly of Armenia had the power to declare amnesty.</p>   |
| <p>Ne bis in idem<br/>(Arts 17 and 20 Rome Statute)</p>  | <p><b>Ecuador:</b> <b>Compatible.</b> An accused person who has been tried according to the rules of due process would be tried a second time by the ICC only in exceptional circumstances. The objective of the Statute was to avoid impunity.</p> <p><b>Spain:</b> <b>Compatible.</b> The principle <i>ne bis in idem</i> was part of the constitutional right to effective judicial protection. This right was not limited to the protection afforded by Spanish courts but extended to jurisdictional bodies whose competence was recognized in Spain. The transfer of judicial competence to the ICC enabled the ICC to amend the decisions of Spanish bodies without infringing the constitutional right to judicial protection.</p> <p><b>Honduras:</b> <b>Compatible.</b> Under the Rome Statute, prosecution for an offence already dealt with by a national court could take place only in the cases specified in the Statute, i.e. where the proceedings had not been conducted independently or impartially in accordance with the norms of due process and had been conducted in a manner, precisely, to elude justice.</p> <p><b>Albania:</b> <b>Compatible.</b> The principle <i>ne bis in idem</i> was present in the constitution. Article 34 of the constitution stipulated that a person could be tried again if so decided by a higher court in accordance with the law. The ICC had the character of a court of review and therefore constituted the highest court with regard to the crimes under its jurisdiction.</p> |
| <p>Judicial guarantees<br/>(Arts 11, 20, 22, 23 and 66 Rome Statute)</p> <p>(ICC Art. 61[2b] and 67[1d])</p> | <p><b>Guatemala:</b> The judicial guarantees provided by the ICC were in line with the rights protected under the constitution. Furthermore, the guarantees and rights incorporated into the Statute corresponded to those laid down in international human rights treaties which Guatemala had ratified and which expanded the rights recognized under Article 44 of the constitution.</p> <p><b>Colombia:</b> Articles 61(2b) and 67(1d) of the Rome Statute were interpreted as allowing the ICC to determine whether or not it was in the interests of justice for an accused person to be represented by legal counsel. Under the Colombian constitution, all persons were entitled to legal counsel at all times during proceedings.</p>  |
| <p>Deferral of an investigation by a request of the Security Council<br/>(Art. 16 Rome Statute)</p>          | <p><b>Belgium:</b> It was contrary to the constitutional principle of judicial independence that a non-judicial body could intervene to prevent Belgian judicial authorities from investigating or prosecuting cases. If the power of the Security Council to request the deferral of an investigation or prosecution before the ICC was construed as extending to investigation and prosecution by national authorities, it would be contrary to the principle of judicial independence.</p>   |
| <p>Limitation on the prosecution or punishment of other offences (Art. 108 Rome Statute)</p>                 | <p><b>Belgium:</b> <b>Incompatible.</b> It was contrary to the constitutional principle of judicial independence that the ICC's approval was required to prosecute and punish other acts after a person had been tried by the ICC.</p>  |
| <p>Enforcement of sentences<br/>(Art. 103 Rome Statute)</p>  | <p><b>Belgium:</b> <b>Compatible.</b> The King's pardon could be granted only with regard to sentences imposed by Belgian courts.</p> <p><b>France:</b> <b>Compatible.</b> Since the Statute allowed States to attach conditions to their acceptance of sentenced persons for incarceration on their territory, France would be able to make its acceptance conditional on the application of national legislation on the enforcement of sentences and to state the possibility, derived from the right of pardon, of a sentence being totally or partially exempted.</p> <p><b>Ukraine:</b> <b>Compatible.</b> The risk that Ukrainian citizens serving sentences in another State could enjoy fewer human rights guarantees than those provided by the Ukrainian constitution could be diminished by means of a declaration stating Ukraine's willingness to have sentenced Ukrainian citizens serve their sentences in Ukraine.</p>  |

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|   | <b>Guatemala:</b> | <b>Compatible.</b> The provisions of the Rome Statute empowering the ICC to order the forfeiture of proceeds, property and assets deriving directly or indirectly from a crime and their transfer to the Trust Fund did not constitute a limitation on the right to property enshrined in the constitution. Similarly, the ICC's power to transfer to the Trust Fund such proceeds, property and assets on behalf of the victims was no more than a simple way to ensure reparation of injury or prejudice suffered as the result of a crime.   |
|   | <b>Armenia:</b>   | <b>Incompatible.</b> Persons under the territorial jurisdiction of Armenia but convicted by the ICC could not benefit from the reduction of sentences provided for in the constitution. Article 103 of the Rome Statute was therefore contrary to Armenia's constitution.   |
| <i>Principle of legality (Arts 6, 7 and 8 Rome Statute)</i> | <b>Colombia:</b>  | Articles 6, 7 and 8 of the Rome Statute lacked the "precision, certainty and clarity" required by Colombian law to accord with the principle of legality, although the standard for this was lower in international law than in national systems. However, the Elements of Crimes, not yet published, would provide some of the required detail.  |
| <i>Command responsibility (Art. 28 Rome Statute)</i>        | <b>Colombia:</b>  | Article 28 of the Rome Statute extended the command-responsibility doctrine beyond the scope attained by Colombian law, the latter explicitly providing only for direct responsibility, and then only for official military commanders. The Constitutional Court found a basis in case-law for accepting the application of command responsibility to omissions, and in Legislative Act No. 2 for extending it to civilian authorities.   |
| <i>Defences (Arts 31[1c] and 33 Rome Statute)</i>           | <b>Colombia:</b>  | <b>Compatible.</b> There were differences between Article 31(1c) of the Rome Statute on the defence of property as grounds for excluding criminal responsibility for war crimes and Article 33 of the Rome Statute on superior orders. For the former, Colombia's Constitutional Court referred to the four conditions found in the Statute for its applicability: (1) the act concerned must be a war crime; (2) the property defended must be "essential" for the survival of the person accused or another person or a military mission; (3) the defence must be against an unlawful and imminent use of force; and (4) the defence must be proportionate. These were found to be compatible with international humanitarian law.<br><br>As for Article 33 of the Rome Statute on superior orders, Article 91 of the constitution explicitly exonerated military personnel from responsibility for criminal acts arising from an order to commit those acts. In such cases, responsibility would fall only on the person giving the order. However, Colombian jurisprudence had previously stated that Article 91 did not apply to cases of international crimes, as this would be incompatible with international humanitarian law. |

## PART B - CONSTITUTIONAL PROVISIONS RELATING TO THE ROME STATUTE

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| <b>COLOMBIA:</b>   | <b>Article 93-3 and 4.</b> Colombia can recognize the jurisdiction of the International Criminal Court in the terms provided for in the Rome Statute adopted on 17 July 1998 by the United Nations Conference of Plenipotentiaries and may, as a result, ratify that treaty in conformity with the procedure laid down in the Colombian constitution.<br><br>Accepting a different approach to substantial issues by the Rome Statute with respect to guarantees contained in the constitution shall have effect exclusively within the ambit of the matter regulated in it [the Statute]. |
| <b>FRANCE:</b>     | <b>Article 53-2.</b> France may recognize the jurisdiction of the International Criminal Court as provided for by the treaty signed on 18 July 1998.   |
| <b>IRELAND:</b>    | <b>Article 29-9.</b> The State may ratify the Rome Statute of the International Criminal Court done at Rome on the 17 <sup>th</sup> day of July, 1998.   |
| <b>LUXEMBOURG:</b> | <b>Article 118.</b> The provisions of the constitution do not hinder the approval of the Statute of the International Criminal Court, done in Rome on 17 July 1998, and the performance of the obligations arising from the Statute according to the conditions provided therein.  |
| <b>MADAGASCAR:</b> | <b>Article 131.</b> The provisions of the constitution do not hinder the ratification of the Statute of the International Criminal Court, done in Rome on 17 July 1998, and the performance of the obligations arising from the Statute according to the conditions provided therein.  |
| <b>PORTUGAL:</b>   | <b>Article 7-7.</b> With a view to achieving international justice that promotes respect for the rights of both individuals and peoples, and subject to the provisions governing complementarity and the other terms laid down in the Rome Statute, Portugal may accept the jurisdiction of the International Criminal Court.  |

**XV**  
**MODEL PLAN OF  
ACTION, WORKSHEET  
AND ANNUAL REPORT  
FOR NATIONAL  
IHL COMMITTEES**

## Model plan of action for [period] of the [name] Committee, adopted on [date]

### Distribution list

#### I. OBJECTIVES, STRATEGIES AND RESPONSIBILITIES

1. Participation in treaties and examination of validity of reservations  
(*Example Objective:* promoting ratification of the Mine Ban Convention. *Strategy:* present arguments to the Ministry of Defence. *Responsibility for pursuing the objective:* Ministry of Defence representative on the Committee.)
2. Adoption of national implementation measures  
(*Example Objective:* implementation of the Rome Statute of the International Criminal Court. *Strategy:* prepare a draft bill for submission to Parliament. *Responsibility for pursuing the objective:* Committee working group in charge of the repression of war crimes.)
3. Monitoring of new developments in international humanitarian law on the national and the international levels  
(*Example Objective:* monitoring the proceedings of an international conference on international humanitarian law and ensuring that they are subsequently taken into account by the authorities. *Strategy:* advise the authorities during preparations for the conference and take part in it as an expert or a member of the delegation of the State in question. *Responsibility for pursuing the objective:* Ministry of Foreign Affairs representative on the Committee.)
4. Internal operation of the Committee  
(*Example Objective:* amendment of the Committee's charter. *Strategy:* adopt a new draft and submit it to the authority to which the Committee is attached. *Responsibility for pursuing the objective:* Committee in plenary session.)

#### II. EVENTS AND CONTACTS

1. Participation in/organization of conferences, seminars and study sessions  
[Subjects, dates, places]
2. Contacts with other committees  
[Countries of committees in question, issues to be discussed, dates, places]

#### III. BUDGET

1. Amount needed  
[Allocation]
2. Funds available and to be sought  
[Allocation, source, and strategy for securing possible budget increase]

#### IV. SCHEDULE

[Dates of plenary meetings and known deadlines]



## Model work sheet

### [Insert subject]: work sheet No. ...

(updated on day/month/year)

#### I. PROVISION(S) TO BE IMPLEMENTED

1. International legal basis
  - Name(s) of treaty(ies) concerned
  - Number(s) and content of article(s) concerned
2. National legal basis
  - Name(s) of law(s) incorporating the treaty(ies) mentioned above

#### II. STATUS OF THE ISSUE

1. Existing measures  
[Description]
2. Action already taken and results achieved (chronological order)
  - Authority(ies) taking action (executive and legislative authorities, Committee, one of its working groups or members)
  - Action taken and result(s) achieved
3. Analysis of necessary implementation measures
  - Shortcomings
  - Measure(s) to be taken to remedy those shortcomings

#### III. PROPOSAL OF PRACTICAL MEASURES AND SUBMISSION TO THE AUTHORITY RESPONSIBLE FOR THE MATTER

*(Example: "The Committee proposes that the report of the working group, together with a draft bill amending the criminal code, be submitted to the Minister of Justice, with a request that the Minister recommend action on the Committee's proposal.")*

#### IV. FOLLOW-UP

1. Date of submission to the relevant authority, period allowed for reply, and contacts with the authority concerned
2. Issue by the Committee of a reminder within the time frame established
3. Reply from the authority

#### V. BUDGETARY IMPLICATIONS

1. Measure(s) 1
  - Ministry(ies) or authority(ies) responsible for the matter [where appropriate, indicate the working group or sub-committee in charge and the name, first name, position, address, telephone and fax numbers and e-mail address of its chairperson]
  - Financial implications [amount and source]
2. Measure(s) 2 ...

#### ANNEXES

[Documents relating to the issue in question, such as report of the working group or sub-committee in charge of the matter, the text of the law or regulation to be amended with indication of source, the text of the draft law, regulation or administrative measure prepared by the Committee]



## Model annual report

### Annual report for [year] of the [name] Committee

#### I. INTRODUCTION

[Distribution, reminder of the Committee's mandate and composition]

#### II. ORGANIZATION AND STRUCTURE

1. Plenary meeting(s) of the Committee
  - Date(s)
  - Matter(s) dealt with
2. Opinions, recommendations and reports adopted by the Committee
  - Date(s) of adoption and issue(s) addressed
3. Working groups
  - Number and subjects dealt with
  - Chairmanship and composition
  - Report(s) adopted

#### III. SPECIFIC ACTIVITIES AND RESULTS

1. Promotion of participation in treaties and analysis of the validity of reservations
  - Activity(ies) undertaken (especially those provided for in the plan of action)  
[Dates, role played by the Committee, etc.]
  - Result(s) achieved
2. Adoption of national implementation measures
  - Activity(ies) undertaken (especially those provided for in the plan of action)  
[Dates, role played by the Committee, etc.]
  - Result(s) achieved
3. Monitoring of new developments in international humanitarian law on the domestic and international levels
  - Activity(ies) undertaken (especially those provided for in the plan of action)  
[Dates, role played by the Committee, etc.]
  - Result(s) achieved
4. Cooperation
  - Activity(ies) undertaken (especially those provided for in the plan of action)  
[Dates, role played by the Committee in taking part in or organizing conferences, seminars, study sessions; contacts with other committees or bodies in charge of implementation of international humanitarian law]
  - Result(s) achieved

#### IV. EVALUATION

1. General work of the Committee
2. Comments on specific activities or results

#### ANNEXES

- Annex I Reports on meetings
- Annex II Reports of working groups
- Annex III Texts of opinions and recommendations and of any draft law or document prepared by the Committee during the year

**XVI**  
**GUIDING PRINCIPLES**  
**FOR THE DOMESTIC**  
**IMPLEMENTATION OF A**  
**COMPREHENSIVE SYSTEM**  
**OF PROTECTION FOR**  
**CHILDREN ASSOCIATED WITH**  
**ARMED FORCES OR**  
**ARMED GROUPS**

# Presentation

Recruiting children into armed forces or armed groups and forcing them to get involved in the fighting is a recurrent practice in contemporary armed conflict. The consequences in humanitarian terms are often tragic and irreversible, for the children concerned and for their families and communities. Children who take part in fighting and witness atrocities, or themselves commit atrocities, may unwittingly destroy their childhood and be marked for life.

The issue of children's association with armed forces or armed groups is one to which the International Committee of the Red Cross (ICRC), a humanitarian organization and the custodian of international humanitarian law, devotes particular attention. It does this not only in the context of its operational activities to benefit victims but also in its work to promote and spread knowledge of humanitarian law and to ensure its implementation and respect by States involved in armed conflicts.

The protection of children affected by armed conflicts, international and non-international, has been a source of concern for many decades. A significant number of legal instruments, binding and non-binding, have been gradually adopted with a view to minimizing the risks to such children. These instruments pay particular attention to the question of the minimum age of involvement of children in hostilities and to the types of activity that should be prevented.

The gradual process of codifying the regime of protection for children has undoubtedly contributed to improving the general protection for them against the effects of conflicts. It has however also led to practical difficulties because, depending on the legal framework applicable in a given context, the types and extent of the obligations of the parties involved in the conflict may vary considerably.

Together with a number of international and non-governmental organizations, the ICRC has actively contributed to the development of international rules protecting children against the effects of armed conflicts. The ICRC is also investing a great deal of effort in promoting the ratification of relevant treaties, as well as their extensive implementation.

The ICRC is committed to helping States – through its Advisory Service on International Humanitarian Law – to establish domestic frameworks for implementing and enforcing, and thus ensuring respect for, the law. It should be noted that the need for such normative frameworks exists in *all countries*.

On the basis of its legal work and its activities in conflict situations, the ICRC has reached the conclusion that, although some important questions have not yet been fully addressed in legal instruments, most of the suffering endured by children during armed conflicts can be prevented or alleviated if there is greater respect for and more scrupulous implementation of *existing* rules. Unfortunately, experience clearly demonstrates that, in the absence of practical measures of implementation developed at the domestic level, accepted rights and obligations are often a dead letter.

It was with this in mind that the ICRC decided to work on the development of a set of *Guiding Principles for the Domestic Implementation of a Comprehensive System of Protection for Children Associated with Armed Forces or Armed Groups*, presented for the first time in this publication.

The Guiding Principles are the result of a consultation process that included detailed examination of the various rules and principles relevant to the protection of children affected by armed conflicts. They also benefited from the work carried out during a meeting of experts organized by the ICRC in December 2009 (Children Associated with Armed Forces or Armed Groups: Implementation of International Norms on the Recruitment and Participation of Children in Armed Conflicts, Geneva, 7-9 December 2009).

The general objectives of these discussions with government officials, representatives of the various UN agencies, and experts from non-governmental organizations engaged in securing protection for children during armed conflicts were:

- to analyse the international legal framework applicable to the involvement of children in armed conflicts and the commitments made in this regard on the international and regional levels, as well as the implications for the laws and the domestic practice of States; and
- to encourage the development of, and compliance with, legislative and other national measures for implementing the international rules relating to the recruitment and use of children in hostilities by armed forces and/or armed groups, with a particular focus on the Optional Protocol of 25 May 2000 to the Convention on the Rights of the Child on the involvement of children in armed conflict.

A series of presentations introduced a number of different topics, which were eventually discussed in small working groups. Participants based their discussions on a detailed questionnaire whose purpose was to raise pertinent legal and policy issues.

The Guiding Principles, which were drafted by the ICRC, draw heavily on the views expressed at the meeting of experts in 2009.

**Although a number of experts made extremely useful contributions during the drafting phase, the ICRC takes full responsibility for the final version of the Guiding Principles.**

The specific aim of the Guiding Principles is to suggest practical and detailed measures for effective domestic implementation of the international rules protecting children affected by armed conflict.

The Guiding Principles emphasize the *obligations of the States party to international treaties*, but that in no way alters the fact that these obligations also apply to armed groups involved in armed conflicts.<sup>1</sup>

Finally, it must be noted that the Guiding Principles are not aimed at *developing* new law. They are intended a) to **clarify existing obligations** (taking into consideration the fact that the degree of ratification of the applicable treaties is uneven); b) **to facilitate** – through legislative, administrative and practical measures – **respect for existing obligations**; and c) to **serve the purpose of promoting, disseminating and, in particular, implementing the relevant provisions**.

The Guiding Principles, and the laws, regulations and other measures already adopted by States may be found in the 'National Implementation Database' on the ICRC website (<http://www.icrc.org/eng/resources/ihl-databases/index.jsp>).

<sup>1</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Optional Protocol), Art. 4(1).

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## Introduction: Purpose and methodology

These Guiding Principles are intended to serve the purpose of promoting and spreading knowledge of international humanitarian law and, in particular, of implementing the provisions protecting children affected by armed conflicts, especially children associated or previously associated with armed forces or armed groups.

The Guiding Principles suggest a number of practical, regulatory and legal measures as means to encourage States to improve such protection. They are based mainly on binding international rules (taking into account the specific obligations of all relevant treaties and of customary law). They also refer to widely accepted instruments of a non-binding character ("soft law"). A checklist of the main obligations regarding children associated with armed forces and armed groups is provided in Annex IV.

**In the Guiding Principles, measures based on binding international rules can be recognized by the use of the word "must." Recommendations based on soft law instruments, "best practices," or proposals made during the meeting of experts mentioned in the preceding pages can be recognized by the use of the words "should" or "could."**

The aim of the Guiding Principles is to recommend practical and detailed measures for the effective domestic implementation of the international rules protecting children affected by armed conflicts and thus enhancing the protection afforded to children. Although the emphasis is on the *obligations of States party to international treaties*, the obligations of armed groups have also been mentioned when appropriate. Many of the proposed measures could be applied, *mutatis mutandis*, by and to armed groups; others clearly depend on the existence of a State apparatus.

Although the Guiding Principles will have to be applied in accordance with the domestic legal orders and drafting traditions of the countries where they are used, they provide specific directions on how laws, regulations and other measures can ensure respect for recognized international legal standards. They should not, however, be viewed as a model law. Legislative traditions are too various and no single format can accommodate all the differences. Furthermore, the task of protecting children affected by armed conflict involves a number of different problems that should be tackled separately. Finally, it is important that all the laws, regulations and other measures that are developed to protect children against the effects of hostilities should emerge from a process of analysis and assessment that includes all interested parties.

The measures proposed are preventive, suppressive, educational and rehabilitative in nature. It is important that they be implemented through the most suitable legal channel. The Guiding Principles are designed to facilitate the work of national committees on international humanitarian law (where such bodies have been established) as well as to serve as a guide for national authorities and for commanders of armed groups in developing and adopting legislation or codes of conduct regarding the recruitment and participation of children in armed conflict.

The Guiding Principles cover the fundamental aspects of the law and propose a graduated approach to providing the strongest protection for children associated – at present and in the future – with armed forces or armed groups. They include a commentary that sets out, principle by principle, the rights, obligations and responsibilities under international law of responsible authorities or commanders.

The Guiding Principles should be used in conjunction with Annex XVII of this Manual. Annex XVII suggests Model Legislative Provisions addressing the specific issues of recruitment and use of children in armed conflict.

As has already been mentioned, the Guiding Principles are the result of a consultation process that involved detailed examination of the various rules and principles relevant to the protection of children affected by armed conflicts. The legal framework proposed here has its basis in a number of international instruments – specifically, the following provisions (See Annex I: Applicable law [extracts]):

### **International humanitarian law: Treaty law**

- Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949, (GCIII) – Articles 4, 16, 49;<sup>2</sup> *universally ratified*<sup>3</sup>
- Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 (GCIV) – Articles 14(1), 23(1), 24, 38(5), 40(3), 50, 68(4), 76, 89;<sup>4</sup> *universally ratified*<sup>5</sup>
- Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (API), of 8 June 1977 – Articles 43, 44, 48, 51, 70(1), 75, 77, 86;<sup>6</sup> *170 States Parties*<sup>7</sup>
- Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (APII), of 8 June 1977 – Articles 4(3), 6, 13.<sup>8</sup> *165 States Parties*<sup>9</sup>

### **International humanitarian law: Customary law**

ICRC Study – Rules 135-137.<sup>10</sup>

### **International human rights law**

- Convention on the Rights of the Child (1989) – Articles 1, 37, 38, 40, 44;<sup>11</sup> *193 States Parties*<sup>12</sup>
- The African Charter on the Rights and Welfare of the Child (1999) – Article 22;<sup>13</sup> *45 States Parties*
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000);<sup>14</sup> *141 States Parties*<sup>15</sup>
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) – Article 11(4);<sup>16</sup> *46 States Parties*
- Ibero-American Convention on the Rights of Youth (2005) – Article 12;<sup>17</sup> *17 States Parties*
- United Nations Committee on the Rights of the Child General Comment No. 10 (2007): Children's rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10.<sup>18</sup>

### **Other relevant instruments (including regional codes)**

- International Labour Organization Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour: C182 (1999) – Articles 3(a-d), 7;<sup>19</sup> *173 States Parties*

<sup>2</sup> Available at <http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument> (last visited 10 June 2011).

<sup>3</sup> Detailed listing of States party to these conventions, dates of signature and ratification/accession, and text of declarations and reservations is available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited 25 March 2011).

<sup>4</sup> Available at <http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument> (last visited 10 June 2011).

<sup>5</sup> See above note 3.

<sup>6</sup> Available at <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument> (last visited 10 June 2011).

<sup>7</sup> Detailed listing of States party to this protocol, dates of signature and ratification/accession, and text of declarations and reservations is available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P> (last visited 25 March 2011).

<sup>8</sup> Available at <http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument> (last visited 10 June 2011).

<sup>9</sup> Detailed listing of States party to this protocol, dates of signature and ratification/accession, and text of declarations and reservations is available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P> (last visited 25 March 2011).

<sup>10</sup> Available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter39\\_rule135](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter39_rule135), [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter39\\_rule136](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter39_rule136) and [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter39\\_rule137](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter39_rule137) (last visited 10 June 2011).

<sup>11</sup> Available at <http://www.icrc.org/ihl.nsf/FULL/540?OpenDocument> (last visited 10 June 2011).

<sup>12</sup> Detailed listing of States party to this convention, dates of signature and ratification/accession, and text of declarations and reservations is available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=540&ps=P> (last visited 25 March 2011).

<sup>13</sup> Available at [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf) (last visited 25 March 2011).

<sup>14</sup> Available at <http://www.icrc.org/ihl.nsf/FULL/595?OpenDocument> (last visited 10 June 2011).

<sup>15</sup> Detailed listing of States party to this convention, dates of signature and ratification/accession, and text of declarations and reservations is available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=595&ps=P> (last visited 10 June 2011).

<sup>16</sup> Available at [http://www.achpr.org/english/\\_info/women\\_en.html](http://www.achpr.org/english/_info/women_en.html) (last visited 10 June 2011).

<sup>17</sup> Available at <http://www.unhcr.org/refworld/publisher,OJ,,4b28eefe2,0.html> (last visited 10 June 2011).

<sup>18</sup> Available at [http://www2.ohchr.org/english/bodies/crc/docs/GC10\\_en.doc](http://www2.ohchr.org/english/bodies/crc/docs/GC10_en.doc) (last visited 10 June 2011).

<sup>19</sup> Available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (last visited 10 June 2011).

- Statute of the International Criminal Court (1998) – Articles 8(2) (b xxvi), 8(2e vii), 25, 26, 31(1a-b-d);<sup>20</sup> *114 States Parties*<sup>21</sup>
- Guidelines on Children and Armed Conflict adopted by the European Union (2003, updated 2008);<sup>22</sup>
- United Nations Security Council resolution 1612 on Children and Armed Conflict (S/RES/1612 [2005]);<sup>23</sup>
- United Nations Security Council resolution 1882 on Children and Armed Conflict (S/RES/1882 [2009]);<sup>24</sup>
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice [Beijing Rules] (General Assembly resolution 40/33 of 29 November 1985);<sup>25</sup>
- The Paris Commitments to protect children from unlawful recruitment or use by armed forces or armed groups [Paris Commitments] (2007);<sup>26</sup>
- The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups [Paris Principles] (2007) – Articles 2 and 8;<sup>27</sup>
- N'Djamena Declaration on Ending Recruitment and Use of Children by Armed Forces and Groups (2010) – Article 4.

# 1. Legal protection for children in armed conflicts: A summary

International humanitarian law provides broad protection for children. In the event of armed conflict, whether international or non-international, children benefit from the **general protection** provided for civilians not taking part in the hostilities. Civilians are guaranteed humane treatment and covered by the legal provisions on the conduct of hostilities. Given the particular vulnerability of children, the Third and Fourth Geneva Conventions of 1949 (hereafter GCIII and GCIV) and their Additional Protocols of 1977 (hereafter API and APII) lay down a series of rules according them **special protection**. Children who have taken a direct part in hostilities do not lose that special protection. In particular, the 1977 Additional Protocols, the 1989 Convention on the Rights of the Child and its 2000 Optional Protocol on the involvement of children in armed conflict also set limits on children's **recruitment and participation in hostilities**.

## General protection

In an **international armed conflict**, children who are not members of the armed forces of a State are protected by GCIV on the protection of civilians and by API. They are covered by the fundamental guarantees that these treaties provide, particularly the right to life, the prohibition of coercion, corporal punishment, torture, collective punishment and reprisals (Art. 27-34 of GCIV and Art. 75 of API) and by the rules of API on the conduct of hostilities, including both the rule that a distinction must be made between civilians and combatants and the prohibition on attacks against civilians not taking part in hostilities (Art. 48 and 51).

In a **non-international armed conflict**, children are covered by the fundamental guarantees for persons not taking direct part in the hostilities or having ceased to taking part (Art. 3 common to the Geneva Conventions and Art. 4 of APII). They are further protected by the principle that “the civilian population as such, as well as individual civilians, shall not be the object of attack” (Art. 13 of APII).

## Special protection

In an **international armed conflict**, GCIV guarantees special “care” for children, but it is API that lays down the principle of special protection: “Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason” (Art. 77). This principle also applies to **non-international armed conflict** (Art. 4[3] of APII). The provisions setting out

<sup>20</sup> Available at <http://www.icrc.org/ihl.nsf/FULL/585?OpenDocument> (last visited 10 June 2011).

<sup>21</sup> Detailed listing of States party to these conventions, dates of signature and ratification/accession, and text of declarations and reservations is available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=585&ps=P> (last visited 29 March 2011).

<sup>22</sup> Available at <http://www.consilium.europa.eu/uedocs/cmsUpload/GuidelinesChildren.pdf> (last visited 10 June 2011).

<sup>23</sup> Available at <http://www.unhcr.org/refworld/docid/43f308d6c.html> (last visited 10 June 2011).

<sup>24</sup> Available at [http://www.un.org/children/conflict/\\_documents/SC-RESOLUTION1882-2009.pdf](http://www.un.org/children/conflict/_documents/SC-RESOLUTION1882-2009.pdf) (last visited 10 June 2011).

<sup>25</sup> Available at <http://www2.ohchr.org/english/law/pdf/beijingrules.pdf> (last visited 10 June 2011).

<sup>26</sup> Available at [http://www.un.org/children/conflict/\\_documents/pariscommitments/ParisCommitments\\_EN.pdf](http://www.un.org/children/conflict/_documents/pariscommitments/ParisCommitments_EN.pdf) (last visited 10 June 2011).

<sup>27</sup> Available at <http://www.un.org/children/conflict/english/parisprinciples.html> (last visited 10 June 2011).



this protection include rules on evacuation,<sup>28</sup> assistance and care;<sup>29</sup> identification, family reunification and unaccompanied children;<sup>30</sup> education;<sup>31</sup> arrested, detained or interned children;<sup>32</sup> exemption from the death penalty and protection against recruitment and participation in hostilities.<sup>33</sup>

The principle of special protection for children affected by armed conflict is considered as a customary rule of international law.<sup>34</sup>

## Recruitment and participation in hostilities

### *The 1977 Additional Protocols*

Children frequently take part in armed hostilities. Their participation may range from aiding combatants (bringing them weapons and munitions, carrying out reconnaissance missions, etc.) to being recruited to serve as combatants in national armed forces or fighters in armed groups. Article 77 of API obliges the States to take all feasible measures to prevent children under 15 years of age from taking direct part in hostilities. It expressly prohibits their recruitment into the armed forces and advises the parties to conflict to give priority in recruiting, among those aged between 15 and 18, to the eldest (Art. 77). APII goes further, prohibiting both the recruitment of children under 15 years of age and their participation – direct or indirect – in hostilities (Art. 4[3c]).

