

# The Handbook of International Humanitarian Law

4<sup>th</sup> edition

## Black-Letter Text

### Chapter 1

#### INTRODUCTION

### Chapter 2

#### HISTORICAL DEVELOPMENT AND LEGAL BASIS

##### I. DEFINITION OF THE TERM 'HUMANITARIAN LAW'

- 2.01 The use of armed force is prohibited under Article 2 (4) of the UN Charter. The Charter provides for two express exceptions only. States may resort to armed force only in the exercise of individual or collective self-defence (Article 51 UN Charter) or as authorized by the Security Council (Articles 39-42 UN Charter). International humanitarian law (IHL) applies with equal force to all the parties in an armed conflict irrespective of which party was responsible for starting the conflict. IHL comprises the whole of established law governing the conduct of armed conflict.
- 2.02 International humanitarian law constitutes a reaffirmation and development of the traditional international law of war (*jus in bello*). Most rules of the law of war now extend even to those armed conflicts that the parties do not regard as wars. The term 'international humanitarian law' takes this development into account.
- 2.03 International humanitarian law sets certain bounds to the use of force against an adversary. It determines both the relationship of the parties to a conflict with one another and their relationship with neutral states. Certain provisions of international humanitarian law are also applicable in the relationship between the state and its own citizens.
- 2.04 While general rules apply to all types of warfare, special rules inform the law of land warfare and the law of air and missile warfare (*see below*, Chapter 7), the law of naval warfare (*see below*, Chapter 17), military uses of cyberspace (*see below*, Section 6.29 and sub-Chapter 7 V), military operations in outer space (*see below*, Sections 3.16 and 18.56), and the law of neutrality (*see below*, Chapter 18).

##### II. HISTORICAL DEVELOPMENT

- 2.05 The following historical references may promote appreciation of the development and value of international humanitarian law.
- 2.06 Throughout its history, the development of international humanitarian law has been influenced by religious

concepts and philosophical ideas. Customary rules of warfare are part of the very first rules of international law. The development from the first rules of customary law to the first written humanitarian principles for the conduct of war, however, encountered some setbacks.

- 2.07 Some rules which imposed restrictions on the conduct of war, the means of warfare, and their application can be traced back to ancient times.
- The Sumerians regarded war as a state governed by the law, which was started by a declaration of war and terminated by a peace treaty. War was subject to specific rules which, *inter alia* guaranteed immunity to enemy negotiators.
  - Hammurabi King of Babylon (1728–1686 BC) wrote the ‘Code of Hammurabi’ for the protection of the weak against oppression by the strong and ordered that hostages be released on payment of a ransom.
  - The law of the Hittites also provided for a declaration of war and for peace to be concluded by treaty, as well as for respect for the inhabitants of an enemy city which has capitulated. The war between Egypt and the Hittites in 1269 BC, for instance, was terminated by a peace treaty.
  - In the 7th century BC, Cyrus I, King of the Persians, ordered the wounded Chaldeans to be treated like his own wounded soldiers.
  - The Indian epic *Mahabharata* (ca. 400 BC) and the Laws of Manu (circa 200 BC-200 AD) already contained provisions which prohibited the killing of a surrendering adversary who was no longer capable of fighting; forbade the use of certain means of combat, such as poisoned or burning arrows; and provided for the protection of enemy property and prisoners of war.
  - The Greeks, in the wars between the Greek city-states, considered each other as having equal rights and in the war led by Alexander the Great against the Persians, respected the life and personal dignity of war victims as a prime principle. They spared the temples, embassies, priests, and envoys of the opposite side and exchanged prisoners of war. For example, the poisoning of wells was proscribed in warfare. The Romans also accorded the right to life to their prisoners of war. However, the Greeks and Romans both distinguished between those peoples whom they regarded as their cultural equals and those whom they considered to be barbarians.
- 2.08 Islam also acknowledged the essential requirements of humanity. In his orders to his commanders, the first caliph, Abu Bakr (about 632), stipulated for instance the following: ‘The blood of women, children and old people shall not stain your victory. Do not destroy a palm tree, nor burn houses and cornfields with fire, and do not cut any fruitful tree. You must not slay any flock or herds, save for your subsistence.’ While in many cases Islamic warfare was no less cruel than warfare by Christians, under the reign of leaders like Sultan Saladin in the twelfth century, the laws of war were observed in an exemplary manner. Saladin ordered the wounded of both sides to be treated outside Jerusalem and allowed the members of the Order of St. John to discharge their hospital duties.
- 2.09 In the Middle Ages feud and war were governed by strict principles. The principle of protecting women, children and the aged from hostilities was espoused by St Augustine. The enforcement of respect for holy places (Truce of God) created a right of refuge, or asylum, in churches, the observance of which was carefully monitored by the Church. Knights fought according to certain (unwritten) rules which were enforced by tribunals of knights. These particular rules applied only to knights, not to the ordinary people. Among the knights’ rules was the requirement to regard an enemy knight as an equal combatant who had to be defeated in an honourable fight, and it was forbidden to start a war without prior notification.
- 2.10 The ‘Bushi-Do’, the medieval code of honour of Zen Buddhism in Japan, included the rule that humanity must be exercised even in battle and towards prisoners of war.
- 2.11 In the seventeenth century the Confucian philosopher Butsu Sorai wrote that whoever kills a prisoner of war shall be guilty of manslaughter, whether that prisoner had surrendered or fought ‘to the last arrow’.
- 2.12 As a result of the decline of the chivalric orders, the invention of firearms, and above all the creation of armies consisting of mercenaries, the morals of war regressed towards the end of the Middle Ages. Considerations of chivalry were unknown to these armies. Equally, they made no distinction between combatants and the civilian population. Mercenaries regarded war as a trade which they followed for the purpose of private gain.
- 2.13 At the beginning of modern times the wars of religion, and particularly the Thirty Years War, once again

employed the most inhuman methods of warfare. The cruelties of this war particularly led to the jurisprudential consideration of the *jus in bello* and established a number of principles to be observed by combatants. In his work *'De jure belli ac pacis'*, published in 1625, Hugo Grotius, the father of modern international law, emphasized the existing bounds to the conduct of war.

- 2.14 A fundamental change in the attitude of states to the conduct of war came only with the advent of the Age of Enlightenment in the eighteenth century. In 1762 Jean-Jacques Rousseau made the following statement in his work *'Du Contrat Social'*: 'War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders... The object of the war being the destruction of the hostile State, the other side has a right to kill its defenders while they are bearing arms; but as soon as they lay them down and surrender they become once more merely men, whose life no one has any right to take.' From this doctrine, which was soon generally acknowledged, it follows that acts of hostility may only be directed against the armed forces of the adversary, not against the civilian population which takes no part in the hostilities. These ideas also found expression in several international treaties concluded at that time.
- 2.15 In the nineteenth century, after a few interim setbacks, humanitarian ideas continued to gain ground. They led to remarkable initiatives by individuals as well as to numerous international treaties. These treaties imposed restrictions on both the instruments of warfare and the methods of their use.
- 2.16 Florence Nightingale soothed the sufferings of the sick and wounded through her efforts as an English nurse in the Crimean War (1853–1856). She later made an essential contribution towards the renovation of both the civil and military nursing systems of her country.
- 2.17 In 1861 Francis Lieber (1800–1872), a German-American professor of political science and law at Columbia College, which later became Columbia University, prepared on the behalf of President Lincoln a manual based on international law (the Lieber Code) which was put into effect for the first time in 1863 for the Union Army of the United States in the American Civil War (1861–1865).
- 2.18 The Genevese merchant Henry Dunant who, in the Italian War of Unification, had witnessed the plight of 40,000 Austrian, French, and Italian soldiers wounded on the battlefield of Solferino (1859), published his impressions in his book 'A Memory of Solferino' which became known all over the world. In 1863 the International Committee of the Red Cross (ICRC) was founded in Geneva on his initiative (*see below*, Section 21.24).
- 2.19 The 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field defined the legal status of medical personnel. It stipulated that wounded enemy soldiers were to be collected and cared for in the same way as members of friendly armed forces. These rules were extended and improved by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 1906.
- 2.20 The 1868 Declaration of St Petersburg was the first to introduce limitations on the use of weapons of war. It codified the customary principle, still valid today, prohibiting the use of weapons to cause unnecessary suffering. It also confirmed that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy".
- 2.21 The 1874 Brussels Declaration provided the first comprehensive code of the laws and customs of war. That Declaration was further developed at the Hague Peace Conferences of 1899 and 1907. The most important result was the Hague Regulations Concerning the Laws and Customs of War on Land (HagueReg).
- 2.22 World War I, with its new munitions and unprecedented extension of combat actions, demonstrated the limits of the existing law.
- 2.23 In 1923 the Hague Rules of Aerial Warfare (HRAW 1923) were formulated, together with rules concerning the control of radio communications in times of war. Although they were never legally adopted, they were influential in the development of legal opinion. Harvard University's Program on Humanitarian Policy and Conflict Research, developed a manual in 2010 elaborating on the rules of air and missile warfare (*HPCR Manual*).
- 2.24 In 1929 the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field and the Convention relative to the Treatment of Prisoners of War were signed in Geneva. They developed the terms of the Geneva Convention of 1906 and part of the Hague Regulations of 1907.
- 2.25 The first regulations on naval warfare were already developed in the Middle Ages. These regulations, which primarily embodied the right to search vessels and their cargo and the right of seizure, were subsequently

changed several times. The treatment of ships belonging to neutral states lacked uniform regulation and was disputed. In the Baltic Sea, the Hanseatic League used its almost unrestricted naval supremacy to enforce embargoes in times of war, which were not only detrimental to its adversary, but also made it impossible for neutral states to trade with that adversary. The ability of neutral states to pursue their maritime trade activities in times of war could only override the attempts by belligerents to cut their adversaries off from ship-to-shore supplies if the position of these powerful neutral states was secured. In the eighteenth century, this led to the formation of alliances between neutral states, and to the deployment of their naval forces to protect their right to free maritime trade. The 1856 Paris Declaration Concerning Maritime Law was the first agreement to address the protection of neutral maritime trade. A major restatement of current international principles and rules at sea was achieved by an international group of legal and naval experts with the 1995 Sanremo Manual on International Law Applicable to Armed Conflicts at Sea.

### **III. LEGAL SOURCES**

- 2.26** The four Geneva Conventions have come to be internationally binding upon all states:
- Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I);
  - Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II);
  - Geneva Convention III Concerning the Treatment of Prisoners of War (GC III);
  - Geneva Convention IV Concerning the Protection of Civilian Persons in Time of War (GC IV).
- 2.27** The 1907 Hague Conventions are binding not only upon the contracting parties, but are widely recognized as customary law. The documents relevant to international humanitarian law are:
- Hague Convention IV Concerning the Laws and Customs of War on Land (HC IV), and Annex to the Convention: Regulations Concerning the Laws and Customs of War on Land (HagueReg);
  - Hague Convention V Concerning the Rights and Duties of Neutral Powers and Persons in Case of War on Land (HC V);
  - Hague Convention VI Concerning the Status of Enemy Merchant Ships at the Outbreak of Hostilities (HC VI);
  - Hague Convention VII Concerning the Conversion of Merchant Ships into Warships (HC VII);
  - Hague Convention VIII Concerning the Laying of Automatic Submarine Contact Mines (HC VIII);
  - Hague Convention IX Concerning Bombardment by Naval Forces in Times of War (HC IX);
  - Hague Convention XI Concerning Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (HC XI);
  - Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War (HC XIII).
- 2.28** The three Protocols Additional to the Geneva Conventions are designed to reaffirm and develop the rules embodied in the laws of Geneva of 1949 and part of the laws of The Hague of 1907:
- Protocol of 8 June 1977 Additional to the Geneva Conventions of 12 August 1949, and Concerning the Protection of Victims of International Armed Conflicts (AP I);
  - Protocol of 8 June 1977 Additional to the Geneva Conventions of 12 August 1949, and Concerning the Protection of Victims of Non-International Armed Conflicts (AP II); and
  - Protocol of 8 December 2005 Additional to the Geneva Conventions of 12 August 1949, Relating to the Adoption of an Additional Distinctive Emblem (AP III).
- 2.29** Other agreements refer to specific issues of warfare and the protection of certain legal assets. The most important documents are:
- St Petersburg Declaration of 11 December 1868 Renouncing the Use, in Times of War, of Explosive

Projectiles under 400 grammes Weight (PetersburgDecl 1868);

- Hague Declaration of 29 July 1899 Concerning Expanding Bullets, so-called ‘dum-dum bullets’ (Dum-Dum Bullets HagueDecl. 1899);
- 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—Geneva Protocol on Gas Warfare (GasProt);
- London *Proces-Verbal* on 6 November 1936 Concerning the Rules of Submarine Warfare (LondonProt 1936);
- Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict—Cultural Property Convention (CultPropConv) with Protocols adopted on 14 May 1954 and 26 May 1999;
- Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction—Biological Weapons Convention (BWC);
- Convention of 18 May 1977 on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques—ENMOD Convention (ENMOD);
- Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (Inhumane WeaponsConv, amended on 20 December 2001) with Protocols adopted on 10 October 1980, 13 October 1995, 3 May 1996, and 28 November 2003;
- International Convention of 4 December 1989 Against the Recruitment, Use, Financing and Training of Mercenaries (MercenaryConv);
- Convention of 13 January 1993 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical WeaponsConv);
- Ottawa Convention of 3 December 1997 on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-personnel Mines and on their Destruction (LandMinesConv);
- Rome Statute of the International Criminal Court of 17 July 1998 (ICC Statute, amended on 10 and 11 June 2010);
- Dublin Convention of 30 May 2008 on Cluster Munitions;
- Arms Trade Treaty of 2 April 2013;
- Treaty on the Prohibition of Nuclear Weapons of 7 July 2017.

2.30 Many rules of international humanitarian law are binding as rules of customary law or general principles of law.

2.31 If an act of war is not expressly prohibited by international agreements or customary law, this does not necessarily mean that it is actually permissible. The so-called Martens Clause, developed by the Livonian Professor Friedrich Fromhold (Fyodor Fyodorovich) Martens (1845–1909), delegate of Tsar Nicholas II at the Hague Peace Conferences, which was included in the Preamble to the 1907 Hague Convention IV and reaffirmed in the 1977 Additional Protocol I and other international treaties, provides as follows:

In cases not covered by international agreements, civilians and combatants remain under the protection and authority of the principles on international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

## **IV. HUMANITARIAN REQUIREMENTS AND MILITARY NECESSITY**

2.32 In armed conflict, a belligerent may apply only that amount and kind of force necessary to defeat the enemy. Acts of war are only permissible if they are directed against military objectives, if they are not likely to cause unnecessary suffering, and if they are not perfidious.

- 2.33 International humanitarian law in armed conflicts is a compromise between military and humanitarian requirements. Its rules comply with both military necessity and the dictates of humanity. Considerations of military necessity cannot, therefore, justify departing from the rules of humanitarian law in armed conflicts to seek a military advantage using forbidden means.
- 2.34 Any exception to the prescribed behaviour for reasons of military necessity shall be permissible only if a rule of international humanitarian law expressly provides for such a possibility. The Hague Regulations Concerning the Laws and Customs of War on Land, for instance, prohibit the destruction or seizure of enemy property, 'unless such destruction or seizure be imperatively demanded by the necessities of war' (Article 23, lit. g, HagueReg).

## V. BINDING EFFECT OF INTERNATIONAL LAW FOR THE SOLDIER

- 2.35 The obligations of a state under international humanitarian law are binding not only upon its government and its supreme military command but also upon every individual.
- 2.36 Basic rules of international humanitarian law are classic examples of peremptory norms (*ius cogens*), so that any other rule which conflicts with such basic rules is void.
- 2.37 Apart from these basic rules, all members of the armed forces are obliged to comply and ensure compliance with all rules of international humanitarian law binding upon their state.
- 2.38 The four Geneva Conventions and the Protocols Additional to them oblige all contracting parties to disseminate the text of the Conventions as widely as possible (Article 47 GC I; Article 48 GC II; Article 127 GC III; Article 144 GC IV; Article 83, para. 1, AP I; Article 19 APII; Article 7 AP III). This shall particularly be accomplished through programmes of instruction for the armed forces and by encouraging the civilian population to study these Conventions (Article 83, para. 1, AP I). Considering their responsibility in times of armed conflict, military and civilian authorities shall be fully acquainted with the text of the Conventions and the Protocols Additional to them (Article 83, para. 2, AP I). Members of the armed forces shall be instructed in their rights and duties under international law in peacetime and in times of armed conflict.
- 2.39 Instruction of soldiers in international law should be conducted in the military units by senior officers and legal advisers and at the armed forces schools by teachers of law. The emphasis must be made on teaching what is related to practice. Soldiers should be instructed, using examples, in how to deal with the problems of and the issues involved in international law. The purpose of this instruction is not only to disseminate knowledge, but also and primarily to develop an awareness of what is right and what is wrong. The soldier must be taught to bring his conduct into line with this awareness in every situation.
- 2.40 The commanding officer must ensure that all subordinates are aware of their duties and rights under international law. Commanders are obliged to prevent, and where necessary to suppress or to report to competent authorities, breaches of international law (Article 87 AP I). They are supported in these tasks by a legal adviser (Article 82 AP I).
- 2.41 It shall be the duty of a member of the armed forces to follow the rules of international humanitarian law. With whatever means wars are being conducted, the soldier will always be obliged to respect and observe the rules of international law and to base all actions upon them. If, in a situation, there is doubt as to what international law prescribes, the issue shall be referred to the superior officer to decide. If this is not possible, the soldier will always be right to let himself or herself be guided by the principles of humanity and to follow the own conscience.
- 2.42 The soldier shall avoid inhumanity even in combat and refrain from using force against defenceless persons and persons needing protection, and from committing any acts of perfidy and brutality. Soldiers shall look upon wounded opponents as fellow persons in need. They shall respect prisoners of war as opponents fighting for their country. They shall treat the civilian population as they would wish civilians, civilian property, and cultural property of their own people to be treated by the adversary. Similar respect shall be shown to foreign property and cultural assets.
- 2.43 Superiors shall only issue orders which are in conformity with international law. Superiors who issue an order contrary to international law expose not only themselves but also their subordinates obeying these

orders to the risk of being prosecuted (Article 86 AP I).