Members of armed forces involved in an international armed conflict – children included – *are considered as combatants* and in the event of their capture are entitled to prisoner-of-war status under GCIII and customary law.<sup>35</sup>

The Additional Protocols stipulate that children taking a direct part in hostilities under the age of 15 are entitled to privileged treatment: in the event of capture they continue to benefit from the special protection accorded to children by international humanitarian law (Art. 77[3] of API and Art. 4[3d] of APII).

### *The 1989 Convention on the Rights of the Child*

This treaty covers all the fundamental rights of children. Article 38 refers to the applicability of international humanitarian law and urges the States Parties to take all feasible measures to ensure that those less than 15 years old do not take direct part in hostilities (para. 2) and to ensure that recruiters give priority to the oldest of those aged between 15 and 18 (para. 3). The article applies to all States Parties irrespective of the existence of hostilities. The Convention on the Rights of the Child does not contain a derogation clause.

The treaty also provides for a monitoring mechanism that is strengthened by the States Parties' obligation to report on the national measures they have adopted (Art. 44).

### *The 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*

The Optional Protocol strengthens protection for children involved in armed conflict:

- The States Parties are required to take all feasible measures to ensure that members of their armed forces who have not reached the age of 18 do not take direct part in hostilities (Art. 1).
- Compulsory recruitment into State armed forces of persons under 18 years of age is prohibited (Art. 2).
- The States Parties are required to raise the minimum age for voluntary recruitment from 15 years. This rule does not apply to military academies (Art. 3).
- The States Parties are required to deposit a binding declaration upon ratification or accession that sets forth the age at

<sup>28</sup> GCIV, Art. 14, 17, 24 (para. 2), 49 (para. 3) and 132 (para. 2); API, Art. 78; APII, Art. 4 (para. 3e).

<sup>29</sup> GCIV, Art. 23, 24 (para. 1), 38 (para. 5), 50 and 89 (para. 5); API Art. 70 (para. 1) and 77 (para. 1); APII, Art. 4 (para. 3).

<sup>30</sup> GCIV, Art. 24-26, 49 (para. 3), 50 and 82; API, Art. 74, 75 (para. 5), 76 (para. 3) and 78; APII, Art. 4 (para. 3b) and 6 (para. 4).

<sup>31</sup> GCIV, Art. 24 (para. 1), 50 and 94; APII, Art. 78 (para. 2); API, Art. 4 (para. 3a).

<sup>32</sup> GCIV, Art. 51 (para. 2), 76 (para. 5), 82, 85 (para. 2), 89, 94, 119 (para. 2) and 132; API, Art. 77 (para. 3 and 4); APII, Art. 4 (para. 3d).

<sup>33</sup> GCIV, Art. 68 (para. 4); API, Art. 77 (para. 5); APII, Art. 6 (para. 4).

<sup>34</sup> ICRC Study, Rule 135.

<sup>35</sup> ICRC Study, Rules 136 and 137.

which they will permit voluntary recruitment (Art. 3[2]).

- Armed groups distinct from the national armed forces should not, under any circumstances, recruit (on either a compulsory or a voluntary basis), or use in hostilities, persons under the age of 18. The States Parties are required to take all feasible measures to prevent, prohibit and criminalize such practices (Art. 4).

### ***The 1998 Statute of the International Criminal Court***

This Statute, also known as the Rome Statute, includes in its list of war crimes within the Court's jurisdiction the use of children under 15 years of age to participate actively in hostilities or their conscription or enlistment into national armed forces during an international armed conflict (Art. 8 [2b xxvii]) or into the national armed forces or other armed groups during a non-international armed conflict (Art. 8 [2e vii]).

In accordance with the principle of complementarity on the basis of which the Statute is framed (Art. 17-19), the Court has jurisdiction in situations where a State is unwilling or unable genuinely to carry out the investigation or prosecution. In order to take advantage of this principle and to ensure – at the national level – the suppression of such crimes, States should adopt legislation enabling them to prosecute perpetrators.

As the Court focuses on the prosecution of the most serious crimes and the most serious offenders, a lack of appropriate national law may result in some violators escaping prosecution.

### ***The 1999 International Labour Organization Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (C 182)***

Article 3(a) of the Convention No. 182<sup>36</sup> considers the forced recruitment of children to be a form of slavery and includes it amongst the worst forms of child labour. Under Article 7, the States Parties are required to take measures to ensure the effective implementation and enforcement of the Convention's provisions.

### ***Other norms***

In addition to these treaty provisions, children are also protected by a number of rules of customary international humanitarian law and by several instruments of “soft law” (See Annex I on applicable law).

<sup>36</sup> ILO Convention No. 182 has been ratified by 173 of the 183 ILO member States (as of December 2010).

## 2. National measures to incorporate legal protections

### *National implementation*

Despite the rules laid down by international law, thousands of children are today taking an active part in and are victims of hostilities.

*The States have a responsibility* to put an end to this situation. They are therefore urged to *ratify the treaties* protecting children in armed conflict and to *take national measures adapted to their legal systems* to implement those treaties. Whether in legislative or other form, such measures are needed to enable the States to respect and to ensure respect for the rules laid down by the treaties.

It is suggested that priority be granted to implementing the rules listed below.

### *Recruitment and participation in hostilities*

- A State bound by the **Optional Protocol** to the Convention on the Rights of the Child must take legal, administrative and other measures to ensure effective implementation of the Protocol's provisions (Art. 6). This implies that all feasible measures must be taken to ensure that children under 18 years of age do not take direct part in hostilities (Art. 1) and to ensure that there is no compulsory recruitment of children under 18 years of age (Art. 2). Since armed groups that are distinct from the national armed forces should not recruit or use children under 18 years of age in hostilities (Art. 4[1]), the States Parties must adopt legal measures to prohibit and criminalize such recruitment and use (Art. 4[2]).
- The States party to the **Convention on the Rights of the Child** (Art. 38[3]) or to **API** (Art. 77[2]) must take legislative, administrative and other measures in accordance with Article 4 of the Convention on the Rights of the Child prohibiting the recruitment into their armed forces of children under 15, and measures ensuring that recruiters give priority to the oldest among those between 15 and 18 years of age.
- The States party to **API** must take all feasible measures to suppress the recruitment in their armed forces of children under 15 (Art. 86).
- The States party to **APII** must take all feasible measures (in non-international armed conflicts) to prohibit the recruitment of children under 15 years of age and their participation in hostilities (Art. 4[3c]).
- In order to take advantage of the principle of complementarity, the States party to the **ICC Statute** should ensure that their national criminal legislation makes it possible to prosecute persons who have conscripted or enlisted children under 15 years of age or who have used children under 15 as active participants in hostilities (Art. 8[2b-xxvi, and e-vii]).

### *Detention and internment*

- The States party to the 1977 **Additional Protocols** must take all feasible measures to ensure that any child under 15 years of age who is arrested, detained or interned for reasons relating to conflict enjoys the special protection provided by international humanitarian law (Art. 77[3] of API and Art. 4[3d] of APII).

### *Death penalty*

- The States party to **GCIV** (Art. 68[4]) and the 1977 **Additional Protocols** (Art. 77[5] of API and Art. 6[4] of APII) and the **Convention on the Rights of the Child** (Art. 37) must take the measures needed under penal and military law to prohibit the pronouncement or carrying out of a death sentence against anyone less than 18 years old at the time of the offence, when the offence is related to an armed conflict.
- The States party to the **Convention on the Rights of the Child** (Art. 37) may not impose capital punishment for offences committed by persons below 18 years of age.

## 3. Definitions

For the purpose of this document, the following definitions (mostly taken from the Paris Principles, see Annex I) are used: The word **child** refers to every human being below the age of 18 years.<sup>37</sup>

**A child associated with armed forces or armed groups** refers to any person below 18 years of age who is, or has been, recruited or used by an armed force or armed group in any capacity, including but not limited to children – boys and girls – used as fighters, cooks, porters, messengers and spies or for sexual purposes.<sup>38</sup>

**Recruitment** refers to the involvement of children in any kind of armed force or armed group.<sup>39</sup>

- **Enlistment or voluntary recruitment** occurs when persons facing no threat or penalty join armed forces or groups of their own free will.<sup>40</sup>
- **Conscription** is compulsory recruitment into armed forces.
- **Forced recruitment** is a form of forced labour: it takes place without the consent of the person joining the armed forces or an armed group.<sup>41</sup> It is achieved mainly through coercion, abduction or under threat of penalty.
- **Unlawful recruitment** is recruitment of children under the age stipulated in the international treaties applicable to the armed forces or armed groups in question or in domestic law.<sup>42</sup>

**Armed forces** of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates. Such armed forces shall be subject to an internal disciplinary system.<sup>43</sup>

**Armed groups** refers to groups distinct from the armed forces of a State.<sup>44</sup>

**“Straight 18 Approach”** means the prohibition of recruitment and use of children in hostilities under 18 without exception.<sup>45</sup>

### Commentary

There is no comprehensive definition of the term “child” in international humanitarian law. The Geneva Conventions and their Additional Protocols, however, provide different rules with a different scope of application depending on the age. Three main rules can be easily extrapolated from an interpretation of some articles of the 1949 Geneva Conventions<sup>46</sup> and the 1977 Additional Protocols: 1) these treaties differentiate between children under the age of 15, to whom special protection must be accorded and children between the age of 15 and 18; 2) neither compulsory labour nor a death sentence may be imposed to children; 3) special protection is provided for younger children.<sup>47</sup>

Article 1 of the Convention on the Rights of the Child (CRC) has for the first time enshrined a definition of the word “child” in an internationally binding instrument of almost universal validity (a claim based on the extent of its ratification). Therefore, the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict sets provisions using this definition as a starting point.

Generally speaking, the term “recruitment” means the entire process of recruiting military personnel for the armed forces or armed groups and takes in all the phases of selection and training. Enlistment, conscription and forced recruitment are

<sup>37</sup> Unless, under the law applicable to the child, majority is attained earlier. (UN Convention on the Rights of the Child, Art. 1).

<sup>38</sup> Paris Principles 2007, Art. 2.1.

<sup>39</sup> Paris Principles 2007, Art. 2(4).

<sup>40</sup> Optional Protocol, Art. 3(2).

<sup>41</sup> ILO Convention 182, Art. 3(a).

<sup>42</sup> Paris Principles 2007, Art. 2(5).

<sup>43</sup> API, Art. 43(1).

<sup>44</sup> Optional Protocol, Art. 4.

<sup>45</sup> Optional Protocol, Arts 1, 2 and 3.

<sup>46</sup> More specifically, a number of articles in GCIIV contain provisions on children under 15 years of age (Arts 14[1], 23[1], 24, 38[5] and 50) and to those under the age of 18 (Arts 40[3] and 68[4]).

<sup>47</sup> See for instance: Art. 24(3) of the GCIIV for children less than 12 years of age.

governed by international law as follows. Recruitment of children under the age of 15 is prohibited by API and APII, by the CRC, and by customary international humanitarian law.<sup>48</sup> It is a crime under the Rome Statute. Conscription and forced recruitment of children less than 18 years of age are prohibited by the Optional Protocol (Art. 2) and ILO Convention No.182 (Art. 3[a]). Under the Optional Protocol, the age for voluntary recruitment of children must be raised above 15 years (Art. 3). In recruiting among persons who have attained the age of 15 but who have not yet attained the age of 18, the States must endeavour to give priority to the oldest (CRC Art. 38, API Art. 77[2]). The Optional Protocol imposes an absolute obligation on States Parties to raise their minimum age for voluntary recruitment from 15, as well as to consider a graduated process of working toward the goal of fully complying with the "straight-18" approach. (It is important to bear in mind that the "straight-18" concept refers to the principle that, "under the CRC, persons under the age of 18 are entitled to special protection."<sup>49</sup>)

The obligations regarding unlawful recruitment thus vary from State to State depending on their national legal framework, and particularly on the age at which recruitment is prohibited.

When it is not already the case, the Committee on the Rights of the Child recommends to States Parties that they raise the minimum age for recruitment into armed forces to 18 years.

Any State that cannot effectively differentiate between different regimes of obligations based on the various treaties to which it is party is strongly advised to take the "straight-18" approach.

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<sup>48</sup> See Annex I, ICRC Study, Rules 136-137.

<sup>49</sup> See Optional Protocol, Art. 3.1.

## 4. Children associated with armed forces

States bound by **API** must take all feasible measures to ensure that children under the age of 15 do not take direct part in hostilities.<sup>50</sup> They must also refrain from recruiting them into their armed forces.<sup>51</sup> When children between the ages of 15 and 18 are recruited and used in hostilities, priority should be given to the oldest.

States bound by **APII** must ensure that the recruitment of children under the age of 15 and their participation in hostilities – direct or indirect – are prohibited.

States bound by the **Optional Protocol** must ensure that the compulsory recruitment of children under the age of 18 is prohibited.<sup>52</sup> They must also take all feasible measures to ensure that children do not take direct part in hostilities.<sup>53</sup> The States Parties must take all feasible measures to prohibit and criminalize recruitment and use of children under the age of 18 by armed groups distinct from the armed forces, in accordance with Article 4. As stipulated in Article 3(1) of the Optional Protocol, they must raise the minimum age for voluntary recruitment from 15 while taking all feasible measures to guarantee that special protection is given for persons under 18 years of age. When becoming bound by the Optional Protocol, the States must deposit a binding legal declaration of their minimum voluntary recruitment age.

### Commentary

States must adopt comprehensive measures at the domestic level to meet their obligation on the recruitment and participation in hostilities of children. Implementation of international obligations at the domestic level undeniably begins with legislation from which subsequent regulatory and practical measures must be derived. These legal tools are at the core of effective protection.

A State that wishes to ban the recruitment of children under the age of 18 and their direct participation in hostilities can do so by adhering to the Optional Protocol and depositing a binding declaration as required in Article 3, setting 18 as the minimum age for voluntary recruitment. The declaration should express the State's commitment to not recruiting children under a fixed age either within its territory or on that of another State, regardless of whether they enlist voluntarily. Further, it must describe the safeguards that it has adopted to ensure that such recruitment is not forced or coerced.<sup>54</sup> As a minimum, safeguards must ensure the genuineness of consent, the informed consent of the parents or legal guardians, the full disclosure of the duties involved in the military service, and a reliable proof of age.<sup>55</sup>

The obligations relating to the prohibition of recruitment and participation of children in hostilities differ somewhat from one document to the other. While the States are encouraged to prohibit all types of recruitment and participation of children under 18 in armed conflicts, they are bound by the treaties to which they adhere. While API requires the States Parties to take all feasible measures to ensure that children under 15 do not take direct part in hostilities, APII extends this rule to all forms of participation in non-international armed conflict. For instance, while performing services for an armed group is indirect participation, involvement in combat is unequivocally considered direct participation.

When children between the ages of 15 and 18 are nevertheless recruited and used in hostilities, it is strongly recommended that priority should be given to the oldest among them.

<sup>50</sup> API, Art. 77(2).

<sup>51</sup> API, Art. 77(2).

<sup>52</sup> Optional Protocol, Art. 2.

<sup>53</sup> Optional Protocol, Art. 1.

<sup>54</sup> Optional Protocol, Art. 3(2).

<sup>55</sup> Optional Protocol, Art. 3(3).

## 5. Recruitment

### • Forced recruitment / compulsory recruitment / conscription

In States bound by **API** and **APII**, measures must be taken to prohibit all forms of recruitment (including forced recruitment, compulsory recruitment and conscription) of children under the age of 15.

States bound by the **Optional Protocol** must take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the prohibition of compulsory recruitment or conscription of children under the age of 18.<sup>56</sup>

State authorities should ensure that the relevant legislation requires registration for conscription to take place only the year when individuals reach the age of 15 or 18, as the case may be. While ascertaining an individual's ability to undertake military training, through a full medical examination, recruiters should also verify the reliability of his or her identification documents.

States bound by **ILO Convention 182** must take all measures needed to ensure the effective implementation and enforcement of the prohibition and suppression of forced recruitment of children under the age of 18.<sup>57</sup>

### • Voluntary recruitment / enlistment

States bound by **API** and **APII** must take measures to ensure that all forms of recruitment, including voluntary recruitment or enlistment in the armed forces of children under the age of 15, are prohibited.<sup>58</sup>

The States party to the **Optional Protocol** are obliged to make a declaration raising the minimum age for such recruitment higher than 15 years.<sup>59</sup>

State authorities should enact legislation providing minimum safeguards in order to verify that the recruitment of children is genuinely voluntary in every instance.

### • Recruitment or use in hostilities by armed groups distinct from the national armed forces

States must take all feasible measures to prohibit and criminalize the recruitment and use of children less than 18 years by armed groups distinct from the armed forces.<sup>60</sup>

## Commentary

### Forced recruitment

Article 3(a) of ILO Convention No. 182<sup>61</sup> considers the forced recruitment of children to be a form of slavery and includes it amongst the worst forms of child labour. The States Parties must therefore take all measures needed to ensure the effective enforcement of the prohibition of this practice, including the application of penal sanctions (Art. 7.1).

### Compulsory recruitment / Conscription

International humanitarian law prohibits the recruitment, voluntary or compulsory, of children under the age of 15.<sup>62</sup> In recent decades, the State practice prohibiting the recruitment of children under the age of 18 has been abundant, reflecting an

<sup>56</sup> Optional Protocol, Art. 6.

<sup>57</sup> ILO Convention 182, Art. 7(1) in relation to Art. 3 (a).

<sup>58</sup> API, Art. 77 (2) and APII, Art. 4 (3) (c).

<sup>59</sup> Optional Protocol, Art. 3.

<sup>60</sup> Optional Protocol, Arts 4 (1) and (2).

<sup>61</sup> ILO Convention No. 182 has been ratified by 173 of the 183 ILO member states (as of December 2010).

<sup>62</sup> API, Art. 77; APII, Art. 4 (3).

emerging "straight-18" approach, which is gradually gaining support. Undoubtedly, it constitutes a good practice. States still obliging children between the ages of 15 and 18 to be recruited but who want to comply with the prohibition could do so by specifying in the relevant legislation that the registration process should take place the year in which an individual reaches the age of 18. Military authorities bear responsibility for verifying the age of recruits through medical examinations and other legal means: identity cards, birth certificates, and so on.

An alternative to military service should be offered when possible.

### **Voluntary recruitment / Enlistment**

Under Article 77 of API and Article 4(3) of APII, the minimum age for the recruitment, voluntary or obligatory, of children into armed forces is 15. Under Article 3(1) of the Optional Protocol, however, the States Parties are required to raise the minimum age for voluntary recruitment above 15 years. Article 3(1) of the Optional Protocol reflects the compromise reached during the negotiation phase, when it was decided that States Parties could each establish a minimum age, between 16 and 18, in their domestic legislation. The majority of States Parties established 18 in their domestic legislation as the minimum age for voluntary recruitment. This shows that a trend towards a "straight-18" approach is developing at the international level. Only a small minority of States does not adhere to the "straight-18" approach.

Since children are entitled to special protection, the national authorities should adopt appropriate practical, regulatory and legal measures. When effective implementation appears to be challenged, the States should embrace the "straight-18" approach. It is critically important that the military authorities receive the necessary documents well before determining whether to approve the voluntary recruitment of a child. Those documents should include a written declaration attesting to the child's willingness to volunteer; a written statement (supported by a valid identity card or birth certificate) attesting to the child's age, and the written consent of the parents or guardians. At least two measures to strengthen protection for children are available to the military authorities: (1) a medical examination to ascertain the child's ability to perform military activities; and (2) psychological tests to ascertain the child's aptitude to military life. Asking the right questions can also help to determine whether the child genuinely wants to enlist and the reasons why the child has decided to do so.

Recruitment methods should be designed and implemented so as to make compliance with the law practicable. All recruitment should be done in a transparent manner, explaining all the implications of commitment. Such commitment should be reasonable, especially in duration.

In addition, the national authorities should provide information concerning the rights and obligations of potential voluntary recruits. The legislation should include pre-established conditions concerning duties, duration, discharge and sanctions, of which the child and its parents or guardians have to be fully aware. Competent authorities should establish a mechanism for lodging complaints, in order to protect children from any abuse.

States and armed groups should consider avoiding recruitment campaigns that target children, especially in schools. Furthermore, precautions should be taken to ensure that the premises used for recruitment are not attacked afterwards. Civilian sites of recruitment campaigns should retain their civilian character.



## 6. Juvenile justice

### a) Arrest and detention

Children deprived of their liberty must be treated with humanity.

Children accused of crimes under international or domestic law, allegedly committed while associated with armed forces or armed groups, must be detained only as a last resort.<sup>63</sup> In cases where detention is unavoidable, it must be imposed only for the shortest possible time<sup>64</sup> and be accompanied by the right to challenge its legality before a court or other competent, independent and impartial authority and the right to a prompt decision on any such action.<sup>65</sup> Children must have the right to maintain contact with their families through correspondence and visits.<sup>66</sup>

Considering the vulnerability of children, States should refrain from prosecuting them for mere association with an armed group and in such cases consider granting them amnesty.<sup>67</sup>

No matter the reason for their detention, special measures should be implemented to benefit detained children, such as educational programs, medical care, psychological support, adequate legal assistance and access to a mechanism for lodging complaints in the event of torture or other cruel, inhuman or degrading treatment or punishment.<sup>68</sup>

Children must be held separately from adults unless they are held together with their family. Boys should be separated from girls. Special attention should be paid to the needs of girls who are detained.<sup>69</sup>

While detention must be used only as a last resort, pre-trial detention must be avoided completely.<sup>70</sup> Collective punishments are prohibited.<sup>71</sup>

### Commentary

Children may have been deprived of their liberty by simple association with armed groups; as civilian internees; or on accusation of committing crimes.

International humanitarian law, the CRC, other instruments of human rights and soft law (see *The United Nations Standard Minimum Rules for the Protection of Juveniles Deprived of their Liberty*),<sup>72</sup> require that detained children accused of violations of the law be treated with humanity and dignity. This starts by ensuring that any detention of a child is in conformity with the law. Hence, no child must be deprived of liberty in an unlawful or arbitrary manner. Children must be given the opportunity to challenge the legality of that deprivation and therefore be given access to legal counsel. The detention of a child must be a last resort and limit itself to the shortest period of time. Indeed, alternatives to detention should be sought.

Children should also be accorded a number of practical benefits, such as educational programs combined with recreational activities and physical and psychological support to help them recover from the traumatic experience of conflict. Detained children should only be restrained in cases where they pose a threat to themselves or others. Therefore, detention must be used in the best interests of the children rather than as a means of punishment.<sup>73</sup>

<sup>63</sup> CRC, Art. 37(b); General Comment No. 10, para. 79.

<sup>64</sup> CRC, Art. 37(b).

<sup>65</sup> CRC, Art. 37(d).

<sup>66</sup> CRC, Art. 37(c); GCIII Art. 71; GCIV, Art. 116; APII, Art. 5(2).

<sup>67</sup> APII, Art. 6(5); N'Djamena Declaration on Ending Recruitment and Use of Children by Armed Forces and Groups (2010) – Art. 4; Paris Principles, Art. 8, para 7.

<sup>68</sup> CRC, Arts 39 and 40(4).

<sup>69</sup> AP1, Art. 77(4); CRC, Art. 37(c).

<sup>70</sup> General Comment No. 10, paras 80-81.

<sup>71</sup> GCIV, Art. 33 (para. 1).

<sup>72</sup> Available at <http://www.un.org/documents/ga/res/45/a45r113.htm>.

<sup>73</sup> General Comment No. 10, para. 89.

Under the CRC, family visits and correspondence must be authorized except in the legally prescribed exceptional circumstances.<sup>74</sup> Under the Third and the Fourth Geneva Conventions, prisoners of war and civilian internees are entitled to correspond with family members.<sup>75</sup> Under Additional Protocol II<sup>76</sup> persons whose liberty has been restricted shall be allowed to send and receive letters.

Following their arrest, children should be turned over as quickly as possible to a rehabilitation and reintegration agency. The States party to the CRC must acknowledge the right of every child to be treated consistently with his dignity and worth, thereby promoting alternatives that favour rehabilitative measures over punitive measures.<sup>77</sup> States should also encourage the use of close supervision, intensive care and placement in a home or educational setting.<sup>78</sup>

During international armed conflicts, States must grant the ICRC regular access to children detained in connection with the conflict.<sup>79</sup> During non-international armed conflicts, the States should regard with favour such offers by the ICRC or other impartial humanitarian organizations.<sup>80</sup>

While children must be separated from adults (unless detained in family units),<sup>81</sup> it is also recommended that girls be separated from boys. Such decisions must be made case by case according to the child's best interests.<sup>82</sup> The aim of detention being rehabilitation and reintegration into society, children must be granted care and protection based on their specific needs. Thus, offenders must receive special care that addresses their past involvement in armed conflict and their need for rehabilitation and reintegration. All children must receive fair treatment and not be placed under the negative influence of adults detained in the same facility.<sup>83</sup>

## b) Criminal responsibility

Children alleged to have committed crimes under international or domestic law while associated with armed forces or armed groups must be treated in accordance with international norms and standards for juvenile justice, keeping in mind that the principle of the best interests of the child must be a primary consideration in the administration of juvenile justice.<sup>84</sup>

### Commentary

The States must fix a minimum age for criminal responsibility, which should not be less than 12 years (CRC General Comment No. 10). Below the age of criminal responsibility, no prosecution must take place.

Children who are alleged to have committed war crimes should be primarily considered as victims and should be treated as such. On the other hand, to ignore their criminal responsibility could imply impunity and have the reverse and perverse effect of rendering them attractive to armed forces and armed groups since crimes committed by them would go unpunished. A solution to this problem has yet to be found by the international community.

In cases where persons under 18 are prosecuted, the fact that the prosecuted person is a minor must be taken into account in all aspects of the process. All relevant international norms set in the CRC must be taken into account with due consideration for their legal status as children. Other standards, as set out in the Beijing Rules and CRC General Comment No. 10, should also be considered.

The States party to the CRC must promote special procedures adapted to the children's specific needs. This means appropriately adapting the guarantees to a fair trial; the presumption of innocence, the right to be heard, the right to effective participation

<sup>74</sup> CRC, Art. 37 (c); General Comment No. 10, para. 87.

<sup>75</sup> GCIII, Art. 71; GCIV, Art. 116.

<sup>76</sup> APII, Art. 5 (2) b.

<sup>77</sup> CRC, Art. 40(1).

<sup>78</sup> General Comment No. 10, para. 23.

<sup>79</sup> GCIII, Art. 126; GCIV, Art. 76(6) and 143.

<sup>80</sup> GCI-IV, Common Art. 3.

<sup>81</sup> CRC, Art. 37(c); AP1, Art. 77(4).

<sup>82</sup> General Comment No. 10, para. 85.

<sup>83</sup> "Beijing Rules", Art. 26.

<sup>84</sup> CRC, Arts 3 and 40(1).

in the proceedings, prompt and direct information on the charges, legal or other appropriate assistance, decisions without delay and with involvement of parents or guardians, freedom from compulsory self-incrimination, presence and examination of witnesses, the right to appeal, free assistance from an interpreter, as well as the attention to the special needs of children.<sup>85</sup>

It is imperative that the child's best interests and well-being be considered in all circumstances. Age should be regarded as a mitigating circumstance. The use of age as a mitigating circumstance has gained international approval.<sup>86</sup>

Finally, the principle of the child's best interests dictates that the aim of criminal justice for children should shift from repression and retribution to rehabilitative and restorative justice. Diversion mechanisms should thus be allowed and utilized as appropriate.

There is an emerging consensus that international courts have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime. This consensus is based on the statute of the International Criminal Court and the practice of the Special Court for Sierra Leone amongst others. However, serious violations of international humanitarian law remain a matter of jurisdiction and do not exclude the legality of criminal prosecution under other courts, especially domestic ones.

Any child alleged to have committed, accused of committing, or recognized as having committed a war crime must be treated in a manner consistent with promoting that child's sense of dignity and worth. Whatever action is taken to ascertain the child's accountability, his or her age must be taken into account as well as the obligation to promote his reintegration into society. Due consideration must be given to the likelihood that the child has been a victim of war crimes. Whenever appropriate and desirable, such action should not include judicial proceedings. International human rights standards and legal safeguards should be fully respected at all times.

### c) Criminal proceedings

When prosecuted for crimes under international or domestic law allegedly committed while associated with armed forces or armed groups, children must be tried before domestic courts or other independent and impartial judicial bodies affording all judiciary guarantees that are generally recognized as indispensable.<sup>87</sup> In addition, the States party to the CRC must ensure that children receive a fair trial<sup>88</sup> and that neither capital punishment nor life imprisonment without possibility of release is imposed.<sup>89</sup>

The judicial bodies should not be military in nature. The States should establish a separate justice system for children.<sup>90</sup> In addition, whenever appropriate, measures for dealing with children without resorting to judicial proceedings should be taken.<sup>91</sup>

Where large numbers of people are facing criminal proceedings as a result of armed conflict, the processing of cases involving children should take priority.<sup>92</sup>

### Commentary<sup>93</sup>

Juvenile justice is intended to promote the physical and psychological recovery of children as well as their reintegration into society. Criminal proceedings should be adapted to those objectives and take into consideration the special needs of children as victims.

<sup>85</sup> CRC, Art. 40(2)(b).

<sup>86</sup> For example, in 1998 the International Criminal Tribunal for the former Yugoslavia considered youth as a mitigating factor in the case of *Prosecutor v. Furundzija* (1998), available at <http://www.icty.org/case/furundzija/4> (last visited 10 June 2011).

<sup>87</sup> GCIV, Common Art. 3; CRC, Art. 37(d).

<sup>88</sup> CRC, Art. 40.

<sup>89</sup> GCIV, Art. 68(4); CRC, Art. 37; General Comment No. 10 (2007), Children's rights in Juvenile Justice: 25 April 2007, paras 23-27.

<sup>90</sup> CRC, Art. 40(3), General Comment No. 10 (2007), Children's rights in Juvenile Justice: 25 April 2007, para. 30-31.

<sup>91</sup> CRC, Art. 40(3b).

<sup>92</sup> Paris Principles, Art. 8.10. The prioritization of prosecution of children has been practised in several countries (Burundi, Timor-Leste, etc.) and is considered good practice.

<sup>93</sup> See also Chapter 7(c) on Transitional Justice.