**2.44** An order is not binding if:

- it violates the human dignity of the third party concerned or the recipient of the order;
- it is not of any use for service; or
- in the particular situation, the soldier cannot reasonably be expected to execute it.

Orders which are not binding need not be executed by the soldier. Moreover, it is expressly prohibited to obey orders whose execution would be a crime.

**2.45** Grave breaches of international humanitarian law (Article 50 GC I; Article 51 GC II; Article 130 GC III; Article 147 GC IV; Article 85 AP I) shall be penal offences under national law.

**2.46** A plea of superior orders shall not be a good defence if the subordinate realized or should have realized that the action ordered was a crime (*see* also Article 33 ICC Statute).

**2.47** Punishment for disobedience or refusal to obey is proscribed if the order is not binding.

## **VI. TASKS OF THE LEGAL ADVISER**

**2.48** States must ensure that legal advisers are available, when necessary:

- to advise military commanders in all matters pertinent to the military law and the international law;
- to examine military orders and instructions on the basis of legal criteria;
- to participate in military exercises as legal officers whose duties include giving advice on matters pertinent to international law; and
- to give legal instruction to soldiers of all ranks, particularly including the further education the rules of international humanitarian law.

**2.49** Legal advisers should have direct access to the commander to whom they are assigned. The commander may give directives to a legal adviser only with respect to general aspects of duty.

**2.50** The legal advisers receive directives and instructions pertinent to legal matters only from their supervising legal adviser, via the legal specialist chain of command.

**2.51** A legal adviser may additionally exercise the functions of a Disciplinary Attorney for the Armed Forces. In the case of a severe disciplinary offence the legal adviser may then conduct the investigation and bring the charge before the military disciplinary court. Such a disciplinary offence may include a grave breach of international law which in addition to its criminal quality also has a disciplinary significance.

## Chapter 3

# SCOPE OF APPLICATION OF INTERNATIONAL HUMANITARIAN LAW

## I. MATERIAL SCOPE

- 3.01 International humanitarian law regulates, and as a rule applies in times of, armed conflict.
- 3.02 An international armed conflict exists if one state uses force of arms against another state. It is irrelevant whether the parties to the conflict consider themselves to be at war or in a state of armed conflict with each other.
- 3.03 The application of international humanitarian law is not dependent on a formal declaration of war. Formal declarations of war (Article 1 HC III) nowadays occur only very rarely.
- 3.04 International humanitarian law also applies to all cases of total or partial military occupation, even if this occupation meets with no armed resistance (Article 2, para. 2, common to the Geneva Conventions).
- 3.05 The application of international humanitarian law is not affected by whether or not the parties to an armed conflict recognize one another as states (Article 13, para. 3, GC I; Article 13, para. 3, GC II; Article 4 A, para. 3, GC III; Article 43, para. 1, AP I).
- 3.06 The application of humanitarian law in international armed conflicts does not depend on whether an armed conflict has been started in violation of a provision of international law regulating the use of force (*jus ad bellum*). International humanitarian law applies equally to all the parties to an armed conflict irrespective of the legality or illegality of their resort to force.
- 3.07 During an international armed conflict, the law of neutrality shall be applied to the relations between the belligerent parties and states not participating in the conflict (Article 2 HC III; *see* below, Chapter 18).
- 3.08 A non-international armed conflict is a situation of protracted armed violence between governmental authorities and organized armed groups within a state or between such groups within a state.
- 3.09 In a non-international armed conflict each party shall be bound by the applicable conventional and customary international humanitarian law. Regular armed forces should comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, however such conflicts are characterized (*see* below, Chapter 19).

## II. PERSONAL SCOPE

- 3.10 International humanitarian law binds parties to an armed conflict and individuals.
- 3.11 International humanitarian law protects persons who do not or no longer directly participate in hostilities.
- 3.12 Although members of the armed forces of a party to an armed conflict and civilians directly participating in hostilities may be subject to direct attack, they enjoy the protection of international humanitarian law against certain methods and means of warfare.

## III. GEOGRAPHICAL SCOPE

- 3.13 In international armed conflicts military operations may only be carried out in:
- the territories of the parties to the conflict as defined by the national boundaries;
  - the high seas (including the airspace above and the sea floor); and
  - exclusive economic zones.
- 3.14 The national territory includes:

- land territory;
- rivers and landlocked lakes;
- national maritime waters and territorial waters; and
- the airspace above these territories.

- 3.15 The dividing line between the airspace of the national territory of a state and outer space shall be drawn where, due to existing physical conditions, the density of the air is small enough to permit the employment of satellites. According to the present state of the art, the minimum flight altitude of satellites ranges between 80 and 110 km above ground level.
- 3.16 The 1967 Outer Space Treaty prohibits placing nuclear weapons or any other weapons of mass destruction in outer space and provides that the moon and other celestial bodies be used exclusively for peaceful purposes. Military operations in outer space that occur in connection to an armed conflict are governed by international humanitarian law (*see* also Section 2.04 above and Sections 5.32 and 18.56 below).
- 3.17 Subject to the agreement of the parties to the armed conflict, it is prohibited to extend military operations to demilitarized zones (Article 60 AP I), in particular hospital and safety zones (Article 23 GC I; Article 14 GC IV) and neutralized zones (Article 15 GC IV). Non-defended localities (Article 25 HagueReg; Article 59 AP I) may not be attacked (*see* Section 7.16 below).
- 3.18 Military operations shall not be carried out in the national territories of neutral or other states not parties to the conflict and in neutralized areas in which, according to contractual agreements, no military operations shall take place, even if the state to whose area of jurisdiction they belong is a party to the conflict.
- 3.19 The zones in which military operations actually take place are referred to as the area of operations.
- 3.20 The law of belligerent occupation applies in territory that has actually come under the authority of hostile armed forces.
- 3.21 In non-international armed conflicts the applicability of international humanitarian law extends to the area of operations and the territory under the control of a party to the armed conflict (*see* below, Section 19.01).

## IV. TEMPORAL SCOPE

- 3.22 International humanitarian law begins to apply from the beginning of the international armed conflict, the situation of belligerent occupation, or the non-international armed conflict.
- 3.23 In international armed conflicts, international humanitarian law ceases to apply on the general close of military operations. The law of belligerent occupation ceases to apply at the termination of occupation. In non-international armed conflict, international humanitarian law ceases to apply at the end of the armed conflict. However, persons deprived of their liberty or whose liberty has been restricted for reasons related to the armed conflict continue to benefit from the protections of international humanitarian law until the end of such deprivation or restriction of liberty (Article 6, paras. 2, 3 and 4, GC IV; Article 3, lit. b, AP I; Article 5 GC I; Article 5, para. 1, GC III; Article 3, lit. b, AP I; Article 2, para. 2, AP II).
- 3.24 In international armed conflicts hostilities may be terminated temporarily or permanently. Even a definite cessation of hostilities does not alter the fact that there is a state of war. A state of war will be ended only by a conclusion of peace unless it has already been expressly terminated. The following Sections on activities relating to the termination of hostilities and on the conclusion of peace are based on treaty law and custom in international armed conflicts. They partly affect activities to terminate hostilities and conclude peace agreements also in non-international armed conflicts (*see* below, Section 19.21).

### 1. *Parlementaires and Protecting Powers*

- 3.25 A cessation of hostilities is regularly preceded by negotiations with the adversary. In the area of operations the parties to the conflict frequently use parlementaires for this purpose.
- 3.26 Parlementaires are persons authorized by one party to the conflict to enter into negotiations with the adversary. Parlementaires and persons accompanying them, for example drivers and interpreters, have a right to inviolability (Article 32 HagueReg). They make themselves known by a white flag.
- 3.27 When entering the territory of the adversary, parlementaires and the persons accompanying them shall not be taken prisoner or detained. The principle of inviolability shall apply until they have returned safely to

friendly territory. The adverse party is not required to cease firing in the entire sector in which a parlementaire arrives.

- 3.28 Parlementaires lose their right of inviolability if it is proved in an incontestable manner that they have taken advantage of their privileged position for provoking or committing an act of treason (Article 34 HagueReg).
- 3.29 Misusing the flag of truce constitutes perfidy and is thus a violation of international law (Article 23 lit. f HagueReg; Article 37, para. 1 lit. a, Article 38, para. 1 AP I).
- 3.30 Apart from dispatching parlementaires, the parties to a conflict may also communicate with each other through the intermediary of Protecting Powers. Protecting Powers are neutral or other states not parties to the conflict which safeguard the rights and interests of a party to the conflict and those of its nationals *vis-à-vis* an adverse party to the conflict (Article 2 lit. c AP I). Particularly, the International Committee of the Red Cross may act as a 'substitute' (Article 5, para. 4, AP I) if the parties to the conflict cannot agree upon the designation of a Protecting Power.

## 2. Cease-fire and Armistice

- 3.31 An armistice agreement is characterized by the intention to provide an opportunity for making preparations for the termination of an armed conflict. Its aim is to terminate hostilities permanently. That is what distinguishes an armistice from a ceasefire. An armistice may be local (Article 37 HagueReg). As a matter of principle, however, an armistice agreement shall be designed to suspend military operations between the parties to the conflict and to pave the way for peace negotiations.
- 3.32 A cease-fire is defined as a temporary interruption of military operations which is limited to a specific area and will normally be agreed upon between the local commanders. It shall generally serve humanitarian purposes, in particular searching for and collecting the wounded and the shipwrecked, rendering first aid to these persons, and removing civilians (Article 15 GC I; Article 18 GC II; Article 17 GC IV). The regulations governing armistices (Article 36–41 HagueReg) shall be applied *mutatis mutandis*.
- 3.33 If the parties to the conflict have not defined the duration of an armistice, it shall, as a matter of principle, be considered a valid assumption that the armistice is designed to be the transition to a definite cessation of hostilities. The ban on the use of force embodied in the UN Charter shall also be observed during this period of transition. In contrast to the provisions of the Hague Regulations Concerning the Laws and Customs of War on Land (Article 36 HagueReg), the parties to a conflict may not, at any time, resume operations after the conclusion of an armistice except in the exercise of the right to self-defence in accordance with the UN Charter.
- 3.34 Any serious violation of a cease-fire or an armistice may give the other party the right of denouncing it and, provided that the conditions for an exercise of the right of self-defence in accordance with the UN Charter are fulfilled, to recommence hostilities. A denunciation of the armistice will be necessary only if the military situation so permits (Article 40 HagueReg; Articles 2, no. 4, and 51 UN Charter).
- 3.35 A violation of the terms of the armistice by individuals acting on their own initiative does not entitle the injured party to denounce the agreement but only to demand the punishment of the offenders and reparation for the losses sustained (Article 41 HagueReg).
- 3.36 The terms of the armistice treaty shall be strictly observed by the parties to a conflict. It is not permissible to carry out any military operations giving an advantage over the adversary. To what extent this shall also apply to other actions taken during the armistice depends on the terms of the agreements made.
- 3.37 The area of application of a limited armistice shall be defined as precisely as possible.
- 3.38 An armistice must be notified in an unmistakable form and in good time. Hostilities are to be suspended immediately after the notification, or on the date fixed (Article 38 HagueReg).
- 3.39 The terms of an armistice shall not deviate from the provisions of the Geneva Conventions to the detriment of protected persons (Article 6 common to GC I-III; Article 7 GC IV).

## 3. Capitulation

- 3.40 A capitulation is the unilateral or mutually agreed termination of hostilities. It must take into account the rules of military honour (Article 35, para. 1, HagueReg).
- 3.41 It may be a total capitulation applying to all armed forces of a state, or a partial capitulation limited to

specific units.

3.42 Every commander may declare or accept a capitulation only for his particular area of command. The capitulation and its acceptance are binding upon the states involved in the conflict. Every state may, however, call a capitulating commander to account if he has violated his duties, for example acted against orders.

3.43 A capitulation must be faithfully observed by the parties to the conflict (Article 35, para. 2, HagueReg). Persons who infringe the terms of the capitulation may be called to account by the adversary.

#### 4. Conclusion of Peace

3.44 While a cease-fire, an armistice, or a capitulation only lead to a suspension or cessation of hostilities, a conclusion of peace results in the termination of the state of armed conflict.

3.45 A frequently used instrument to conclude peace is a peace treaty.

3.46 Armed conflicts may also be terminated by a ceasefire without any peace treaty, or other modes that reflect the mutual consent of the parties to terminate the armed conflict.

## V. RELEVANCE OF OTHER FIELDS OF INTERNATIONAL LAW

3.47 International humanitarian law must be applied in context with other principles and provisions of international law.

#### 1. Peacetime Rules

3.48 International humanitarian law does not *ipso facto* terminate or suspend the operation of peacetime rules.

#### 2. Human Rights

3.49 Human rights continue to apply in armed conflicts and post-conflict military operations.

#### 3. International Criminal Law

3.50 Important principles and rules of international humanitarian law have been reaffirmed in the progressive development of international criminal law

## VI. RELEVANCE OF INTERNATIONAL HUMANITARIAN LAW IN PEACETIME AND POST-CONFLICT MILITARY OPERATIONS

3.51 Certain principles and rules of international humanitarian law are also relevant in peacetime and post-conflict military operations

## Chapter 4

# GENERAL PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW

- 4.01 The right of the parties to an armed conflict to choose means (Article 22 HagueReg) and methods (Article 35, para. 1 AP I) of warfare is not unlimited. It is particularly prohibited to employ means or methods which are intended or of a nature:
- to cause superfluous injury or unnecessary suffering (Article 23 lit. e HagueReg; Article 35, para. 2, AP I);
  - to injure military objectives, civilians, or civilian objects without distinction (Article 51, paras. 4 and 5, AP I; *see* below, sub-Chapter III 2); or
  - to offend elementary principles of humanity.
- 4.02 ‘Superfluous injury’ and ‘unnecessary suffering’ are caused by the use of weapons and methods of combat whose foreseeable harm would be clearly excessive in relation to the lawful military advantage intended.
- 4.03 The prohibition of indiscriminate warfare means that both the civilian population as a whole and individual civilians shall be spared as far as possible from attack.
- 4.04 The principle of humanity entails additional demands and condemnations on the conduct of states, international organisations, fighters and civilians.

## Chapter 5

# COMBATANTS AND NON-COMBATANTS

## I. GENERAL RULES

- 5.01 The armed forces of a party to a conflict consist of combatants and non-combatants. Combatants are persons who may take a direct part in the hostilities (Article 3 HagueReg; Article 43, para. 2, AP I), i.e. participate in the operation or control of a weapon or a weapon-system in an indispensable function. Other members of the armed forces may be qualified as non-combatants. The status of the various groups of service personnel will be determined by national decision in accordance with the aforementioned international legal principles.
- 5.02 Whereas combatants may not be punished for the mere fact of fighting, persons who take a direct part in the hostilities without being entitled to do so (unprivileged belligerents or unlawful combatants) face penal consequences. They do not have the right to prisoner-of-war status. Yet they have a legitimate claim to certain fundamental guarantees (Article 75 AP I) including the right to humane treatment and a proper judicial procedure.
- 5.03 In particular, mercenaries shall be regarded as unlawful combatants. A mercenary is any person who is motivated to take a direct part in the hostilities by the desire for private gain without being a national or a member of the armed forces of a party to the conflict (Article 47 AP I). The provisions of the 1989 MercenaryConv then also apply.

## II. COMBATANTS

- 5.04 The armed forces of a party to a conflict consist of all its organized armed forces, groups, and units. They also include militias and volunteer corps integrated in the armed forces. The armed forces shall be:
- under a command responsible to that party for the conduct of its subordinates, and

- subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict (Article 43, para. 1, AP I).
- 5.05 It shall be left to the discretion of the individual states to choose whether to admit women to their armed forces. Their combatant or non-combatant status is determined by the same principles as that of male members of armed forces.
- 5.06 The parties to the conflict shall take all feasible measures to ensure that children who have not attained the age of eighteen years do not take part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces (Article 77, para. 2, AP I; Article 38 ChildConv, and ProtChildConv; *see* below Section 8.06).
- 5.07 Whenever a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall notify the other parties to the conflict (Article 43, para. 3, AP I).
- 5.08 Combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack (Article 44, para. 3, AP I). In accordance with the generally agreed practice of states, members of regular armed forces shall wear their uniform (Article 44, para. 7, AP I). Combatants who are not members of uniformed armed forces shall wear a permanent distinctive sign visible from a distance and carry their arms openly.
- 5.09 Recognizing that there are situations in occupied territories and in wars of national liberation where, owing to the nature of the hostilities, a combatant (especially a guerilla) cannot so distinguish himself from the civilian population, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
- during each military engagement, and
  - during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate (Article 44, para. 3, sentence 2, AP I).
- The term ‘military deployment’ refers to any movement towards the point from which an attack is to be launched.
- 5.10 The inhabitants of a territory which has not yet been occupied who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to form themselves into armed units (so-called *levée en masse*) shall be combatants. They shall carry arms openly and respect the laws and customs of war in their military operations (Article 2 HagueReg; Article 4 A No. 6 GC III).
- 5.11 While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant (Article 44, para. 2, AP I).
- 5.12 Combatants who fall into the hands of the adversary shall be prisoners of war (Article 3, sentence, HagueReg; Article 44, para. 1, AP I). They shall not be called to account for their participation in lawful military operations. Violations of international law committed by them may be prosecuted under the laws of the detaining power and international law (Articles 82 *et seq.* GC III).
- 5.13 Should any doubt arise as to whether a person who has taken part in hostilities and fallen into the hands of the adversary shall be deemed a combatant or civilian, that person shall continue to be treated as a prisoner of war until such time as his or her status has been determined by a competent tribunal (Article 5, para. 2, GC III; Article 45, para. 1, AP I).

### **III. NON-COMBATANTS**

- 5.14 Persons who are members of the armed forces but who, by virtue of national regulations, have no combat mission, such as judges, government officials, and blue-collar workers, are non-combatants. If they fall into the power of the adversary, they will be prisoners of war as will combatants (Article 4 A, No. 1, GC III).
- 5.15 Members of the medical service and religious personnel (chaplains) attached to the armed forces are also non-combatants. Medical personnel and chaplains who have fallen into the hands of the adversary shall be detained only in so far as it is necessary for assisting prisoners of war. Although they shall not be deemed prisoners of war, they shall be granted the same legal protection (Articles 24, 28 and 30 GC I; Articles 36

and 37 GC II; Article 33 GC III).

- 5.16 Non-combatants, too, have the right to defend themselves or others against any attacks. Medical personnel and chaplains are allowed to bear and use small arms (pistols, rifles, or sub-machine-guns) for this purpose (Article 22 No. 1 GC I; Article 35 No. 1 GC II; Article 13, para. 2 lit. a, AP I). This presupposes a national authorization for the handling of fire arms and ammunition.
- 5.17 A detainee shall not be prosecuted for his participation in hostilities, unless he or she has been positively identified as an unlawful combatant.
- 5.18 No sentence may be passed and no penalty may be executed except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure (Article 84 GC III; Article 75, para. 4, AP I).

## IV. PERSONS ACCOMPANYING THE ARMED FORCES

- 5.19 Persons who accompany the armed forces without being members thereof, such as war correspondents, members of labour units, or of services responsible for the welfare of the soldiers, shall not be deemed combatants. If they fall into the power of the adversary, they shall become prisoners of war (Article 4 A, No. 4, GC III).

## V. CIVILIAN CONTRACTORS

- 5.20 Private contractors and civilian employees of the armed forces may not assume combatant functions. Their geographical and organizational closeness to the armed forces may increase the risk of incidental death or injury among such personnel (*see* below Section 7.04). If they directly participate in hostilities they will lose protection for the duration of each specific act amounting to direct participation (*see* below, Section 8.17).

## VI. SPECIAL FORCES

- 5.21 It shall be lawful for combatants recognizable as such (by their uniform, insignia, etc.) to participate in raids, acts of sabotage, and other attacks carried out by special forces in the enemy's hinterland or in forward areas. Combatants who commit such acts wearing plain clothes or the uniform of the adversary are liable to be punished. They shall nevertheless have the right to a regular judicial procedure (Articles 82-108 GC III; Article 75, para. 4, AP I).

## VII. SPIES

- 5.22 Spies are persons who clandestinely, or under false pretences, e.g. not wearing the uniform of their armed forces, gather information in the territory controlled by the adversary. Even if they are members of armed forces, they do not have the right to prisoner-of-war status. Persons who fall into the hands of the adversary while engaged in espionage shall be liable to punishment (Articles 29–31 HagueReg).
- 5.23 Even if captured while engaged in espionage, a spy shall not be punished without prior conviction pursuant to regular judicial proceedings (Article 30 HagueReg; Article 75, para. 4, AP I).
- 5.24 A spy who, after re-joining his own or allied armed forces upon completion of his mission, is subsequently captured by the adversary, shall be treated as a prisoner of war and incur no responsibility for his previous acts of espionage (Article 31 HagueReg; Article 46, para. 4, AP I).
- 5.25 Combatants, such as reconnaissance patrols, who, marked as such, reconnoitre the adversary's area of operations shall not be deemed engaged in espionage (Article 29, para. 2, HagueReg; Article 46, para. 2 AP I). The same applies to military aircraft on overt missions of information gathering (Rule 123 *HPCR Manual*).

## **VIII. SPECIAL ASPECTS OF AERIAL AND NAVAL WARFARE, CYBER WARFARE, AND MILITARY OPERATIONS IN OUTER SPACE**

- 5.26** Unlike military ground vehicles, manned military aircraft and ships are required to bear external marks indicating their nationality and military character. Non-uniformed members of armed forces who take part in hostilities using correctly marked military aircraft or ships shall remain combatants. When captured by the adversary they shall prove their military status by an identity card.
- 5.27** No aircraft other than military aircraft of the parties to an international armed conflict shall engage in any form of hostilities (Article 16, para. 1, HRAW 1923; Rule 17 *HPCR Manual*).
- 5.28** A military aircraft shall be under the command of a duly commissioned soldier. The crew must be subject to military discipline (Article 14 HRAW 1923; Rule 1, lit. x, *HPCR Manual*).
- 5.29** No civilian aircraft shall be armed (Article 16, para. 3, HRAW 1923).
- 5.30** Public non-military aircraft shall be treated as civilian objects (Articles 5 and 6 HRAW 1923; Rules 17, 22 *HPCR Manual*). Public aircraft employed for jurisdictional purposes (customs, police) shall also carry papers and bear marks evidencing their non-military character (Article 4 HRAW 1923; Rule 17 *HPCR Manual*). Public aircraft are subject to confiscation, unless specially protected (Article 32 HRAW 1923; Rule 136 (a) *HPCR Manual*). Private aircraft are liable to capture and adjudication by a prize court in order that any neutral claim may be duly heard and determined (Articles 52, 55 HRAW 1923; Rule 134 *HPCR Manual*).
- 5.31** Special provisions relating to naval warfare are contained in Chapter 17.
- 5.32** Sections 5.26 – 5.30 in principle also apply to military operations in outer space (*see* Sections 2.04 and 3.16 above and 18.56 below).
- 5.33** For the application of international humanitarian law to military operations in cyberspace *see* below Section 6.29 and Subchapter 7 V.

## Chapter 6

### MEANS OF COMBAT

#### I. GENERAL RULES

- 6.01 While the general principles of international humanitarian law (*see* above, Chapter 4) fully apply to the use of any means of combat, a prohibition of the development, production, stockpiling, transfer, or use of a particular weapon requires an explicit rule.
- 6.02 In the study, development, acquisition, or adoption of new means or methods of combat it shall be determined whether these means and methods are compatible with the rules of international law (Article 36 AP I).

#### II. CERTAIN CONVENTIONAL WEAPONS

- 6.03 It is prohibited to employ poison and poisoned weapons (Article 23 lit. a HagueReg; Article 8, para. 2 lit b, xvii- xviii, and lit e, xiii-xiv, ICC Statute).
- 6.04 In the 1868 St Petersburg Declaration the use of explosive and incendiary projectiles weighing under 400 grammes was prohibited, since these projectiles were deemed to cause disproportionately severe injury to soldiers, which is not necessary to put them out of action. This prohibition is now only of limited importance, since it is reduced by customary law to the use of explosive and incendiary projectiles of a weight significantly lower than 400 grammes which can disable only the individual directly concerned but not any other persons. 20 mm high-explosive grenades and projectiles of a similar calibre are not prohibited.
- 6.05 It is prohibited to use bullets which expand or flatten easily in the human body (Dum-Dum Bullets HagueDecl 1899; Article 8, para. 2 lit b, xix, and lit e, xv, ICC Statute). This applies also to the use of shotguns, since shot causes similar suffering unjustified from the military point of view. It is also prohibited to use projectiles of a nature:
- to burst or deform while penetrating the human body;
  - to tumble early in the human body; or
  - to cause shock waves leading to extensive tissue damage or even lethal shock (Articles 35, para. 2, and 51, para. 4, lit. c, AP I; Article 23 lit. e HagueReg).
- 6.06 It is also prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays (NonDetectableFragmentsProt; Article 8, para. 2 lit b, xxviii, and lit e, xvii ICC Statute).
- 6.07 Treaty law prohibits to use anti-personnel mines, to develop, produce, acquire, stockpile, retain or transfer them. All existing anti-personnel mines shall be destroyed (Article 1 LandMinesConv). ‘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 (Article 2, para. 1, LandMinesConv).
- 6.08 Under the Convention on Cluster Munitions State Parties undertake never under any circumstances to use or develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions, and to cooperate in munition clearance and destruction, victim assistance and risk education programmes.
- 6.09 The use of other mines and other devices on land is, in principle, permissible (Article 1 MinesProt). The following definitions apply:
- ‘mine’ means any device placed—or remotely delivered—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 (Article 2 No. 1 MinesProt);

- ‘other devices’ means manually emplaced munitions or devices designed to kill, injure, or damage and which are actuated by remote control or automatically after a lapse of time (Article 2 No. 5 MinesProt).
- 6.10** It is prohibited to direct the above-mentioned munitions—even by way of reprisals—against the civilian population as such or against individual civilians (Article 3, para. 7, MinesProt). Any indiscriminate use of these weapons is prohibited (Article 3, para. 8, MinesProt).
- 6.11** All feasible precautions shall be taken to protect civilians also from unintended effects of these munitions (Article 3, para. 10, MinesProt).
- 6.12** Booby-traps and other devices shall not be used in any built-up area, or other area predominantly inhabited by civilians, in which there is no actual or imminent combat between ground forces (Article 7, para. 3, MinesProt). Exceptions are permissible if:
- these munitions are placed on or in the close vicinity of a military objective; or
  - measures are taken to protect civilians from their effects, for example, the posting of warning sentries, the provision of fences, or the issue of warnings (Article 7, paras. 3, lit. a and b, MinesProt).
- 6.13** It is prohibited to use mines, booby-traps or other devices equipped with a mechanism designed to detonate the munition by the presence of commonly available mine detectors during normal use in detection operations (Article 3, para. 5, MinesProt). The use of a self-deactivating mine equipped with an anti-handling device capable of functioning after the mine has ceased to be capable of functioning is prohibited (Article 3, para. 6, MinesProt).
- 6.14** The use of anti-personnel mines which are not detectable is prohibited (Article 4 MinesProt). Anti-personnel mines others than remotely-delivered mines must either be equipped with a self-destruction mechanism and a self-deactivation device or be placed in an area marked, fenced, and monitored by military personnel (Article 5 MinesProt).
- 6.15** The use of remotely delivered mines is prohibited unless such mines are equipped with an effective self-deactivation device (Article 6, paras. 2 and 3, MinesProt). After emplacement, their location shall be accurately recorded (Article 6, para. 1, MinesProt). Effective advance warning shall be given of any delivery or dropping of remotely delivered mines which may affect the civilian population, unless circumstances do not permit this (Article 6, para. 4, MinesProt).
- 6.16** It is prohibited in all circumstances to use:
- a) any booby-trap in the form of an apparently harmless portable object (Articles 2, para. 4, and 7, para. 2, MinesProt);
  - b) booby-traps which are in any way attached to or associated with:
    - internationally recognized protective emblems, signs, or signals;
    - sick, wounded, or dead persons;
    - burial or cremation sites or graves;
    - medical facilities, transportation, equipment, or supplies;
    - food or drink;
    - objects of a religious nature;
    - cultural objects;
    - children’s toys and all other objects related to children; or
    - animals or their carcasses (Article 7, para. 1 MinesProt); or
  - c) any mine, booby-trap or other device which is designed or of a nature to cause superfluous injury or unnecessary suffering (Article 3, para. 3, MinesProt).
- 6.17** This prohibition does not apply to fixed demolition appliances or to portable demolition devices lacking any harmless appearance.
- 6.18** The location of minefields, mines, booby-traps and explosive remnants of war shall be recorded. The parties to the conflict shall retain these records and, whenever possible, by mutual agreement, provide for their publication (Article 9 MinesProt, Article 4 ERWProt).

**6.19** When a United Nations force or mission performs peace-keeping, observation, or similar functions, each party to the conflict shall, if requested:

- render harmless all mines or booby-traps (Article 12, para. 2 lit. b (ii), MinesProt);
- take such measures as may be necessary to protect the force or mission from the effect of mines, booby-traps, and explosive remnants of war while carrying out its duties (Article 12, para. 2 lit. b (i) MinesProt, Article 6, para. 1 lit. a, ERWProt); and
- make available to the head of the force or mission all pertinent information in the party's possession (Article 12, para. 2 lit. b (iii), MinesProt; Article 6, para. 1 lit. B, ERWProt).

Likewise humanitarian and fact-finding missions of the United Nations System as well as missions of impartial humanitarian organizations shall be protected from the effect of mines, booby-traps and other devices and shall be provided with safe passage (Article 12, paras. 3–5, MinesProt).

**6.20** After the cessation of an international armed conflict, the parties to the conflict shall, both among themselves and, where appropriate, with other states or international organizations, exchange information and technical assistance necessary to remove or otherwise render ineffective minefields, mines, booby-traps, and explosive remnants of war (Article 10 MinesProt, Article 3 ERWProt).

**6.21** Incendiary weapons are weapons or munition primarily designed to set fire to materials or objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof. Examples are: flame-throwers, fougasses (hand-held weapons containing liquid incendiaries), shells, rockets, grenades, mines, bombs and other containers of incendiary substances (Article 1, para. 1 lit. a, IncendiariesProt).

**6.22** Incendiary weapons do not include:

- munitions which may have incidental incendiary effects (e.g. illuminants, tracers, smoke or signalling systems, Article 1, para. 1 lit. b (i), IncendiariesProt); or
- munitions designed to combine penetration, blast, or fragmentation effects with an additional incendiary effect (e.g. armour-piercing projectiles, fragmentation shells, explosive bombs). The incendiary effect shall only be used against military objectives (Article 1, para. 1 lit. b (ii), IncendiariesProt).

**6.23** When incendiary weapons are used, all precautions shall be taken which are practicable or practically possible, taking into account all the current circumstances, including humanitarian and military considerations (Article 1, para. 5, IncendiariesProt).

**6.24** The civilian population, individual civilians, and civilian objects shall be granted special protection. They shall not be made the object of attack by incendiary weapons (Article 2, para. 1, IncendiariesProt).

**6.25** It is prohibited under any circumstances to make any military objective located within a concentration of civilians the object of attack by incendiary weapons (Article 2, paras. 2 and 3, IncendiariesProt).

**6.26** It is further prohibited to use incendiary weapons against forests or other kinds of plant cover except when such natural elements are used by the adversary to cover, conceal, or camouflage a military objective, or are themselves military objectives (Article 2, para. 4, IncendiariesProt).

**6.27** It is prohibited to employ laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision (Article 1 LaserProt).

**6.28** Drones are not prohibited as such, but must be used in compliance with international law, in particular international humanitarian law and its rules on means and methods of warfare.

**6.29** The use of cyber malware as means of combat is not prohibited as such by international humanitarian law, but it is subject to applicable provisions of international law, the general rules governing means of combat (*see above*, Section 6.01 and 6.02), and the rules on methods of combat (*see below*, Section 7.35).

**6.30** Autonomous weapons or robotics are not prohibited as such, but like all means of warfare, they must be capable of being used in compliance with international humanitarian law. In particular they must be programmed in a way that allows for the compliance with the principles of distinction, proportionality and precaution. The responsibility for the respect of these principles rests on the human programmers and operators.