Children prosecuted under a domestic judicial system should be granted protection specific to their age. Should judicial proceedings be initiated, the principles of a fair trial as well as other relevant applicable standards and guarantees must be applied.<sup>94</sup> Proceedings relating to children who are alleged to have infringed, accused of infringing, or recognized as having infringed criminal law must take social and/or educational measures and strictly limit deprivation of liberty, particularly pre-trial detention, as a measure of last resort and for the shortest appropriate period of time. A variety of services – such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programs and other alternatives to institutional care – must be available to ensure that children are dealt with in a manner that promotes their well-being and is proportionate both to their circumstances and the offence.<sup>95</sup>

Article 40 of the CRC and various instruments of soft law (see for example the Beijing Rules) address the special protection that should be granted to children brought before criminal courts or other competent authorities. For instance, special assistance and other measures should be accorded if children are called to testify, and psychological support should be made available to the extent possible. No child should be forced to testify. The same sources, mainly Article 40(3) of the CRC, encourage the States to promote the establishment of a separate justice system for juvenile justice.

Children should be prosecuted in a separate – and civilian – justice system. The Committee on the Rights of the Child, however, has noted with concern information regarding attempts by certain States to incorporate international standards for juvenile justice into the proceedings of military courts.<sup>96</sup>

#### d) Sentencing

Sentencing must aim to foster the rehabilitation of children and there must be an effort to reintegrate the children into their communities. National authorities should directly contribute to this effort. The sentences handed down could take the form of residential placement or community service, for instance.<sup>97</sup>

In cases where punishment is considered, neither capital punishment nor life imprisonment without possibility of release should be imposed.<sup>98</sup>

#### Commentary

Cases where children are imprisoned for crimes under international or domestic law committed while they were associated with armed forces or armed groups should remain exceptional. National authorities should take appropriate measures for the re-education, rehabilitation, and social reintegration of children. States should consider the possibility of suspending sentences and allowing alternative follow-up.

Practical measures should be designed and implemented at the national level to facilitate the reintegration into society of children convicted of crimes committed when they were associated with armed forces or armed groups. This could take the form of some combination of educational programs and community service. Transitional justice mechanisms have demonstrated that doing something to benefit the community is likely to strengthen children's feeling that they have an active role to play in society and also restore their self-confidence, while at the same time encouraging the community to accept the returning children.<sup>99</sup> The child's family and/or the community should be involved whenever appropriate in the process of dealing with the crimes in order to discuss the facts of the case. This may help prevent community members from discriminating against or stigmatizing children formerly associated with armed forces or armed groups.

Under the Fourth Geneva Convention (Art. 68[4]), the "death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence." The Covenant on Civil and Political Rights (Art. 6[5]) states that the death sentence may not be imposed for crimes committed by persons below 18 years of age. The CRC (Art. 37[a]) lays down the same obligation, adding that children may not be sentenced to life imprisonment without the possibility of eventual release.

<sup>94</sup> CRC, Art. 40(2); General Comment No. 10, paras 40-67.

<sup>95</sup> CRC, Art. 40(4).

<sup>96</sup> Committee on the Rights of the Child, Consideration of reports submitted by States Parties under Art. 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, CRC/C/OPAC/ISR/CO/1, para. 33.

<sup>97</sup> "Beijing Rules", Rules 11 and 19; Paris Commitments, Art. 12; CRC, Art. 40(4).

<sup>98</sup> CRC, Art. 37(a).

<sup>99</sup> See also Chapter 7(c) on Transitional Justice.

## 7. Mechanisms to enforce the prohibition on recruiting children and provide redress for its victims

### a) Criminal repression

The States party to **API** and **APII** should adopt legislation stating that the recruitment of children under the age of 15 into the armed forces or armed groups, and their participation in hostilities, are criminal offences.<sup>100</sup>

The States party to the **Optional Protocol** must adopt legislation stating that the compulsory recruitment of children under the age of 18, and their participation in hostilities, are criminal offences.<sup>101</sup>

The States party to the **Optional Protocol** must take all feasible measures to prevent the recruitment or use in hostilities of children under the age of 18 by armed groups that are distinct from the armed forces of the State. The States Parties must adopt the legal measures needed to prohibit and criminalize such practices.<sup>102</sup>

The principle of complementarity dictates that the States party to the **ICC Statute** should ensure they are able to prosecute individuals for conscripting<sup>103</sup> or enlisting children under the age of 15 years into the national armed forces or causing them to participate actively in hostilities. The law should establish individual criminal responsibility for the perpetrators of these crimes as well as command responsibility for all commanders who fail to prevent or punish their perpetration. The States should ensure that these crimes are not covered by any amnesty law.<sup>104</sup>

Extraterritorial criminal jurisdiction should be established in the form of universal jurisdiction, namely for the recruitment and use in hostilities of children contrary to the relevant international rules.

### Commentary

#### a) Criminal repression

International humanitarian law prohibits the recruitment of children under the age of 15 into armed forces or armed groups and their use in hostilities. Every violation of this rule should be punished adequately, regardless of whether the children's participation was direct or indirect.

There is some evidence in State practice to suggest that a similar rule of customary law is developing, which regards all recruitment and use in hostilities of persons under the age of 18 as a serious violation of international law.

The recruitment of children under the age of 15 into armed forces or armed groups as well as their active participation in hostilities is a war crime under Article 8 (2b xxvi) of the Rome Statute. The commission of war crimes entails individual criminal responsibility, which means that those who commit the crimes will be held criminally responsible for them. Their military superiors will also be held responsible for failing to prevent or punish the criminal conduct of their subordinates (command responsibility).<sup>105</sup>

<sup>100</sup> API, Art. 77(2) and APII, Art. 4(3)(c).

<sup>101</sup> Optional Protocol, Art. 6(1) in relation to Arts 1 and 2.

<sup>102</sup> Optional Protocol, Art. 4(2).

<sup>103</sup> ICC Statute, Art. 8(2b xxvi).

<sup>104</sup> N'Djamena Declaration on Ending Recruitment and Use of Children by Armed Forces and Groups (2010) – Art. 4.

<sup>105</sup> ICRC Study on Customary International Humanitarian Law, Rule 153, reads "Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible."

At present, there are proceedings before the ICC<sup>106</sup> for war crimes, particularly for the unlawful recruitment of children under the age of 15 and their use in hostilities.

In order to comply with the principle of complementarity set out in the Rome Statute,<sup>107</sup> States should undertake to reform or amend their domestic legal framework with the aim of criminalizing such conduct.

A State party to the Rome Statute should amend its criminal law in order for the principle of extraterritorial criminal jurisdiction – in the form of universal jurisdiction – to be used regarding the crime of recruiting and using children under the age of 15. The universality principle is based on the concept that a crime – in this instance the recruitment and use in hostilities of children under the age of 15 – is universally held to be of such gravity that all States are competent to prosecute those guilty of it. This competence is valid regardless of where the crime was committed, the nationality of the perpetrator, the nationality of the victim, and whether or not the accused is in custody or even present in the forum State. The principle of universal jurisdiction allows national authorities to commence criminal investigations of persons suspected of such crimes and to gather evidence. They may thus exercise criminal jurisdiction over these persons, without requiring that the person first be present, even temporarily, in the country.

National authorities could also consider submitting to universal jurisdiction the recruitment and use in hostilities of children between 15 and 18 years of age.

## b) Reparation

Given that children who are unlawfully recruited are victims and also have rights, adequate reparation should be made to them. Effective reparations should amount to a combination of measures providing restitution, rehabilitation and compensation.<sup>108</sup> They may take the form of administrative programs such as an educational curriculum and professional training. Another approach to reparations may be to offer children symbolic amends such as satisfaction, assurances, and guarantees of non-repetition and of commemoration. Material benefits often take the form of concrete projects such as community centers for the purpose of rehabilitation.<sup>109</sup>

## Commentary

### b) Reparation

Reparation – i.e. measures to compensate a whole community and/or individual citizen victims of a wrongful act – is not usually considered a priority after the end of an armed conflict. Nonetheless, a reparation mechanism for children should be established separately from measures for general victims of the conflict.

Reparation can take many different forms. It can be granted as financial compensation, restitution, rehabilitation, satisfaction, official apologies and ceremonies, physical and psychological assistance, as well as guarantees of non-repetition.

As reparation refers to a large scope of obligations, States are encouraged to follow the comprehensive guidelines on reparations drawn up by the UN in order to adequately respect the victims' right to remedy and reparation.<sup>110</sup> The right to individual reparation does not exist under international humanitarian law.<sup>111</sup> States, however, should adopt legislation inspired by the best practices of the United Nations on the matter. Moreover, the States party to the CRC "shall take all appropriate measures

<sup>106</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07.

<sup>107</sup> ICC Statute, Art. 1. The 2007 ICRC Fact Sheet on the Statute of the International Criminal Court also explains that "by the virtue of the principle of complementarity, the jurisdiction of the ICC is intended to come into play only when a State is genuinely unable or unwilling to prosecute alleged war criminals over which it has jurisdiction. To benefit from this principle, States will need to have adequate legislation enabling them to prosecute such criminals."

<sup>108</sup> OHCHR Rule-of-Law Tools for Post-Conflict States - Truth commissions (2006), available at <http://www.ohchr.org/Documents/Publications/RuleofLawTruthCommissionsen.pdf>. The International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts provide a reliable reference as for the different forms on reparation (See Arts 34 – 39) available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf). In the present context, these forms of reparations are also set out in General Assembly resolution 60/147 of 21 March 2006, Section IX available at <http://www.unhcr.org/refworld/docid/4721cb942.html>.

<sup>109</sup> Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation, Published by The Human Rights Program at Harvard Law School.

<sup>110</sup> United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law*, 21 March 2006, A/RES/60/147, available at <http://www.unhcr.org/refworld/docid/4721cb942.html>.

<sup>111</sup> However, relevant State practice and doctrinal sources seem to demonstrate a tendency towards the development of a right to reparations for victims of armed conflict. See Conference Report, International Law Association, the Hague Conference (2010), *Reparation for Victims of Armed Conflict*, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1018>: "Until most recently, international law did not provide for any right to reparation for victims of armed conflicts. The Committee submits, however, that the situation is changing." See also, ICRC Study, Rule 150 and its commentary.

to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."<sup>112</sup>

States party to the Optional Protocol must cooperate in the rehabilitation and social reintegration of people who have been victims of acts contrary to the Optional Protocol. This may take the form of technical cooperation and financial assistance.<sup>113</sup>

Because of the complexity of the process, it is important that national authorities first identify the most vulnerable categories of people needing reparation and remain especially careful not to stigmatize them. The States should ensure that financial compensation allotted to children is always combined with educational and training programs.

### c) Transitional justice

National authorities engaged in transitional justice initiatives should raise public awareness of the impact of armed conflict on the lives of children. They should also recognize children's distinct roles as victims, witnesses and, sometimes, perpetrators of crime. The opportunity for active voluntary participation of children in transitional justice initiatives should be ensured. To this end, appropriate training should be provided for all professionals involved in transitional justice.

Where possible, the national authorities should also establish and encourage local justice initiatives that take into account cultural traditions, while undertaken in full respect of international human rights standards. Initiatives that involve children previously associated with armed forces or armed groups should promote social reconciliation and non-punitive approaches to accountability. They must always be complementary to the formal system of justice and official truth-seeking mechanisms since the involvement of children fulfils their right to be heard in proceedings that affect them.<sup>114</sup>

## Commentary

### c) Transitional justice

The concept of transitional justice<sup>115</sup> refers to the "full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses in order to ensure accountability, and achieve justice and reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement and individual prosecutions, reparation, truth seeking, institutional reform, vetting and dismissal, or a combination thereof."<sup>116</sup> The process of transitional justice takes a rights-based approach and, inspired by international humanitarian law and human rights law, demands that States halt, investigate, punish, redress and prevent abuses including those committed against children. These measures should be taken in connection with other peace-building measures.

Transitional justice mechanisms include a number of initiatives that could be organized by competent national authorities. Their aim would be to restore confidence in the rule of law, to end impunity, to encourage reconciliation and to avoid the repetition of abuses committed against children.

- It is important to establish appropriate domestic, hybrid and/or international tribunals for the purpose of identifying, prosecuting and punishing perpetrators of serious atrocities. There are many good examples such as the Special Court for Sierra Leone, which has already successfully concluded judicial proceedings for war crimes, including unlawful recruitment of children under the age of 15.<sup>117</sup>
- Truth-telling initiatives have been used in some countries to determine and document abuses involving children: abuses of which children were victims and others witnessed by children.

<sup>112</sup> CRC, Art. 39.

<sup>113</sup> Optional Protocol, Art. 7(1).

<sup>114</sup> CRC, Art. 12.

<sup>115</sup> Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation, Published by The Human Rights Program at Harvard Law School.

<sup>116</sup> See UN Security Council, "The rule of law and transitional justice in conflict and post-conflict societies", *Report of the Secretary-General*, 23 August 2004, para. 8 (S/2004/616), available at <http://www.un.org/en/ruleoflaw/index.shtml>.

<sup>117</sup> *The Prosecutor v. Norman*, available at <http://www.unhcr.org/refworld/publisher/SCSL,,,49abc0a22,0.html> (last visited 10 June 2011); *The Prosecutor v. Brima, Kamara and Kanu*, available at <http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/tabid/106/Default.aspx> (last visited 10 June 2011).

- Reconciliation activities within divided communities have been promoted with the purpose of establishing peaceful communication amongst people. It is important that not only children have a voice as perpetrators, but also as victims. Further, victims of violations committed by children should also be offered the opportunity to tell their story.

Other activities include the making of reparations – individual, collective and symbolic – to victims, the construction of monuments and memorials to educate future generations, and institutional reforms such as the vetting of public institutions.

The participation of children, as victims and witnesses in investigations and court proceedings for crimes under international law, should be voluntary. Children are entitled to and should be accorded special protective measures to facilitate their testimony, whether they are victims or perpetrators. Specific training should be provided to all professionals involved with children during the entire process of transitional justice.

Local justice initiatives are very important as they engage the community in the process of social reconciliation and emphasize the transformation rather than the punishment of former child soldiers. Children previously associated with armed forces or armed groups need to regain their confidence in the community and vice versa. Local approaches to justice are based on traditions and customs and should be undertaken in full respect for international human rights standards. They are not a substitute for judicial processes.



## 8. Preventive measures

### a) Birth certificates

Every child should receive his/her own identity document. In addition to the obligation of the States party to the CRC to register a child immediately after birth (Art. 7[1]), domestic legislation should provide appropriate protective measures such as supplementary systems of child identification, particularly when there are obstacles to the usual process for verifying the age of recruits.

### b) Tracing families of separated children

Children separated from their family by armed conflict have a right to special care and assistance.<sup>118</sup> Efforts to assist unaccompanied minors, the tracing of their next of kin and family reunification are all crucial to preventing the recruitment of children. National authorities should establish and implement mechanisms for facilitating family reunification. When efforts to reunite a child with his immediate family or with other relatives fail, another suitable and long-term solution must be found. This could, when deemed appropriate, take the form of foster families, for example. Appropriate alternative care must be provided in accordance with the best interests of the child.

### c) Registration of internally displaced or refugee children

As particularly vulnerable individuals, internally displaced children and refugee children are entitled to be protected from unlawful recruitment. The national authorities should set up an effective registration system<sup>119</sup> in order to identify all vulnerable children, thus making it possible to plan and implement protection programs.

### d) External control

To ensure the effective implementation of the above-mentioned international standards for recruitment, the national authorities should consider an inspection regime that seeks to verify that all the requirements have been met and that no child is recruited in violation of the applicable legislation.

## Commentary

### a) Birth certificate

A child without a provable date of birth is extremely vulnerable to all sorts of abuse and injustice, including unlawful recruitment into the armed forces. The States party to the CRC should commit themselves to strengthening birth-registration systems so that the identity of every child can be established easily and precisely. Where the process is hindered because of armed conflict, the State should also provide temporary means of identification: metal tags bearing the child's name and age or a school-class badge signifying enrolment in school, on the basis of which it is possible to verify the child's age.

### b) Tracing children's families

Before starting the tracing process, the children should be identified and registered individually. The quality and the quantity of information<sup>120</sup> collected during this phase are of utmost importance for successful tracing. It is important to prepare the family, the community of origin and the children themselves for the reunification and for the children's full reintegration into the community. If children cannot be reunited with their family, an appropriate alternative form of care must be provided. Foster placement can be considered in such cases.

### c) Registration of internally displaced or refugee children

Every person, including children and anyone displaced by conflict, should be provided with a temporary means of identification. The national authorities should explore the possibility of equipping refugee and internally displaced children with metal tags. There are frequent reports of unlawful recruitment among refugee and internally displaced children, mainly because

<sup>118</sup> GCIV, Arts 17 and 24; API, Art. 78; APII, Art. 4(3).

<sup>119</sup> The registration system should include precise data and could be established along the lines of API, Art. 78(3).

<sup>120</sup> Based for instance on the list provided for in API, Art. 78(3).

protection for children in refugee and IDP camps is often inadequate. The lack of an effective registration system increases the vulnerability of these children.

#### **d) External control**

In order to examine the compliance of armed forces with their obligations and, especially, to check whether there are children in their ranks, an inspection regime should be established at the national level. This could be created under various forms, for instance as ombudsmen or civilian authorities, but should be distinct from the military structure. The inspectors would in all likelihood be extremely helpful in identifying children who have been unlawfully recruited as well as those responsible for their recruitment. Some countries have already established such a regime within the context of a broader process of reform involving the restructuring of the armed forces. Recruiters violating the law should face proper criminal prosecution and sanctions.

#### **e) Military schools**

With regard to the enrolment process in military schools, national authorities should specify in their legislation whether they provide for incentives and, if they do, the types of incentive used to encourage enrolment in these schools. The specification of authorized incentives allows the setting of legal limits that circumscribe the scope of implementation. The law should also state unambiguously that children enrolled in military schools are not considered part of the armed forces. Recruits in military schools and their parents or guardians are entitled to receive adequate information about their rights and obligations and, especially, about their right to leave their military schools at their request and after giving a reasonable notice. In such circumstances, disciplinary action or any other type of sanction should be prohibited.

#### **f) Educational and vocational programs**

1. Programs that offer children viable alternatives to voluntary recruitment and prevent unlawful recruitment should be designed and set up at the national level. These programs should include, in particular, educational and vocational training carried out, where possible, in combination with employment opportunities, and should be directed towards children between the ages of 15 and 18.
2. Programs that make people aware of the rights of children involved in armed conflicts (especially special measures to protect them) should be designed and implemented at the national level. These programs should be specifically aimed at all who are in contact with children whether they are military or civilian.

In addition, training for professionals who work with and for children should be given in order to ensure the full implementation of the law and adequate promotion of that law.

### **Commentary**

#### **e) Military schools**

In compliance with Article 3(5) of the Optional Protocol, military schools are exempted from the requirement to raise the minimum age from 15 to 18. Nevertheless, students attending military schools are not automatically considered to have been formally recruited into the armed forces until they reach the age of 18.<sup>121</sup> Voluntary recruitment in military schools requires the utmost transparency. National authorities should state the following explicitly in any legislation they adopt: the measures taken to encourage students to enroll in military schools, the level of military training in comparison with other schools, and the process by which students might later become members of the armed forces.<sup>122</sup> In addition, it is important to offer students enrolled in military schools the legal right to leave at their request, after giving reasonable notice – i.e. not more than three months. After graduation, students should not be under any obligation to join the armed forces.

The States party to the Optional Protocol should ensure that children attending military schools have direct access to independent investigation mechanisms and complaint mechanisms in the event of abuse and ill-treatment. When feasible, additional preventive measures should be adopted. For instance, a hotline should be created, as should youth groups. The choice of preventive measures should depend on the context and aim at addressing the root causes of these acts.

<sup>121</sup> For example, in the Central African Republic and the Philippines, students enrolled in military schools are considered as part of the armed forces, whereas in Colombia enrolment in military school and enlistment in the armed forces are distinct.

<sup>122</sup> Guidelines regarding initial reports to be submitted by States Parties under Article 81 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, CRC/OP/AC/1, 14 November 2001.

Armed forces should also include guidelines in their military manuals or adopt regulations in order to safeguard the preventive measures and help their effective implementation.

The States party to the Optional Protocol should enact appropriate legislation to ensure that enrolment in military school is voluntary. An alternative to military schooling should be offered when possible.

#### **f) Educational and vocational programs<sup>123</sup>**

1. These programs should be designed to cover the particular needs of children under the age of 18. Their aim should be to prevent the recruitment of children into State armed forces or non-State armed groups, and to offer viable alternatives to it. To this end, the national authorities should ensure access to free basic education and implement vocational and professional training so that every child (including girls) between 15 and 18 years of age is aware of the alternatives to recruitment.

These programs should address all the root causes that lead to recruitment and participation of children in hostilities, and as such, aim at developing infrastructure. They should also pay particular attention to the special vulnerability of children displaced by the hostilities.

2. Every State should also ensure that all the actors that may be involved or in contact with children – police units, detention authorities, teachers, doctors, judges, lawyers, social workers and other professionals in contact with migrant and asylum-seeking children – are informed of the legal protection granted to children during armed conflict. In fact, these might be the persons who have the first contact with children formerly associated with armed forces or armed groups. These activities should be implemented at the national, regional and local levels and should include primary health-care personnel.

Educational training programs and awareness-raising campaigns are among the most effective ways of ensuring that all sections of the population are adequately informed about the legal protection granted by international humanitarian law and international human rights law to children during armed conflict.

Promotion programs geared towards non-recruitment should be set up for the armed forces. All those involved in the recruitment process should be fully aware of their obligations under international and domestic law.

General awareness-raising should also be considered in order to develop a better understanding of the situation and combat the frequently negative stereotype of children re-entering their community after being involved in armed conflict. International cooperation in educational programs and, especially, in the exchange of best practices is useful.

<sup>123</sup> CRC, Arts 28 and 29.

## 9. Disarmament, demobilization and reintegration programs

Disarmament, demobilization and reintegration programs should be undertaken for the purpose of ensuring that all those under the age of 18 associated with armed forces or armed groups are eligible for assistance in this respect.

The States party to the **Optional Protocol** must take all feasible measures to demobilize or otherwise release from service persons under 18. When necessary, they must also accord all appropriate assistance for their physical and psychological recovery and their social reintegration.<sup>124</sup>

The release of all children unlawfully recruited or used by armed forces or groups must be sought unconditionally at all times, including during armed conflict. Actions to secure disarmament, demobilization and reintegration of children should not be dependent on a cease-fire or peace agreement or on any release or demobilization process for adults.

Reintegration programs – including a suitable combination of educational and vocational training – should be designed and implemented. Special attention should be given to the needs and experiences of girls previously associated with armed forces or armed groups: they should be provided with appropriate health care, including care for conditions such as forced pregnancy. They should also be offered distinct educational and professional training opportunities, with the purpose of facilitating their full reintegration into their families and communities.

National authorities should take advantage of increased international cooperation and availability of resources to include as many children as possible in disarmament, demobilization and reintegration programs.

All children under the age of 18 who have been associated with armed forces or armed groups, and who are seeking refugee status, should be entitled to care and special protection. To this end, competent national authorities should ensure that the fact that they were recruited and used in hostilities, as well as the possibility that they may have committed war crimes, are not regarded as reasons to prevent such children from being granted asylum and refugee status.

Educational and vocational training programs should be designed and implemented for the specific purpose of improving and enhancing the social and economic reintegration of children, including those accused of crimes under international or domestic law committed while associated with armed forces or armed groups in the country where they have applied for refugee status.

### Commentary

The States are encouraged to observe the Paris Principles and Commitments (see Annex I) in order to better promote and implement the full scope of relevant obligations and best practices. Particularly relevant to disarmament, demobilization and reintegration programs is the section on release and reintegration, which promotes programs regardless of whether a formal process exists.<sup>125</sup> The following measures should thus be considered in all situations where the recruitment and participation in hostilities of children has occurred.

The disarmament, demobilization and reintegration process consists of three phases. The first is disarmament: the collection, inspection and disposal of small arms, ammunition, explosives, and light and heavy weapons within a conflict zone. Disarmament also includes a process for responsible arms management. The second phase is demobilization, during which the parties begin to disband their military structure. Demobilization is the formal and controlled discharge of active combatants from armed forces or other armed groups. In the final phase – reintegration – ex-combatants and their families adapt themselves to leading productive lives, both socially and economically. It is very important that States provide immediate physical and psychological assistance and, if necessary, other forms of medical attention to children who have been released. Awareness-raising is essential to ensuring the success of such programs and should thus be encouraged among armed forces, armed groups and the communities themselves.

<sup>124</sup> Optional Protocol, Art. 6(3).

<sup>125</sup> See Paris Commitments, section 19.

Educational and vocational training programs should be implemented with the aim of facilitating the reintegration of children into their families and communities. Children should also have access to jobs and other income-generating activities to support themselves and help their families. All measures should be taken with due concern for safeguarding the best interests of the child. For disarmament, demobilization and reintegration programs to be successful, the national authorities should also engage in adequate amounts of dialogue with children's families and communities to pave the way for their social reintegration. "Peace and reconciliation" events are also important in facilitating the long-term reintegration of children and should be part of transitional justice initiatives. To ease their return to civilian life, children formerly involved in armed conflict should be given access to programs that benefit all war-affected children. States should avoid re-recruiting disarmed and demobilized children, even after they reach the age of majority. They should be excluded from conscription on humanitarian grounds.

Both States and local communities should address the specific situation of girls associated with armed forces or armed groups. Since girls need special protection, national authorities should design and implement programs specifically for them, with the aim of helping them to overcome the traumatic experience of armed conflict. Direct physical and psychological care as well as professional training should be made available to them, and opportunities for employment created. Careful attention should be provided to girls returning with babies, while being careful not to single out these children. Equivalent special protection should be given to children with disabilities.

The international community, through enhanced international cooperation, should make every effort to provide affected countries with the resources needed for preventive programs and reintegration programs that benefit all vulnerable children. It is important to devote attention not only to those previously associated with armed forces or armed groups, but to all vulnerable children who may decide to enlist or to re-enlist for lack of alternatives. Ideally, disarmament, demobilization and reintegration programs should be part of broader programs of poverty eradication and socio-economic development.

Article 1(F)<sup>126</sup> of the 1951 Refugee Convention excludes the application of the Convention to persons who might have committed war crimes and/or crimes against humanity during armed conflicts. The application of exclusion clauses to children, however, needs to be put into effect with great caution.<sup>127</sup> Where children have allegedly committed crimes while being associated with armed forces or armed groups, it is important to take into account the fact that they might have been victims of violations of international law and are not only perpetrators. In addition, such exclusion clauses must be applied only to children who had reached the age of criminal responsibility, as laid down by international or national law, at the time the crime was committed.

The States should consider the appropriateness of accepting applications for asylum and/or refugee status from children who allegedly committed war crimes, and take the steps needed to implement such a policy.

Every State should establish a registration system to identify and register all the children (often unaccompanied) arriving from a foreign country and applying for asylum and refugee status. National authorities should develop or refine their system of data collection in order to improve their reporting methods. An effective registration system is also useful for gauging the presence, in their midst, of children previously associated with armed forces or armed groups to whom direct aid must be provided. Unfortunately, practice suggests a lack of interest in, and a lack of funding and programs for, dealing with such children on the territories of countries not their own. Therefore, the "receiving" States should implement specific educational and training programs with the aim of promoting the social and economic reintegration of children in the societies in which they have taken refuge.

<sup>126</sup> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:  
 (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;  
 (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;  
 (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

<sup>127</sup> UNHCR Guidelines on International Protection No 8: Child Asylum Claims under Art. 1(a2) and 1(F) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees, HRC/GIP/09/08, 22 December 2009, available at <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html> (last visited 10 June 2011).

# Annex I

## Applicable law (extracts)

### A) International humanitarian law

#### Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949

##### Article 4

(A) Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

##### Article 16

Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.

##### Article 49

The Detaining Power may utilize the labour of prisoners of war who are physically fit, taking into account their age, sex, rank and physical aptitude, and with a view particularly to maintaining them in a good state of physical and mental health.

Non-commissioned officers who are prisoners of war shall only be required to do supervisory work. Those not so required may ask for other suitable work which shall, so far as possible, be found for them.

If officers or persons of equivalent status ask for suitable work, it shall be found for them, so far as possible, but they may in no circumstances be compelled to work.

#### Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949

##### Article 14

(1) In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.

##### Article 17

The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.

##### Article 23

(1) Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

##### Article 24

The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

The Parties to the conflict shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards for the observance of the principles stated in the first paragraph.

They shall, furthermore, endeavour to arrange for all children under twelve to be identified by the wearing of identity discs, or by some other means.

#### **Article 38**

(5) Children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.

#### **Article 40**

(3) In the cases mentioned in the two preceding paragraphs, protected persons compelled to work shall have the benefit of the same working conditions and of the same safeguards as national workers in particular as regards wages, hours of labour, clothing and equipment, previous training and compensation for occupational accidents and diseases.

#### **Article 50**

The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.

The Occupying Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage. It may not, in any case, change their personal status, nor enlist them in formations or organizations subordinate to it.

Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.

A special section of the Bureau set up in accordance with Article 136 shall be responsible for taking all necessary steps to identify children whose identity is in doubt. Particulars of their parents or other near relatives should always be recorded if available.

The Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years.

#### **Article 68**

[4] In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence.

#### **Article 76**

Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country.

They shall receive the medical attention required by their state of health. They shall also have the right to receive any spiritual assistance which they may require. Women shall be confined in separate quarters and shall be under the direct supervision of women. Proper regard shall be paid to the special treatment due to minors. Protected persons who are detained shall have the right to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross, in accordance with the provisions of Article 143.

Such persons shall have the right to receive at least one relief parcel monthly.

#### **Article 89**

Daily food rations for internees shall be sufficient in quantity, quality and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies. Account shall also be taken of the customary diet of the internees.

Internees shall also be given the means by which they can prepare for themselves any additional food in their possession.

Sufficient drinking water shall be supplied to internees. The use of tobacco shall be permitted.

Internees who work shall receive additional rations in proportion to the kind of labour which they perform.

Expectant and nursing mothers and children under fifteen years of age, shall be given additional food, in proportion to their physiological needs.