### III. WEAPONS OF MASS DESTRUCTION

#### 1. Nuclear Weapons

- 6.31 Numerous multilateral and bilateral treaties already exist which are designed to prohibit the proliferation of nuclear weapons, to restrict the testing of nuclear weapons, to prohibit the stationing of nuclear weapons, to provide for nuclear weapon-free zones, to limit the scope of nuclear armament, and to prevent the outbreak of nuclear war. These include the following:
- Treaty on the Non-Proliferation of Nuclear Weapons (NPT) of 1 July 1968;
  - Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and under Water (Partial Nuclear Test Ban Treaty) of 5 August 1963;
  - Comprehensive Nuclear-Test-Ban Treaty of 24 September 1996 (not yet in force);
  - Antarctic Treaty of 1 December 1959;
  - Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty) of 27 January 1967;
  - Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) of 14 February 1967;
  - Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and the Subsoil Thereof (Seabed Treaty) of 11 February 1971;
  - Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War between the United States of America and the Union of Soviet Socialist Republics (30 September 1971);
  - South Pacific Nuclear-Free Zone Treaty (Treaty of Rarotonga) of 6 August 1985;
  - Treaty on the Southeast Asia Nuclear Weapon-Free Zone (Treaty of Bangkok) of 15 December 1995;
  - African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba) of 11 April 1996;
  - Agreement concerning the Future Consultation Procedure for Implementation of the Agreement between the United States and the Union of Soviet Socialist Republics of September 30, 1971 on Measures to Reduce the Risk of Outbreak of Nuclear War (25 June 2004); and
  - Treaty on a Nuclear-Weapon-Free Zone in Central Asia (Treaty of Semipalatinsk) of 8 September 2006.
- 6.32 The Treaty on the Prohibition of Nuclear Weapons (TPNW) of 7 July 2017 was adopted by non-nuclear armed states.
- 6.33 The international law in force does not contain any explicit prohibition against the use of nuclear weapons, nor can any such prohibition be derived from current treaty or customary law.
- 6.34 International humanitarian law imposes the same general limits on the use of nuclear weapons as on the use of conventional weapons: it is prohibited to make the civilian population the object of attack. A distinction shall at all times be made between persons who take part in hostilities and members of the civilian population, who are to be granted maximum protection.
- 6.35 The new rules introduced by Additional Protocol I were intended to apply to conventional weapons, irrespective of other rules of international law applicable to other types of weapons. They do not regulate, or prohibit the use of nuclear weapons.
- 6.36 As weapons of last resort, nuclear weapons continue to fulfil an essential role to prevent war by ensuring that there are no circumstances in which the possibility of nuclear retaliation in response to military action might be discounted.
- 6.37 The threat and use of nuclear weapons are subject to political control, which shall observe the principle of proportionality, limiting damage on the territory of the enemy as well as the risk of damage on friendly territory.

## 2. Chemical Weapons

- 6.38 The use in war of asphyxiating, poisonous, or other gases, and of all analogous liquids, materials, or similar devices is prohibited (GasProt; Article 23 lit.a HagueReg). This prohibition also applies to toxic contamination of water-supply installations and foodstuffs (Article 54, para. 2, AP I; Article 14 AP II) and the use of irritant agents for military purposes. This prohibition does not apply to unintentional and insignificant poisonous secondary effects of otherwise permissible munitions.
- 6.39 The scope of this prohibition was restricted by the fact that, when signing the Geneva Gas Protocol, numerous states declared that this Protocol should cease to be binding in regard to any enemy state whose armed forces fail to respect the prohibition embodied in the Protocol. According to the principle of reciprocity, states which did not record such a reservation will also not be legally bound by the Protocol with respect to a follow-on use of chemical weapons against states which launch, support, or assist in planning an attack by chemical weapons contrary to international law.
- 6.40 The Convention on Chemical Weapons of 13 January 1993 includes comprehensive prohibitions of any development, production, stockpiling, transfer, and use of chemical weapons, as well as provisions on international control of compliance with these provisions.

## 3. Bacteriological (Biological) and Toxin Weapons

- 6.41 The use of bacteriological weapons is prohibited (GasProt).
- 6.42 The development, manufacture, acquisition, and stockpiling of bacteriological (biological) and toxin weapons is prohibited (BiologicalWeaponsConv). These prohibitions apply both to biotechnological and synthetic procedures serving other than peaceful purposes. They also include genetic engineering procedures and the alteration of micro-organisms through genetic engineering.

# Chapter 7

## METHODS OF COMBAT

### I. MILITARY OBJECTIVES

- 7.01 Attacks, i.e. any acts of violence against the adversary, whether in offence or in defence (Article 49, para. 1, AP I), shall be limited exclusively to military objectives.
- 7.02 Military objectives are armed forces—with paratroops in descent (Article 42, para. 3, AP I) but not crew members parachuting from an aircraft in distress (Article 42, para. 1, AP I)—and also objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offer a definite military advantage (Article 52, para. 2, AP I).
- 7.03 Military objectives include particularly:
- armed forces;
  - military aircraft and war ships;
  - buildings and objects for combat service support; and
  - commercial objectives which make an effective contribution to military action (transport facilities, industrial plants, etc.).

The term ‘military advantage’ refers to the advantage which can be expected from an attack as a whole and not only from isolated or specific parts of the attack.

- 7.04 Civilians present in military objectives are not protected against attacks directed at those objectives; the presence of civilian workers in an arms production plant, for instance, will not prevent opposing armed forces from attacking this military objective.

- 7.05** An objective which is normally dedicated to civil purposes shall, in case of doubt, be assumed not to be used in a way which makes an effective contribution to military action (Article 52, para. 3, AP I), and shall therefore be treated as a civilian object.
- 7.06** Attacks against military objectives shall be conducted with maximum precautions to protect the civilian population (Article 51, para. 1, AP I; Article 13 AP II). Attacks which may affect the civilian population shall be preceded by an effective warning, unless circumstances do not permit this (Article 26 HagueReg; Article 57, para. 2 lit. c, AP I). These rules shall also apply to attacks by missiles and remotely controlled weapons.
- 7.07** Unmanned aerial vehicles (UAVs) may be used for target control and other purposes. They may be equipped with arms (unmanned combat aerial vehicles – UCAVs –). UAVs and UCAVs must be remotely controlled and piloted.
- 7.08** In the aerial war zone enemy military aircraft may be attacked without warning in order to make them crash or land. Downed aircraft shall become spoils of war. The members of the crew and the passengers—save unlawful combatants and mercenaries—shall become prisoners of war (Article 36, para. 1, HRAW 1923; Article 4 A, paras. 2 and 4 GC III).
- 7.09** Other enemy public aircraft shall not be attacked without warning. They may, however, by force of arms, be intercepted and compelled to land (Article 34 HRAW 1923; Rule 136 (a) HPCR Manual). Such aircraft may be attacked if they:
- escort enemy military aircraft;
  - fly through an aerial zone interdicted by the adversary; or
  - take part in hostilities.
- 7.10** Should a belligerent party establish an ‘exclusion zone’ in international airspace, the same rules of international humanitarian law will apply inside and outside the ‘exclusion zone’ (Rule 107 HPCR Manual). Even where a ‘no-fly zone’ is established in belligerent airspace to warn aircraft entering that zone without special admission (Rule 108 HPCR Manual), the principles of target discrimination still apply.
- 7.11** It is prohibited to order that there shall be no survivors. It is also prohibited to threaten an adversary with such an order or to conduct military operations on that basis (Article 40 AP I; Article 23, lit. d, HagueReg).

## **II. PROTECTION OF CIVILIAN OBJECTS**

- 7.12** It is prohibited to fire at or bombard—whether to terrorize them or for any other purpose—members of the civilian population, unless and for such time as they take a direct part in hostilities (Article 51, paras. 2-3, AP I), and to make civilian objects the object of attack. Such attacks in reprisal are also prohibited (Articles 51, para. 6, 53 lit. c, 54, para. 4, 55, para. 2, and 56, para. 4, AP I).
- 7.13** Defended localities or buildings may be fired at or bombarded in order to:
- break down active resistance (conquering fire, bombardment);
  - eliminate military objectives located therein (destructive fire, bombardment).
- In both cases, the fire or bombardment shall be locally limited to the actual resistance and the military objectives.
- 7.14** Effective advance warning shall be given of any bombardment, unless circumstances do not permit this (Article 57, para. 2 lit. c, AP I; Article 26 HagueReg).
- 7.15** It is prohibited in any circumstances to fire at or bombard civilian and military objects without distinction (Article 51, paras. 4-5, AP I).
- 7.16** Indiscriminate firing and bombardment means attacks:
- which are not directed at a specific military objective (Article 51, para. 4 lit. a, AP I);
  - which cannot be directed at a specific military objective (Article 51, para. 4 lit. b, AP I); or
  - whose intended effects cannot be limited to the military objective (Article 51, para. 4 lit. c, AP I).
- 7.17** Attacks and bombardments are also to be considered as indiscriminate if:

- a number of clearly separate and distinct military objectives located in a built-up area are attacked as if they were one single military objective (Article 51, para. 5 lit. a, AP I);
- they are likely to cause loss of civilian life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated (Article 51, para. 5 lit. b, AP I);
- they also cause excessive injury and damage to civilians or civilian objects located outside the actual target area and its immediate vicinity.

**7.18 Before engaging an objective, every responsible military leader shall:**

- verify the military nature of the objective to be attacked (Article 57, para. 2 lit. a (i), AP I);
- choose means and methods minimizing incidental injury and damage to civilian life and objects (Article 57, para. 2 lit. a (ii), AP I);
- refrain from launching any attack which may be expected to cause incidental injury and damage to civilian life and objects which would be excessive in relation to the concrete and direct military advantage anticipated (Article 57, para. 2 lit. a (iii), AP I);
- give the civilian population advance warning of attacks which may affect it, unless circumstances do not permit this (Article 57, para. 2 lit. c, AP I);
- when a choice is possible between several military objectives of equal importance, engage that objective the attack on which is likely to cause the least incidental injury or damage (Article 57, para. 3, AP I).

The obligation to take feasible precautions in attack applies equally to the operation of unmanned combat aerial vehicles – UCAVs – (Rule 39 *HPCR Manual*).

An attack shall be suspended if it becomes apparent that the objective is not military or is subject to special protection or that the attack may be expected to cause excessive incidental loss of civilian life (Article 57, para. 2 lit. b, AP I).

**7.19 The attack or bombardment of non-defended localities is prohibited (Article 59, para. 1, AP I; Article 25 HagueReg).**

**7.20 A locality shall be considered non-defended if it has been so declared by its competent authorities, is open for occupation, and fulfils the following conditions:**

- all combatants, mobile weapons, and mobile military equipment must have been evacuated;
- no hostile use will be made of fixed military installations and establishments;
- no acts of hostility shall be committed by the authorities or the population; and
- no activities in support of military operations will be undertaken (Article 59, para. 2, AP I).

**7.21 A locality shall not on suspicion be deemed defended unless the behaviour of the adversary substantiates such a supposition.**

**7.22 It is prohibited to extend military operations to demilitarized zones. The prerequisites for establishing such a zone are the same as those applying to non-defended localities (Articles 59, para. 2, and 60, para. 3, AP I). Demilitarized zones are created by agreement between the parties to the conflict either in peacetime or in the course of conflict. It is prohibited for any party to the conflict to attack or occupy such zones (Article 60, para. 1, AP I).**

**7.23 If a party to the conflict breaches these provisions, the non-defended localities, open towns or cities, or demilitarized zones will lose their special protection. The general provisions for the protection of the civilian population and civilian objects shall, however, continue to apply (Articles 59, para. 7, and 60, para. 7, AP I).**

**7.24 It is further prohibited to attack:**

- safety zones and neutralized zones, i.e. zones designed to give shelter to wounded and sick soldiers and to civilians who take no part in hostilities (Article 23 GC I; Articles 14, 15 GC IV);
- medical and religious personnel (Articles 12, 15 AP I);
- hospital ships (Article 22 GC II);

- hospitals and associated personnel (Article 19 GC I; Articles 18, 20 GC IV);
- objects indispensable to the survival of the civilian population (e.g. production of foodstuffs, clothing, drinking water installations) with intent to deprive the civilian population of their supply (Article 54, para. 2 AP I; Article 14 AP II); any deviations from this prohibition shall be permissible only on friendly territory if required by cogent military necessity (Article 54, paras 3 and 5, AP I; Article 14 AP II);
- coastal lifeboats and associated fixed coastal installations (Article 27 GC II);
- cultural objects (Article 53 AP I);
- aircraft protected by international law:
  - + employed for the purpose of exchanging prisoners;
  - + on the assurance of safe-conduct;
  - + medical aircraft (Articles 36, para. 1, and 37, para. 1, GC I; Article 39 GC II; Articles 24-31 AP I; Article 17 AP II); and
  - + civilian aircraft.

### **III. PROTECTION OF WORKS AND INSTALLATIONS CONTAINING DANGEROUS FORCES**

- 7.25** Works and installations containing dangerous forces, namely dams, dykes, and nuclear electricity generating stations (Article 56, para. 1, AP I) shall not be made the object of attack, even where these objects are military objectives, if such attack could cause the release of dangerous forces and consequent severe damage to the civilian population (Article 56, para. 1, AP I).
- 7.26** This protection shall cease if these plants are used in regular, significant, and direct support of military operations and such attack is the only feasible way to terminate such use. (Article 56, paras. 2 lit. a-b, AP I). This shall also apply to other military objectives located at or in the vicinity of these plants or installations (Article 56, para. 2 lit. c, AP I).
- 7.27** Regular, significant, and direct support of military operations (Article 56, paras. 2 lit. a-c, AP I) includes, for instance, the manufacture of weapons, ammunition, and defence materiel. The mere possibility of use by armed forces is not subject to these provisions.
- 7.28** The decision to launch an attack shall be taken on the basis of all information available at the time of action. The parties to a conflict shall be bound by the principle of proportionality to refrain from launching an attack if the risk of releasing dangerous forces is such that it is excessive to any military advantage.
- 7.29** Military objectives shall not be located in the vicinity of works and installations containing dangerous forces unless they are necessary for the defence of those works (Article 56, para. 5, AP I).
- 7.30** The parties to the conflict shall remain obliged to take all precautions to protect dangerous works from the effects of attack (e.g. by shutting down nuclear electricity generating stations).
- 7.31** Works and installations containing dangerous forces may be marked with a special protective sign consisting of three bright orange circles on a horizontal axis (Article 56, para. 7, AP I).

### **IV. AERIAL BLOCKADE**

- 7.32** An aerial blockade is a means to prevent aircraft and unmanned aerial vehicles from entering or leaving a certain airspace of the adversary. The blockade must be declared and notified to all states. It must be enforced impartially. In order to be binding, it must be effective.

- 7.33 The party declaring the blockade must consider its consequences. The suffering of the civilian population must not be excessive to the concrete and direct military advantage anticipated. Starvation of the civilian population as a method of warfare is prohibited. The right to receive humanitarian assistance must be respected (*see* below, Chapter 11).
- 7.34 The principles and rules of naval blockades apply *mutatis mutandis* to aerial blockades (*see* below, Sections 17.51-17.53; *see* Rules 147-159 HPCR Manual).

## V. CYBER OPERATIONS IN ARMED CONFLICT

- 7.35 Cyber operations amounting to ‘attack’ must comply with the principles and rules of international humanitarian law (*see* above, Section 6.30).
- 7.36 Cyber operations from or against neutral territory are prohibited.

## VI. RUSES OF WAR AND THE PROHIBITION AGAINST PERFIDY

- 7.37 Ruses of war and the employment of measures necessary for obtaining information about the adverse party and the country are permissible (Article 37, para. 2, AP I; Article 24 HagueReg) (e.g. the use of enemy signals, passwords, signs, decoys, etc.; to be distinguished from espionage, *see* Sections 5.22–5.25).
- 7.38 Perfidy is prohibited. The term ‘perfidy’ refers to acts misleading the adverse party into the belief that there is a situation affording protection under international law (e.g. humanitarian agreement to suspend combat with the intention of attacking by surprise the adversary relying on the agreement, Article 37 AP I).
- 7.39 It is prohibited to make improper use of flags of truce, enemy or neutral national flags, military insignia and uniforms, and internationally acknowledged protective emblems, e.g. the red cross or the red crescent (Article 39 AP I; Article 23, para. 1 lit. f, HagueReg; Article 17, para. 2, CultPropConv), distress codes, signals or frequencies (Rule 115 HPCR Manual). For specific rules of naval warfare *see* below Chapter 17.

## VII. PSYCHOLOGICAL WARFARE

- 7.40 It is permissible to engage in political and military propaganda by spreading false information to undermine the adversary’s will to resist and to influence the military discipline of the adversary (e.g. instigation to defect).
- 7.41 Incitement to commit crimes and breaches of international law is prohibited.

## VIII. Reprisals

- 7.42 Reprisals are coercive measures which would normally be contrary to international law but which are taken in retaliation by one party to a conflict in order to stop the adversary from violating international law.
- 7.43 Because of their political and military significance, reprisals shall be authorized by the highest political

**level. No individual soldier is authorized to order reprisals on his own accord.**

**7.44 Reprisals shall not be excessive in relation to the offence committed by the adversary and shall be preceded by a warning. They must be the last resort, when all other means to stop the illegal behaviour have failed and the warning has not been heeded.**

**7.45 It is expressly prohibited by international agreement to take reprisals against:**

- **the wounded, sick, and shipwrecked; medical and religious personnel; medical facilities and supplies (Article 46 GC I; Article 47 GC II; Article 33, para. 2 lit. b, GC III; Article 20 AP I);**
- **prisoners of war (Article 13, para. 3, GC III);**
- **the civilian population or civilians (Article 33, para. 3, GC IV; Article 51, para. 6, AP I);**
- **civilian objects (Article 52, para. 1, AP I);**
- **private property of civilians on occupied territory or of enemy foreigners on friendly territory (Article 33, para. 3, GC IV);**
- **objects indispensable to the survival of the civilian population (Article 55, para. 2, AP I);**
- **the natural environment (Article 55, para. 2, AP I);**
- **works and installations containing dangerous forces (Article 56, para. 4, AP I); or**
- **cultural objects and places of worship (Article 53, lit. c, AP I; Article 4, para. 4, CultPropConv).**

## Chapter 8

# PROTECTION OF CIVILIANS

## I. GENERAL RULES

- 8.01** In order to ensure respect for and protection of the civilian population and civilian objects, the parties to an armed conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives. Accordingly, they shall direct their operations only against military objectives (Article 48 AP I).
- 8.02** Civilians shall be respected and protected. They are entitled to respect for their persons, their honour, their family rights, their religious convictions, and their manners and customs (Article 27, para. 1, GC IV; Article 46, para. 1, HagueReg). Their property is also protected (Article 46, para. 2, HagueReg). Neither the civilian population as such, nor individual civilians not taking a direct part in hostilities, shall be the object of attacks (Article 51, para. 2, AP I; Article 13, para. 2, AP II). Civilians shall not be killed, wounded, or unlawfully detained. While in detention, civilians must be treated humanely (Article 27, 76 and 79–134 GC IV; Articles 11, 75 AP I; Article 5 AP II).
- 8.03** Any attack on the honour of women, in particular rape, enforced prostitution, or any form of indecent assault, is prohibited (Article 27, para. 2, GC IV; Article 76, para. 1, AP I).
- 8.04** Children shall be the object of special respect and protection. They shall be provided with the care and aid they require, whether because of their youth or for any other reason (Art 24 GC IV; Article 77, para. 1, AP I). Children who have not attained the age of eighteen shall not take part in hostilities. They shall not be enlisted into the armed forces. If they fall into the power of an adverse party they shall be granted special protection (Article 77, para. 3, AP I; *see also* Article 38 ChildConv; ProtChildConv; *see above* Section 5.06).
- 8.05** None of the parties to the conflict shall use civilians as a shield to render certain points or areas immune from military operations (Article 28 GC IV; Article 51, para. 7, AP I).
- 8.06** Collective penalties (Article 33, para. 1, GC IV), measures of intimidation or terrorism (Article 33, para. 1 GC IV, Article 51, para. 2, AP I; Article 13, para. 2, AP II), reprisals against the civilian population and its property (Article 33, para. 3, GC IV; Articles 20, 51, para. 6, and 52, para. 1, AP I), and pillage (Article 33, para. 2, GC IV; Article 47 HagueReg) are all prohibited.
- 8.07** The taking of hostages is prohibited (Article 34 GC IV).
- 8.08** Attacks on military objects must not cause incidental loss of civilian life, injury to civilians, or damage to civilian objects excessive in relation to the concrete and direct military advantage anticipated (Article 51, para. 5 lit. b, AP I; Article 23, para. 1 lit. g, HagueReg).
- 8.09** When launching an attack on a military objective, all feasible precautions shall be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians, and damage to civilian objects (Article 57, para. 2 lit. a (ii), AP I).
- 8.10** If soldiers are employed for the protection of civilian objects, they may be attacked, on account of their status as combatants. Their presence is therefore a factor endangering the object to be protected. Whenever soldiers are employed for the protection of civilian objects, the situation must be assessed by weighing the expected military advantage (*see above*, Section 8.08).
- 8.11** Hospital and safety zones and localities may be established by agreement so as to protect wounded, sick, and aged persons, children, expectant mothers, and mothers of children under seven from any attack (Article 14 GC IV). Military objects shall not be located within or in the vicinity of hospital and safety zones and localities. These zones and localities shall be neither used for military purposes nor defended.
- 8.12** The parties to the conflict may agree to establish demilitarized (neutralized) zones (Article 15 GC IV; Article 60 AP I). No military activities shall be carried out in these zones. Their sole purpose is to provide shelter for wounded, sick, and other persons not involved in the conflict.
- 8.13** Journalists engaged in dangerous professional missions in areas of armed conflict are considered as civilians. They are protected, provided that they take no action adversely affecting their status as civilians

(Article 79 AP I). War correspondents are journalists accredited by the armed forces, yet they remain civilians. As persons accompanying the armed forces without being members thereof, in case of capture they benefit of the status of prisoners of war (Article 4 A, para. 4, GC III). Journalists may obtain an identity card which attests to their status (Article 4 A, para. 4, and Annex IV, GC III; 79, para. 3 and Annex II, AP I).

- 8.14 Civilians may at any time seek assistance from a protecting power, the International Committee of the Red Cross (ICRC), or any relief organization (Article 30, para. 1, GC IV). Representatives of protecting powers and of the ICRC shall be entitled to visit protected persons at any place and at any time they choose (Article 143 GC IV).
- 8.15 Persons who are reasonably suspected of activities hostile to the security of the state are not entitled to claim the respect of all rights accorded to civilians, in particular not those which, if exercised in favour of that person, would be prejudicial to the security of the state (Article 5, paras. 1 and 2, GC IV). Yet these persons shall always be treated humanely. In particular, they shall have the right to a regular and fair judicial procedure (Article 5, para. 3, GC IV; Articles 45, para. 3, and 75 AP I).
- 8.16 Civilians taking a direct part in hostilities lose their right to protection against the effects of hostilities for the duration of each specific act amounting to direct participation (Article 51, para. 3, AP I; Article 13, para. 3, AP II). In case of doubt a person shall be protected against direct attack. When civilians cease to take a direct part in hostilities, they may no longer be attacked, but remain subject to criminal prosecution for violations of international or domestic law they may have committed during such participation (*see* below, Sections 21.10–21.12).
- 8.17 Basic rules protecting the civilian population and individual civilians which bind parties to an international armed conflict also apply to non-international armed conflicts. Customary law has gone beyond treaty law and binds all parties to a non-international armed conflict, the government and insurgent groups, likewise (*see* below Section 19.12).

## II. CIVIL DEFENCE

- 8.18 Civil defence organizations are protected in like manner as the medical service (Articles 61–67 AP I). Civil defence tasks are particularly warning, rescue and maintenance, fire protection, medical service, NBC defence, construction of shelters, and other measures to restore and maintain order (Article 61 AP I). Civil defence organizations, their personnel, buildings, and vehicles as well as shelters provided for the civilian population shall be especially respected and protected (Articles 62–64 AP I).
- 8.19 The protection accorded to (civilian) civil defence organizations under international law shall cease if, in spite of a warning, such an organization commits acts harmful to the enemy (Article 65, para. 1, AP I). Cooperation with military authorities and the employment of members of the armed forces shall not be considered as acts harmful to the enemy. The performance of civil defence tasks may also benefit military victims (Article 65, para. 2 lit. c, AP I). Civil defence organizations may be formed along military lines (Article 65, para. 4, AP I). Their personnel may be enlisted for compulsory service (Article 65, para. 4, AP I) and bear individual weapons for the purpose of maintaining internal order and for self-defence (Article 65, para. 3, AP I).
- 8.20 Civilian civil defence organizations may be permitted to continue their humanitarian activities in occupied territories (Article 63 GC IV; Article 63 AP I).
- 8.21 The international distinctive sign of civil defence is an equilateral blue triangle on an orange ground (Article 66, para. 4 AP I). It is shown in the Annex on Distinctive Emblems, No. 5. Civil defence personnel shall be recognizable by this distinctive sign and by an identity card (Article 66, para. 3, AP I). Aid organizations may also use their own traditional signs.

## III. ALIENS IN THE TERRITORY OF A PARTY TO THE CONFLICT

- 8.22 Protected persons may leave the territory of the State of residence, unless their departure is contrary to the national interest (Article 35, para. 1, GC IV). The departure shall be carried out in humane conditions (Article 36 GC IV). If any such person is refused permission to leave, such a decision must be reviewed by a court or an administrative board (Article 35, para. 2, GC IV).
- 8.23 Aliens remaining in the territory of a party to the armed conflict shall, in principle, be treated in the same way as in peacetime (Article 38, para. 1, GC IV).
- 8.24 Aliens must be ensured in particular
- freedom of religion,
  - medical care, and
  - the right to leave areas exposed to the dangers of the conflict.
- They are entitled to these rights to the same extent as the nationals of the state in which they are living (Article 38 GC IV).
- 8.25 Aliens shall be given the opportunity to find a job. That opportunity shall be equal to that enjoyed by the nationals of the state in which they are living (Article 39 GC IV). Aliens may be compelled to work only under the same conditions as nationals of the state in which they are living (Article 40, para. 1, GC IV).
- 8.26 The placing in assigned residence or internment of aliens may be ordered only if security considerations make it absolutely necessary (Article 42, para. 1, GC IV) or if other measures of control prove to be insufficient (Article 41, para. 1, GC IV). Such decisions are subject to review by a court or an administrative board (Article 43, para. 1, GC IV).
- 8.27 Refugees and stateless persons shall in all circumstances be treated as protected persons (Article 44 GC IV; Article 73 AP I).
- 8.28 Enemy aliens may be transferred to a state party to the Fourth Geneva Convention if this does not cause any disadvantage for these persons (Article 45 GC IV).
- 8.29 All restrictions imposed on aliens shall be cancelled as soon as possible after the close of hostilities (Article 46 GC IV).

## **IV. INTERNMENT OF CIVILIANS**

- 8.30 Internment of civilians shall be permissible only in exceptional cases:
- if such a measure is absolutely necessary for imperative reasons of security (Articles 41–43, and 78, para. 1, GC IV); or
  - as a penalty to be imposed on civilians (Article 68 GC IV).
- Decisions regarding such internment shall be made according to regular procedures and subject to review by an independent institution (Articles 43 and 78, para. 2, GC IV).
- 8.31 The treatment of internees basically corresponds to the treatment of prisoners of war, yet always taking into account the civilian character of the persons concerned (Articles 79–141 GC IV).
- Representatives of the protecting power and delegates of the ICRC may visit the internees at any time in their place of detention and talk to them individually and without witnesses (Article 143 GC IV).
  - The place of internment shall be put under the authority of a responsible officer or a public official chosen from the civil administration of the detaining power (Article 99, para. 1, GC IV). The detaining power shall, as far as possible, accommodate the internees according to their nationality, language, and customs (Article 82, para. 1, GC IV). The detaining power shall ensure that members of the same family are lodged together in the same place of internment. Separation of a temporary nature may be necessary for reasons of employment or health or for the purpose of implementing penal or disciplinary measures (Article 82, para. 2, GC IV).
  - Internees shall always be accommodated separately from prisoners of war and from persons detained for any other reason, in particular convicted prisoners (Article 84 GC IV).

- **Internees shall be treated humanely. In particular, any victimization, punishment drill, military drill, or reduction of food rations is prohibited (Article 100 GC IV). Contact with the exterior shall be permitted (Articles 105–16 GC IV).**
- **In principle, internees are not obliged to work (Article 95, para. 1 GC IV). Internees may, however, be employed for work within places of internment or for activities serving their own interests (Article 95, para. 3 GC IV), but not in relation with the conduct of military operations.**
- **Internees who commit offences shall be subject to the laws in force in the territory in which they are detained (Article 117, para. 1 GC IV).**
- **Internees have the right to have personal contact with representatives of protecting powers and, in particular, with delegates of the International Committee of the Red Cross.**

**8.32 Upon the close of hostilities or occupation, the belligerent parties shall ensure the return of all internees to their last place of residence or facilitate their repatriation (Article 134 GC IV).**

## Chapter 9

# OCCUPATION

## I. GENERAL PROVISIONS

- 9.01 The occupying power shall assume the administration of the occupied territory and the responsibility for the welfare of the occupied territory's inhabitants (Articles 29 and 47–135 GC IV; Article 43 HagueReg).
- 9.02 Territory shall be considered occupied if it has actually come under the authority of armed forces of a hostile foreign power and if those forces are in a position to exercise their authority over the territory (Article 42 HagueReg).
- 9.03 Occupied territory does not include areas that are not subject to the authority of a foreign power, such as areas that are still embattled and in which the occupying power cannot make its authority felt within reasonable time.
- 9.04 In occupied territory the sovereignty of the occupied state is temporarily suspended and superseded by the authority of the occupying power, as determined by the law of occupation. The occupying power is not a successor in the rights of the state whose territories are (in part) occupied.
- 9.05 The occupying power must take all the measures in its power to restore, and ensure, as far as possible, public order and safety. It is not entitled to bring about changes in the status and intrinsic characteristics of the occupied territory. In particular, it must respect, unless absolutely prevented, the existing legal order (Article 43 HagueReg; Article 47 GC IV; Article 4 AP I).
- 9.06 Protected persons in occupied territories are entitled to respect for their persons, their honour, family rights, religious convictions, and manners and customs (Article 4, 27, para. 1, GC IV; Articles 46, and 48–67, and 75 AP I). Their private property is protected (Article 46 HagueReg).
- 9.07 Any discrimination for reasons of race, nationality, language, religious convictions and practices, political opinion, social origin or position, or similar consideration is unlawful (Articles 13, 27, para. 3, GC IV; Article 75 AP I).
- 9.08 Protected persons in occupied territories shall be humanely treated at all times and protected from any acts of violence (Article 27, para. 1, GC IV; Articles 43 and 46 HagueReg).
- 9.09 Reprisals against civilians and their property are prohibited (Article 33, para. 3, GC IV; Articles 20 and 51, para. 6, AP I). The same applies to collective penalties and to measures of intimidation or terrorism (Article 33, para. 1, GC IV). Pillage is prohibited (Article 33, para. 2, GC IV; Article 47 HagueReg).
- 9.10 No one may be punished for an offence he or she has not personally committed (Article 33, para. 1, GC IV). The taking of hostages is prohibited (Article 34 GC IV).
- 9.11 The occupying power shall forward information regarding the fate of protected civilians who are in its power (Article 136 GC IV), as well as of prisoners of war (Article 122 GC III), the wounded, sick, shipwrecked, and dead (Article 16 GC I; Article 19 GC II; *see* below Chapters 12 and 13). For this purpose, a National Information Bureau shall be established after the outbreak of a conflict and in all cases of belligerent occupation (Articles 136–141 GC IV). The Bureau shall co-operate with the Central Tracing Agency of the International Committee of the Red Cross (Article 140 GC IV).
- 9.12 Belligerent occupation of foreign territory (or parts thereof) ends when the occupying forces cease to exert effective control over it.

## II. LEGAL STATUS OF THE POPULATION

- 9.13 The legal status of the population shall not be infringed by any change introduced into the institutions of

the territory, nor by any agreement concluded between the authorities of the occupied territories and the occupying power, nor by annexation of the whole or part of the territory (Article 47 GC IV).

- 9.14 Protected persons cannot renounce their rights under the Fourth Geneva Convention (Article 8 GC IV).
- 9.15 The occupying power shall not detain protected persons in an area particularly exposed to the dangers of war (Article 49, para. 5 GC IV).
- 9.16 Civilians may not be deported or forcibly transferred from occupied territories, unless their security or imperative military reasons so demand (49 GC IV; Rule 129 CIHL). A temporary evacuation of specific areas is permissible if the security of the population or imperative military reasons so demand. An evacuation of persons to areas outside the bounds of the occupied territory shall be permitted only when it is impossible to avoid such displacement for material reasons. Persons must be transferred back to their homes as soon as the security situation so permits (Article 49, para. 2, GC IV, Rule 132 CIHL).
- 9.17 If evacuation is necessary, the occupying power shall provide sufficient accommodation and supply. Members of the same family shall not be separated (Article 49, para. 3, GC IV).
- 9.18 For imperative reasons of security, the occupying power may subject individual civilians to assigned residence or internment (Article 78, para. 1, GC IV).