### **Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977**

#### **Article 48 – Basic rule**

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

#### **Article 51 – Protection of the civilian population**

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.
4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
  - (a) those which are not directed at a specific military objective;
  - (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
  - (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
5. Among others, the following types of attacks are to be considered as indiscriminate:
  - (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
  - (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
6. Attacks against the civilian population or civilians by way of reprisals are prohibited.
7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.
8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

#### **Article 70 – Relief actions**

- (1) If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.



**Article 75 – Fundamental guarantees**

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.
2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
  - (a) violence to the life, health, or physical or mental well-being of persons, in particular:
    - (i) murder;
    - (ii) torture of all kinds, whether physical or mental;
    - (iii) corporal punishment; and
    - (iv) mutilation;
  - (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
  - (c) the taking of hostages;
  - (d) collective punishments; and
  - (e) threats to commit any of the foregoing acts.
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;
  - (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 judgment 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 judgment 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 their 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.

#### **Article 77 – Protection of children**

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.
2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest.
3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.
4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.
5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.

#### **Article 78 – Evacuation of children**

1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.
2. Whenever an evacuation occurs pursuant to paragraph 1, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity.
3. With a view to facilitating the return to their families and country of children evacuated pursuant to this Article, the authorities of the Party arranging for the evacuation and, as appropriate, the authorities of the receiving country shall establish for each child a card with photographs, which they shall send to the Central Tracing Agency of the International Committee of the Red Cross. Each card shall bear, whenever possible, and whenever it involves no risk of harm to the child, the following information:
  - (a) surname(s) of the child;
  - (b) the child's first name(s);
  - (c) the child's sex;
  - (d) the place and date of birth (or, if that date is not known, the approximate age);
  - (e) the father's full name;
  - (f) the mother's full name and her maiden name;
  - (g) the child's next-of-kin;
  - (h) the child's nationality;
  - (i) the child's native language, and any other languages he speaks;
  - (j) the address of the child's family;
  - (k) any identification number for the child;

- (l) the child's state of health;
- (m) the child's blood group;
- (n) any distinguishing features;
- (o) the date on which and the place where the child was found;
- (p) the date on which and the place from which the child left the country;
- (q) the child's religion, if any;
- (r) the child's present address in the receiving country;
- (s) should the child die before his return, the date, place and circumstances of death and place of interment.

#### **Article 86 – Failure to act**

1. 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.
2. 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.

### **Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977**

#### **Article 4 – Fundamental guarantees**

- (3) Children shall be provided with the care and aid they require, and in particular:
- (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;
  - (b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;
  - (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;
  - (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;
  - (e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

#### **Article 6 – Penal prosecutions**

1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.
2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:
  - (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;
  - (b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
  - (c) 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 the law, 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.
3. 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.
4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.

5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

#### **Article 13 – Protection of the civilian population**

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

### **B) Customary international humanitarian law**

#### **ICRC Study**

##### **Rule 135**

Children affected by armed conflict are entitled to special respect and protection. [IAC/NIAC]

##### **Rule 136**

Children must not be recruited into armed forces or armed groups. [IAC/NIAC]

##### **Rule 137**

Children must not be allowed to take part in hostilities. [IAC/NIAC]

### **C) International human rights law**

#### **Convention on the Rights of the Child (1989)**

##### **Article 1**

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

##### **Article 37**

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

##### **Article 38**

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

#### Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
  - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
  - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
    - (i) To be presumed innocent until proven guilty according to law;
    - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
    - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
    - (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
    - (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
    - (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
    - (vii) To have his or her privacy fully respected at all stages of the proceedings.
3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
  - (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
  - (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

#### Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:
  - (a) Within two years of the entry into force of the Convention for the State Party concerned;
  - (b) Thereafter every five years.
2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfillment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.
4. The Committee may request from States Parties further information relevant to the implementation of the Convention.
5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.
6. States Parties shall make their reports widely available to the public in their own countries.

### **African Charter on the Rights and Welfare of the Child (1999)**

#### **Article 22**

1. States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.
2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.
3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

### **Optional Protocol to the Convention of the Rights of the Child on the Involvement of children in Armed Conflicts (2000)**

The States Parties to the present Protocol,

Encouraged by the overwhelming support for the Convention on the Rights of the Child, demonstrating the widespread commitment that exists to strive for the promotion and protection of the rights of the child,

Reaffirming that the rights of children require special protection, and calling for continuous improvement of the situation of children without distinction, as well as for their development and education in conditions of peace and security,

Disturbed by the harmful and widespread impact of armed conflict on children and the long-term consequences it has for durable peace, security and development,

Condemning the targeting of children in situations of armed conflict and direct attacks on objects protected under international law, including places that generally have a significant presence of children, such as schools and hospitals,

Noting the adoption of the Rome Statute of the International Criminal Court, in particular, the inclusion therein as a war crime, of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflicts,

Considering therefore that to strengthen further the implementation of rights recognized in the Convention on the Rights of the Child there is a need to increase the protection of children from involvement in armed conflict,

Noting that article 1 of the Convention on the Rights of the Child specifies that, for the purposes of that Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier,

Convinced that an optional protocol to the Convention that raises the age of possible recruitment of persons into armed forces and their participation in hostilities will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children,

Noting that the twenty-sixth International Conference of the Red Cross and Red Crescent in December 1995 recommended, inter alia, that parties to conflict take every feasible step to ensure that children below the age of 18 years do not take part in hostilities,

Welcoming the unanimous adoption, in June 1999, of International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which prohibits, inter alia, forced or compulsory recruitment of children for use in armed conflict,

Condemning with the gravest concern the recruitment, training and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State, and recognizing the responsibility of those who recruit, train and use children in this regard,

Recalling the obligation of each party to an armed conflict to abide by the provisions of international humanitarian law,

Stressing that the present Protocol is without prejudice to the purposes and principles contained in the Charter of the United Nations, including Article 51, and relevant norms of humanitarian law,

Bearing in mind that conditions of peace and security based on full respect of the purposes and principles contained in the Charter and observance of applicable human rights instruments are indispensable for the full protection of children, in particular during armed conflicts and foreign occupation,

Recognizing the special needs of those children who are particularly vulnerable to recruitment or use in hostilities contrary to the present Protocol owing to their economic or social status or gender,

Mindful of the necessity of taking into consideration the economic, social and political root causes of the involvement of children in armed conflicts,

Convinced of the need to strengthen international cooperation in the implementation of the present Protocol, as well as the physical and psychosocial rehabilitation and social reintegration of children who are victims of armed conflict,

Encouraging the participation of the community and, in particular, children and child victims in the dissemination of informational and educational programmes concerning the implementation of the Protocol,

Have agreed as follows:

#### **Article 1**

States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

#### **Article 2**

States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.

#### **Article 3**

1. States Parties shall raise in years the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.
2. Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.
3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:
  - (a) Such recruitment is genuinely voluntary;
  - (b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;
  - (c) Such persons are fully informed of the duties involved in such military service;
  - (d) Such persons provide reliable proof of age prior to acceptance into national military service.

4. Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.
5. The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.

**Article 4**

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
3. The application of the present article shall not affect the legal status of any party to an armed conflict.

**Article 5**

Nothing in the present Protocol shall be construed as precluding provisions in the law of a State Party or in international instruments and international humanitarian law that are more conducive to the realization of the rights of the child.

**Article 6**

1. Each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the present Protocol within its jurisdiction.
2. States Parties undertake to make the principles and provisions of the present Protocol widely known and promoted by appropriate means, to adults and children alike.
3. States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.

**Article 7**

1. States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations.
2. States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral or other programmes or, inter alia, through a voluntary fund established in accordance with the rules of the General Assembly.

**Article 8**

1. Each State Party shall, within two years following the entry into force of the present Protocol for that State Party, submit a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol, including the measures taken to implement the provisions on participation and recruitment.
2. Following the submission of the comprehensive report, each State Party shall include in the reports it submits to the Committee on the Rights of the Child, in accordance with article 44 of the Convention, any further information with respect to the implementation of the Protocol. Other States Parties to the Protocol shall submit a report every five years.
3. The Committee on the Rights of the Child may request from States Parties further information relevant to the implementation of the present Protocol.



**Article 9**

1. The present Protocol is open for signature by any State that is a party to the Convention or has signed it.
2. The present Protocol is subject to ratification and is open to accession by any State. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.
3. The Secretary-General, in his capacity as depositary of the Convention and the Protocol, shall inform all States Parties to the Convention and all States that have signed the Convention of each instrument of declaration pursuant to article 3.

**Article 10**

1. The present Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after its entry into force, the Protocol shall enter into force one month after the date of the deposit of its own instrument of ratification or accession.

**Article 11**

1. Any State Party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the Convention and all States that have signed the Convention. The denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General. If, however, on the expiry of that year the denouncing State Party is engaged in armed conflict, the denunciation shall not take effect before the end of the armed conflict.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act that occurs prior to the date on which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued consideration of any matter that is already under consideration by the Committee on the Rights of the Child prior to the date on which the denunciation becomes effective.

**Article 12**

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly and accepted by a two-thirds majority of States Parties.
3. When an amendment enters into force, it shall be binding on those States Parties that have accepted it, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments they have accepted.

**Article 13**

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States Parties to the Convention and all States that have signed the Convention.

**Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa****Article 11 – Protection of Women in Armed Conflicts**

1. States Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations which affect the population, particularly women.

2. States Parties shall, in accordance with the obligations incumbent upon them under the international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.
3. States Parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.
4. States Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.

## UN Committee on the Rights of the Child General Comment No. 10 (2007) Children's rights in Juvenile Justice

### F. Deprivation of liberty, including pretrial detention and post-trial incarceration

78. Article 37 of CRC contains the leading principles for the use of deprivation of liberty, the procedural rights of every child deprived of liberty, and provisions concerning the treatment of and conditions for children deprived of their liberty.

#### Basic principles

79. The leading principles for the use of deprivation of liberty are: (a) the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; and (b) no child shall be deprived of his/her liberty unlawfully or arbitrarily.

80. The Committee notes with concern that, in many countries, children languish in pretrial detention for months or even years, which constitutes a grave violation of article 37 (b) of CRC. An effective package of alternatives must be available (see chapter IV, section B, above), for the States parties to realize their obligation under article 37 (b) of CRC to use deprivation of liberty only as a measure of last resort. The use of these alternatives must be carefully structured to reduce the use of pretrial detention as well, rather than "widening the net" of sanctioned children. In addition, the States parties should take adequate legislative and other measures to reduce the use of pretrial detention. Use of pretrial detention as a punishment violates the presumption of innocence. The law should clearly state the conditions that are required to determine whether to place or keep a child in pretrial detention, in particular to ensure his/her appearance at the court proceedings, and whether he/she is an immediate danger to himself/herself or others. The duration of pretrial detention should be limited by law and be subject to regular review.

81. The Committee recommends that the State parties ensure that a child can be released from pretrial detention as soon as possible, and if necessary under certain conditions. Decisions regarding pretrial detention, including its duration, should be made by a competent, independent and impartial authority or a judicial body, and the child should be provided with legal or other appropriate assistance.

#### Procedural rights (Art. 37[d])

82. Every child deprived of his/her liberty has the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his/her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

83. Every child arrested and deprived of his/her liberty should be brought before a competent authority to examine the legality of (the continuation of) this deprivation of liberty within 24 hours. The Committee also recommends that the States parties ensure by strict legal provisions that the legality of a pretrial detention is reviewed regularly, preferably every two weeks. In case a conditional release of the child, e.g. by applying alternative measures, is not possible, the child should be formally charged with the alleged offences and be brought before a court or other competent, independent and impartial authority or judicial body, not later than 30 days after his/her pretrial detention takes effect. The Committee, conscious of the practice of adjourning court hearings, often more than once, urges the States parties to introduce the legal provisions necessary to ensure that the court/juvenile judge or other competent body makes a final decision on the charges not later than six months after they have been presented.

84. The right to challenge the legality of the deprivation of liberty includes not only the right to appeal, but also the right to access the court, or other competent, independent and impartial authority or judicial body, in cases where the deprivation of liberty is

an administrative decision (e.g. the police, the prosecutor and other competent authority). The right to a prompt decision means that a decision must be rendered as soon as possible, e.g. within or not later than two weeks after the challenge is made.

### **Treatment and conditions (Art. 37(c))**

85. Every child deprived of liberty shall be separated from adults. A child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults. There is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate. The permitted exception to the separation of children from adults stated in article 37 (c) of CRC, “unless it is considered in the child’s best interests not to do so”, should be interpreted narrowly; the child’s best interests does not mean for the convenience of the States parties. States parties should establish separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel, policies and practices.

86. This rule does not mean that a child placed in a facility for children has to be moved to a facility for adults immediately after he/she turns 18. Continuation of his/her stay in the facility for children should be possible if that is in his/her best interest and not contrary to the best interests of the younger children in the facility.

87. Every child deprived of liberty has the right to maintain contact with his/her family through correspondence and visits. In order to facilitate visits, the child should be placed in a facility that is as close as possible to the place of residence of his/her family. Exceptional circumstances that may limit this contact should be clearly described in the law and not be left to the discretion of the competent authorities.

88. The Committee draws the attention of States parties to the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the General Assembly in its resolution 45/113 of 14 December 1990. The Committee urges the States parties to fully implement these rules, while also taking into account as far as relevant the Standard Minimum Rules for the Treatment of Prisoners (see also rule 9 of the Beijing Rules). In this regard, the Committee recommends that the States parties incorporate these rules into their national laws and regulations, and make them available, in the national or regional language, to all professionals, NGOs and volunteers involved in the administration of juvenile justice.

89. The Committee wishes to emphasize that, inter alia, the following principles and rules need to be observed in all cases of deprivation of liberty:

- Children should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement, and due regard must be given to their needs for privacy, sensory stimuli, opportunities to associate with their peers, and to participate in sports, physical exercise, in arts, and leisure time activities;
- Every child of compulsory school age has the right to education suited to his/her needs and abilities, and designed to prepare him/her for return to society; in addition, every child should, when appropriate, receive vocational training in occupations likely to prepare him/her for future employment;
- Every child has the right to be examined by a physician upon admission to the detention/correctional facility and shall receive adequate medical care throughout his/her stay in the facility, which should be provided, where possible, by health facilities and services of the community;
- The staff of the facility should promote and facilitate frequent contacts of the child with the wider community, including communications with his/her family, friends and other persons or representatives of reputable outside organizations, and the opportunity to visit his/her home and family;
- Restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted. The use of restraint or force, including physical, mechanical and medical restraints, should be under close and direct control of a medical and/or psychological professional. It must never be used as a means of punishment. Staff of the facility should receive training on the applicable standards and members of the staff who use restraint or force in violation of the rules and standards should be punished appropriately;
- Any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care; disciplinary measures in violation of article 37 of CRC must be strictly forbidden, including

corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned;

- Every child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or other proper independent authority, and to be informed of the response without delay; children need to know about and have easy access to these mechanisms;
- Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; they should place special emphasis on holding conversations with children in the facilities, in a confidential setting.

## **D) Other relevant instruments (including regional codes)**

### **ILO Convention No. 182 on the Worst Forms of Child Labour (1999)**

#### **Article 3**

For the purposes of this Convention, the term *the worst forms of child labour* comprises:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

#### **Article 7**

1. Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions.
2. Each Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to:
  - (a) prevent the engagement of children in the worst forms of child labour;
  - (b) provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration;
  - (c) ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour;
  - (d) identify and reach out to children at special risk; and
  - (e) take account of the special situation of girls.
3. Each Member shall designate the competent authority responsible for the implementation of the provisions giving effect to this Convention.

### **Statute of the International Criminal Court (1998)**

#### **Article 8**

(2) (b) (xxvi) For the purpose of this Statute, "war crimes" means: [...] Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: [...] Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

#### **Article 8**

(2) (e) (vii) For the purpose of this Statute, "war crimes" means: [...] Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: [...] Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities; [...]

**Article 25**

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
  - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
  - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
  - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
  - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
    - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
    - (ii) Be made in the knowledge of the intention of the group to commit the crime;
  - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
  - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

**Article 26**

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

**Article 31**

- (1) In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
  - (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
  - (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court; [...]
  - (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
    - (i) Made by other persons; or
    - (ii) Constituted by other circumstances beyond that person's control.

**Guidelines on Children in Armed Conflict adopted by the European Union (2003)****Update of the EU GUIDELINES ON CHILDREN AND ARMED CONFLICT (2008)****I. CHILDREN AND ARMED CONFLICT**

1. In the past decade alone, armed conflicts are estimated to have claimed the lives of over two million children and physically maimed six million more. Conflict deprives children of parents, care-givers, basic social services, health care and

education. There are some twenty million displaced and refugee children, as well as one million orphans, while others are held hostage, abducted or trafficked. Systems of birth registration and juvenile justice systems collapse. At any given time, there are estimated to be at least 300,000 child soldiers participating in conflicts.

2. Children have special short and long term post-conflict needs, such as for tracing of family members, redress and social reintegration, psycho-social rehabilitation programmes, participation in disarmament, demobilization and reintegration programmes as well as within transitional justice frameworks. In this regard, the EU welcomes the creation of a follow-up forum to the Paris Commitments, which focuses on coordinating and facilitating international support for such programmes.
3. In many situations, there remains a climate of impunity for those committing crimes against children, as proscribed by international humanitarian law and the Rome Statute of the International Criminal Court. The EU underlines the fundamental role of international criminal jurisdictions in fighting impunity and addressing the relevant violations of international law concerning the illegal use and recruitment of child soldiers.
4. The Convention on the Rights of the Child (CRC) is almost universally ratified, but by no means universally applied. Particularly in situations of armed conflict, children suffer disproportionately, in a variety of ways, and with long lasting effects. The impact of armed conflict on future generations may sow the seeds for conflicts to continue or to re-emerge. The Optional Protocol to the CRC on the involvement of children in armed conflict is aimed at countering this situation.
5. The EU welcomes that important international mechanisms have been established dealing with children and armed conflict, in particular, the Special Representative of the UN Secretary General for Children and Armed Conflict, and the Security Council Working Group on Children and Armed Conflict. Consequently, the EU and its member States shall take into consideration and, where appropriate, coordinate their action with these mechanisms, in a view to maximize impact of their respective interventions. [...]
6. Promotion and protection of the rights of the child is a priority of the EU's human rights policy. The European Union (EU) considers it of critical importance to address the issue of children and armed conflict not only because children are suffering in the present and will shape the future but because they have inherent and inalienable rights, as set out in the CRC, its Optional Protocols and other international and regional human rights instruments. The EU aims to raise the awareness of this issue by giving more prominence to EU actions in this field, both within the EU and in its relations with third parties.
7. The EU undertakes to address the short, medium and long term impact of armed conflict on children in an effective and comprehensive manner, making use of the variety of tools at its disposal, and building on past and ongoing activities (overview of EU actions in Annex I). The EU's objective is to influence third countries and non state actors to implement international and regional human rights norms, standards and instruments, as well as international humanitarian law (as listed in Annex II) and to take effective measures to protect children from the effects of armed conflict, to end the use of children in armed forces and armed groups, and to end impunity for crimes against children. The EU recognizes the importance of ensuring coordination and continuity between the various policies and actions targeting the situation of children affected by armed conflict in the various policy areas, including CFSP/ESDP, external assistance and humanitarian aid. [...]
8. The EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. These principles are common to the Member States. Respect for human rights features among the key objectives of the EU's Common Foreign and Security Policy (CFSP), which includes the European Security and Defense Policy (ESDP). Respect for human rights is also part of the Community's policies regarding trade and development co-operation and humanitarian assistance.
9. The promotion and protection of the rights of all children is a priority concern of the EU and its Member States. In its work to ensure the protection of children affected by armed conflict, the EU is guided by relevant international and regional norms and standards on human rights and humanitarian law including, inter alia, those contained in Annex II.
10. The EU supports the work of the relevant actors, in particular the UN Secretary General, the Special Representative of the Secretary General for Children and Armed Conflict, the Working Group of the Security Council on Children and Armed Conflict, UNICEF, UNIFEM, OHCHR, UNHCR, UNDP, ILO, the Committee on the Rights of the Child, the Human Rights Committee, the Human Rights Council, the Third Committee, the Council of Europe, OSCE/ODIHR as well as UN Special

Mechanisms and other relevant actors such as the ICRC, the Human Security Network and civil society organizations. The EU also supports the work of child protection networks and Task Forces monitoring UN Resolution 1612 on the ground. The EU will pro-actively contribute and work with these actors to ensure that the existing international safeguards to the rights of the child are strengthened and effectively implemented.

#### IV. GUIDELINES

Regular monitoring, reporting and assessments form the basis for the identification of situations where EU action is called for. Where EU-led crisis management operations are concerned, decision making will proceed on a case-by-case basis, bearing in mind the potential mandate for the specific action and the means and capabilities at the disposal of the EU.

##### A. Monitoring and reporting

11. In their periodic reports and where relevant, and in full knowledge, and in coordination with, the reporting and monitoring system of the UN established through UNSC resolutions 1539 (2004) and 1612 (2005), the EU Heads of Mission, Heads of Mission of civilian operations, EU Military Commanders (through the chain of command) as well as the EU Special Representatives will include an analysis of the effects of conflict or looming conflict on children. These reports should address in particular violations and abuses against children, recruitment and deployment of children by armies and armed groups, killing and maiming of children, attacks against schools and hospitals, blockage of humanitarian access, sexual and gender-based violence against children, abduction of children and the measures taken to combat them by the parties in case. While these six violations provide a primary focus, they do not exclude monitoring and reporting of, and response to, other violations committed against children as relevant in each country situation. They will include in their normal reporting periodic evaluation of the effect and impact of EU actions on children in conflict situations where appropriate. Where relevant, Heads of Mission may prepare *ad hoc* reports on country situations, including an update on the implementation of relevant country strategies which may cover also these issues. Lessons learned from EU crisis management operations may form another important source of information for the competent working parties provided they are not classified.
12. The Commission will draw the attention of the Council and Member States to relevant reporting in this area and provide further information, where appropriate and necessary, on Community-funded projects aimed at children and armed conflict and post-conflict rehabilitation. Member States will feed into this overview by providing information on bilateral projects in this area.

##### B. Assessment and recommendations for action

13. The Council Working Group on Human Rights (COHOM) in close co-ordination with other relevant working parties will on the basis of the above mentioned reports and other relevant information, such as reports and recommendations from the UNSG (including the list of parties to armed conflict that recruit or use children as annexed to the annual report to the UN Security Council on children and armed conflict), the Special Representative of the Secretary General for Children and Armed Conflict, the UN Security Council working group on Children and armed conflict, UNICEF, UN Special Mechanisms and human rights Treaty Bodies as well as non-governmental organizations, at regular intervals identify situations where EU actions are called upon, in particular where alarming situations arise which call for immediate attention, and make recommendations for such action to the appropriate level (PSC/Coreper/Council).

##### C. EU tools for action in relations with third countries

The EU has a variety of tools for action at its disposal. The EU will build on existing initiatives in order to consolidate, strengthen and advance EU actions for children affected by armed conflict (as in Annex I). In addition, the tools at the EU's disposal include, inter alia, the following:

14. **Political dialogue:** The human rights component of the political dialogue at all levels between the EU and third countries and regional organizations shall, where relevant, include all aspects of the rights and well being of the child during pre-conflict, conflict and post-conflict situations.
15. **Démarches:** EU will make démarches and issue public statements urging relevant third countries to take effective measures to ensure protection of children from the effects of armed conflict, to end the use of children in armed forces and armed groups, and to end impunity. The EU Special Representatives and Heads of Mission will be tasked to continue to address the matter with non state actors where relevant. Where appropriate, the EU will also react to positive developments that have taken place.



16. Multilateral co-operation: the Community is engaged in funding projects relating to children and armed conflict in several fields, in particular for Disarmament, Demobilization, Reintegration and Rehabilitation (DDRR) and through humanitarian assistance. The Commission will identify possibilities for extending such support, for example in the context of its Country Strategy Papers and its Mid Term Reviews, paying specific attention to the situations in priority countries. The Commission will also specifically consider the link between relief, rehabilitation and development. In this continuum, the Commission has recognized the importance of support to education in emergencies, which has to be integrated into comprehensive longer-term policies. Member States will equally seek to reflect priorities set out in these guidelines in their bilateral co-operation projects.
17. Crisis management operations: during the planning process, the question of protection of children should be adequately addressed. In countries where the EU is engaged with crisis management operations, and bearing in mind the mandate of the operation and the means and capabilities at the disposal of the EU, the operational planning should take into account, as appropriate, the specific needs of children, bearing in mind the particular vulnerability of the girl child. In pursuit of the relevant UNSC resolutions, the EU will give special attention to the protection, welfare and rights of children in armed conflict when taking action aimed at maintaining peace and security.
18. Making use of the various tools at its disposal, the EU will seek to ensure that specific needs of children will be taken into account in early-warning and preventive approaches as well as actual conflict situations, peace negotiations, peace agreements, ensuring that crimes committed against children be excluded from all amnesties, post-conflict phases of reconstruction, rehabilitation, reintegration and long-term development. The EU will seek to ensure that the local community, including children, is involved in the peace process. In this context, the EU will take advantage of and build on experience gained within the UN system and regional organizations. Girls and those children, who are refugees, displaced, separated, abducted, affected by HIV/AIDS, disabled, subject to sexual exploitation or in detention are particularly vulnerable.
19. Training: the coordinated EU Training Concept in the field of crisis management should take account of the implications of these guidelines. In light of this, the EU recommends training in child protection.
20. Other measures: the EU might consider making use of other tools at its disposal where appropriate, such as the imposition of targeted measures. When EU agreements with third countries are approaching renewal the EU will consider carefully the country's record on respect for children's rights, with particular reference to children affected by armed conflict.

## V. IMPLEMENTATION AND FOLLOW-UP

21. COHOM is furthermore requested to:
- a) oversee the implementation of EU action taken in accordance with these guidelines and to that end develop modalities to render paragraph 12 operational, as well as to oversee the implementation of relevant country strategies. In this context, reference is made to the 25 June 2001 General Affairs Council's conclusions, which recalled that the Community actions should be consistent with the EU's action as a whole;
  - b) review and update on a regular basis the EU list of priority countries;
  - c) promote and oversee mainstreaming of the issue of children and armed conflict throughout all relevant EU policies and actions, as well as to co-operate with other EU bodies in the area of security and development to comprehensively protect the rights of children;
  - d) undertake ongoing review of the implementation of these guidelines, in close co-ordination with the relevant working groups, Special Representatives, Heads of Mission, Heads of Mission of civilian operations and EU Military Commanders (through the chain of command);
  - e) continue to examine, as appropriate, further ways of co-operation with the UN and other international and regional intergovernmental organizations, NGOs as well as corporate actors in this area;
  - f) report to PSC on an annual basis on progress made towards fulfilling the objectives set out in these guidelines;
  - g) submit an evaluation of these guidelines to the Council with recommendations for improvements or updates as and when appropriate;
  - h) on that basis, consider establishing a focal point (for instance a special group of experts or Special Representative) to ensure the future implementation of these guidelines.



## Paris Commitments to protect children from unlawful recruitment and use by armed forces or armed groups (Paris Commitments) [2007]

### **We,**

Ministers and representatives of countries having gathered in Paris on 5 and 6 February 2007 to strongly reaffirm our collective concern at the plight of children affected by armed conflict, our recognition of the physical, developmental, emotional, mental, social and spiritual harm to children resulting from the violation of their rights during armed conflict, and our commitment to identifying and implementing lasting solutions to the problem of unlawful recruitment or use of children in armed conflict;

*Recalling* all the international instruments relevant to the prevention of recruitment or use of children in armed conflict, their protection and reintegration, and to the fight against impunity for violators of children's rights, as well as relevant regional instruments, as listed in the Annex hereto, and in particular calling upon all States which have not done so yet to consider ratifying as a matter of priority the Convention on the Rights of the Child and the Optional Protocols thereto;

*Recalling* UN Security Council resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004) and 1612 (2005) which have repeatedly condemned and called for an end to the unlawful recruitment and use of children by parties to armed conflict contrary to international law, and led to the establishment of a Monitoring and Reporting mechanism and of a Working Group to address violations of children's rights committed in times of armed conflict;

*Recalling* the 1997 Cape Town principles ("Cape Town principles and best practices on the prevention of recruitment of children into the armed forces and on demobilization and social reintegration of child soldiers in Africa"), that have been helpful to guide decisions and actions taken to prevent the unlawful recruitment of children under 18 years of age into armed forces or groups, stop their use, secure their release, provide protection and support their reintegration or integration into family, community and civilian life;

*Deeply concerned* that girls continue to be largely invisible in programming and diplomatic initiatives regarding the unlawful recruitment and use of children by armed forces or groups and committed to reversing and redressing this imbalance;

*Deeply concerned* that the Millennium Development Goals of universal primary education and the development of decent and productive work for youth will not be reached as long as children continue to be unlawfully recruited or used in armed conflicts;

*Recognizing that* States bear the primary responsibility for providing security to and ensuring the protection of all children within their jurisdiction, that children's reintegration into civilian life is the ultimate goal of the process of securing their release from armed forces or groups, and that planning for reintegration should inform all stages of the process and should commence at the earliest possible stage;

### **We commit ourselves :**

1. To spare no effort to end the unlawful recruitment and use of children by armed forces or groups in all regions of the world, i.a. through the ratification and implementation of all relevant international instruments and through international cooperation.
2. To make every effort to uphold and apply the Paris principles ("The Guidelines to Protect Children from Unlawful Recruitment or Use by Armed Forces and Armed Groups") wherever possible in our political, diplomatic, humanitarian, technical assistance and funding roles and consistent with our international obligations.

### **In particular, we commit ourselves:**

3. To ensure that conscription and enlistment procedures for recruitment into armed forces are established and that they comply with applicable international law, including the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, and to establish mechanisms to ensure that age of entry requirements are fully respected and that responsibility for establishing the age of the recruit rests with the recruiting party.
4. To take all feasible measures, including legal and administrative measures, to prevent armed groups within the jurisdiction of our State that are distinct from our armed forces from recruiting or using children under 18 years of age in hostilities.