### **III. RIGHTS AND DUTIES OF THE OCCUPYING POWER**

- 9.19 The national laws applicable in the occupied territory shall, in principle, remain in force. Laws which constitute a threat to security of the occupying forces or an obstacle to the application of humanitarian law, may be repealed or suspended by the occupying power (Article 64 GC IV; Article 43 HagueReg).
- 9.20 The occupying power may enact legal provisions of its own if military necessity, obligations under international humanitarian law or the obligation to maintain orderly government so demand (Article 64, para. 2, GC IV; Article 43 HagueReg).
- 9.21 The administration of the occupied territory shall be given the opportunity to carry on its activities. The judicial system of the occupied territory shall remain in force (Article 64, para. 1, GC IV; Article 43 HagueReg).
- 9.22 The occupying power may set up administrative bodies and courts of its own if military necessity or the obligation to maintain public order so demand (Article 64, para. 2, GC IV).
- 9.23 The status of judges and public officials shall not be altered. It is prohibited to compel them to carry on their functions against their conscience (Article 54, para. 1, GC IV). Public officials may be removed from their posts (Article 54, para. 2, GC IV).
- 9.24 The occupying power may not compel members of the population to serve in its armed forces (Article 51, para. 1, GC IV) or otherwise to take part in military operations against their own (or any other) country (Article 51, para. 2, GC IV; Article 52, para. 1, HagueReg). Any pressure or propaganda by the occupying power which aims at securing enlistment in its armed forces is prohibited (Article 51, para. 1, GC IV).
- 9.25 It is prohibited to exercise physical or moral coercion against members of the civilian population in order to obtain any kind of information (Article 31 GC IV) including military information (Article 44 HagueReg).
- 9.26 For the benefit of the occupational forces or for ensuring public utility services and the feeding, sheltering, clothing, transportation, and health of the inhabitants of the occupied territories, the occupying power may compel civilians over eighteen years to work. Work which would oblige them to take part in military operations (Article 51, para. 2, GC IV; Article 52 HagueReg) or lead to the mobilization of workers in military or paramilitary organizations is not allowed (Article 51, para. 4, GC IV).
- 9.27 Civilians liable to work shall, as far as possible, be kept in their usual place of employment. Existing working conditions (e.g. wages, working hours, labour protection) shall not be altered by the occupying power (Article 51, para. 3, GC IV).
- 9.28 It is prohibited to employ protected persons for work outside the occupied territories (Article 51, para. 3, GC IV).

- 9.29 The occupying power shall not deport or transfer parts of its own civilian population in the territory it occupies (Article 49, para. 6, GC IV)

## **IV. REQUISITION OF CIVILIAN RESOURCES BY THE OCCUPYING POWER**

- 9.30 In accordance with legislation in force in the occupied territories, the occupying power may collect taxes, tariffs, and dues, for the purpose of defraying expenses of the administration of the occupied territory (Article 48 HagueReg). Any additional contribution shall only be levied to meet the requirements of the occupational forces or to cover its administrative costs (Article 49 HagueReg). No extra charges (contributions) shall be collected except under a written order issued by a commander-in-chief. For every contribution a receipt shall be given to the contributors (Article 51 HagueReg).
- 9.31 A local commander may demand contributions in kind and services (requisitions) from the population and the authorities of the occupied territory to satisfy the needs of the occupational forces (Article 52, paras. 1 and 2, HagueReg). Requisitions shall, on principle, be paid for in cash. If this is not possible a receipt shall be given. Payment shall be effected as soon as possible (Article 52, para. 3, HagueReg).
- 9.32 Movable government property which may be used for military purposes shall become spoils of war (Article 53, para. 1, HagueReg). Upon seizure it shall, without compensation, become the property of the occupying power. Such property includes, for instance, means of transport, weapons, and food supplies (Article 53, para. 1, HagueReg). The latter shall not be requisitioned unless the requirements of the civilian population have been taken into account (Article 55, para. 2, GC IV). The requirements of the civilian population shall be satisfied first (Article 55, para. 1, GC IV).
- 9.33 Movable private property which may be used for military purposes and immovable government property may only be requisitioned and not confiscated (Article 53, para. 2, and 55 HagueReg). Title to such property shall not pass to the occupying state. At the end of occupation, seized items and real estate shall be restored. All private property shall be protected from permanent seizure (Article 46, para. 2, HagueReg), except for commodities designed for consumption.
- 9.34 The property of municipalities, of institutions dedicated to religion, charity, education, and arts and sciences shall be treated as private property (Article 56, para. 1, HagueReg).
- 9.35 Under the above mentioned provisions of the law of occupation relating to taxes, requisitions, seizures and others managements of public and private properties in occupied territory, the occupying forces are constrained by the obligation to ensure that the economy of the occupied territory can only be required to bear the expenses of the occupation to the extent of the capabilities of the occupied country.
- 9.36 Civilian hospitals may be requisitioned only temporarily and in cases of urgent necessity. The care and treatment of patients must be ensured (Article 57, para. 1, GC IV). The material and stores of civilian hospitals cannot be requisitioned as long as they are needed for the civilian population of the occupied territories (Article 57, para. 2, GC IV; Article 14, para. 2, API).
- 9.37 It is prohibited to requisition, destroy or damage cultural property (Article 56 HagueReg; Article 5 CultPropConv). The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory (Rule 41 CIHL).

## **V. SUPPLY ACTIVITIES IN OCCUPIED TERRITORY**

- 9.38 The occupying power is obliged to ensure that the basic needs of the occupied population are met. The provision of supplies to the civilian population shall be ensured to the fullest extent of the means available to it. The resources of the occupied territory shall be used in the first place. If necessary, supplies shall be brought in by the occupying power (Article 55, para. 1, GC IV; Article 69, para. 1, AP I).

- 9.39 Stocks available in the occupied territory may be requisitioned for use by the occupying power only if the needs of the civilian population have been taken into account and a fair price is paid for the requisitioned goods (Article 55, para. 2, GC IV). *See* also Sections 9.30 and 9.33. If the whole or part of the population of an occupied territory is inadequately supplied, the occupying power shall agree to relief actions by other states or by humanitarian organizations (Article 59 GC IV; Articles 69–71 AP I).
- 9.40 The occupying power has the obligation to provide medical care for the civilian population as well as public health and hygiene, in cooperation with the appropriate authorities of the occupied territory. Adequate prophylactic measures shall be taken to prevent contagious diseases and epidemics (Article 56, para. 1, GC IV; Article 14, para. 1, AP I).
- 9.41 The national Red Cross or Red Crescent society shall be authorized to pursue its activities, in accordance with Red Cross Principles. Other relief societies may continue their humanitarian activities under similar conditions (Article 63 GC IV).

## **VI. PENAL RESPONSIBILITY IN CASE OF VIOLATION OF INTERNATIONAL HUMANITARIAN LAW**

- 9.42 Domestic laws relating to prosecution of criminal offences shall, in principle, remain in force. Penal laws of the occupied territory may be repealed by the occupying power only when they constitute a threat to its security (Article 64, para. 1, GC IV).
- 9.43 For the same reasons, and also to guarantee the security of the occupied territory and to maintain an orderly administration, the occupying power may enact penal provisions of its own (Article 64, para. 2, GC IV). These provisions shall not come into force unless they have been published in the language of the occupied territory (Article 65 GC IV).
- 9.44 The occupying power may not prosecute criminal offences committed by protected persons before the occupation, unless they constitute a breach of international humanitarian law (Article 70, para. 1, GC IV).
- 9.45 Breaches of the penal laws of the occupied territory by inhabitants of the occupied territory shall continue to be prosecuted by local courts (Article 64, para. 1, GC IV). Jurisdiction shall pass to a military court of the occupying power only if local courts are not able to work.
- 9.46 Any breaches of penal provisions enacted by the occupying power may be prosecuted by properly constituted military courts established by the occupying power (Article 66 GC IV).
- 9.47 Legal proceedings by military courts of the occupying power shall be conducted in accordance with the rule of law (Articles 67 and 69–75, GC IV; Article 75 AP I).
- 9.48 Minor offences shall only be punishable by internment or simple imprisonment (Article 68, para. 1, GC IV). Serious offences (such as espionage, serious acts of sabotage or homicide) may be punishable by death if such offences were likewise liable to death penalty under the law of the occupied territory before the occupation (Article 68, para. 2, GC IV; Articles 76, para. 3, and 77, para. 5, AP I).
- 9.49 Nationals of the occupying power who, before the occupation, sought refuge in the territory of the occupied state shall not be prosecuted on that account. Crimes and other punishable offences committed after the outbreak of hostilities which would have justified extradition in times of peace shall be liable to prosecution (Article 70, para. 2, GC IV).
- 9.50 Persons accused or convicted of offences shall be detained under humane conditions. All sentences passed must be executed in the occupied territory (Article 76, para. 1, GC IV). Detainees have the right to be visited by delegates of the protecting power and of the International Committee of the Red Cross in accordance with Article 143 GC IV (Article 76, para. 6, GC IV).
- 9.51 At the close of occupation all detainees shall be released and relevant records shall be handed over to the authorities of the liberated territory (Article 77 GC IV).

## Chapter 10

# PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

## I. General Principles

- 10.01 The general principles on the conduct of hostilities apply to the natural environment (Rule 43 CIHL):
- A. No part of the natural environment may be attacked, unless it is a military objective.
  - B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.
  - C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.

## II. The Due Regard Principle

- 10.02 Methods and means of combat must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. 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 such precautions (Rule 44 CIHL).

## III. Active Precautions

- 10.03 An area of major environmental importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective.
- 10.04 The parties to the conflict shall endeavor to conclude such agreements in order to protect valuable elements of the environment.
- 10.05 States and competent international organizations should cooperate with respect to post-armed conflict environmental assessments and remedial measures.

## IV. Treaty Law

- 10.06 The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited (Articles 35, para. 3, and 55, para. 1, AP I). Destruction of the natural environment may not be used as a weapon (ENMOD; Rule 45 CIHL).
- 10.07 Reprisals against the natural environment are prohibited (Article 55, para. 2, AP I; *see above*, Section 7.43).
- 10.08 The parties to the conflict must consider their obligations under environmental agreements.
- 10.09 States and international organizations should, as appropriate, include provisions on environmental protection in agreements concerning the presence of military forces in relation to armed conflict. Such provisions may include preventive measures, impact assessments, restoration and clean-up measures.

- 10.10 In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience (*see* above, Section 2.31).

## V. Particular Obligations of Occupying States

- 10.11 Environmental considerations shall be taken into account by the occupying state in the administration of the occupied territory, including in any adjacent maritime areas over which the territorial state is entitled to exercise sovereign rights. An occupying state shall, unless absolutely prevented, respect the legislation of the occupied territory pertaining to the protection of the environment.

## Chapter 11

### HUMANITARIAN ASSISTANCE

- 11.01 The basic needs of the population must be met by the parties to the armed conflict (Article 27, 55 GC IV, Article 69 AP I, common Article 3 GC I-IV).
- 11.02 Impartial humanitarian organizations are entitled to offer their services in order to undertake humanitarian activities in favour of persons affected by armed conflicts (common Article 3 GC I-IV, Article 9 GC I, Article 9 GC II, Article 9 GC III, Article 10 GC IV).
- 11.03 Humanitarian activities carried out by impartial humanitarian organizations can only be undertaken with the consent of the parties concerned (common Article 3 GC I-IV, Article 70 AP I, Article 18 AP II). Under certain circumstances, exclusively humanitarian activities undertaken by impartial humanitarian organizations must be authorized (Article 59 GC IV).
- 11.04 Once impartial humanitarian relief schemes have been agreed to, the parties to the armed conflict, as well as other states concerned, are expected to allow and facilitate the rapid and unimpeded passage of the relief schemes, subject to their right of control (Articles 23, 59 GC IV, Article 70 AP I).
- 11.05 Humanitarian relief personnel, and objects used for humanitarian relief operations, must be respected and protected (Article 71 AP I).
- 11.06 Whenever circumstances permit, belligerent parties ought to suspend air or missile attacks in order to permit the distribution of humanitarian assistance (Rule 103 *HPCR Manual*).

## Chapter 12

### PROTECTION OF THE WOUNDED, SICK, AND SHIPWRECKED

#### I. WOUNDED, SICK, AND SHIPWRECKED PERSONS

- 12.01 'Wounded' and 'sick' mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may

be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility (Article 8 lit. a AP I).

- 12.02 'Shipwrecked' persons are those, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune and who refrain from all acts of hostility (Article 8 lit. b AP I).
- 12.03 The wounded, sick, and shipwrecked, to whichever Party they belong, shall be respected and protected in all circumstances (Articles 12, para. 1, and 35, para. 1, GC I; Article 12, para. 1, GC II; Article 3, para. 1 No. 2, GC III; Article 16 GC IV; Article 10, para. 1, AP I; Article 7, para. 1, AP II). Any attempts upon their lives, or violence to their persons, are prohibited. They shall be treated humanely and cared for without any adverse distinction founded on any grounds other than medical ones (Article 12, para. 2, GC I; Article 12, para. 2, GC II; Article 10, para. 2, AP I; Article 7, para. 2, AP II).
- 12.04 Reprisals against the wounded, sick, and shipwrecked persons and against persons or objects protected by GC I and GC II and AP I are prohibited (Article 46 GC I; Article 47 GC II; Article 20 AP I; *see above*, Section 7.43).
- 12.05 All possible measures shall be taken at all times to search for, collect and evacuate the wounded, sick, and shipwrecked and to ensure their adequate medical assistance. (Article 15 GC I; Article 18, para. 1 GC II; Article 19 GC III; Article 16 GC IV; Article 8 AP II). They shall be protected against pillage and ill-treatment (Article 15 GC I; Article 18, para. 1, GC II; Article 16 GC IV; Article 8 AP II).
- 12.06 It is prohibited to subject wounded, sick, and shipwrecked persons who are deprived of their liberty as a result of an armed conflict or occupation to any medical procedure not consistent with generally accepted medical standards. (Article 11 AP I; Article 5, para. 2 lit. e, AP II).
- 12.07 Parties to the conflict shall record in respect of each wounded, sick, shipwrecked, or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification. All pertinent information shall be forwarded to the appropriate information bureau (Article 16 GC I; Article 19 GC II; *see below*, Section 13.10).

## II. THE DEAD AND MISSING

- 12.08 The dead are to be searched for, collected, identified and prevented from being despoiled (Articles 15, para. 1, and 16 GC I; Article 18 and 19 GC II; Article 16, para. 2, GC IV; Article 33, para. 4, AP I; Article 8 AP II). Burial or cremation of the dead shall be preceded by a documented examination of the bodies (Article 17, para. 1, GC I; Article 20, para. 1, GC II). The dead must be disposed of in a respectful manner and their graves respected and properly maintained (Article 17, para. 3, GC I; Article 120, para. 4, GC III; Article 130, para. 1, GC IV; Article 34 AP I; Article 8 AP II).
- 12.09 Each party to the conflict must search for missing persons as soon as circumstances permit and shall transmit all relevant information concerning such persons (Article 33, para. 1, AP I).

## III. MEDICAL UNITS AND TRANSPORT

- 12.10 Medical units and medical transports must be respected and protected at all times and shall not be made the object of attack (Article 27, para. 1, HagueReg; Article 19, para. 1, GC I; Article 18, para. 1, GC IV; Article 12, para. 1, and Article 21 AP I; Article 11, para. 1, AP II). As far as possible, medical units shall be so sited that attacks against military objectives do not imperil their safety (Article 19, para. 2, GC I; Article 18, para. 5, GC IV; Article 12, para. 4, AP I).
- 12.11 The requisition of medical units and medical vehicles is permissible only if the medical needs of the civilian population, as well as those of any wounded and sick under treatment are satisfied. (Articles 19, para. 1, 33, 35, para. 2, GC I; Article 57 GC IV; Articles 14, 21 AP I).
- 12.12 Medical units and transports lose their protection if they are used to commit, outside their humanitarian function, acts harmful to the enemy, but only after a due warning has been given and such warning has remained unheeded (Article 21 GC I; Article 19, para. 1, GC IV; Articles 13, para. 1, 21 AP I; Article 11,

para. 2, AP II).

## IV. MEDICAL PERSONNEL

- 12.13 'Medical personnel' means those persons assigned, by a party to the conflict, exclusively to medical purposes or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary. The term includes:
- a) medical personnel of a party to the conflict, whether military or civilian, including those described in the First and Second Conventions, and those assigned to civil defence organizations;
  - b) medical personnel of national Red Cross (Red Crescent) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict;
  - c) medical personnel made available to a party to the conflict for humanitarian purposes by a neutral or other state which is not a party to that conflict; by a recognized and authorized aid society of such a state; and by an impartial international humanitarian organization (Articles 24–26 GC I; Articles 36 GC II; Articles 8, lit. c, and 9, para. 2. AP I).
- 12.14 Medical personnel shall be respected and protected in all circumstances. (Articles 24 and 25 GC I; Articles 36 and 37 GC II; Article 15 AP I; Article 9 AP II). It is prohibited to punish persons for carrying out medical activities compatible with medical ethics or to compel persons engaged in medical activities to perform acts or to carry out work contrary to the rules of medical ethics (Article 16 AP I; Article 10 AP II).
- 12.15 Medical personnel lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy.
- 12.16 Military medical personnel are medical personnel who are members of the armed forces. Military medical personnel enjoy special protection (Articles 24 and 30 GC I; Articles 36 GC II; *see above*, Section 315).
- 12.17 If military medical personnel and protection personnel of recognized national relief societies fulfilling the same duties fall into the hands of the adversary, they may be retained as long as the state of health and the number of prisoners of war so require. They will not themselves be regarded as prisoners of war. They will nevertheless benefit at least from all the provisions of GC III (Article 28 GC I; Article 37 GC II; Article 33 GC III).
- 12.18 Medical personnel whose retention is not indispensable for the care of prisoners of war shall be repatriated (Article 30 GC I; Article 37 GC II).
- 12.19 Medical personnel must identify themselves.

## V. MEDICAL AIRCRAFT

- 12.20 Medical aircraft are military or civilian aircraft, designed exclusively for medical transport on a permanent or temporary basis and subordinate to a competent authority of a party to the conflict. As well as the national emblem they must carry the distinctive emblem on their wings and hull and may not be attacked (Article 39 GC II; Articles 26, para. 1, and 29 AP I).
- 12.21 The parties to a conflict are prohibited from using their medical aircraft to gain any military advantage over an adversary. The presence of medical aircraft shall not be used in an attempt to render military objectives immune from attack (Article 28 AP I).
- 12.22 Medical aircraft may be ordered to land, whether on land or on water, to permit inspection. The inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting party shall not require the wounded and sick to be taken off the aircraft unless this is essential for inspection. In any event the inspecting party shall ensure that the condition of the wounded and sick is not adversely affected (Article 30, para. 2, AP I).

- 12.23 If inspection discloses that the aircraft does not meet the requirements for special protection or has acted in breach of its obligations, it may be seized. An aircraft which has been assigned as a permanent medical aircraft and is seized may be used thereafter only as a medical aircraft (Article 30, para. 4, AP I).

## **VI. HOSPITAL AND SAFETY ZONES AND LOCALITIES; NEUTRALIZED ZONES**

- 12.24 The parties to an armed conflict may agree to establish hospital and safety zones and localities to protect from the effects of the conflict the wounded and sick as well as personnel entrusted with the organization and administration of these zones and localities and with the care of the persons assembled therein (Article 23 and Annex I GC I; Article 14 and Annex I GC IV).
- 12.25 Parties to an armed conflict may propose to establish, in the regions where fighting is taking place, neutralized zones (Article 15 GC IV).
- 12.26 Hospital and safety zones and localities and neutralized zones shall not be the object of attack. They must be protected and respected at all times (Annex I, Article 11, GC I and Annex I, Article 11, GC IV).
- 12.27 Hospital and safety zones and localities and neutralized zones shall be clearly marked (Annex I, Article 6, GC I and Annex I, Article 6, GC IV).

## **VII. THE DISTINCTIVE EMBLEM**

- 12.28 The distinctive emblems of the Geneva Conventions and Additional Protocols are the red cross, the red crescent, or the red crystal (a red frame in the shape of a square on edge) on a white ground (Article 38 GC I; Article 41 GC II; Article 8, para. 1, AP I; Article 12 AP II; Article 2, para. 2 AP III, *see below*, Annex 'Distinctive Emblems', No. 1).
- 12.29 The distinctive emblem shall be used to identify medical and religious personnel, medical units and transports and medical equipment (Articles 39–43 GC I; Articles 41–43 GC II; Articles 18, paras. 3 and 4, 20, paras. 2 and 3, 21, and 22 para. 2 GC IV; Article 18, AP I; Article 12 AP II; Article 2 AP III).
- 12.30 In times of peace, the distinctive emblem may also be used by National Red Cross, Red Crescent or Red Crystal Societies, the international Red Cross organizations and their duly authorized personnel and, in exceptional circumstances, to identify ambulances and aid stations providing free treatment to the wounded and sick. (Article 44, paras. 2–4, GC I, Article 3 AP III).
- 12.31 States are obliged to supervise the use of the distinctive emblems and signals and shall prevent and repress any misuse thereof. (Articles 53, 54 GC I; Article 45 GC II; Articles 18, para. 8, 37–38, 85, para. 3 lit. f, API; Article 6 AP III; Article 23 lit. f HagueReg).
- 12.32 Camouflage of medical units in order to protect them against discovery by the enemy may exceptionally be permitted when compelling military reasons so require. It may only be ordered by brigade commanders and comparable and superior officers. The senior medical officer in charge and the legal adviser shall be consulted in advance.
- 12.33 The camouflage should be limited in space and time. During an attack it should be suspended.
- 12.34 Camouflage does not deprive medical units of the protection accorded to them by international law. They are, however, exposed to the risk that the adversary might consider them to be military objectives and attack them.

## Chapter 13

# PROTECTION OF PRISONERS IN ARMED CONFLICT

## I. GENERAL

- 13.01 Detention of persons is a wide-spread phenomenon in armed conflict to respond to serious threats to the security of the detaining authority. While civilians may be interned only in exceptional cases (*see* above, Section 8.30), captured enemy soldiers may be deprived of their liberty as a general rule. The purpose of captivity is to exclude them from further military operations. As long as they have not committed crimes detainees must be treated as persons captured for reasons of security, not as criminals.
- 13.02 In international armed conflicts captured enemy combatants and other groups of persons defined in Article 4 of the III. Geneva Convention and Article 43 of Additional Protocol I enjoy prisoner-of-war status. They may not be prosecuted for lawful acts of violence committed in the course of hostilities ('combatant privilege'), but only for violations of international humanitarian law, in particular war crimes, genocide or crimes against humanity. The state to whose armed forces the capturing unit belongs (detaining power) is responsible for the treatment of prisoners of war (Article 12, para. 1, GC III).
- 13.03 In any case of doubt as to whether persons having committed a belligerent act and having fallen into the hands of the enemy are to be protected as prisoners of war such persons shall enjoy that protection until such time as their status has been determined by a competent tribunal (Article 5, para. 2, GC III; Article 45, paras. 1 and 2, AP I).
- 13.04 Persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment shall be treated humanely under all circumstances and shall enjoy, as a minimum, fundamental human rights protections (Article 75 AP I).
- 13.05 A detaining power may transfer prisoners of war to another power only if it has satisfied itself of the willingness and ability of the latter to apply the rules of international law as to the protection of prisoners of war (Article 12, para. 2, GC III). In no circumstances shall a detainee be transferred to a country where he or she would be under the risk of violation of fundamental rights including torture or cruel, inhuman or degrading treatment or punishment; arbitrary deprivation of life or have reason to fear persecution for his or her political opinions or religious beliefs (Article 12, para. 2, GC III; Article 45 GC IV; Articles 6-7 ICCPR; Article 3 CAT).
- 13.06 Fundamental rules for the treatment of prisoners are:
- It is prohibited to treat prisoners inhumanely or dishonourably (Articles 13 and 14 GC III; Article 75 AP I; Article 10 ICCPR).
  - Any discrimination on the grounds of race, nationality, religious belief or political opinions, or similar criteria is unlawful (Article 16 GC III; Article 26 ICCPR).
  - Reprisals against prisoners are prohibited (Article 13, para. 3, GC III; Article 51, para. 6, AP I; *see* above, Section 7.43).

Representatives of the protecting power and delegates of the ICRC may visit prisoners in their camps at any time and talk to them individually and without witnesses.

## II. BEGINNING OF CAPTIVITY

- 13.07 The status of prisoner of war begins as soon as a combatant (Articles 4 A, nos. 1–3 and 6, GC III; Article 44 AP I) or other person with equal status (Article 4 A, nos. 4 and 5; Article 4 B, no. 1; and Article 5, para. 2, GC III; Article 45, para. 1, AP I) and *hors de combat* (Article 41, para. 2, AP I) falls into the hands of the adversary. An adversary who, having laid down his arms, or no longer having means of defence, surrenders

or is otherwise unable to fight or defend himself shall no longer be made the object of attack (Article 41, para. 1, AP I; Article 23, para. 1, HagueReg). He shall be taken prisoner of war.

- 13.08 Detention of other persons in armed conflict must be restricted and procedures must be introduced to ensure independent review. Arbitrary deprivation of liberty is prohibited (Rule 99 *CIHL*).
- 13.09 Prisoners of war shall be disarmed and searched. Their military equipment and military documents shall be taken away from them (Article 18, para. 1, GC III).
- 13.10 Prisoners of war shall keep all effects and articles of personal use, their metal helmets, and NBC protective equipment as well as all effects and articles used for their clothing and feeding (Article 18, para. 1, GC III). They shall also keep their badges of rank and nationality, their decorations, and articles of mainly personal or sentimental value, e.g. pictures of family members (Article 18, para. 3, 40 GC III).
- 13.11 The detaining power is obliged to forward information regarding the fate of prisoners of war (Article 122 GC III) as well as of wounded, sick, shipwrecked, and dead (Article 16 GC I; Article 19 GC II), and of protected civilians (Articles 136–141 GC IV). For this purpose, each of the parties to the conflict shall institute an official Information Bureau on the outbreak of a conflict and in all cases of occupation (Article 122, para. 1, GC III). The Bureau shall cooperate with the Central Prisoners of War Information Agency of the ICRC (Articles 122, para. 3, and 123 GC III).
- 13.12 Sums of money and articles of value carried by prisoners of war may not be taken away from them except by order of an officer of the detaining power and after a receipt has been given. Such money and objects shall be returned to prisoners of war at the end of their captivity (Article 18, paras. 4–6, GC III).
- 13.13 Prisoners of war shall be evacuated as soon as possible to camps situated in an area far enough from the area of operations for them to be out of danger. Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation (Article 19 GC III).
- 13.14 The evacuation of prisoners of war shall be effected in humane conditions, similar to those for the forces of the detaining power in their changes of station. Prisoners of war shall be supplied with sufficient food, clothing, and medical care. The civilian population shall be prevented from attacking prisoners of war (Article 20 GC III).
- 13.15 Prisoners of war who, under unusual conditions of combat, cannot be evacuated shall be released; in this case, too, all feasible precautions shall be taken to ensure their safety (Article 41, para. 3, AP I).
- 13.16 Every prisoner of war, when questioned on the subject, is entitled to give only his surname, first names, rank, date of birth, and army, regimental, personal, or serial number (in the German Armed Forces: service number). The exercise of this right shall not cause him any disadvantage (Article 17, para. 4, GC III). The questioning of prisoners of war shall be carried out in a language which they understand (Article 17, para. 6, GC III). No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind (Article 17, para. 4, GC III).

### III. CONDITIONS OF CAPTIVITY

- 13.17 The detaining power may subject prisoners of war to internment, i.e. put them into camps and guard them (Article 21, para. 1, GC III). These camps shall not be situated in danger zones (Articles 19, para. 1, and 23, para. 1, GC III). They shall not be used to render certain areas immune from military operations (Article 23, para. 1, GC III).
- 13.18 The camps shall meet certain minimum requirements of hygiene and health (Article 22, para. 1, GC III). They shall be provided with shelters against air raids and other hazards of war (Article 23, para. 2, GC III). Whenever the military situation permits, prisoner-of-war camps shall be marked by the letters PG (*prisonniers de guerre*) or PW (prisoners of war), clearly visible from the air (Article 23, para. 4, GC III).
- 13.19 As far as possible, prisoners of war shall be assembled according to their nationality, language, and customs (Article 22, para. 3, GC III).
- 13.20 Prisoners of war shall receive sufficient food (Article 26 GC III) and clothing (Article 27 GC III) as well as

necessary medical attention (Articles 29–31 GC III).

- 13.21 Latitude in the exercise of religious duties shall be ensured (Article 34 GC III).
- 13.22 The detaining power may utilize the labour of able-bodied enlisted men for certain non-military works (Articles 49, para. 1, and 50 GC III). Non-commissioned officers shall only be required to do supervisory work. Officers are exempted from compulsory work (Article 49, paras. 2 and 3, GC III).
- 13.23 No prisoner of war shall be employed against his will on labour which is of an unhealthy or otherwise dangerous nature (e.g. mine-clearing), or which is humiliating; nevertheless, he may volunteer to do dangerous or unhealthy work (Article 52 GC III).
- 13.24 Not more than one week after arrival at a camp, every prisoner of war shall be enabled to write direct to his family and the Central Prisoners of War Agency, informing them of his captivity (Articles 70 and 123 GC III), and to correspond regularly with his relatives thereafter.
- 13.25 Regarding inadequate conditions of captivity, prisoners of war may apply to the authorities of the detaining power or to a protecting power (Article 78, paras. 1 and 2, GC III). The exercise of the right to make complaints shall not give rise to any punishment (Article 78, para. 3, GC III).
- 13.26 The prisoners of war shall elect representatives to represent their interests; where officers are among the prisoners of war, the senior officer shall be recognized as the camp prisoners' representative (Articles 79–81 GC III).
- 13.27 A prisoner of war shall be subject to the laws, regulations, and orders effective in the armed forces of the detaining power. The detaining power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against these provisions (Article 82, para. 1, GC III).
- 13.28 Penal and disciplinary sanctions are governed by the following rules:
- No prisoner of war may be punished or disciplined more than once for the same act (Article 86 GC III).
  - Prisoners of war may not be sentenced to any penalties except those provided for in respect of members of the armed forces of the detaining power for the same acts (Article 87, para. 1, GC III).
  - Prisoners of war shall be given an opportunity to present their defence (Articles 96, para. 4, and 99, para. 3, GC III).
  - Collective punishment for individual acts and cruel punishment are forbidden (Article 87, para. 3, GC III).
- 13.29 Acts which constitute offences against discipline shall be investigated immediately (Article 96, para. 1, GC III). Disciplinary punishment may be ordered only by appropriate courts of law, military commanders, camp commanders, and their representatives who have been assigned disciplinary powers (Article 96, para. 2, GC III). In no case may prisoners of war themselves exercise disciplinary powers (Article 96, para. 3, GC III).

## **IV. ESCAPE OF PRISONERS OF WAR**

- 13.30 Prisoners of war who have made good their escape and who are recaptured shall not be liable to any punishment in respect of their escape (Article 91, para. 2, GC III). The escape of a prisoner of war shall be deemed to have succeeded when the person (Article 91, para. 1, GC III):
- has joined friendly or allied armed forces;
  - has entered neutral territory or otherwise left the territory under control of the adversary; or
  - has joined a ship in the territorial waters but not under the control of the detaining power.
- 13.31 A prisoner of war who has been captured in his attempt to escape shall be liable only to disciplinary punishment in respect of his act (Article 92, para. 1, GC III); this shall also apply to a repeated offence.
- 13.32 A prisoner of war shall not be liable to judicial prosecution even when committing offences to facilitate his or her escape, e.g. theft of food or clothing, or the drawing up and use of false papers. This shall not apply

to cases in which the escapee has used violence against life or limb during his escape (Article 93, para. 2, GC III).

## **V. TERMINATION OF CAPTIVITY**

- 13.33** Save by a successful escape, captivity shall cease with the release of the prisoner from the custody of the detaining power.
- 13.34** Seriously wounded and seriously sick prisoners of war who are fit to travel and whose mental or physical fitness has been incurably or permanently diminished or whose recovery may not be expected within one year shall be repatriated during the armed conflict. No prisoner of war however, may be repatriated against his will during hostilities (Articles 109, 110 GC III).
- 13.35** All prisoners of war shall be released and repatriated without delay after the cessation of active hostilities (Article 118 GC III). This requires neither a formal armistice agreement nor the conclusion of a peace treaty. What matters is the actual cessation of hostilities – provided that, according to a reasonable estimate, they are unlikely to resume. Repatriation shall be carried out in an orderly manner, in accordance with a plan agreed by all parties, working with and under the control of the protecting powers and the International Committee of the Red Cross (Articles 8–10 GC III).
- 13.36** Detainees who have committed an indictable offence and against whom criminal proceedings are pending or who have yet to complete a punishment may be detained beyond the cessation of active hostilities (Article 119, para. 5, GC III).
- 13.37** Other detainees in armed conflict must be released upon decision of a competent court or review board.

## Chapter 14

### HUMAN RIGHTS IN ARMED CONFLICT

- 14.01 The application of international humanitarian law does not exclude that human rights law may also be applicable. The relationship between international humanitarian law and human rights law has been shaped as part of a development, which started after the Second World War and finds expression in the incorporation of human rights principles in Article 75 API and customary international humanitarian law.
- 14.02 The main sources of human rights law are conventional and customary international law. Major human rights treaties apply globally, such as:
- the International Covenant on Civil and Political Rights of 19 December 1966 with its Optional Protocols;
  - the International Covenant on Economic, Social and Cultural Rights of 19 December 1966;
  - the UN Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948;
  - the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 with its Optional Protocol;
  - the Convention on the Rights of the Child of 20 November 1989 with its Optional Protocols;
  - the International Convention for the Protection of all Persons from Enforced Disappearance of 23 September 2005.
- 14.03 Other human rights treaties have developed at regional level:
- the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950;
  - the American Convention on Human Rights of 22 November 1969;
  - the African Charter on Human and Peoples' Rights of 27 June 1981;
  - the Arab Charter on Human Rights of 22 May 2004.
- 14.04 When applicable simultaneously, the relationship between international human rights law and international humanitarian law may be characterised by mutual complementarity and by the *lex specialis* principle.
- 14.05 Whether human rights obligations of a sending state apply extraterritorially depends upon the terms of the human rights treaty or customary rule in question. In many cases, a decisive factor will be whether the individuals concerned come within the jurisdiction of the state with whose armed forces they come into contact.
- 14.06 Human rights obligations are binding upon states and international organizations. Their binding effect on organized armed groups is controversial.
- 14.07 International humanitarian law and human rights law provide for the protection of refugees and internally displaced persons.