5. To adhere to the principle that the release of all children recruited or used contrary to international law by armed forces or groups shall be sought unconditionally at all times, including during armed conflict, and that actions to secure the release, protection and reintegration of such children should not be dependent on a cease-fire or peace agreement or on any release or demobilization process for adults.
6. To fight against impunity, and to effectively investigate and prosecute those persons who have unlawfully recruited children under 18 years of age into armed forces or groups, or used them to participate actively in hostilities, bearing in mind that peace or other agreements aiming to bring about an end to hostilities should not include amnesty provisions for perpetrators of crimes under international law, including those committed against children.
7. To use all available means to support monitoring and reporting efforts at the national, regional and international levels on violations of child rights during of armed conflict, including in relation to the unlawful recruitment or use of children, and in particular to support the monitoring and reporting mechanism established by Security Council resolutions 1539 and 1612.
8. To fully cooperate with the implementation of targeted measures taken by Security Council against parties to an armed conflict which unlawfully recruit or use children, such as, but not limited to, a ban on arms and equipment transfers or military assistance to these parties.
9. To take all necessary measures, including the elaboration of rules of engagement and standard operating procedures, and the training of all relevant personnel therein, to ensure that children recruited or used by enemy armed forces or groups who are deprived of their liberty are treated in accordance with international humanitarian law and human rights law, with special consideration for their status as children.
10. To ensure that all children under 18 years of age who are detained on criminal charges are treated in accordance with relevant international law and standards, including those provisions which are specifically applicable to children; and that children who have been unlawfully recruited or used by armed forces are not considered as deserters under applicable domestic law.
11. To ensure that children under 18 years of age who are or who have been unlawfully recruited or used by armed forces or groups and are accused of crimes against international law are considered primarily as victims of violations against international law and not only as alleged perpetrators. They should be treated in accordance with international standards for juvenile justice, such as in a framework of restorative justice and social rehabilitation.
12. In line with the Convention on the Rights of the Child and other international standards for juvenile justice, to seek alternatives to judicial proceedings wherever appropriate and desirable, and to ensure that, where truth-seeking and reconciliation mechanisms are established, the involvement of children is supported and promoted, that measures are taken to protect the rights of children throughout the process, and in particular that children's participation is voluntary.
13. To ensure that children who are released from or have left armed forces or groups are not used for political purposes by any party, including political propaganda.
14. To ensure that children who cross international borders are treated in accordance with international human rights and humanitarian and refugee law, and in particular, that children who flee to another country to escape unlawful recruitment or use by armed forces or armed groups can effectively exercise their right to seek asylum, that asylum procedures are age and gender-sensitive and that the refugee definition is interpreted in an age and gender-sensitive manner taking into account the particular forms of persecution experienced by girls and boys, including unlawful under-age recruitment or use in armed conflict, and that no child is returned in any manner to the borders of a State where there is real risk of torture or cruel and unusual treatment or punishment or when that child is recognized as a Convention refugee according to the 1951 Refugee Convention, or of unlawful recruitment, re-recruitment or use by armed forces or groups, assessed on a case by case basis.
15. To ensure that children who are not in their state of nationality, including those recognized as refugees and granted asylum are fully entitled to the enjoyment of their human rights on an equal basis with other children.
16. To advocate and seek for the inclusion in peace and ceasefire agreements by parties to armed conflict that have unlawfully recruited or used children of minimum standards regarding the cessation of all recruitments, the registration,

the release and the treatment thereafter of children, including provisions to meet the specific needs of girls and their children for protection and assistance.

17. To ensure that any programmes or actions conducted or funded to prevent unlawful recruitment and to support children unlawfully recruited or used by armed forces or groups are based on humanitarian principles, meet applicable minimum standards, and develop systems for accountability, including the adoption of a code of conduct on the protection of children and on sexual exploitation and abuse.
18. To ensure that armed forces or groups having recruited or used children unlawfully are not allowed to secure advantages during peace negotiations and security sector reforms, such as using the number of children in their ranks to increase their share of troop size in a power sharing agreement.
19. To ensure that any funding for child protection is made available as early as possible, including in the absence of any formal peace process and formal disarmament, demobilization and reintegration (DDR) planning, and to also ensure that funding remains available for the time required and for activities in communities benefiting a wide range of children affected by armed conflict in order to achieve full and effective integration or reintegration into civilian life.
20. In that context, we, Ministers and representatives of countries having gathered in Paris on 5 and 6 February 2007, welcome the update of the 1997 Cape Town principles ("the Paris principles"), which will be a useful guide in our common efforts to fight against the plight of children affected by armed conflicts.

## **The Paris Principles and Guidelines on Children Associated with Armed Forces of Armed Groups (Paris Principles) [2007]**

### **Article 2**

For the purposes of these Principles

- 2.0 "Child" refers to any person less than 18 years of age in accordance with the Convention on the Rights of the Child.
- 2.1 "A child associated with an armed force or armed group" refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys, and girls used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.
- 2.2 "Armed forces" refers to the military institution of a State with a legal basis, and supporting institutional infrastructure (salaries, benefits, basic services, etc).
- 2.3 "Armed groups" refers to groups distinct from armed forces as defined by Article 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.
- 2.4 "Recruitment" refers to compulsory, forced and voluntary conscription or enlistment of children into any kind of armed force or armed group.
- 2.5 "Unlawful recruitment or use" is recruitment or use of children under the age stipulated in the international treaties applicable to the armed force or armed group in question or under applicable national law.
- 2.6 "Release" Includes the process of formal and controlled disarmament and demobilization of children from an armed force or armed group as well as the informal ways in which children leave by escaping, being captured or by any other means. It implies a disassociation from the armed force or armed group and the beginning of the transition from military to civilian life. Release can take place during a situation of armed conflict; it is not dependent on the temporary or permanent cessation of hostilities. Release is not dependent on children having weapons to forfeit.
- 2.7 "Disarmament" is the collection, documentation, control and disposal of small arms, ammunition, explosives and light and heavy weapons of combatants and often also of the civilian population. Disarmament also includes the development of responsible arms management programmes.

2.8 “Demobilization” is the formal and controlled discharge of active combatants from armed forces or other armed groups. The first stage of demobilization may extend from the processing of individual combatants in temporary centres to the massing of troops in camps designated for this purpose (cantonment sites, encampments, assembly areas or barracks). The second stage of demobilization encompasses the support package provided to the demobilized persons, which is called reinsertion.

2.9 “Child Reintegration” is the process through which children transition into civil society and enter meaningful roles and identities as civilians who are accepted by their families and communities in a context of local and national reconciliation. Sustainable reintegration is achieved when the political, legal, economic and social conditions needed for children to maintain life, livelihood and dignity have been secured. This process aims to ensure that children can access their rights, including formal and non-formal education, family unity, dignified livelihoods and safety from harm.

2.10 “Formal DDR process” is a process that contributes to security and stability in a post-conflict recovery context by removing weapons from the hands of combatants, taking the combatants out of military structures and helping them to integrate socially and economically into society by finding livelihoods.

#### **Article 8**

10. Where large numbers of people are facing criminal proceedings as a result of armed conflict, the processing the cases of children and of mothers who have children with them in detention should take priority.

# Annex II

## Resolutions and Reports

### UN Security Council resolutions

- Security Council resolution 1261 (1999)
- Security Council resolution 1314 (2000)
- Security Council resolution 1379 (2001)
- Security Council resolution 1460 (2003)
- Security Council resolution 1539 (2004)
- Security Council resolution 1612 (2005)
- Security Council resolution 1882 (2009)
- Statement of its President on 24 July 2006
- Statement of its President on 28 November 2006
- Statement of its President on 12 February 2008
- Statement of its President on 17 July 2008
- Statement of its President on 29 April 2009

### Special Representative of the Secretary-General on Children and Armed Conflict

- *Protection of Children affected by Armed Conflict: Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, 12 October 1998, A/53/482
- *Protection of Children affected by Armed Conflict: Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, 1 October 1999, A/54/430
- *Protection of Children affected by Armed Conflict: Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, 3 October 2000, A/55/442
- *Protection of Children affected by Armed Conflict: Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, 9 October 2001, A/56/453
- *Protection of Children affected by Armed Conflict: Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, 24 September 2002, A/57/402
- *Protection of Children affected by Armed Conflict: Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, 29 August 2003, A/58/328
- *Protection of Children affected by Armed Conflict: Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, 8 October 2004, A/59/426
- *Protection of Children affected by Armed Conflict: Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, 7 September 2005, A/60/335
- *Protection of Children affected by Armed Conflict: Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, 17 August 2006, A/61/275
- *Protection of Children affected by Armed Conflict: Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, 13 August 2007, A/62/228
- *Protection of Children affected by Armed Conflict: Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, 6 August 2008, A/63/227
- *Protection of Children affected by Armed Conflict: Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, 6 August 2009, A/64/254

## UN Secretary-General

- *Report on Children and Armed Conflict to the Security Council*, 19 July 2000, S/2000/712
- *Report on Children and Armed Conflict to the Security Council*, 7 September 2001, S/2001/852
- *Report on Children and Armed Conflict to the Security Council*, 26 November 2002, S/2001/1299
- *Report on Children and Armed Conflict to the Security Council*, 10 November 2003, S/2003/1053
- *Report on Children and Armed Conflict to the Security Council*, 9 February 2005, S/2005/72
- *Report on Children and Armed Conflict to the Security Council*, 26 October 2006, S/2006/826
- *Report on Children and Armed Conflict to the Security Council*, 21 December 2007, S/2007/757
- *Report on Children and Armed Conflict to the Security Council*, 26 March 2009, S/2009/158

## General Assembly

- *Guidelines for the Alternative Care of Children*, 30 October 2009, A/C.3/64/L.50
- *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law*, 21 March 2006, A/RES/60/147

UN Secretary-General's report to the General Assembly on "The status of the Convention on the Rights of the Child," UN Doc. A/64/172, 27 July 2009

## UN Security Council

- "The rule of law and transitional justice in conflict and post-conflict societies," report of the Secretary-General, 23 August 2004, S/2004/616

## Convention on the Rights of the Child

- Guidelines regarding initial reports to be submitted by States party under Article 8(1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict: 12/10/2001, CRC/OP/AC/1
- Revised Guidelines regarding initial reports to be submitted by States Parties under article 8 paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict: 19 October 2007, CRC/C/OPAC/2
- General Comment No. 10 (2007) Children's rights in Juvenile Justice: 25 April 2007, CRC/C/GC/10

## Soft law

- "The Paris Principles", The principles and guidelines on children associated with armed forces or armed groups, Paris, 2007
- "The Paris Commitments" The Paris Commitments to protect children from unlawful recruitment or use by armed forces or armed groups, Paris, 2007
- "The Cape Town Principles and Best practices", Adopted at the symposium on the prevention of the recruitment of children into armed conflicts and on demobilization and on social reintegration of child soldiers in Africa, South Africa, 1997
- "The Beijing Rules", *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, UN doc. A/40/53, 1985

## Economic and Social Council

- Resolution: Guidelines on Justice in matters involving child victims and witnesses of crime, Res/2005/20, 22 July 2005

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*Prosecutor v. Anto Furundzija*, Judgment, Trial Chamber, 10 December 1998, Case No. IT-95-17/1-T



## Checklist of States' Obligations relating to Children Associated with Armed Forces or Armed Groups

|                                     | CRC  | OP-CAC  | GC III   | GC IV  | API  | AP II  | African Charter (Child)  | Protocol to the African Charter   | Ibero-American Convention  | ILO Convention 182  | ICC Statute   |
|-------------------------------------|--|---|--|--|--|--|--|---|--|---|---|
| <b>Participation in hostilities</b> | State Parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities. (Art. 38(2))   | Ensure "all feasible measures" are taken so that those under 18 years of age do not take a direct part in hostilities. (Art. 1)   |  |  | State Parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities. (Art. 77(2)) | Children who have not attained the age of 15 years shall not be allowed to take direct part in hostilities. (Art. 4(3)(c)) | States Parties shall take all necessary measures to ensure that no child shall take a direct part in hostilities. (Art. 22(2)) | States Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities. (Art. 11 al.4) | States Parties undertake to assure youth under 18 years of age that they shall not be called up or involved, in any way, in military hostilities. (Art. 12(3)) |   | Using children under the age of 15 years to participate actively in hostilities is a war crime. (Art. 8(2)(b)(xxvi) & 8(2)(e)(vii)) |
| <b>Recruitment</b>                  | State Parties shall refrain from recruiting any person who has not attained the age of 15 years into their armed forces. When recruiting, State Parties shall endeavour to give priority to those who are oldest (between 15 and 18 years). (Art. 38(3)) | Ensure that those under 18 years of age are not compulsorily recruited into their armed forces (Art. 2). / Ensure that States raise the minimum age for voluntary recruitment (from the current minimum of 15 years). (Art. 3(1)) | The Occupying Power may not, in any case, change children's personal status, nor enlist them in formations or organizations subordinate to it. (Art. 50 para. 2) | State Parties shall refrain from recruiting any person who has not attained the age of 15 years into their armed forces. When recruiting, State Parties shall endeavour to give priority to those who are oldest (between 15 and 18 years). (Art. 77(2)) | Children who have not attained the age of 15 years shall not be recruited in the armed forces or groups. (Art. 4(3)(c))  | States Parties shall take all necessary measures to refrain from recruiting any child. (Art. 22(2))                        | States Parties shall take all necessary measures to ensure that no child is recruited as a soldier. (Art. 11 al.4)             | States Parties shall take all necessary measures to ensure that no child is recruited as a soldier. (Art. 12(1))  | Each Member shall take effective measures to prevent the forced or compulsory recruitment of children for use in armed conflict. (Art. 7(2)(a))                | Conscription or enlisting children under the age of 15 years into the national armed forces is a war crime. (Art. 8(2)(b)(xxvi) & 8(2)(e)(vii)) |   |

|                                  | CRC | OP-CAC  | GC III | GC IV | API | AP II | African Charter (Child) | Protocol to the African Charter | Ibero-American Convention  | ILO Convention 182   | ICC Statute |
|----------------------------------|-----|---|--------|-------|-----|-------|-------------------------|---------------------------------|--|--|-------------|
| <b>Voluntary recruitment</b>     |     | Ensure that recruitment of those under 18 years of age (if applicable) is genuinely voluntary, with consent of guardians, upon reliable proof of age, providing full information on duties involved. (only if permitted by law) (Art. 3(3)) |        |       |     |       |                         |                                 |  |  |             |
| <b>Enforcement &amp; redress</b> |     | Ensure that the recruitment and use in hostilities by Non-State Actors of persons under 18 years of age is punishable as a criminal offence. (Art. 4)   |        |       |     |       |                         |                                 | The States Parties undertake to promote the pertinent legal measures to guarantee the exercise of this right [conscientious objection] and advance in the progressive elimination of the obligatory military service. (Art. 12(2)) | Each Member shall take all necessary measures to implement and enforce provisions including penal sanctions or, as appropriate, other sanctions. (Art. 7(1)) |             |

|                   | CRC  | OP-CAC | GC III  | GC IV | AP I  | AP II   | African Charter (Child)  | Protocol to the African Charter | Ibero-American Convention | ILO Convention 182 | ICC Statute |
|-------------------|--|--------|---|-------|---|---|--|---------------------------------|---------------------------|--------------------|-------------|
| <b>Protection</b> | State parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict. (Art. 38(4)) |        | Subject to any privileged treatment which may be accorded by reason of their [...] age, [...] all prisoners of war shall be treated alike. (Art. 16)  |       |   | Special protection to children under 15 years shall remain applicable to them if they take a direct part in hostilities. (Art. 4(3)(d)) | States Parties shall undertake to respect and ensure for rules of IHL which affect the child. (Art. 22(1)) |                                 |                           |                    |             |
| <b>Detention</b>  |  |        | The Detaining Power may utilize the labour of prisoners of war who are physically fit, taking into account their age [...] and physical aptitude, with a view particularly to maintaining them in a good state of physical and mental health. (Art. 49) |       | Children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units. (Art. 77(4)) |   |  |                                 |                           |                    |             |

|                             | CRC  | OP-CAC | GC III | GC IV | AP I  | AP II   | African Charter (Child) | Protocol to the African Charter | Ibero-American Convention | ILO Convention 182 | ICC Statute |
|-----------------------------|--|--------|--------|-------|---|---|-------------------------|---------------------------------|---------------------------|--------------------|-------------|
| <b>Criminal Proceedings</b> | States Parties shall ensure to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, unless it is considered not to be in the best interest of the child. (Art. 40(2)(b)(iii)) |        |        |       | No sentence may be passed except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure. (Art. 75(4)) | No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. (Art. 6(2)) |                         |                                 |                           |                    |             |
| <b>Sentencing</b>           | Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years. (Art. 37(a))  |        |        |       | The death penalty for an offence related to the armed conflict may not be executed on persons under 18 years of age at the time of the offence. (Art. 77(5))  | The death penalty shall not be pronounced on persons who were under the age of 18 years at the time of the offence. (Art. 6(4))   |                         |                                 |                           |                    |             |

| CRC            | OP-CAC   | GC III | GC IV | AP I | AP II | African Charter (Child) | Protocol to the African Charter | Ibero-American Convention | ILO Convention 182  | ICC Statute |
|----------------|--|--------|-------|------|-------|-------------------------|---------------------------------|---------------------------|---|-------------|
| DDR programmes | States Parties shall take all feasible measures to ensure that persons recruited/used are demobilized or otherwise released from service; shall accord appropriate assistance for their physical and psychological recovery and their social reintegration. (Art. 6(3)) States Parties shall cooperate in the rehabilitation and social reintegration of persons victims of acts contrary thereto. (Art. 7(1)) |        |       |      |       |                         |                                 |                           | Each Member shall take effective measures to provide direct assistance for the removal of children from being used in armed conflicts, and for their rehabilitation and social integration as well as access to free basic education and vocational training where appropriate. (Art. 7(2)(b)(c)) |             |

**XVII**  
**MODEL LEGISLATIVE**  
**PROVISIONS ON THE**  
**RECRUITMENT OR USE**  
**OF CHILDREN IN ARMED**  
**CONFLICT**

The following model legislative provisions are intended to be used by States as guidance in the drafting of legislation prohibiting the recruitment or use of children in armed conflict, with reference to the multiple sources of international law that create obligations upon States. The two standards presented here are:

- Option 1, which encapsulates what is widely known as the “straight 18” approach; and
- Option 2, which follows more strictly the existing provisions in treaty and custom.

The “straight 18” approach of Option 1 goes beyond the individual requirements of international treaty and customary law and offers a broader scope of protection by prohibiting all recruitment of persons under the age of 18 by armed forces or armed groups, and their participation in hostilities. Option 2 stays closer to the international obligations listed below. States wishing to implement only provisions from the Optional Protocol (2000) listed below may nonetheless find the present draft model legislative provisions useful. States wishing to implement only other specific norms and treaties may wish to consult examples from other countries’ legislation cited in this document, and to refer to model legislation available on the ICRC’s website ([www.icrc.org](http://www.icrc.org)).

In drafting these model legislative provisions the following sources of international law were considered:

- the Convention on the Rights of the Child (1989) (“CRC”);
- the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000) (“Optional Protocol”);
- the Rome Statute of the International Criminal Court (1998) (“Rome Statute”);
- International Criminal Court, Elements of Crimes (2002);
- ILO Convention No. 182 on the Worst Forms of Child Labour (1999) (“ILO 182”);
- Additional Protocols I and II of 1977 to the Geneva Conventions of 1949; as well as
- the ICRC Study on customary international humanitarian law (2005), including online updates to June 2012 (“Customary IHL Study”).

This document is divided into four parts:

- Part I contains the **text** of the model legislative provisions;
- Part II offers **commentary** on the text of the model legislative provisions, citing sources of international law and national legislation and practice;
- Part III indicates the relevant sections in the **sources** of international law; and
- Part IV sets out the relevant **national legislation** and other **practice**.

# Part I: Model Legislative Provisions

## Option 1 (“straight 18” approach)

### 1. Recruitment or use of children in armed conflict

No person shall:

- (a) recruit, conscript or enlist a person under the age of 18 years into armed forces or groups; or
- (b) use a person under the age of 18 years in hostilities.

### 2. Penalties

Any person who contravenes section 1 shall be liable on conviction to a term of imprisonment not exceeding XXX years or to a fine not exceeding XXX units, or both.

## Option 2 (narrower treaty and custom-based approach)

### 1. Forcible recruitment of persons under the age of 18 years

No person shall forcibly or compulsorily recruit a person under the age of 18 years into the armed forces.

### 2. Conscripting persons under the age of 15 years or using them in hostilities

No person shall:

- (a) recruit, conscript or enlist a person under the age of 15 years into the armed forces; or
- (b) use a person under the age of 15 years in hostilities.

### 3. Recruitment into or use in armed groups of persons under the age of 18 years

#### 3.1 No person shall:

- (a) recruit a person under the age of 18 years into an armed group; or
- (b) use a person under the age of 18 years in hostilities.
- (c) This section does not apply to the recruitment or use of persons under the age of 18 years by the armed forces.

### 4. Penalties

4.1 Any person who contravenes section 1 shall be liable on conviction to a term of imprisonment not exceeding XXX years or to a fine not exceeding XXX units, or both.

4.2 Any person who contravenes section 2 shall be liable on conviction to a term of imprisonment not exceeding XXX years or to a fine not exceeding XXX units, or both.

4.3 Any person who contravenes section 3 shall be liable on conviction to a term of imprisonment not exceeding XXX years or to a fine not exceeding XXX units, or both.

### 5. Regulations for recruitment into the armed forces

5.1 Members of the armed forces who have not attained the age of 18 years shall not directly participate in hostilities.

5.2 Persons between 15 and 17 years of age may be voluntarily recruited into the armed forces of a State, provided that the following safeguards are maintained:



- (a) Members of armed forces who have not attained the age of 18 years do not take a direct part in hostilities.
- (b) Such recruitment is genuinely voluntary.
- (c) Such recruitment is carried out with the informed consent of the person's parents or legal guardians.
- (d) Such persons are informed of the duties involved in such military service.
- (e) Such persons provide a reliable proof of age prior to acceptance into military service.

**5.3 In recruiting those persons who have attained the age of 15 years but who have not attained the age of 18 years, priority will be given to those who are oldest.**

# Part II: Model Legislative Provisions with Commentary

## Option 1 (“straight 18” approach)

### 1. Recruitment or use of children in armed conflict

No person shall:

- (a) recruit<sup>1</sup>, conscript<sup>2</sup> or enlist<sup>3</sup> a person under the age of 18 years<sup>4</sup> into armed forces<sup>5</sup> or groups<sup>6</sup>; or
- (b) use a person under the age of 18 years in hostilities.<sup>7</sup>

### 2. Penalties

Any person who contravenes section 1 shall be liable on conviction to a term of imprisonment not exceeding XXX years or to a fine not exceeding XXX units, or both.<sup>8</sup>

## Option 2 (narrower treaty and custom-based approach)

### 1. Forcible recruitment of persons under the age of 18 years

No person shall forcibly or compulsorily recruit<sup>9</sup> a person under the age of 18 years<sup>10</sup> into the armed forces.<sup>11</sup>

### 2. Conscripting persons under the age of 15 years or using them in hostilities

No person shall:

- (a) recruit, conscript or enlist a person under the age of 15 years into the armed forces;<sup>12</sup> or
- (b) use a person under the age of 15 years in hostilities.<sup>13</sup>

### 3. Recruitment into or use in armed groups of persons under the age of 18 years

#### 3.1 No person shall:

- (a) recruit a person under the age of 18 years into an armed group; or
- (b) use a person under the age of 18 years in hostilities.<sup>14</sup>
- (c) This section does not apply to the recruitment or use of persons under the age of 18 years by the armed forces.

### 4. Penalties

- 4.1 Any person who contravenes section 1 shall be liable on conviction to a term of imprisonment not exceeding XXX years or to a fine not exceeding XXX units, or both.<sup>15</sup>
- 4.2 Any person who contravenes section 2 shall be liable on conviction to a term of imprisonment not exceeding XXX years or to a fine not exceeding XXX units, or both.
- 4.3 Any person who contravenes section 3 shall be liable on conviction to a term of imprisonment not exceeding XXX years or to a fine not exceeding XXX units, or both.

### 5. Regulations for recruitment into the armed forces

- 5.1 Members of the armed forces who have not attained the age of 18 years shall not directly participate in hostilities.<sup>16</sup>
- 5.2 Persons between 15 and 17 years of age may be voluntarily recruited into the armed forces of a State, provided that the following safeguards are maintained:

- (a) Members of armed forces who have not attained the age of 18 years do not take a direct part in hostilities.
- (b) Such recruitment is genuinely voluntary.
- (c) Such recruitment is carried out with the informed consent of the person's parents or legal guardians.
- (d) Such persons are informed of the duties involved in such military service.
- (e) Such persons provide a reliable proof of age prior to acceptance into military service.<sup>17</sup>

**5.3 In recruiting those persons who have attained the age of 15 years but who have not attained the age of 18 years, priority will be given to those who are oldest.<sup>18</sup>**

## Part III: Sources of International Law

### 1. Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977)

#### Art. 77(2) Protection of Children

"The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest."<sup>19</sup>

### 2. Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977)

#### Art. 4(3)(c) Fundamental Guarantees

"Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities."<sup>20</sup>

### 3. Convention on the Rights of the Child (1989)

#### Art. 38

- "1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict."<sup>21</sup>

### 4. Statute of the International Criminal Court (1998)

#### Art. 5(1)

"The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression."

"For the purpose of this Statute, "war crimes" means:

**Art. 8(2)(b)** Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

[...]

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities."

[...]

**Art. 8(2)(e)** "Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

[...]

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities."<sup>22</sup>

## 5. International Criminal Court, Elements of Crimes (2002)

In an international armed conflict

### Art. 8(2)(b)(xxvi)

Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

*"War crime of using, conscripting and enlisting children*

1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

In a non-international armed conflict

### Art. 8(2)(e)(vii)

Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

*"War crime of using, conscripting and enlisting*

1. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.

4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.”<sup>23</sup>

## **6. ILO Convention No. 182 on the Worst Forms of Child Labour (1999)**

### **Art. 1**

“Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.”

### **Art. 2**

“For the purposes of this Convention, the term *child* shall apply to all persons under the age of 18.”

### **Art. 3**

“For the purposes of this Convention, the term *the worst forms of child labour* comprises:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.”

### **Art. 7**

“1. Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions.”<sup>24</sup>

## **7. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000)**

### **Art. 1**

“States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.”

### **Art. 2**

“States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.”

### **Art. 3**

- “1. States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.
2. Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.
3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:
  - (a) Such recruitment is genuinely voluntary;
  - (b) Such recruitment is carried out with the informed consent of the person’s parents or legal guardians;

- (c) Such persons are fully informed of the duties involved in such military service;
  - (d) Such persons provide reliable proof of age prior to acceptance into national military service.
4. Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.
  5. The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.”

#### Art. 4

- “1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
3. The application of the present article shall not affect the legal status of any party to an armed conflict.”<sup>25</sup>

#### 8. ICRC Customary IHL Study (2005)

Rule 136 of the ICRC Customary IHL Study provides that “children must not be recruited into armed forces or armed groups.” Although Rule 136 does not define ‘children’, the Commentary to it does recognize that “although there is not, as yet, a uniform practice with respect to the minimum age for recruitment, there is agreement that it should not be below 15 years of age.”

Rule 137 of the ICRC Customary IHL Study, provides that “children must not be allowed to take part in hostilities.”<sup>26</sup>

Rule 156 of the ICRC Customary IHL Study, provides that “serious violations of international humanitarian law constitute war crimes.”<sup>27</sup>

“A deductive analysis of the actual list of war crimes found in various treaties and other international instruments, as well as in national legislation and case-law, shows that violations are in practice treated as serious, and therefore as war crimes, if they endanger protected persons or objects or if they breach important values.

(i) *The conduct endangers protected persons or objects.* The majority of war crimes involve death, injury, destruction or unlawful taking of property. However, not all acts necessarily have to result in actual damage to persons or objects in order to amount to war crimes. This became evident when the Elements of Crimes for the International Criminal Court were being drafted. It was decided, for example, that it was enough to launch an attack on civilians or civilian objects, even if something unexpectedly prevented the attack from causing death or serious injury. This could be the case of an attack launched against the civilian population or individual civilians, even though, owing to the failure of the weapon system, the intended target was not hit. The same is the case for subjecting a protected person to medical experiments – actual injury is not required for the act to amount to a war crime; it is enough to endanger the life or health of the person through such an act.

(ii) *The conduct breaches important values.* Acts may amount to war crimes because they breach important values, even without physically endangering persons or objects directly. These include, for example, abusing dead bodies; subjecting persons to humiliating treatment; making persons undertake work that directly helps the military operations of the enemy; violation of the right to fair trial; and recruiting children under 15 years of age into the armed forces.”<sup>28</sup>

The commentary to Rule 156 lists under other serious violations of international humanitarian law “conscripting or enlisting children under the age of 15 into the armed forces or groups, or using them to participate actively in hostilities.”<sup>29</sup>

# Part IV: Sources of National Legislation and Other Practice<sup>30</sup>

## 1. Argentina

Argentina's Law of War Manual (1989) provides that "the belligerent parties shall take all measures to ensure that children under the age of 15 do not participate directly in hostilities."<sup>31</sup>

With respect to non-international armed conflicts in particular, the manual states: "Children under the age of 15 shall not ... be authorized to participate in hostilities."<sup>32</sup>

## 2. Australia

### 1) Criminal Code Act (taking into account amendments up to Act No. 80 of 2011)

National armed forces

Section 268.68 War crime — using, conscripting or enlisting children

"(1) A person (the **perpetrator**) commits an offence if:

- (a) the perpetrator uses one or more persons to participate actively in hostilities as members of the national armed forces; and
- (b) the person or persons are under the age of 15 years; and
- (c) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 17 years."

"(2) A person (the **perpetrator**) commits an offence if:

- (a) the perpetrator conscripts one or more persons into the national armed forces; and
- (b) the person or persons are under the age of 15 years; and
- (c) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 15 years."

"(3) A person (the **perpetrator**) commits an offence if:

- (a) the perpetrator enlists one or more persons into the national armed forces; and
- (b) the person or persons are under the age of 15 years; and
- (c) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 10 years."

Other armed forces and groups

"(4) A person (the **perpetrator**) commits an offence if:

- (a) the perpetrator uses one or more persons to participate actively in hostilities other than as members of the national armed forces; and
- (b) the person or persons are under the age of 18 years; and
- (c) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 17 years."

"(5) A person (the **perpetrator**) commits an offence if:

- (a) the perpetrator conscripts one or more persons into an armed force or group other than the national armed forces; and
- (b) the person or persons are under the age of 18 years; and
- (c) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 15 years."



“(6) A person (the **perpetrator**) commits an offence if:

- (a) the perpetrator enlists one or more persons into an armed force or group other than the national armed forces; and
- (b) the person or persons are under the age of 18 years; and
- (c) the perpetrator’s conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty for a contravention of this subsection: Imprisonment for 10 years.”

#### Section 268.88 War crime — using, conscripting or enlisting children

##### National armed forces

“(1) A person (the **perpetrator**) commits an offence if:

- (a) the perpetrator uses one or more persons to participate actively in hostilities as members of the national armed forces; and
- (b) the person or persons are under the age of 15 years; and
- (c) the perpetrator’s conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict.

Penalty: Imprisonment for 17 years.”

“(2) A person (the **perpetrator**) commits an offence if:

- (a) the perpetrator conscripts one or more persons into the national armed forces; and
- (b) the person or persons are under the age of 15 years; and
- (c) the perpetrator’s conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict.

Penalty: Imprisonment for 15 years.”

“(3) A person (the **perpetrator**) commits an offence if:

- (a) the perpetrator enlists one or more persons into the national armed forces; and
- (b) the person or persons are under the age of 15 years; and
- (c) the perpetrator’s conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict.

Penalty: Imprisonment for 10 years.”

##### Other armed forces and groups

“(4) A person (the **perpetrator**) commits an offence if:

- (a) the perpetrator uses one or more persons to participate actively in hostilities other than as members of the national armed forces; and
- (b) the person or persons are under the age of 18 years; and
- (c) the perpetrator’s conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict.

Penalty: Imprisonment for 17 years.”

“(5) A person (the **perpetrator**) commits an offence if:

- (a) the perpetrator conscripts one or more persons into an armed force or group other than the national armed forces; and
- (b) the person or persons are under the age of 18 years; and
- (c) the perpetrator’s conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict.

Penalty: Imprisonment for 15 years.”

“(6) A person (the **perpetrator**) commits an offence if:

- (a) the perpetrator enlists one or more persons into an armed force or group other than the national armed forces; and
- (b) the person or persons are under the age of 18 years; and
- (c) the perpetrator’s conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict.

Penalty for a contravention of this subsection: Imprisonment for 10 years.”<sup>33</sup>

**2) Australia’s LOAC Manual (2006) states that “children under 18 years of age should not take a direct part in hostilities.”<sup>34</sup>**

**3) Australia’s Defence Instructions (General)**

Recruitment and employment of members under 18 years in the Australian Defence Force, of 4 July 2008 states:

“11. ... [A]ll feasible measures are to be taken to ensure that minors are not deployed to an area of hostilities. That is, to the maximum extent possible, and where it will not adversely impact on the conduct of operations, minors should not be deployed into areas of operations where there is a likelihood of hostile action.

12. Where a minor is on the strength of a unit that is required to deploy to an area of hostility, that minor is not to deploy with the unit. In the case of a unit that is in transit or on exercise, and is required to deploy at short notice, minors in that unit must be returned to a safe area without undue delay.

13. A commander is not obliged to remove a minor from direct participation in hostilities where:

- a. circumstances beyond the control of the commander do not permit removal,
- b. where it would be more dangerous to the minor to attempt to do so, or
- c. where it would prejudice the effectiveness of the mission.

However, nothing in this paragraph relieves a commander of the obligation to do everything possible within their power to prevent minors from participating directly in hostilities.

14. There should be very few circumstances in which the above requirement could not be met. The most obvious exception relates to Navy. Where a minor is serving in a ship that is diverted at short notice to an area of hostility, and it is not possible for that minor to be landed at the nearest safe port prior to the vessel continuing to the area of operations, that minor is to remain with their ship.”<sup>35</sup>

### 3. Azerbaijan

1) The Criminal Code (1999) provides that “recruiting minors into the armed forces constitutes a war crime.”<sup>36</sup>

2) The Law on the Rights of the Child (1998) states that “direct participation in military operations of children under 15 years old is prohibited.”<sup>37</sup>

### 4. Belarus

1) The Law on the Rights of the Child (1993) provides that it is “prohibited to make children participate in hostilities and armed conflicts.”

2) The Criminal Code (1999) provides that “it is a war crime to allow children under the age of 15 years to take part in hostilities.”

## 5. Belgium

The Criminal Code (amended in 2003), article 136 (*quater*, para 1, point 7) defines “the recruitment of children under the age of 15 into armed forces or armed groups as well as the act of actively involving children under the age of 15 in hostilities” as war crimes.<sup>40</sup>

## 6. Cameroon

The Instructor’s Manual (2006) states that “children below the age of 15 ... cannot be recruited into the Armed Forces.”<sup>41</sup>

The Manual also states: “Parties to the conflict are obliged not to engage children under the age of fifteen in direct participation in hostilities...”<sup>42</sup>

## 7. Canada

- 1) The LOAC Manual (2001) states in its chapter on non-international armed conflicts: “[The 1977 Additional Protocol II] provides that children are to receive such aid and protection as required including: [...] c. a ban on their enlistment or participation in the hostilities while under the age of fifteen.”<sup>43</sup>
- 2) The National Defence Act (1985) states: “A person who is under the age of eighteen years may not be deployed by the Canadian Forces to a theatre of hostilities.”<sup>44</sup>
- 3) The Crimes Against Humanity and War Crimes Act (2000) provides in section 4(1) that “every person is guilty of an indictable offence who commits (b) a crime against humanity or (c) a war crime”.

Section 3 of the Act defines a crime against humanity as “any inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations whether or not it constitutes a contravention of the law in force at the time and in the place of its commission”.

Section 3 also defines a ‘war crime’ as “an act or omission committed during an armed conflict that at the time and in the place of its commission constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission”.

Section 3(4) further provides that “for greater certainty crimes described in article 8, paragraph 2 of the Rome Statute are crimes according to customary international law”.<sup>45</sup> This squarely brings conscripting and enlisting children under the age of 15 into armed forces or groups or using them to participate actively in hostilities as stipulated under art. 8(2)(e)(vii) and 8(2)(b)(xxvi) within the scope of crimes against humanity and war crimes under the Act.

## 8. Colombia

- 1) The Law on Judicial Cooperation (1997) states that “children under 18 may not be sent to participate in actual military activities.”<sup>46</sup>
- 2) The Colombian Penal Code (Law No. 599 of 2000) in article 162 provides that a “person who recruits minors below the age of 18 years or who forces them to participate directly or indirectly in hostilities or in armed operations, will incur a prison sentence ranging from six to ten years and a fine”.<sup>47</sup> This provision is applicable to both illegal armed groups as well as armed forces and the definition of crime includes both direct as well as indirect participation of children in hostilities, including the use of children for intelligence.
- 3) In addition, the Law on Childhood and Adolescence No. 1098 (2006) prohibits “the use and recruitment of children by armed groups, and also prohibits any act violative of ILO Convention No. 182.”<sup>48</sup>

- 4) The Basic Military Manual (1995) provides, with respect to non-international armed conflicts in particular, that it is prohibited to “recruit and allow direct participation in hostilities of children under the age of 15”.<sup>49</sup>

## 9. Congo

The Congo’s Genocide, War Crimes and Crimes against Humanity Act (1998) defines war crimes “with reference to the categories of crimes defined in art. 8 of the 1998 ICC Statute”.<sup>50</sup>

## 10. Denmark

The Military Criminal Code (2005) provides:

“Any person who deliberately uses war means [“krigsmiddel”] or procedures the application of which violates an international agreement entered into by Denmark or international customary law, shall be liable to the same penalty [i.e. imprisonment up to life imprisonment].”<sup>51</sup>

## 11. Ethiopia

- 1) Section 4(3) of the Defence Force Proclamation No. 27/1996 provides that “the Defence Ministry may recruit persons who are fit and willing for military purposes. The minimum age for recruitment is 18 years”.<sup>52</sup>
- 2) The Criminal Code (2004) provides in section 270(m), entitled War Crimes against the Civilian Population, that “whoever in time of war, armed conflict or occupation organizes, orders or engages in, against the civilian population and in violation of the rules of public international law and of international humanitarian conventions by recruiting children who have not attained the age of 18 years as members of defense forces to take part in armed conflict is punishable with rigorous imprisonment from 5 – 20 years or, in more serious cases, with life imprisonment or death”.<sup>53</sup>

## 12. Finland

The Criminal Code of Finland provides in chapter 11, section 5(1)(5), entitled ‘war crime’, that “a person in connection with a war or other international or domestic armed conflict or occupation in violation of other rules and customs of international law on war, armed conflict or occupation takes or recruits children below the age of 18 years into military forces or into groups in which they are used in hostilities should be sentenced for a war crime to imprisonment for at least one year or for life”.<sup>54</sup> It further provides in chapter 11 section 5(2) that “a person who commits another act defined under article 8 of the Rome Statute of the International Criminal Court or in another manner violates the provisions of an international agreement on war, armed conflict or occupation that is binding on Finland or the generally recognized and established laws and customs of war in accordance with international law shall be sentence for a war crime”.<sup>55</sup>

## 13. Fiji

The Employment Relations Promulgation (2007) in section 91(a) prohibits the “forced or compulsory recruitment of children in armed conflict [...] and that a person who engages in such prohibited form of child labour commits an offence”.<sup>56</sup> Section 256 further provides that “a person who commits an offence under this Promulgation for which no particular penalty is provided is liable on conviction for an individual, to a fine not exceeding USD 10,000 or to a term of imprisonment not exceeding 2 years or both”.<sup>57</sup>

## 14. France

The LOAC Manual (2001) provides: “Only children aged at least 15 can participate in hostilities”, adding that “to make them participate directly in hostilities is a war crime.” The manual states, however: “A child who does take part in an armed conflict shall benefit, because of his military activity, from the status of combatant and of prisoner of war in case of capture.”<sup>58</sup>

## 15. Germany

- 1) The Military Manual (1992) provides: "The parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take direct part in hostilities."<sup>59</sup>
- 2) The Law Introducing the International Crimes Code (2002) punishes anyone who, in connection with an international or non-international armed conflict, "conscripts children under the age of fifteen years into the armed forces, or enlists them in the armed forces or in armed groups"<sup>60</sup>

## 16. Georgia

Georgia's Criminal Code (1999) provides that "any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as using [children under the age of 15 years] to participate actively in hostilities, is a crime in both international and non-international armed conflicts"<sup>61</sup>

## 17. Greece

The Penal Code in art. 323(a) provides "sanctions for the recruitment of under age persons by force, threats, deceptive means or by promises or other benefits for armed conflict". Section 1(1) of Law No. 1763/1988 (as amended by Law No. 2510 of June 1997) on military service provides that, "men from January 1 of the year during which they turn 19 are liable for military service with the armed forces". Section 1(2) of the same law provides that "all Greek males may be called upon to join the armed forces from January 1 of the year they reach 18 to cover increased mobilization needs".

## 18. Indonesia

Art. 63 of the Republic of Indonesia Law No. 23 (2002) provides that "all persons are prohibited from recruiting or equipping children for military or similar purposes and from putting the lives of children in danger"<sup>62</sup> The corresponding penalty is listed under art. 87, which provides for "imprisonment of no more than five years and/or a maximum fine of 100 million Rupiah (USD 11,000) for recruiting and equipping children for military purposes or misusing children by using them in an armed conflict"<sup>63</sup>

## 19. Ireland

Ireland's Geneva Conventions Act (1962), as amended in 1998, provides that "any minor breach of the 1949 Geneva Conventions, including violations of art. 50 of the Geneva Convention IV, and of the 1977 Additional Protocol I, including violations of art. 77(2), as well as any "contravention" of the 1977 Additional Protocol II, including violations of art. 4(3)(c), are punishable offences"<sup>64</sup>

## 20. Jordan

The Military Service Law No. 2 (1972) provides that "children under 16 years old may not be enlisted in the armed forces"<sup>65</sup>

## 21. Kenya

- 1) The LOAC Manual (1997) states: "Children under the age of 15 shall not be recruited into the armed forces."<sup>66</sup>
- 2) The Children Act (2001) in section 10(2) provides that "no child shall take part in hostilities or be recruited in armed conflicts, and where armed conflict occurs, respect for and protection and care of children shall be maintained in accordance with the law". Further, section 20 provides "where any person wilfully or as a consequence of culpable negligence infringes any rights of a child as specified in section 5 to 19 such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine"<sup>67</sup>

## 22. Kyrgyzstan

The Criminal Code of the Kyrgyz Republic (as amended in 2006) in art. 124, entitled Traffic in Persons, provides that “trafficking including recruiting, transport, harbouring, reception, transfer, purchase and sale of a person or another unlawful transaction using force, deception, fraud, kidnapping for the purpose of further exploitation shall be punishable by up to five years of restricted liberty or three to eight years of imprisonment with or with no property seizure”. Exploitation has been defined in this section to include use in armed conflict. Further, section 124(3) provides that “the same act committed towards a juvenile shall be punishable by 8 to 15 years of imprisonment with property seizure”.<sup>68</sup>

## 23. Libyan Arab Jamahiriya

Law No. 40 on Service in the Armed Forces provides that “no one under the age of seventeen years” may serve in the armed forces.<sup>69</sup>

## 24. Lithuania

Criminal Code art. 105. Forcible Use of Civilians or Prisoners of War in the Armed Forces of the Enemy.

- “1. A person who, in time of war, during an armed international conflict, occupation or annexation and in violation of international humanitarian law, forces civilians or prisoners of war to serve in the armed forces of their enemy, uses them as a human shield in a military operation, conscripts or recruits children under the age of 18 years into the armed forces or uses them in a military operation shall be punished with imprisonment for a term of three up to ten years.”
- “2. A person who conscripts or recruits children under the age of 18 years into military service in the military groups not belonging to the armed forces of the State or uses them in a military operation shall be punished by imprisonment for a term of three up to twelve years.”<sup>70</sup>

## 25. Malawi

The National Service Act (1951) states that “no person under the age of 18 years shall be liable for military service”.<sup>71</sup>

## 26. Malaysia

Armed Forces Act (1972) establishes “a minimum age of 18 for anyone to be considered for enrolment or recruitment in the armed forces. Persons below the age of 18 may be appointed as apprentices, but they are not considered as recruits and are therefore not subjected to service law.”<sup>72</sup>

## 27. Mali

According to the Penal Code (2001), “conscripting or enlisting children under the age of fifteen years into the national armed forces or groups” constitutes a war crime in international armed conflicts.<sup>73</sup>

## 28. Montenegro

According to section 444 (1) of the Criminal Code “any person who by force/threat or deceit [...] recruits, transports or transfers [...] a person for use in armed conflict shall be punished by imprisonment [...]”. Section 444(2) provides that “if the offence referred to in Paragraph 1 of this Article is committed to a juvenile person, the offender shall be liable to imprisonment prescribed for that offence, even if there was no force, threat or any other of the stated methods present in the commission of the crime”.<sup>74</sup>

## 29. Netherlands

- 1) The Military Manual (2005) states: "Parties to a conflict should ensure that children under the age of 15 play no direct part in hostilities. Therefore they may not be drafted into the armed forces."<sup>75</sup>
- 2) International Crimes Act (2003)

### Section 5(5)

"Anyone who, in the case of an international armed conflict, commits one of the following acts: [...]

(r) conscripting or enlisting children under the age of fifteen years into the national armed forces or armed groups or using them to participate actively in hostilities [...] shall be liable to a term of imprisonment not exceeding fifteen years or a fifth category fine."

### Section 6(3)

"Anyone who, in the case of an armed conflict not of an international character, commits one of the following acts: [...]

(f) conscripting or enlisting children under the age of fifteen years into the national armed forces or armed groups or using them to participate actively in hostilities [...] shall be liable to a term of imprisonment not exceeding fifteen years or a fifth category fine."<sup>76</sup>

## 30. Nicaragua

Article 509 of the Penal Code further provides that "any person who during an international or non-international armed conflict recruits or enlists individuals under eighteen years in the armed forces or uses them to participate actively in hostilities, shall be punished with imprisonment from ten to fifteen years"<sup>77</sup>

## 31. New Zealand

- 1) The Military Manual (1992) provides, with respect to non-international armed conflicts in particular, that children "are to receive such aid and protection as they require, including ... a ban on their enlistment ... while under the age of fifteen"<sup>78</sup>
- 2) International Crimes and International Criminal Court Act (2000)

### Article 11 War crimes

"(1) Every person is liable on conviction or indictment to the penalty specified in subsection (3) who, in New Zealand or elsewhere, commits a war crime.

(2) For the purposes of this section, a war crime is an act specified in---

- (a) article 8(2)(a) of the Statute (which relates to grave breaches of the First, Second, Third, and Fourth Geneva Conventions); or
- (b) article 8(2)(b) of the Statute (which relates to other serious violations of the laws and customs applicable in international armed conflict); or
- (c) article 8(2)(c) of the Statute (which relates to armed conflict not of an international character involving serious violations of article 3 common to the 4 Geneva Conventions of 12 August 1949); or
- (d) article 8(2)(e) of the Statute (which relates to other serious violations of the laws and customs applicable in armed conflict not of an international character).

(3) The penalty for a war crime is,---

- (a) if the offence involves the wilful killing of a person, the same as the penalty for murder.
- (b) in any other case, imprisonment for life or a lesser term.

(4) Nothing in this section affects or limits the operation of section 3 of the Geneva Conventions Act 1958 (which makes a grave breach of the Geneva Conventions an offence under New Zealand law).<sup>79</sup>

### 32. Nigeria

- 1) Nigeria's Child Rights Act (2003) states: "No child shall be recruited into any of the branches of the armed forces of the Federal Republic of Nigeria."<sup>80</sup>

The Act defines a child as "a person under the age of eighteen years."<sup>81</sup>

- 2) Nigeria's Military Manual (1994) states: "Children under 15 years shall not be recruited."<sup>82</sup>

### 33. Norway

The Military Penal Code (1902), as amended in 1981, provides:

"Anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment."<sup>83</sup>

### 34. Philippines

- 1) The Philippine Army Soldier's Handbook on Human Rights and International Humanitarian Law (2006) provides:

"4. Do not allow any person below 18 years old to take part in the armed conflict. Children shall be considered as zones of peace and shall enjoy the protection of the State against dangers arising from an armed conflict. Children shall not be recruited or employed by the government forces to perform or engage in activity necessary to and in direct connection with an armed conflict either as a soldier, guide, courier or in a similar capacity which would result in his being identified as an active member of an organized group that is hostile to the government forces."<sup>84</sup>

In its glossary, the Handbook further notes: "Children – refers to persons below 18 years of age or those over but unable to fully take care of themselves or protect themselves from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition."<sup>85</sup>

- 2) The Republic Act No. 7610, An Act on Child Protection of Children Against Abuse, Exploitation and Discrimination (1992) of the Philippines, in an article on "Children in situations of armed conflict", provides: "Children shall not be recruited to become members of the Armed Forces of the Philippines, of its civilian units or other armed groups, nor be allowed to take part in the fighting or used as guides, couriers or spies."<sup>86</sup>
- 3) The Republic Act No. 9851, An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and other Crimes against Humanity (2009) provides in section 4(c)(24) that "war crimes or crimes against international humanitarian law includes other serious violations of the laws and customs applicable in armed conflict within the established framework of international law including:
  - (i) Conscripting, enlisting or recruiting children under the age of fifteen (15) years into the national armed forces;
  - (ii) Conscripting, enlisting or recruiting children under the age of 18 years into an armed force or groups other than the national armed forces;
  - (iii) Using children under the age of eighteen (18) years to participate actively in hostilities."<sup>87</sup>

Section 7 outlines penalties and provides in relevant parts that "any person found guilty of committing any of the Act provided under section 4 shall suffer the penalty of reclusion temporal in its medium to maximum period and a fine ranging from one hundred thousand pesos (Php 100,000.00) to Five hundred thousand pesos (php 500,000.00)".

"When justified by the extreme gravity of the crime, especially where the commission of any of the crimes specified herein results in death or serious physical injury or constitutes rape and considering the individual circumstances of the accused, the penalty of reclusion perpetual and a fine ranging from Five hundred thousand pesos (Php 500,000.00) to One million pesos (Php 1,000,000.00) shall be imposed."<sup>88</sup>

Section 8 outlines both individual criminal responsibility as a principal for a crime as well as criminal liability as an accomplice for aiding, abetting or otherwise assisting in the commission of the crime.<sup>89</sup>



- 4) Republic Act No. 9231, An Act Providing for the Elimination of the Worst Forms of Child Labour (2003) provides in section 12(d)(1) that “no child shall be engaged in the worst forms of child labour which includes the forced or compulsory recruitment of children for use in armed conflict.”<sup>90</sup>

Section 16(b) outlines the Penal Provisions and provides that “any person who violates the provision of 12(d) of this Act shall suffer the penalty of a fine of not less than one hundred thousand pesos (P100,000.00) but not more than One million pesos (P1,000,000.00) or imprisonment of not less than twelve (12) year and one (1) day to twenty (20) years, or both such fine and imprisonment at the discretion of the court.”

Section 16(c) provides that “any person who violates sections of 12(d)(1) shall be prosecuted and penalized in accordance with the penalty provided for by the Anti-Trafficking in Persons Act (2003).”<sup>91</sup>

### 35. Qatar

The Law on Military Service (2006) provides that a person appointed to military service may “not be under the age of eighteen”<sup>92</sup>

### 36. Republic of Korea

The ICC Act (2007) provides for the punishment of anyone who commits the war crime of “[c]onscripting children under the age of fifteen years into the armed forces or in armed groups, or enlisting them in the armed forces or in armed groups” in both international and non-international armed conflicts.<sup>93</sup>

### 37. Russian Federation

- 1) Russian Federation Regulations on the Application of IHL (2001) state with regard to internal armed conflict: “Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.”<sup>94</sup>
- 2) The Criminal Code (taking into account amendments up to 2004) states that “recruitment, training, financing, or any other material provision of a mercenary, and also the use of him in an armed conflict or hostilities, committed by a person through his official position, or with relation to a minor, shall be punishable by deprivation of liberty for a term of seven to fifteen years, with or without a fine in the amount of up to 500 thousand roubles or in the amount of the wage or salary, or any other income of the convicted person for a period of up to three years.”<sup>95</sup>

### 38. Rwanda

- 1) The Law Relating to Rights and Protection of the Child against Violence (2001) provides: “Military service is prohibited for children less than 18 years.”<sup>96</sup>
- 2) The Presidential Order Establishing Army General Statutes (2002) provides in Article 5:
 

“For anybody to qualify for recruitment into the Rwanda Defence Forces, he [must fulfil the] following conditions:

[...]

To be at least 18 years old minimum.”<sup>97</sup>
- 3) The Law Repressing the Crime of Genocide, Crimes against Humanity and War Crimes (2003) provides:
 

“Article: 10: “War crime” shall also mean any of the following acts committed in armed conflicts:

[...]

8° forcing civilians, including children under eighteen (18) years, to take part in hostilities or to perform works related to military purposes;

[...]

Article 11: Anyone who commits one of the war crimes provided for in Article 10 of this law shall be punished by the following penalties:

[...]

2° imprisonment for ten (10) to twenty (20) years, where he has committed a crime provided for in point 3°, 8°, 11° or 12° of Article 10 of this law.”<sup>98</sup>

### 39. Slovenia

Penal Code (2007), Article 378

“Whoever, during wartime, armed conflict or occupation or when carrying out or supporting the policy of a state or organisation as part of a larger systematic attack, orders or carries out the conscription of persons under 18 years of age into national or other armed forces and their exploitation for active participation in hostilities, shall be sentenced to imprisonment of not less than ten years.”<sup>99</sup>

### 40. South Africa

The ICC Act (2002) reproduces the war crimes listed in the 1998 Rome Statute, including “conscripting or enlisting children under the age of fifteen years” into national armed forces in international armed conflicts or into armed forces or groups in non-international armed conflicts.<sup>100</sup>

### 41. Spain

- 1) Under the Penal Code (1995), breaches of international treaty provisions providing for special protection of children are punished.<sup>101</sup>
- 2) Spain’s LOAC Manual (1996) provides: “All possible means shall be taken, within the limits of military necessity, to avoid recruiting children under 15.”<sup>102</sup>

### 42. Sri Lanka

- 1) Section 358A of the Penal Code provides that “any person who engages or recruits a child for use in armed conflict shall be guilty of any offence and is liable to imprisonment for a term not exceeding thirty years and a fine.”<sup>103</sup>
- 2) Furthermore, the Employment of Women, Young Persons and Children Act (2006) provides in art. 20A that “no person under the age of 18 years shall be employed in any hazardous occupation”.<sup>104</sup> A list of 49 hazardous occupations to be read with article 20A of the Act was subsequently published in the Government Gazette. This list includes the use of children in armed conflict and brings it squarely within the scope of protection of the Act.<sup>105</sup> As a penalty, the Act provides that, “any person who employs a person in contravention of this prohibition will be guilty of an offence and shall on conviction be liable to a fine not exceeding ten thousand rupees or to imprisonment for a period not exceeding 12 months or both and shall also be ordered to pay compensation as may be determined by the Magistrate to the victim of the offence”.<sup>106</sup>

### 43. Switzerland

Criminal Code (status as of 1 January 2012)

Art. 264f Recruitment and use of child soldiers

- “ 1. The penalty shall be a custodial sentence of not less than three years for any person who enlists a child under the age of fifteen years into armed forces or groups or recruiting them for this purpose or using them to participate in armed conflicts.
2. In especially serious cases, and in particular where the offence affects a number of children or the offender acts in a cruel manner, a custodial sentence of life may be imposed.
3. In less serious cases, a custodial sentence of not less than one year may be imposed.”<sup>107</sup>

## 44. Uganda

The Defence Forces Act (2005) provides: “No person shall be enrolled into the Defence Forces unless he or she ... is at least 18 years of age”.<sup>108</sup>

## 45. Ukraine

- 1) The IHL Manual (2004):

As regards children, international humanitarian law envisages the following:

“children who have not attained the age of fifteen years shall not be allowed to take part in hostilities.”<sup>109</sup>

- 2) The Military Service Law (1992) states that “18 years is the recruitment age for the armed forces. Adolescents of 15 to 17 years old can enter military schools after having passed a medical examination. Military education and military service for persons who have not reached 15 years of age are forbidden.”<sup>110</sup>

## 46. United Kingdom

- 1) The LOAC Manual (2004) states in its chapter on the protection of civilians in the hands of a party to the conflict: “Steps must be taken to ensure that those aged under fifteen years are not recruited into the armed forces and do not take a direct part in hostilities. Moreover, where there is recruitment of young persons aged between fifteen and eighteen years, priority is to be given to the oldest.”

With regard to internal armed conflict, the manual states:

“15.7. It is prohibited to conscript or enlist children under the age of fifteen years into armed forces or groups” or to use them “to participate actively in hostilities.”<sup>111</sup>

- 2) The International Criminal Court Act (2001)

### Art. 50(1)

“In this Part –  
‘war crime’ means a war crime as defined in article 8.2 of the Rome Statute.”

### Schedule 8

#### Article 8

“For the purpose of this Statute, ‘war crime’ means:

2(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

[...]

2(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.”<sup>112</sup>

## 47. United States

“Public Law 110–340  
110th Congress

An Act to prohibit the recruitment or use of child soldiers, to designate persons who recruit or use child soldiers as inadmissible aliens, to allow the deportation of persons who recruit or use child soldiers, and for other purposes.<sup>113</sup>

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### SECTION 1. SHORT TITLE.

This Act may be cited as the “Child Soldiers Accountability Act of 2008”.

### SEC 2. ACCOUNTABILITY FOR THE RECRUITMENT AND USE OF CHILD SOLDIERS.

(a) CRIME FOR RECRUITING OR USING CHILD SOLDIERS.—

(1) IN GENERAL.—Chapter 118 of title 18, United States Code, is amended by adding at the end the following:

#### “§ 2442. Recruitment or use of child soldiers

“(a) OFFENSE.—Whoever knowingly—

“(1) recruits, enlists, or conscripts a person to serve while

such person is under 15 years of age in an armed force or group; or

“(2) uses a person under 15 years of age to participate actively in hostilities;

knowing such person is under 15 years of age, shall be punished as provided in subsection (b).

“(b) PENALTY.—Whoever violates, or attempts or conspires to violate, subsection (a) shall be fined under this title or imprisoned not more than 20 years, or both and, if death of any person results, shall be fined under this title and imprisoned for any term of years or for life.

“(c) JURISDICTION.—There is jurisdiction over an offense described in subsection (a), and any attempt or conspiracy to commit such offense, if—

“(1) the alleged offender is a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22))) or an alien lawfully admitted for permanent residence in the United States (as defined in section 101(a)(20) of such Act (8 U.S.C. 1101(a)(20)));

“(2) the alleged offender is a stateless person whose habitual residence is in the United States;

“(3) the alleged offender is present in the United States, irrespective of the nationality of the alleged offender; or

“(4) the offense occurs in whole or in part within the United States.

“(d) DEFINITIONS.—In this section:

“(1) PARTICIPATE ACTIVELY IN HOSTILITIES.—The term ‘participate actively in hostilities’ means taking part in—

“(A) combat or military activities related to combat, including sabotage and serving as a decoy, a courier, or at a military checkpoint; or

“(B) direct support functions related to combat, including transporting supplies or providing other services.

“(2) ARMED FORCE OR GROUP.—The term ‘armed force or group’ means any army, militia, or other military organization, whether or not it is state-sponsored, excluding any group assembled solely for nonviolent political association.”

(2) STATUTE OF LIMITATIONS.—Chapter 213 of title 18, United States Code is amended by adding at the end the following:

#### § 3300. Recruitment or use of child soldiers

“No person may be prosecuted, tried, or punished for a violation of section 2442 unless the indictment or the information is filed not later than 10 years after the commission of the offense.”

(3) CLERICAL AMENDMENT.—Title 18, United States Code, is amended—

(A) in the table of sections for chapter 118, by adding at the end the following:

“2442. Recruitment or use of child soldiers”; and

(B) in the table of sections for chapter 213, by adding at the end the following:

“3300. Recruitment or use of child soldiers.”

- (b) GROUND OF INADMISSIBILITY FOR RECRUITING OR USING CHILD SOLDIERS.—Section 212(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)) is amended by adding at the end the following:
- “(G) RECRUITMENT OR USE OF CHILD SOLDIERS.—Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18, United States Code, is inadmissible.”
- (c) GROUND OF REMOVABILITY FOR RECRUITING OR USING CHILD SOLDIERS.—Section 237(a)(4) of the Immigration and Nationality Act (8 U.S.C. 1227(a)(4)) is amended by adding at the end the following:
- “(F) RECRUITMENT OR USE OF CHILD SOLDIERS.—Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18, United States Code, is deportable.”
- (d) ASYLUM AND WITHHOLDING OF REMOVAL.—
- (1) ISSUANCE OF REGULATIONS.—Not later than 60 days after the date of enactment of this Act, the Attorney General and the Secretary of Homeland Security shall promulgate final regulations establishing that, for purposes of sections 241(b)(3)(B)(iii) and 208(b)(2)(A)(iii) of the Immigration and Nationality Act (8 U.S.C. 1231(b)(3)(B)(iii); 8 U.S.C. 1158(b)(2)(A)(iii)), an alien who is deportable under section 237(a)(4)(F) of such Act (8 U.S.C. 1227(a)(4)(F)) or inadmissible under section 212(a)(3)(G) of such Act (8 U.S.C. 1182(a)(3)(G)) shall be considered an alien with respect to whom there are serious reasons to believe that the alien committed a serious nonpolitical crime.
- (2) AUTHORITY TO WAIVE CERTAIN REGULATORY REQUIREMENTS.—
- The requirements of chapter 5 of title 5, United States Code (commonly referred to as the “Administrative Procedure Act”), chapter 35 of title 44, United States Code (commonly referred to as the “Paperwork Reduction Act”), or any other law relating to rulemaking, information collection, or publication in the Federal Register, shall not apply to any action to implement paragraph (1) to the extent the Attorney General or the Secretary of Homeland Security determines that compliance with any such requirement would impede the expeditious implementation of such paragraph.

Approved October 3, 2008.”

## Notes

- 1 The term 'recruits' is used in AP I, art. 77(2), AP II, art. 4(3)(c) and the Optional Protocol, art. 4(1).

The term can also be found in the following national laws and military manuals. The military manuals referred to in this document are cited in the ICRC Customary IHL Study (2005) and in certain cases reiterate the State's international obligations without necessarily adding implementing legislation.

1. Azerbaijan: Criminal Code, art. 116.0.5 (1999);
  2. Belgium: Criminal Code, art. 136 (*quater*, para 1, point 7) (amended in 2003);
  3. Cameroon: Instructor's Manual, at p. 90, section 351(5) (2006);
  4. Colombia: Penal Code (Law No. 599 of 2000), section 162 (2000); Law on Childhood and Adolescence No. 1098, art. 20(7) (2006); Basic Military Manual, at p. 75 (1995);
  5. Ethiopia: Criminal Code, section 270(m) (2004);
  6. Finland: Criminal Code, chapter 11, section 5(5) (amendments up to 940/2008);
  7. Fiji: Employment Relations Promulgation, section 91(a) (2007);
  8. Greece: Penal Code, art. 323(a);
  9. Indonesia: Law No. 23, art. 63 (2002);
  10. Kenya: The Children Act, sections 10(2) and 29 (No. 8 of 2001); Law of Armed Conflict Military Basic Course, The School of Military Police at p. 8;
  11. Kyrgyz Republic: Criminal Code, art. 124 (as amended in 2006);
  12. Lithuania: Criminal Code, section 105(2) (last amended in 2008);
  13. Malaysia: Armed Forces Act, section 18 (1972);
  14. Montenegro: Criminal Code, section 444(1) (Official Gazette of the Republic of Montenegro No. 70/2003, and Correction, No. 13/2004);
  15. Nicaragua: Penal Code, art. 509 (2008);
  16. Nigeria: Child Rights Act, section 34(1) (2003);
  17. Philippines: Republic Act No. 9851, An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and other Crimes against Humanity, section 4(c)(24) (2009); Republic Act No. 9231, An Act providing for the Elimination of the Worst Forms of Child Labour, section 12(d)(1) (2003); Republic Act No. 7610, An Act on Special Protection of Children against Abuse Exploitation and Discrimination, art. X, section 22(b) (1992);
  18. Russian Federation: Regulation on the Application of IHL, section 81 (2001); Criminal Code, art. 359(2) (taking into account amendments as of 2004);
  19. Rwanda: Presidential Order Establishing Army General Statutes, art. 5 (2002);
  20. Spain: LOAC Manual, vol. 1, section 1.3(c)(1) (1996);
  21. Sri Lanka: Penal Code, section 358A (2006);
  22. Switzerland: Criminal Code, section 264(f) (2012);
  23. Ukraine: Military Service Law, art. 15 (1992);
  24. United Kingdom: LOAC Manual, section 9.9.1 (2004); and
  25. United States: Child Soldiers Accountability Act, section 2442(a)(1) (2008).
- 2 The term 'conscripts' is used in the Rome Statute, arts. 8(2)(b)(xxvi) and 8(2)(e)(vii). Also note that ILO 182, art. 3(a), makes reference to 'forced or compulsory recruitment' and the Optional Protocol uses the term "compulsory recruitment" in art. 2.

The term 'conscripts' may be found in the following national laws and military manuals:

1. Australia: Criminal Code Act, sections 268.68(2) and 268.88(2) (taking into account amendments up to Act No. 80 of 2011);
  2. Canada: Crimes Against Humanity and War Crimes Act, section 3(4) refers to crimes described in art. 8(2) of the Rome Statute ("conscript and enlistment into armed forces or groups") (2000);
  3. Colombia: Law on Childhood and Adolescence No. 1098, prohibits the use and recruitment of children by armed groups, and also prohibits any act violative of ILO Convention No. 182 ("forced compulsory recruitment for use in armed conflict") (2006);
  4. Fiji: Employment Relations Promulgation, section 91(a) ("forced or compulsory recruitment") (2007);
  5. Finland: Criminal Code, chapter 11, section 5(2) refers to war crimes under art. 8 of the Rome Statute ("conscript and enlistment into armed forces or groups") (39/1889, amendments up to 940/2008 included);
  6. Germany: Law Introducing the International Crimes Code, art. 1, section 8(1)(5) (2002);
  7. Greece: Penal Code ("recruitment by force or threats");
  8. Lithuania: Criminal Code, art. 105 (last amended in 2008);
  9. Mali: Penal Code, art. 31(i)(26) (2001);
  10. Netherlands: International Crimes Act, sections 5(5)(r) and 6(3)(f) (2003);
  11. New Zealand: International Crimes and International Criminal Court Act, art. 11(2)(b) and (d) refers to crimes under art. 8(2)(b) and 8(2)(e) of the Rome Statute ("conscript and enlistment into armed forces or groups") (2000);
  12. Philippines: Republic Act No. 9851, An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and other Crimes against Humanity, section 4(c)(24) (2009); Republic Act No. 9231, An Act Providing for the Elimination of the Worst Forms of Child Labour, section 12(d)(1) (2003);
  13. Republic of Korea: ICC Act, art. 19(3)(5) (2007);
  14. Slovenia: Penal Code, art. 378 (2007);
  15. South Africa: ICC Act, schedule 1, part 3, sections (b)(xxvi) and (e)(vii) (2002);
  16. United Kingdom: The International Criminal Court Act, schedule 8, sections 8(2)(b)(xxvi) and 8(2)(e)(vii) (2001); LOAC Manual section 9.9.1 (2004); and
  17. United States: Child Soldiers Accountability Act, section 2442 (a)(1) (2008).
- 3 The term 'enlists' is used in the Rome Statute, arts. 8(2)(b)(xxvi) and 8(2)(e)(vii). The term may also be found in the following national laws and military manuals:
1. Australia: Criminal Code Act, sections 268.68(3) and 268.88(3) (taking into account amendments up to Act No. 80 of 2011);
  2. Canada: Crimes Against Humanity and War Crimes Act, section 3(4) refers to crimes described in art. 8(2) of the Rome Statute ("conscript and enlistment into armed forces or groups") (2000);
  3. Germany: Law Introducing the International Crimes Code, art. 1, section 8(1)(5) (2002);
  4. Jordan: Military Service Law No. 2, chapter 2, art. 5 (1972);
  5. Lithuania: Criminal Code, section 105 (last amended in 2008);
  6. Mali: Penal Code, art. 31(i)(26) (2001);
  7. Netherlands: International Crimes Act, sections 5(5)(r) and 6(3)(f) (2003);
  8. New Zealand: International Crimes and International Criminal Court Act, art. 11(2)(b) and (d) refers to crimes under art. 8(2)(b) and 8(2)(e) of the Rome Statute ("conscript and enlistment into armed forces or groups") (2000);
  9. Nicaragua: Penal Code, art. 509 (2008);
  10. Philippines: Republic Act No. 9851, An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and other Crimes against Humanity, section 4(c)(24) (2009);
  11. South Africa: ICC Act, schedule 1, part 3, sections (b)(xxvi) and (e)(vii) (2002);
  12. Switzerland: Criminal Code, section 264(f) (2012);
  13. United Kingdom: The International Criminal Court Act, schedule 8, sections 8(2)(b)(xxvi) and 8(2)(e)(vii) (2001); LOAC Manual, section 9.9.1 (2004); and
  14. United States: Child Soldiers Accountability Act, section 2442(a)(1) (2008).
- 4 Although Option 1 broadly prohibits all recruitment and participation in hostilities of persons under the age of 18, the standard 'under the age of 18' is used in relation to protecting such persons from direct participation in hostilities and compulsory recruitment by States or use by armed groups and can be found in the Optional Protocol, arts. 1, 2 and 4(1), respectively, as well as in ILO 182, art. 2, in the context of prohibiting the forced or compulsory recruitment of children for use in armed conflict.

This standard is also used by the following States in their national legislation and military manuals:

1. Australia: Criminal Code Act, sections 268.68 (4 – 6) and 268.88 (4 – 6) (refers to participation in hostilities, conscription and enlistment other than as members of national armed forces) (taking into account amendments up to Act No. 80 of 2011); The Manual of the Law of Armed Conflict, section 9.50 (2006);

2. Colombia: Penal Code (Law No. 599 of 2000), section 162 (2000); Law on Judicial Cooperation art. 13 – 14 (1997);
  3. Denmark: Military Criminal Code, section 36(2) (2005);
  4. Ethiopia: Criminal Code, section 270(m) (2004); Defence Force Proclamation No. 27/1996, section 4(3) (1996);
  5. Fiji: Employment Relations Promulgation, section 91(a) (2007);
  6. Finland: Criminal Code, chapter 11, section 5(5) (as amended up to 940/ 2008);
  7. Lithuania: Criminal Code, section 105(2) (last amended in 2008);
  8. Malaysia: Armed Forces Act, section 18 (1972);
  9. Nicaragua: Penal Code, art. 509 (2008);
  10. Nigeria: Child Rights Act, sections 277 and 34(1) (2003);
  11. Philippines: Republic Act No. 9851, An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and other Crimes against Humanity, section 4(c)(24) ("conscripting, enlisting or recruiting children under 18 years into armed groups or using children under 18 to participate actively in hostilities") (2009); Republic Act No. 9231, An Act Providing for the Elimination of the Worst Forms of Child Labour, section 12(d) (1) (2003); Army Soldiers Handbook on Human Rights and IHL at p. 67 (2006);
  12. Qatar: Law on Military Service, art. 13 (2006);
  13. Rwanda: Law Relating to Rights and Protection of the Child against Violence, art. 19 (2001); Presidential Order Establishing Army General Statutes, art. 5 (2002); Law Repressing the Crime of Genocide, Crimes against Humanity and War Crimes, arts. 10 – 11 (2003);
  14. Slovenia: Penal Code, art. 378 (2007);
  15. Sri Lanka: Penal Code, section 358A (2006);
  16. Uganda: Defence Forces Act, section 52(2) (2005); and
  17. Ukraine: Military Service Law, art. 15 (1992).
- 5 The term 'armed forces' is used in AP I, art. 77(2), AP II, art. 4(3) (c), the Rome Statute, arts. 8(2)(b)(xxvi) and 8(2)(e)(vii), and the Optional Protocol art. 2. Rule 136 of the ICRC Customary IHL Study provides that children must not be recruited into armed forces. Rule 136 does not define 'children'; however, its Commentary does recognize that although there is "not, as yet, a uniform practice with respect to the minimum age for recruitment, there is agreement that it should not be below 15 years of age." Rule 156 of the ICRC Customary IHL Study provides that serious violations of international humanitarian law constitute war crimes and lists in the commentary to that Rule both "conscripting or enlisting children under the age of 15 into armed forces or groups, or using them to participate in hostilities."

This term is also referred to in the following national laws and military manuals:

1. Azerbaijan: Criminal Code, art. 116.0.5 (1999);
  2. Australia: Criminal Code Act, sections 268.68 (1 – 3) and 268.88 (1 – 3) (taking into account amendments up to Act No. 80 of 2011);
  3. Belgium: Criminal Code, art. 136 (*quater*, para 1, point 7) (amended in 2003);
  4. Cameroon: Instructor's Manual, section 351.5 at p. 90 (2006);
  5. Canada: Crimes Against Humanity and War Crimes Act, section 3(4) refers to crimes described in art. 8(2) of the Rome Statute ("conscripting and enlistment into armed forces or groups") (2000);
  6. Colombia: Penal Code (Law No. 599 of 2000), section 162 (2000);
  7. Congo: Genocide, War Crimes and Crimes against Humanity Act, art. 4 (1998);
  8. Denmark: Military Criminal Code, section 36(2) (2005);
  9. Ethiopia: Criminal Code, section 270(m) (uses the term "defence forces") (2004);
  10. Finland: Criminal Code, chapter 11, section 5(5) ("military forces") (as amended up to 940/ 2008);
  11. Germany: Law Introducing the International Crimes Code, art. 1, section 8(1)(5) (2002);
  12. Ireland: Geneva Conventions Act, section 4(1) and (4) (as amended in 1998);
  13. Lithuania: Criminal Code, section 105(1) (last amended in 2008);
  14. Malaysia: Armed Forces Act, section 18 (1972);
  15. Mali: Penal Code, art. 31(i)(26) (2001);
  16. Netherlands: International Crimes Act, sections 5(5)(r) and 6(3)(f) (2003);
  17. Nicaragua: Penal Code, art. 509 (2008);
  18. New Zealand: International Crimes and International Criminal Court Act, art. 11(2)(b) and (d), refers to crimes under art. 8(2)(b) and 8(2)(e) of the Rome Statute ("conscripting and enlistment into armed forces or groups") (2000);
  19. Norway: Military Penal Code, section 108 (as amended in 1981);
  20. Philippines: Republic Act No. 9851, An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and other Crimes against Humanity, section 4(c)(24) (2009); Republic Act No. 7610, An Act on Special Protection of Children Against Abuse, Exploitation and Discrimination, art. X, section 22(b) (1992);
  21. Republic of Korea: ICC Act, art. 19(3)(5) (2007);
  22. Russian Federation: Regulation on the Application of IHL, section 81 (2001);
  23. Slovenia: Penal Code, art. 378 (2007);
  24. Spain: Penal Code, art. 612(3) (1995);
  25. South Africa: ICC Act, schedule 1, part 3, sections (b)(xxvi) and (e)(vii) (2002);
  26. Switzerland: Criminal Code, section 264(f) (2012);
  27. Ukraine: Military Service Law, art. 15 (1992);
  28. United Kingdom: The International Criminal Court Act, schedule 8, sections 8(2)(b)(xxvi) and 8(2)(e)(vii) (2001); LOAC Manual, section 9.9.1 (2004); and
  29. United States: Child Soldiers Accountability Act, section 2442(a)(1) (2008).
- 6 The term 'armed groups' is used in AP II, art. 4(3)(c), the Rome Statute, arts. 8(2)(b)(xxvi) and 8(2)(e)(vii) and the Optional Protocol, art. 4(1). Rule 136 of the ICRC Customary IHL Study provides that children must not be recruited into armed forces or armed groups. Rule 156 of the ICRC Customary IHL Study provides that serious violations of international humanitarian law constitute war crimes and lists in the commentary to that Rule both "conscripting or enlisting children under the age of 15 into armed forces or groups, or using them to participate in hostilities." Also note that AP I art. 77(2) binds the "parties to the conflict", which by implication covers armed groups.

The term 'armed groups' is referred to in the following national laws and military manuals:

1. Australia: Criminal Code Act, sections 268.68 (4 – 6) and 268.88 (4 – 6) ("other than as members of national armed forces") (taking into account amendments up to Act No. 80 of 2011);
2. Belgium: Criminal Code, art. 136 (*quater*, para 1, point 7) (amended in 2003);
3. Cameroon: Instructor's Manual, at p. 29 ("parties to the conflict") (2006);
4. Canada: Crimes Against Humanity and War Crimes Act, section 3(4) refers to crimes described in art. 8(2) of the Rome Statute ("conscripting and enlistment into armed forces or groups") (2000);
5. Colombia: Penal Code (Law No. 599 of 2000), section 162 (2000);
6. Congo: Genocide, War Crimes and Crimes against Humanity Act, art. 4, refers to crimes described in art. 8(2) of the Rome Statute ("conscripting and enlistment into armed forces or groups") (1998);
7. Denmark: Military Criminal Code, section 36(2) (2005);
8. Finland: Criminal Code, chapter 11, section 5(5) ("military groups") and section 5(2), refers to crimes defined under art. 8(2) of the Rome Statute and therefore includes armed groups (amendments up to 940/ 2008);
9. Germany: Law Introducing the International Crimes Code, art. 1, section 8(1)(5) (2002);
10. Ireland: Geneva Conventions Act, section 4(1) and (4) (1962);
11. Lithuania: Criminal Code, section 105(2) ("military groups not belonging to the armed forces of the State") (last amended in 2008);
12. Mali: Penal Code, art. 31(i)(26) (2001);
13. Netherlands: International Crimes Act, section 5(5)(r) and 6(3)(f) (2003);
14. New Zealand: International Crimes and International Criminal Court Act, art. 11(2)(b) and (d) refers to crimes under arts. 8(2)(b) and 8(2)(e) of the Rome Statute ("conscripting and enlistment into armed forces or groups") (2000);
15. Norway: Military Penal Code, section 108 ("contravention of the protection of persons as laid out in ... the two additional protocols to the Geneva Conventions ...") (as amended in 1981);



16. Philippines: Republic Act No. 9851, An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and other Crimes against Humanity, section 4(c)(24)(ii) (2009); Republic Act No. 7610, An Act on Special Protection of Children Against Abuse, Exploitation and Discrimination, art. X, section 22(b) (1992);
  17. Republic of Korea: ICC Act, art. 10(3)(5) (2007);
  18. Russian Federation: Regulation on the Application of IHL, section 81 (2001);
  19. Slovenia: Penal Code, art. 378 ("national or other armed forces") (2007);
  20. South Africa: ICC Act, schedule 1, part 3, sections (b)(xxvi) and (e)(vii) (2002);
  21. Switzerland: Criminal Code, section 264(f) (2012);
  22. United Kingdom: The International Criminal Court Act, schedule 8, sections 8(2)(b)(xxvi) and 8(2)(e)(vii) (2001); LOAC Manual, section 9.9.1 (2004); and
  23. United States: Child Soldiers Accountability Act, section 2442(a)(1) (2008).
- 7 The term 'use in hostilities' can be found with the following variations in: AP I, art. 77(2) "do not take a direct part in hostilities", AP II, art. 4(3)(c) "allowed to take part in hostilities", the Rome Statute, arts. 8 (2)(b)(xxvi) and 8(2)(e)(vii) "using them to participate actively in hostilities" and the Optional Protocol, art. 1 "do not take a direct part in hostilities" as well as art. 4(1), "use in hostilities". Rule 137 of the ICRC Customary IHL Study provides that children must not be allowed to take part in hostilities. Rule 156 of the ICRC Customary IHL Study provides that serious violations of international humanitarian law constitute war crimes and lists in the commentary to that Rule both "conscripting or enlisting children under the age of 15 into armed forces or groups, or using them to participate in hostilities."

The term 'use in hostilities' can be found in the following national laws and military manuals:

1. Argentina: (Law of War Manual) Leyes de Guerra, PC-08-01, Público, Edición 1989 ("participate directly in hostilities") (1989);
2. Australia: Criminal Code Act, section 268.68(1)(a) ("participate actively in hostilities") (taking into account amendments up to Act No. 80 of 2011); LOAC Manual, section 9.50 ("direct part in hostilities") (2006);
3. Azerbaijan: Law on the Rights of the Child, art. 37 ("direct participation in military operations") (1998);
4. Belarus: Law on the Rights of the Child, art. 29 ("participate in hostilities") (1993); Criminal Code, art. 136(5) ("take part in hostilities") (1999);
5. Belgium: Criminal Code, art. 136 (*quater*, para 1, point 7) ("actively involving children in hostilities") (amended in 2003);
6. Canada: Crimes Against Humanity and War Crimes Act, section 3(4), refers to crimes described in art. 8(2) of the Rome Statute ("using them to participate actively in hostilities") (2000);
7. Cameroon: Instructor's Manual, section 131 ("direct participation in hostilities") (2006);
8. Canada: National Defence Act, section 34 ("may not be deployed to a theatre of hostilities") (1985);
9. Colombia: Penal Code (Law No. 599 of 2000), section 162 ("participate directly or indirectly in hostilities") (2000); Law on Judicial Cooperation arts. 13 – 14 ("participate in actual military activities") (1997); Basic Military Manual, at p. 75 ("direct participation in hostilities") (1995);
10. Finland: Criminal Code, chapter 11, section 5(5) ("used in hostilities") (amendments up to 940/2008);
11. France: LOAC Manual, at p. 40 ("participate in hostilities") (2001);
12. Lithuania: Criminal Code, section 105 (1 – 2) ("uses them in a military operation") (last amended in 2008);
13. Germany: Military Manual, section 306 (1992) ("do not take a direct part in hostilities");
14. Georgia: Criminal Code, art. 413(d) ("participate actively in hostilities") (1999);
15. Kenya: The Children Act, sections 10(2) and 29 ("take part in hostilities") (No. 8 of 2001);
16. Netherlands: International Crimes Act, sections 5(5)(r) and 6(3)(f) ("using them to participate actively in hostilities") (2003);
17. Nicaragua: Penal Code, art. 509 ("participate actively in hostilities") (2008);
18. New Zealand: International Crimes and International Criminal Court Act, art. 11(2)(b) and (d) refers to crimes under arts. 8(2)(b) and 8(2)(e) of the Rome Statute ("using them to participate actively in hostilities") (2000);
19. Philippines: Republic Act No. 9851, An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and other Crimes against Humanity, section 4(c)(24)(iii) ("participate actively in hostilities") (2009);
20. Russian Federation: Regulation on the Application of IHL, section 81 ("nor allowed to take part in hostilities") (2001); Criminal Code, art. 359(2) ("... for use in armed conflict or hostilities") (taking into account amendments as of 2004);
21. Rwanda: Law Repressing the Crime of Genocide, Crimes against Humanity and War Crimes, arts. 10 – 11 ("take part in hostilities") (2003);
22. Slovenia: Penal Code, art. 378 ("participation in hostilities") (2007);
23. Sri Lanka: Penal Code, section 358A ("use in armed conflict") (2006);
24. Ukraine: IHL Manual, section 52(2) ("not be allowed to take part in hostilities") (2004);
25. United Kingdom: The International Criminal Court Act, schedule 8, sections 8(2)(b)(xxvi) and 8(2)(e)(vii) ("use to participate actively in hostilities") (2001); LOAC Manual, section 9.9.1 ("participate actively in hostilities") (2004); and
26. United States: Child Soldiers Accountability Act, section 2442(a)(2) ("uses a person under 15 to participate actively in hostilities") (2008).

In treaty law and national legislation the term 'use in hostilities' is more commonly used than the term 'use in armed conflict'. The term 'use to participate actively in hostilities' has also been defined in two recent judgments.

In *Prosecutor v. Thomas Lubanga Dyilo*, the accused was charged with "enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(iii)(a) of the Rome Statute from early September 2002 to 2 June 2003." Additionally, the accused was charged with "enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) of the Rome Statute from 2 June to 13 August 2003." The term 'use to participate actively in hostilities' was defined by the Trial Chamber to include "a wide range of activities from those children on the front line through to the boys and girls who are involved in a myriad roles that support the combatants." The Trial Chamber ruled that "the decisive factor in determining if an 'indirect' role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target." The Trial Chamber added that "these combined factors – the child's support and this level of consequential risk – mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them." The Trial Chamber further added that "given the different types of roles that may be performed by children used by armed groups, the Chamber's determination of whether a particular activity constitutes 'active participation' can only be made on a case-by-case basis." (ICC Trial Chamber I, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06, 14 March 2012).

In *Prosecutor v. Charles Ghankay Taylor*, the accused was charged with "conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities (Count 9)." The Trial Chamber of the Special Court for Sierra Leone defined 'using children to participate actively in hostilities' "encompasses putting their lives directly at risk in combat, but may also include participation in activities linked to combat such as carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields." The Trial Chamber further added "whether a child is actively participating in hostilities in such situations will be assessed on a case-by-case basis." The Trial Chamber held that "in the context of food-finding missions in which children carried arms and/or committed crimes against civilians, such activities constitute active participation in hostilities." The Trial Chamber also held that the elements of crime of using persons below 15 years to actively participate in hostilities were proved beyond reasonable doubt in relation to the use of children to guard diamond mines, as body guards, to amputate limbs and to decapitate people (Special Court for Sierra Leone Trial Chamber II, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Judgment, 18 May 2012).

Certain treaties refer to 'use in armed conflict', such as ILO 182, which in art. 3(a) prohibits 'forced or compulsory recruitment of children for use in armed conflict'. Both AP I and AP II apply respectively to the 'parties to the conflict' and to 'armed forces or groups' and the Rome Statute in arts. 8(2)(b) and 8(2)(e) makes reference to international/non-international armed conflict, respectively.

The following national laws use the term 'use in armed conflict':

1. Ethiopia: Criminal Code, section 270(m) ("take part in armed conflict") (2004);
2. Kenya: The Children Act, sections 10(2) and 29 ("recruited in armed conflicts") (No. 8 of 2001);
3. Montenegro: Criminal Code, section 444(1) ("use in armed conflicts") (Official Gazette of the Republic of Montenegro No. 70/2003, and Correction, No. 13/2004);
4. Sri Lanka: Penal Code, section 358A ("use in armed conflict") (2006);
5. Switzerland: Criminal Code, section 264(f) ("using them to participate in armed conflict") (2012);



6. Russian Federation: Criminal Code, art. 359(2) ("...for use in armed conflict or hostilities") (taking into account amendments as of 2004);
  7. Both the Australian Criminal Code sections 268.68 and 268.88 (taking into account amendments up to Act No. 80 of 2011) and the United Kingdom International Criminal Court Act, schedule 8, sections 8(2)(b)(xxvi) and 8(2)(e)(vii) (2001) make reference to armed conflict.
- 8 In incorporating these model legislative provisions into national legislation drafters need to bear in mind that the Rome Statute in art. 25 provides for criminal responsibility for individual and joint commission as well as for ordering, soliciting or inducing and aiding, abetting or otherwise assisting in the commission of war crimes. Furthermore, art. 28 of the Rome Statute provides for the responsibility of commanders and other superiors in the commission of crimes. See, for example, the United States' Child Soldiers Accountability Act (2008) on page 36 of this document. Both articles 25 and 28 of the Rome Statute deal only with crimes within the jurisdiction of the ICC, i.e. in this case a breach of arts. 8(2)(b)(xxvi) and 8(2)(e)(vii) and not, for example, the crime of recruiting children between 15 and 18 years of age.
- 9 The following treaties use the term 'forced or compulsory recruitment': ILO 182, art. 3(a), and Optional Protocol, art. 2, prohibit 'compulsory recruitment into armed forces'. Rule 136 of the ICRC Customary IHL Study provides that children must not be recruited into armed forces or armed groups.
- Note: The **Rome Statute**, arts. 8(2)(b)(xxvi) and 8(2)(e)(vii) uses the term 'conscripting' which is congruent with compulsory recruitment, and both AP I, art. 77(2) and AP II, art. 4(3) use the term 'recruitment', which covers both voluntary and compulsory recruitment; however, these treaties apply only to children under 15 years of age.
- 10 The standard 'under the age of 18' is used in the Optional Protocol, arts. 1, 2 and 4, and in ILO 182, art. 2. Please refer to supra note 4 for States that use this standard in their national legislation and military manuals.
- 11 ILO 182, art. 7(1) requires penal sanctions for forced or compulsory recruitment of persons under 18 for use in armed conflict, which by implication covers such recruitment by armed forces. Note: The Rome Statute, art. 8(2)(b)(xxvi) and 8(2)(e)(vii), criminalizes conscription into the armed forces for children under 15. Rule 156 of the ICRC Customary IHL Study provides that serious violations of international humanitarian law constitute war crimes and lists in the commentary to that Rule both "conscripting or enlisting children under the age of 15 into armed forces or groups, or using them to participate in hostilities."

The following States provide criminal sanctions for forced or compulsory recruitment for children under 18:

1. Colombia: Penal Code (Law No. 599 of 2000), art. 162 ("recruits into armed forces", which by implication covers both voluntary and compulsory recruitment) and Law on Childhood and Adolescence No. 1098 art. 20(7) ("prohibits forced and compulsory recruitment of children under 18") (2006);
2. Denmark: Military Criminal Code, section 36(2) (2005) ("Any person who deliberately uses war means or procedures the application of which violates an international agreement entered into by Denmark or international customary law, shall be liable to the same penalty [i.e. imprisonment up to life imprisonment]");
3. Fiji: Employment Relations Promulgation, section 91(a) ("prohibits forced or compulsory recruitment") (2007);
4. Greece: Penal Code, art. 323(a) ("recruitment by force, threats...");
5. Indonesia: Law No. 23, art. 87 (2002);
6. Ireland: Geneva Conventions Act, sections 4(1) and (4) ("conscription") (as amended in 1998);
7. Kyrgyz Republic: Criminal Code, art. 124 ("force");
8. Lithuania: Criminal Code, art. 105(2) ("conscripting into armed forces") (last amended in 2008);
9. Mali: Penal Code, art. 3(i)(26) ("conscripting") (2001);
10. Montenegro: Criminal Code, section 444(1) ("any person who by force/threat or deceit recruits...") (Official Gazette of the Republic of Montenegro, No. 70/2003, and Correction, No. 13/2004);
11. Philippines: Republic Act No. 9851, An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and other Crimes against Humanity, section 4(c)(24)(iii) ("conscripting") (2009); Republic Act No. 9231, An Act Providing for the Elimination of the Worst Forms of Child Labour, section 12(d)(1) ("forced or compulsory recruitment of children") (2003);
12. Rwanda: Law Repressing the Crime of Genocide, Crimes against Humanity and War Crimes, arts. 10 – 11 ("forcing children under the age of 18...") (2003);
13. Slovenia: Penal Code, art. 378 ("conscripting") (2007);
14. Spain: Penal Code, art. 612(3) (1995); and
15. Sri Lanka: Penal Code, section 358A ("recruits for use in armed conflict", which by implication covers forced or compulsory recruitment) (2006).

The following States provide criminal sanctions for forced or compulsory recruitment of children under 15 into the armed forces:

1. Australia: Criminal Code Act, sections 268.68(2) and 268.88(2) ("conscripting into national armed forces") (taking into account amendments up to Act No. 80 of 2011);
2. Belgium: Criminal Code, art. 136 (*quater*, para. 1, point 7) ("recruitment of children under the age of 15 is a war crime") amended in 2003;
3. Canada: Crimes Against Humanity and War Crimes Act, section 3(4) refers to crimes described in art. 8(2) of the Rome Statute ("conscripting into armed forces") (2000);
4. Congo: Genocide, War Crimes and Crimes against Humanity Act, art. 4 (1998);
5. Finland: Criminal Code, chapter 11, section 5(2) refers to crimes under art. 8 of the Rome Statute ("conscripts into armed forces");
6. France: LOAC Manual, at p. 40 ("prohibited to recruit persons under 15 into the armed forces") (2001). The manual considers such recruitment "a war crime";
7. Georgia: Criminal Code, art. 413(d) (1999);
8. Germany: Law Introducing the International Crimes Code, art. 1, section 8(1)(5) (2002);
9. Ireland: Geneva Conventions Act, section 4(1) and (4) (as amended in 1998);
10. Netherlands: International Crimes Act, section 5(5)(r) and 6(3)(f) ("conscripting into armed forces") (2003);
11. New Zealand: International Crimes and International Criminal Court Act, art. 11(2)(b) and (d), refers to crimes under arts. 8(2)(b) and 8(2)(e) of the Rome Statute ("conscripting into armed forces") (2000);
12. Norway: Military Penal Code, section 108 (as amended in 1981);
13. Republic of Korea: ICC Act, art. 10(3)(5) (2007);
14. South Africa: ICC Act, schedule 1, part 3, sections (b)(xxvi) and (e)(vii) (2002);
15. Switzerland: Criminal Code, art. 263(f) ("recruits into armed forces") (as of January 2012);
16. United Kingdom: The International Criminal Court Act, schedule 8, sections 8(2)(b)(xxvi) and 8(2)(e)(vii) ("conscripting") (2001);
17. United States: Child Soldiers Accountability Act, section 2442(a)(2) ("conscripting") (2008).

- 12 The following are examples of States prohibiting recruitment of children under 15 into the armed forces:

1. Argentina: Law of War Manual, section 4.12 (1989);
2. Australia: Criminal Code Act, sections 268.68 (1 – 3) and 268.88 (1 – 3) (taking into account amendments up to Act No. 80 of 2011);
3. Belgium: Criminal Code, art. 136 (*quater*, para. 1, point 7) ("recruitment of children under the age of 15 is a war crime") (amended in 2003);
4. Cameroon: Instructor's Manual, at p. 90, section 351(5) (2006);
5. Canada: LOAC Manual, section 22 (1999); Crimes against Humanity and War Crimes Act, section 3(4) (2000);
6. Colombia: Basic Military Manual, at p. 75 (1995);
7. France: LOAC Manual, at p. 40 (2001);
8. Germany: Military Manual, section 306 (1992);
9. Ireland: Geneva Conventions Act, sections 4(1) and (4) (as amended in 1962);
10. Kenya: LOAC Manual, at p. 8 (1997);
11. Mali: Penal Code, art. 31(i)(26) (2001);
12. Netherlands: Military Manual, section 1061 (2005); International Crimes Act, sections 5(5) and 6(3) (2003);
13. New Zealand: Military Manual, section 1813 (1992); International Crimes and International Criminal Court Act, art. 11(2)(b) and (d) (2000);
14. Nigeria: Military Manual, at p. 38, section 4(1994);
15. Norway: Military Penal Code, section 108 (as amended in 1981);
16. Philippines: Republic Act No. 9851, An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and other Crimes against Humanity, section 4(c)(24)(i) (2009);
17. Republic of Korea: ICC Act, art. 10(3)(5) (2007);

18. Russian Federation: Regulations on the Application of IHL, section 81 (2001);
  19. Spain: LOAC Manual, vol. I, section 1.3(c)(1) (1996); Penal Code art. 612(3) (1995);
  20. Switzerland: Criminal Code, section 264(f) (2012);
  21. United Kingdom: LOAC Manual, section 9.9.1 (2004); International Criminal Court Act, art. 50(1) and schedule 8, sections 8(2)(b)(xxvi) and 8(2)(e)(vii) (2001); and
  22. United States: Child Soldiers Accountability Act, section 2442(a)(1) (2008).
- 13 The Rome Statute criminalizes conscripting or enlisting children under 15 into national armed forces in arts. 8(2)(b)(xxvi) and 8(2)(e)(vii). Also, ILO 182, art. 7(1), requires criminal penalties for forced or compulsory recruitment of children under 18.

See supra note 12 for States that provide criminal sanctions for forced or compulsory recruitment of children under 15 into the armed forces.

- 14 The Optional Protocol, art. 4(2), requires States to "prohibit and criminalize" recruitment and use in hostilities of persons under 18 by armed groups. Rule 137 of the ICRC Customary IHL Study provides that children must not be allowed to take part in hostilities. Rule 156 of the ICRC Customary IHL Study provides that serious violations of international humanitarian law constitute war crimes and lists in the commentary to that Rule both "conscripting or enlisting children under the age of 15 into armed forces or groups, or using them to participate in hostilities." Note: even though the Rome Statute only covers children under 15, arts. 8(2)(b)(xxvi) and 8(2)(e)(vii) criminalize the "use of children to actively participate in hostilities" by armed groups.

The following States criminalize recruitment or use in hostilities of children under 18 by armed groups:

1. Australia: Criminal Code Act, sections 268.68 (4 – 6) and 268.88 (4 – 6) (taking into account amendments up to Act No. 80 of 2011);
2. Colombia: Penal Code (Law No. 599 of 2000), art. 162 ("recruits or forces to participate directly or indirectly in hostilities. Applicable to armed groups.");
3. Denmark: Military Penal Code, section 36(2) (2005); ("(2) Anybody who deliberately uses war methods or procedures contrary to an international agreement signed by Denmark or international customary law shall be punished similarly");
4. Finland: Criminal Code, chapter 11, section 5(1)(5) ("recruits into military groups or uses in hostilities") (amendments up to 940/2008);
5. Lithuania: Criminal Code, art. 105(2) ("conscripts or recruits into military groups not belonging to the armed forces of the State") (last amended in 2008);
6. Nicaragua: Penal Code, art. 509 (2008);
7. Philippines: Army Soldiers Handbook, at p. 55, section 4 (2006); Republic Act No. 9851, An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and other Crimes against Humanity, section 4(c)(24)(ii) (2009);
8. Rwanda: Law Repressing the Crime of Genocide, Crimes against Humanity and War Crimes, arts. 10 – 11 (2003);
9. Slovenia: Penal Code, art. 378 ("national or other armed forces") (2007);
10. Spain: Penal Code, art. 612(3) (1995); and
11. Sri Lanka: Penal Code, section 358A (2006).

The following States criminalize recruitment or use in hostilities of children under 15 by armed groups:

1. Belgium: Criminal Code, art. 136 (*quater*, para. 1, point 7) (amended in 2003);
  2. Canada: Crimes Against Humanity and War Crimes Act, section 3(4) refers to crimes described in art. 8(2) of the Rome Statute ("conscripting and enlistment into armed forces or groups") (2000);
  3. Congo: Genocide, War Crimes and Crimes against Humanity Act, art. 4 (1998) defines war crimes with reference to the categories of crimes defined in art. 8 of the Rome Statute;
  4. Germany: Law Introducing the International Crimes Code, art. 1, section 8(1)(5) (2002);
  5. Ireland: Geneva Conventions Act, section 4(1) and (4) (as amended in 1998);
  6. Mali: Penal Code, art. 31(i)(26) (2001);
  7. Netherlands: International Crimes Act, sections 5(5)(r) and 6(3)(f) (2003);
  8. New Zealand: International Crimes and International Criminal Court Act, art. 11(2)(b) and (d) refers to crimes under arts. 8(2)(b) and 8(2)(e) of the Rome Statute ("conscripting and enlistment into armed forces or groups") (2000);
  9. Norway: Military Penal Code, section 108 (as amended in 1981);
  10. Republic of Korea: ICC Act, art. 10(3)(5) (2007);
  11. South Africa: ICC Act, schedule 1, part 3, sections (b)(xxvi) and (e)(vii) (2002);
  12. Switzerland: Criminal Code, section 264(f) (2012);
  13. United Kingdom: International Criminal Court Act, art. 50(1) (2001); and
  14. United States: Child Soldiers Accountability Act, section 2442 (a)(1) (2008).
- 15 Of the 47 States surveyed 12 States provide for imprisonment as a penalty (Australia, Denmark, Ethiopia, Finland, Kyrgyzstan, Lithuania, Nicaragua, New Zealand, Norway, Rwanda, Slovenia and Switzerland); five States provide for a fine in addition to imprisonment (Colombia, Indonesia, Kenya, Philippines (Republic Act No. 9851) and Sri Lanka (Penal Code)); six States provide for imprisonment or a fine or both (Fiji, Indonesia, Kenya, Philippines (Republic Act No. 9231), Sri Lanka (Employment of Women, Young Persons and Children Act) and the United States); and the Netherlands provides for a fine as an alternative to imprisonment.
- 16 The prohibition against children directly participating in hostilities can be found in the Optional Protocol, art. 1. However, States may also wish to consider the higher standard set by Rule 137 of the ICRC Customary IHL Study, which provides that children must not be allowed to take part in hostilities. Additionally, Rule 156 of the ICRC Customary IHL Study provides that serious violations of international humanitarian law constitute war crimes and lists in the commentary to that Rule both "conscripting or enlisting children under the age of 15 into armed forces or groups, or using them to participate in hostilities." ILO 182, art. 3(a) prohibits forced or compulsory recruitment for use in armed conflict covering all persons under the age of 18. The Rome Statute, arts. 8(2)(b)(xxvi) and 8(2)(e)(vii), also prohibits active participation in hostilities for children under 15.

Of the 28 States surveyed below, 17 use the term 'direct or active participation in hostilities' (Argentina, Australia, Azerbaijan, Cameroon, Congo, Colombia, Finland, France, Germany, Georgia, Netherlands, Nicaragua, New Zealand, Philippines, Slovenia, United Kingdom and the United States) while seven use the term 'participation in hostilities' (Belarus, Canada, Lithuania, Russian Federation, Rwanda, Switzerland and Ukraine).

The prohibition against children directly participating in hostilities can also be found in the following national laws and regulations:

1. Argentina: (Law of War Manual) Leyes de Guerra, PC-08-01, Público, Edición 1989 ("the belligerent parties shall take all measures to ensure that children under the age of 15 do not participate directly in hostilities") (1989);
2. Australia: LOAC Manual, section 9.50 ("children under 18 years of age should not take a direct part in hostilities" (2006)); Criminal Code Act, sections 268.68 (1 and 4) and 268.88 (1 and 4) ("participate actively in hostilities") (taking into account amendments up to Act No. 80 of 2011);
3. Azerbaijan: Law on the Rights of the Child, art. 37 ("direct participation in military operations") (1998);
4. Belarus: Law on the Rights of the Child, art. 29 ("make children participate in hostilities"), 1993; Criminal Code, art. 136(5) ("direct participation in hostilities") (1999);
5. Cameroon: Instructor's Manual, at p. 29, section 131 ("not to engage children under fifteen in direct participation in hostilities") (2006);
6. Canada: National Defence Act, section 34 (1985); LOAC Manual, section 1714(1)(c) (2001) states in its chapter on non-international armed conflicts: ("a ban on their enlistment or participation in the hostilities while under the age of fifteen"); Crimes against Humanity and War Crimes Act, section 3(4) ("crimes described in art. 8, para. 2, of the Rome Statute are crimes according to customary international law", i.e. active participation of children in hostilities) (2000);
7. Congo: Genocide, War Crimes and Crimes against Humanity Act, art. 4 ("defines war crimes with reference to the categories of crimes defined in art. 8 of the 1998 ICC Statute i.e. active participation of children in hostilities") (1998);
8. Colombia: Law on Judicial Cooperation, art. 13 – 14 (1997); the Basic Military Manual provides, with respect to non-international armed conflicts in particular, that it is prohibited to "recruit and allow direct participation in hostilities of children under the age of 15" (1995);
9. Denmark: Military Criminal Code, section 36(2) (2005);
10. Finland: Criminal Code, chapter 11, section 5(2) ("commits a crime defined under Article 8 of the Rome Statute of the ICC i.e. active participation of children in hostilities");
11. France: LOAC Manual, at p. 40 ("to make children under the age of 15 participate directly in hostilities is a war crime") (2001);
12. Germany: Military Manual, section 306 ("children who have not attained the age of fifteen years do not take direct part in hostilities") (1992);

13. Georgia: Criminal Code, art. 413(d) ("participate actively in hostilities") (1999);
14. Ireland: Geneva Conventions Act, section 4(1) and (4) (as amended in 1998);
15. Lithuania: Criminal Code, art. 105(1) and (2) ("uses children in a military operation") (last amended in 2008);
16. Netherlands: Military Manual, section 0309 ("children under the age of 15 play no direct part in hostilities") (2005); International Crimes Act, sections 5(5) and 6(3) ("using children to actively participate in hostilities") (2003);
17. Nicaragua: Penal Code, art. 509 ("uses children under eighteen years to participate actively in hostilities");
18. New Zealand: International Crimes and International Criminal Court Act, art. 11(2)(b) and (d) (2000);
19. Norway: Military Penal Code, section 108 ("any contravention of provisions relating to the protection of persons laid down in the two additional protocols to the Geneva Conventions of 1949") (as amended in 1981);
20. Philippines: Army Soldier's Handbook on Human Rights and International Humanitarian Law at p. 55, section 4 ("children shall not be recruited or employed by the government forces to perform or engage in activity necessary to and in direct connection with an armed conflict either as a soldier, guide, courier or in a similar capacity") (2006); Republic Act No. 9851, An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and other Crimes against Humanity, section 4(c)(24) ("using children under the age of 18 to participate actively in hostilities") (2009);
21. Russian Federation: Regulations on the Application of IHL, section 81 ("children who have not attained the age of fifteen years shall not be allowed to take part in hostilities") (2001); Criminal Code, art. 359(2) ("...for use in armed conflict or hostilities") (taking into account amendments as of 2004);
22. Rwanda: Law Repressing the Crime of Genocide, Crimes against Humanity and War Crimes, art. 10 ("forcing children under 18 years to take part in hostilities") (2003);
23. Slovenia: Penal Code, art. 378 ("exploitation for active participation in hostilities") (2007);
24. Spain: Penal Code, art. 612(3) ("breaches any treaty provisions providing for special protection of children") (1995);
25. Switzerland: Criminal Code, section 264(f) ("using them to participate in armed conflict") (2012);
26. Ukraine: IHL Manual, section 1.4.11 ("children who have not attained the age of fifteen years shall not be allowed to take part in hostilities") (2004);
27. United Kingdom: LOAC Manual, section 9.9.1 ("Steps must be taken to ensure that those aged under fifteen years ... do not take a direct part in hostilities") and section 15.7. ("It is prohibited to conscript or enlist children under the age of fifteen years into armed forces or groups" or to use them "to participate actively in hostilities" within the context of an internal armed conflict) (2004); International Criminal Court Act, art. 50(1) and schedule 8, sections 8(2)(b)(xxvi) and 8(2)(e)(vii) ("use to participate actively in hostilities") (2001);
28. United States: Child Soldiers Accountability Act, section 2442(a)(2) ("uses a person under 15 years to participate actively in hostilities") (2008).

The United States uses the following definition of direct participation in hostilities (DPH) in the Child Soldiers Accountability Act of 2008:

"(1) The term 'participate actively in hostilities' means taking part in —

- (A) combat or military activities related to combat, including sabotage and serving as a decoy, a courier, or at a military checkpoint; or
- (B) direct support functions related to combat, including transporting supplies or providing other services."

It also uses the following definition of DPH in its declaration submitted upon ratification of the Optional Protocol:

(B) "the phrase 'direct part in hostilities' –

- (i) means immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy; and
- (ii) does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment."

In interpreting and applying the provisions of subsection 1, States may wish to consider the Recommendations of the ICRC Concerning the Interpretation of International Humanitarian Law Relating to the Notion of Direct Participation in Hostilities (2009). It provides in relevant parts that direct participation in hostilities requires an act that (a) adversely affects the military capacity of a party to an armed conflict (threshold of harm), in which there is (b) a direct causal link between the act and the resulting harm (direct causation), and the act (c) is specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

In *Prosecutor v. Thomas Lubanga Dyilo*, the Court defined 'active participation in hostilities' to include "a wide range of activities, from those children on the front line through to the boys and girls who are involved in a myriad of roles that support the combatants." (*Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06, 14 March 2012).

## 17 Optional Protocol, art. 3.

Below are examples of safeguards maintained by States in respect of ensuring voluntary recruitment of persons under 18 years of age into the armed forces as detailed in the Declaration submitted upon ratification of the Optional Protocol to the CRC. For more information, visit [Optional Protocol Status of Declarations and Reservations](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=IV-11-b&chapter=4&lang=en#EndDec), available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=IV-11-b&chapter=4&lang=en#EndDec> (last visited 16.03.2012).

### Azerbaijan

"Pursuant to article 3 of the protocol, the Republic of Azerbaijan declares that in accordance with the Law of the Republic of Azerbaijan on the military service of 3 November 1992, the citizens of the Republic of Azerbaijan and other persons, who are meeting the defined requirements of the military service, may voluntarily enter and be admitted in age of 17 the active military service of the cadets military school. The legislation of the Republic of Azerbaijan guarantees that this service shall not be forced or coerced, shall be realized on the basis of deliberative consent of the parents and the legal representatives of those persons, that those persons shall be provided with the full information of the duties regarding this service, and that the documents certifying their age shall be required before the admission to the service in the national armed forces."

### Germany

"The Federal Republic of Germany declares that it considers a minimum age of 17 years to be binding for the voluntary recruitment of soldiers into its armed forces under the terms of art. 3, paragraph 2 of the Optional Protocol. Persons under the age of 18 years shall be recruited into the armed forces solely for the purpose of commencing military training.

The protection of voluntary recruits under the age of 18 years in connection with their decision to join the armed forces is ensured by the need to obtain the consent of their legal guardian and the indispensable requirement that they present an identification card or passport as a reliable proof of their age."

### India

"(i) The minimum age for recruitment of prospective recruits into Armed Forces of India (Army, Air Force and Navy) is 16 years. After enrollment and requisite training period, the attested Armed Forces personnel is sent to the operational area only after he attains 18 years of age;

(ii) The recruitment into the Armed Forces of India is purely voluntary and conducted through open rally system/open competitive examinations. There is no forced or coerced recruitment into the Armed Forces."

### Poland

"1. Under the Polish law the minimum age in the case of obligatory recruitment of the Polish citizens into the national Armed Forces is eighteen (18) years. 2. Under the Polish law the minimum age for the voluntary recruitment of the Polish citizens into the national Armed Forces is seventeen (17) years. Joining the Polish Armed Forces is really voluntary and a candidate is obliged to show a special document certifying the date of his/her birth. Moreover the consent of the person's parents or legal guardians is required before the admission to the service."

### Singapore

"1. The minimum age at which persons may be voluntarily recruited or enlisted into the Singapore Armed Forces is 16 years and 6 months; and 2. The Republic of Singapore maintains the following safeguards in respect of voluntary recruitment or enlistment of persons below the age of 18 years into the Singapore Armed Forces –

The person is required to produce documentary proof of age, including an authentic birth certificate and identity card; Written consent of a parent or legal guardian of the person is required; and

The person is fully informed of the duties involved in military service by the Singapore Armed Forces through, among other things, informational brochures and career counselors to explain the demands of military life."

### The United Kingdom

"1. The United Kingdom Armed Forces are manned solely by volunteers; there is no compulsory recruitment.

2. A declaration of age, backed by an authoritative, objective proof (typically the production of an authentic birth certificate) is an integral and early requirement in the recruitment process. Should an individual volunteering to enter the United Kingdom Armed Forces be found either by their own declaration or by inspection of supporting evidence of age to be under 18 years of age, special procedures are adopted.

These procedures include:

- the involvement of the parent(s) or legal guardian(s) of the potential recruits:

- clear and precise explanation of the nature of duties involved in military service to the [sic] both the individual and their parent(s)/guardian(s); and

- as well as explaining the demands of military life to the individual volunteer and establishing that he/she remains a genuine volunteer, the requirement that the parent(s) or guardian(s), having been similarly informed, freely consent to the individual's entry into the Armed Forces and duly countersign the appropriate application or other appropriate recruitment process forms."

### United States

Section 505(a) of Title 10 of the United States Code provides that "the Secretary concerned may accept original enlistments in the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard, as the case may be, of qualified, effective, and able-bodied persons who are not less than seventeen years of age nor more than forty-two years of age. However, no person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control."

Additionally, in its Declaration the United States lists the following safeguards:

"(c) each person recruited into the Armed Forces of the United States receives a comprehensive briefing and must sign an enlistment contract that, taken together, specify the duties involved in military service; and

(d) all persons recruited into the Armed Forces of the United States must provide reliable proof of age before their entry into military service."

- 18 AP I, art. 77(2), CRC, art. 38(3) and the Optional Protocol, art. 5.
- 19 Protocol Additional to the Geneva Conventions of 1949 and relating to the Protection of Victims of International Armed Conflicts, (Protocol II), art. 77(2) (1977), available at <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument> (last visited 24.4.2012).
- 20 Protocol Additional to the Geneva Conventions of 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, (Protocol II), art. 4(3) (1977), available at <http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument> (last visited 24.4.2012).
- 21 Convention on the Rights of the Child, art. 38 (1989), available at <http://www2.ohchr.org/english/law/pdf/crc.pdf> (last visited 24.4.2012).
- 22 Statute of the International Criminal Court, arts. 8(2)(b)(xxvi) and 8(2)(e)(vii) (1998), available at <http://untreaty.un.org/cod/icc/statute/rome.htm> (last visited 24.4.2012).
- 23 International Criminal Court, Elements of Crime, U.N. Doc. ICC-ASP/1/3 (part II-B) (2002); Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary at p. 375 and 470 (Cambridge University Press 2003).
- 24 ILO Convention No. 182 on the Worst Forms of Child Labour (1989), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm> (last visited 24.4.2012).
- 25 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000), available at <http://www2.ohchr.org/english/law/crc-conflict.htm> (last visited 24.4.2012).
- 26 ICRC Customary IHL Study, Rules 136 and 137, available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul](http://www.icrc.org/customary-ihl/eng/docs/v1_rul) (last visited 24.4.2012).
- 27 ICRC Customary IHL Study, Rule 156 (2005), available at [http://www.icrc.org/customary-ihl/eng/print/v1\\_rul\\_rule156](http://www.icrc.org/customary-ihl/eng/print/v1_rul_rule156) (last visited 13.6.2012).
- 28 *Id.*
- 29 *Id.*
- 30 As stated earlier, the military manuals listed here are cited in the ICRC Customary IHL Study (2005) and in certain cases reiterate the State's international obligations without necessarily adding implementing legislation.
- 31 Argentina: Leyes de Guerra, PC-08-01, Público, Edición 1989, Estado Mayor Conjunto de las Fuerzas Armadas, aprobado por Resolución No. 489/89 del Ministerio de Defensa, section 4.12 (1990), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 136: Recruitment of Child Soldiers.
- 32 Argentina: Leyes de Guerra, PC-08-01, Público, Edición 1989, Estado Mayor Conjunto de las Fuerzas Armadas, aprobado por Resolución No. 489/89 del Ministerio de Defensa, section 7.04 (1990), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 136: Recruitment of Child Soldiers.
- 33 Australia: Criminal Code Act, sections 268.68 and 268.88 (taking into account amendments up to Act No. 80 of 2011) available at <http://www.comlaw.gov.au/Details/C2012C00306> (last visited 29.03.2012).
- 34 Australia: The Manual of the Law of Armed Conflict, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, section 9.50 (2006) as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 137: Participation of Child Soldiers in Hostilities. Note: The LOAC Manual (2006) replaces both the Defence Force Manual (1994) and the Commanders' Guide (1994).
- 35 Australia: Defence Instructions, PERS 33-4 (2008), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 137: Participation of Child Soldiers in Hostilities.
- 36 Azerbaijan: Criminal Code, art. 116.0.5 (1999), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 136: Recruitment of Child Soldiers.
- 37 Azerbaijan: Law on the Rights of the Child, art. 37 (1998), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 137: Participation of Child Soldiers in Hostilities.
- 38 Belarus: Law on the Rights of the Child, art. 29 (1993), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 136: Recruitment of Child Soldiers.
- 39 Belarus: Criminal Code, art. 136(5) (1999), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 136: Recruitment of Child Soldiers.
- 40 Committee on the Rights of the Child, *Concluding Observations: Belgium*, 42nd session, CRC/C/OPAC/BEL/CO/1 (2006).

- 41 Cameroon: Droit des conflits armés et droit international humanitaire, Manuel de l'instructeur en vigueur dans les forces de défense, Ministère de la Défense, Présidence de la République, Etat-major des Armées, at p. 90, section 351(5) (2006), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 136: Recruitment of Child Soldiers.
- 42 *Id.* at p. 29, section 131; see also p. 49, section 213, p. 75, section 321 and p. 132, section 411(5).
- 43 Canada: The Law of Armed Conflict at the Operational and Tactical Levels, Office of the Judge Advocate General, section 1714(1)(c) (2001), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 136: Recruitment of Child Soldiers.
- 44 Canada: National Defence Act, section 34 (1985), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 137: Participation of Child Soldiers in Hostilities.
- 45 Canada: Crimes Against Humanity and War Crimes Act, section 4(1) and (4) (2000), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 137: Participation of Child Soldiers in Hostilities.
- 46 Colombia: Law on Judicial Cooperation, arts. 13 – 14 (1997), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 137: Participation of Child Soldiers in Hostilities.
- 47 Colombia: unofficial translation of the Penal Code, Law No. 599, art. 162 (2000).
- 48 Colombia: unofficial translation of the Law on Childhood and Adolescence, No. 1098, art. 20(7) (2006).
- 49 Colombia: Derecho Internacional Humanitario – Manual Básico para las Personerías y las Fuerzas Armadas de Colombia, Ministerio de Defensa Nacional at p. 75 (1995), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 136: Recruitment of Child Soldiers.
- 50 Congo: Genocide, War Crimes and Crimes against Humanity Act, art. 4 (1998), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 136: Recruitment of Child Soldiers.
- 51 Denmark: Military Criminal Code, section 36(2) (2005), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 136: Recruitment of Child Soldiers.
- 52 Ethiopia: Defence Force Proclamation No. 27/1996, section 4(3) (1996).
- 53 Federal Republic of Ethiopia: Criminal Code (Proclamation No. 414/2004), section 270(m) (2004), available at [http://www.ilo.org/dyn/natlex/natlex\\_browse.details?p\\_lang=en&p\\_country=ETH&p\\_classification=01.04&p\\_origin=COUNTRY&p\\_sortby=SORTBY\\_COUNTRY](http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=ETH&p_classification=01.04&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY) (last visited 24.4.2012).
- 54 Finland: Ministry of Justice, Unofficial translation of the Criminal Code (39/1889), chapter 11, section 5(1), para. 5 (amendments up to 940/2008 included).
- 55 *Id.* at chapter 11, section 5(2).
- 56 Fiji: Employment Relations Promulgation, section 91(a) (2007), available at [http://www.ilo.org/dyn/natlex/natlex\\_browse.details?p\\_lang=en&p\\_country=FJ&p\\_classification=01.02&p\\_origin=COUNTRY&p\\_sortby=SORTBY\\_COUNTRY](http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=FJ&p_classification=01.02&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY) (last visited 24.4.2012).
- 57 Fiji: Employment Relations Promulgation, section 256(a) (2007).
- 58 France: Manuel de droit des conflits armés, Ministère de la Défense, Direction des Affaires Juridiques, Sous-Direction du droit international humanitaire et du droit européen, Bureau du droit des conflits armés at p. 40; see also p. 63 (2001), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 136: Recruitment of Child Soldiers.
- 59 Germany: Humanitarian Law in Armed Conflicts – Manual, DSK VV207320067, edited by The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, English translation of ZDv 15/2, Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch, section 306; see also section 505 (1992) as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 136: Recruitment of Child Soldiers.
- 60 Germany: Law Introducing the International Crimes Code, art. 1, section 8(1)(5) (2002), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 136: Recruitment of Child Soldiers.
- 61 Georgia: Criminal Code, art. 413(d) (1999), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 136: Recruitment of Child Soldiers.
- 62 Republic of Indonesia: Child Protection Act No. 23, art. 63 (2002).
- 63 *Id.* art. 87 (2002).
- 64 Ireland: Geneva Conventions Act, section 4(1)(4) (1962), as cited in the ICRC Customary IHL Study Online Edition on Practice Relating to Rule 136: Recruitment of Child Soldiers.
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## COALITION FOR THE INTERNATIONAL CRIMINAL COURT

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## GENEVA INTERNATIONAL CENTRE FOR HUMANITARIAN DEMINING (GICHD)

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## INTERNATIONAL CAMPAIGN TO BAN LANDMINES (ICBL)

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## INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC)

<http://www.icrc.org/ihl> (database on IHL implementation)

## INTERNATIONAL CRIMINAL COURT (ICC)

[http://www.icc-cpi.int/legal\\_tools/LT1.html](http://www.icc-cpi.int/legal_tools/LT1.html) (legal tools; monitoring of domestic trials of international crimes)

## ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS (OPCW)

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