## Chapter 15

### PROTECTION OF RELIGIOUS PERSONNEL

#### I. GENERAL RULES

- 15.01 Religious personnel are chaplains, ministers of religion or religious teachers assigned to the armed forces of a state to provide spiritual care to the persons in their charge including the dead (Article 24 GC I; Article 37 GC II; Articles 8, lit. d, and 23, para. 5, AP I).**
- 15.02 The same status is accorded to religious personnel who**
- belong to a militia not forming part of the regular armed forces, a volunteer corps, or an organized resistance movement whose members are combatants (Article 13, para. 2, GC I);
  - have been charged by the appropriate military authority to care for the personnel accompanying the armed forces (Article 13, para. 4, GC I);
  - are assigned to hospital ships (Article 36 GC II); or
  - are serving on board of merchant ships (Articles 37 GC II).
- 15.03 Other persons serving as non-permanent religious personnel are not accorded the same status having regard to their duties. They are, however, protected as civilians under Geneva Convention IV, AP I and customary law.**
- 15.04 The auxiliaries of religious personnel (assistants and drivers) assigned to the Armed Forces should be accorded the status of soldiers or persons accompanying the armed forces (*see* below, Section 15.05). It is, however, in keeping with the principles of international humanitarian law to respect and protect these persons, too, as far as possible.**
- 15.05 Religious personnel may include personnel of services responsible for the welfare of the armed forces (Art 13, para. 4, GC I).**
- 15.06 Religious personnel perform their role under the rules and regulations of their church or religious congregation. They should refrain from preaching hatred against other religions and against the adversary.**
- 15.07 Religious personnel shall treat all protected persons humanely in all circumstances, irrespective of their religion or faith (Article 3, para. 1, sub-para. 1, GC I-IV).**
- 15.08 The groups of persons to be attended by religious personnel of the armed forces include:**
- members of the armed forces to which they themselves belong;
  - for religious personnel who fall into the hands of the adversary, also prisoners of war of the same religion belonging to allied armed forces (Articles 33, para. 2 and 35, first sentence GC III);
  - in exceptional cases, members of the opposing armed forces who have been taken prisoner (Article 37 GC III);
  - in case of need, wounded, sick, and shipwrecked members of opposing armed forces of their faith or a similar denomination; and
  - for the duration of an occupation, the civilian population in particular children (Articles 13, 24, 27, para. 1, 38, para. 3, 50, para. 3 and 58, para. 1 GC IV), protected persons accused of offences (Article 6, para. 3 GC IV), and internees (Articles 86, 93 and 94 GC IV).
- 15.09 Religious personnel of the armed forces shall exercise their functions within the scope of the laws and regulations and in accordance with their professional etiquette and religious conscience. They shall, however, not be confined to their religious duties and may particularly:**
- perform the functions of a personal adviser;
  - receive and forward the last wishes of dying soldiers; and
  - provide material assistance to those in need.
- 15.10 Wherever possible, the dead shall be interred by religious personnel of the same denomination. The states concerned have the duty to assist such personnel, within the means available, in fulfilling this task (Article 17, para. 3 GC I).**
- 15.11 Religious personnel shall wear, affixed to the left arm, a water-resistant armlet displaying the red cross or red crescent or red crystal on a white ground (Article 40, para. 1, GC I; Article 42, para. 1, GC II; Article 18, paras. 1 and 3, AP I; Article 12 AP II; Article 2 AP III; *see* below, Annex ‘Distinctive Emblems’, No. 1). The armlet shall be issued and stamped by the appropriate authority (Article 40, para. 1 GC I; Article 42, para. 1, GC II).**

- 15.12 In addition to the armband and identity disk to be worn by all members of the armed forces, religious personnel shall also carry a special identity card, certifying their status (Article 40, para. 2, GC I; Article 42, para. 2, GC II).
- 15.13 Religious personnel may not be deprived of their special insignia, armbands, or identity cards. In case of loss or destruction, they have the right to replacements (Article 40, para. 4, GC I; Article 42, para. 4, GC II). Should they fall into the hands of the adversary, the latter shall be obliged to allow new identity cards or armbands to be forwarded to retained religious personnel (Article 40, para. 4, GC I; Article 42, para. 4, GC II). They may be allowed to retain articles of personal use.
- 15.14 Local arrangements may be concluded between parties to the conflict for the passage of religious personnel or equipment on their way to a besieged or encircled area (Article 15 GC I).
- 15.15 Any special agreement drawn by the parties to an armed conflict which adversely affects the situation or rights conferred upon religious personnel is contrary to international humanitarian law (Article 6 GC I).
- 15.16 The ICRC or other humanitarian organizations may, subject to the consent of the parties to the conflict, arrange for humanitarian activities for the protection and relief of religious personnel (Article 9 GC I).
- 15.17 A meeting of the religious personnel can take place on a neutral territory suitably chosen, when a need arises to settle the disagreement between the parties to the conflict on the application or interpretation of the provisions of the I. Geneva Convention (Article 11 GC I).

## II. PROTECTION OF RELIGIOUS PERSONNEL

- 15.18 Religious personnel shall be respected and protected in all circumstances (Article 24 GC I; Articles 36 and 37 GC II; Article 15, para. 5 AP I). This shall apply:
- at any time throughout the duration of an armed conflict;
  - at any place; and
  - in any case in which religious personnel are retained by the adversary, whether temporarily or for a prolonged period of time.
- 15.19 Religious personnel are entitled to the protection provided by international law. Direct participation in rendering assistance to the victims of war (wounded, sick, shipwrecked, prisoners of war, protected civilians) is not required.
- 15.20 Unlike medical supplies, the articles used for religious purposes are not explicitly protected by international law. It is, however, in keeping with the spirit of the Geneva Conventions to respect the material required for religious purposes and not to use it for alien ends.
- 15.21 Reprisals against religious personnel are prohibited (Article 46 GC I; Article 47 GC II). This prohibition shall protect religious personnel from any restriction of the rights assigned to them (*see above*, Section 7.43, and below, Section 21.06).
- 15.22 Religious personnel may in no circumstances renounce the rights secured to them by international humanitarian law (Article 7 GC I; Article 7 GC II).
- 15.23 Any attack directed against religious personnel and any infringement of their rights constitutes a grave breach of international law, which shall be liable to criminal prosecution (Article 49 GC I; Article 50 GC II).
- 15.24 The fact that religious personnel may be armed, and that they may use the weapons in their own defence or in that of the wounded, sick, and shipwrecked shall not deprive them of the protection accorded to them by international law (Article 22 GC I; Article 35 GC II).
- 15.25 The only arms which may be used by religious personnel are weapons suited for self-defence and emergency aid (individual weapons).
- 15.26 The protection accorded to religious personnel shall cease if they use weapons for any other purpose than that of self-defence and defence of protected persons.

### **III. LEGAL STATUS OF RELIGIOUS PERSONNEL RETAINED BY A FOREIGN POWER**

- 15.27 Religious personnel who are retained by an adverse party shall not be considered as prisoners of war (Article 28, para. 2, GC I; Article 36 GC II; Article 33, para. 1, GC III).
- 15.28 Religious personnel may be retained to assist prisoners of war of the armed forces to which they themselves belong in so far as the state of health, spiritual needs, and number of prisoners require (Article 28 GC I; Articles 36 and 37 GC II; Article 33 GC III).
- 15.29 The provisions of Geneva Conventions I and III apply to the treatment of the retained religious personnel as minimum requirements for protection. As a consequence, they shall receive at least the benefits accorded to prisoners of war by these conventions (Article 30 GC I; Article 33 GC III). In particular, the detaining power shall ensure the representatives of religious organizations a proper reception.
- 15.30 Like prisoners of war, religious personnel shall be released and repatriated without delay after the cessation of active hostilities (Article 118, para. 1 GC III).
- 15.31 The provisions of the Geneva Conventions apply by analogy to religious personnel received or interned in neutral territory (Article 4 GC I; Article 5 GC II).
- 15.32 Religious personnel who are not retained shall be returned (Articles 28 and 30 GC I; Article 37 GC II).
- 15.33 Religious personnel shall be returned to the party to the conflict to which they belong. A detaining power which merely releases a person into the territory of his home state which the said power still occupies does not fulfil its duty to return this person.
- 15.34 The repatriation of religious personnel depends on the condition that a means is open for their return and that military requirements permit (Article 30, para. 3, GC I; Article 37 GC II).
- 15.35 Religious personnel who are repatriated may take with them the effects, personal belongings, valuables and ritual objects belonging to them (Article 30, para. 3, GC I; Article 37 GC II).
- 15.36 Retained religious personnel shall continue to exercise their spiritual functions for the benefit of prisoners of war, preferably those belonging to the armed forces upon which they depend. They shall perform their duties within the scope of the military laws and regulations of the detaining power and in accordance with their professional etiquette and their religious conscience. Their work shall be subject to the control of the competent services (Article 28, para. 2, GC I; Article 37 GC II; Arts. 33, para. 2; and 35 GC III).
- 15.37 The spiritual functions to be exercised for the benefit of prisoners of war particularly include:
- holding religious services, organising prayers, hymn singing, delivery of discourses and other religious ceremonies (Article 34 GC III);
  - ministering to prisoners of war of the same religion (Article 35 GC III); and
  - burying prisoners of war who have died according to the rites of the religion to which they belong (Article 120, para. 4 GC III).
- 15.38 In order to ensure a uniform level of assistance for prisoners of war, religious personnel will be allocated to camps and labour detachments containing prisoners of war belonging to the same forces, speaking the same language, or practising the same religion (Article 35 second sentence GC III).
- 15.39 The detaining power shall provide religious personnel with facilities necessary for the exercise of their spiritual functions (Article 35 GC III).
- 15.40 In particular, they shall be accorded the following facilities:
- They shall be provided with adequate premises where religious services may be held (Article 34, para. 2, GC III).
  - They shall be authorized to visit periodically prisoners of war situated outside the camp (e.g. in working detachments or hospitals, Article 35 GC I). For this purpose, the detaining power shall place at their disposal the necessary means of transport (Articles 33, para. 2 lit. a; and 35, third sentence, GC III).

- They shall have the right to deal with the competent authorities of the camp on all questions relating to their duties (Article 33, para. 2 lit. b, third sentence, GC III).
  - They shall enjoy all facilities for correspondence on matters concerning their duties. They shall be free to correspond, subject to censorship, with the ecclesiastical authorities in the country of detention and with international religious organizations. Letters and cards which they send for this purpose shall be in addition to the quota provided for prisoners of war (Articles 35, fourth and fifth sentences, and 71 GC III).
  - They shall be allowed to receive by any means whatsoever individual parcels or collective shipments containing devotional articles (e.g. the Bible, the Koran, prayer and service books, hymnals, ritual articles, sacramental wine, crucifixes, and rosaries Articles 33 and 72, para. 1, GC III).
- 15.41 Retained religious personnel shall be subject to the disciplinary authority of the detaining power (Article 28, para. 2 GC I; Article 33, para. 2 GC III). They shall therefore be subordinate to the general orders of the camp commander. This shall not apply to the exercise of their religious duties.
- 15.42 Religious personnel may not be compelled to carry out any work other than that concerned with their religious duties (Article 28, para. 2 GC I; Article 33, para. 2 lit. c GC III).
- 15.43 Prisoners of war who are chaplains, ministers of religion or religious teachers, but serve in the armed forces as soldiers only, shall be at liberty to minister freely to the members of their community (Article 36, first sentence GC III). The detaining power has the duty to give them an appropriate authority if prisoners of war of the same faith are to be ministered. Those who have been accorded this authority shall enjoy the same privileges and facilities as retained religious personnel. They shall also not be compelled to carry out any work (Article 36 GC III). Nevertheless, they shall remain prisoners of war, although endowed with special rights.
- 15.44 When prisoners of war do not have the assistance of a chaplain, minister of religion or religious teacher, another qualified person belonging to the prisoners' or another religious denomination may act in their place at the request of the prisoner concerned. These persons will normally be selected from among the prisoners of war, but they may also be members of the civilian population of the detaining power.
- 15.45 Such persons shall regularly be appointed with the agreement of the community of prisoners concerned and subject to the approval of the detaining power and, whenever necessary, the approval of the local religious authorities of the respective faith (Article 37 GC III).
- 15.46 The persons thus appointed shall enjoy the same privileges and facilities as religious personnel. They are subject to the discipline of the camp as well as to all regulations established by the detaining power in the interests of discipline and military security (Article 37, 3rd sentence, GC III). If these persons are selected from the prisoner of war community their status will not change.

## Chapter 16

# PROTECTION OF CULTURAL PROPERTY

## I. DEFINITION OF 'CULTURAL PROPERTY'

- 16.01 The term 'cultural property' means movable or immovable property of great importance to the cultural heritage of peoples (e.g. buildings and other monuments of historic, artistic or architectural significance; archaeological sites; artworks, antiquities, manuscripts, books, and collections thereof; archives; etc.), whether of a secular or religious nature and irrespective of origin or ownership (Article 53, lit. a, AP I; Article 16 AP II; Article 1, lit. a, CultPropConv). The term extends to buildings for preserving or exhibiting, and refuges intended to shelter, movable cultural property (Article 1, lit. b, CultPropConv) and to centres containing a large amount of movable or immovable cultural property, known as 'centres containing monuments' (Article 1, lit. c, CultPropConv).

## II. PROTECTION OF CULTURAL PROPERTY DURING HOSTILITIES

### 1. General Rules

- 16.02 It is prohibited to attack cultural property unless it becomes a military objective and there is no feasible alternative for obtaining a similar military advantage (Articles 53, lit. a, and 52 AP I; Article 16 AP II; Article 4, paras 1 and 2, CultPropConv and Article 6, lit. a, Prot2CultPropConv). The parties to the conflict shall do everything feasible to verify that objectives to be attacked are not cultural property (Article 57, para. 2 lit. a, sublit. i AP I; Article 7, lit. a, Prot2CultPropConv). They shall cancel or suspend an attack if it becomes apparent that the objective is cultural property (Article 57, para. 2 lit. b, AP I; Article 7 lit. d, sublit. i, Prot2CultPropConv).
- 16.03 The parties to the conflict shall take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimising, incidental damage to cultural property (Article 57, para. 2 lit. a, sublit. ii, AP I; Article 7, lit. b, Prot2CultPropConv). They shall refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property which would be excessive in relation to the concrete and direct military advantage anticipated (Article 57, para. 2 lit. a, sublit. iii, AP I; Article 7, lit. c, Prot2CultPropConv). They shall cancel or suspend an attack if it becomes apparent that it may be expected to cause incidental damage to cultural property which would be excessive in relation to the concrete and direct military advantage anticipated (Article 57, para. 2 lit. b, AP I; Article 7, lit. d, sublit. ii, Prot2CultPropConv).
- 16.04 All other acts of hostility against cultural property are prohibited unless imperatively required by military necessity (Article 23, lit. g, HagueReg; Article 4, paras. 1 and 2, CultPropConv).
- 16.05 It is prohibited to make cultural property the object of reprisals (Article 53, lit. c, AP I; Article 4, para. 4 CultPropConv; *see above*, Section 7.43).
- 16.06 It is prohibited to make any use of cultural property or its immediate surroundings for purposes likely to expose it to destruction or damage in the event of armed conflict unless no choice is possible between such use and another feasible method for obtaining a similar military advantage (Article 4, paras 1 and 2, CultPropConv and Article 6, lit. b, Prot2CultPropConv).
- 16.07 All forms of theft, pillage, misappropriation, confiscation, and vandalism of cultural property are prohibited (Article 28 HagueReg; Article 7 HC IX; Article 4, para. 3, CultPropConv). The parties to the conflict shall prohibit, prevent and, if necessary, put a stop to all such acts (Article 4, para. 3, CultPropConv). They shall refrain from requisitioning movable cultural property situated in the territory of an opposing party (Article 4, para. 3, CultPropConv).

16.08 The parties to the conflict shall, to the maximum extent feasible, take the necessary precautions to protect cultural property under their control against the dangers resulting from military operations (Art 58, lit. c, AP I). To the maximum extent feasible, they shall remove cultural property from the vicinity of military objectives (Article 58, lit. a, AP I; Article 8, lit. a, Prot2CultPropConv) or provide for adequate *in situ* protection (Article 8, lit. a, Prot2CultPropConv), and they shall avoid locating military objectives near cultural property (Article 8, lit. b, Prot2CultPropConv).

## 2. Special Protection

16.09 Contracting parties may request that a limited number of refuges for movable cultural property and of centres containing monuments and a limited amount of immovable cultural property of very great importance be placed under special protection (Art 8, para. 1, CultPropConv).

16.10 The grant of special protection is subject to the following criteria:

- The cultural property must be situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point (e.g. an aerodrome, broadcasting station, major port, railway station or main line of communication) (Article 8, para. 1 lit. a, CultPropConv). Cultural property not so situated may nonetheless be placed under special protection if the contracting party requesting such protection undertakes, in the event of armed conflict, to make no use of the military objective in question and, in the case of a port, railway station or aerodrome, to divert all traffic therefrom (Article 8, para. 5, CultPropConv). A refuge for movable cultural property not so situated may nonetheless be placed under special protection if it is designed in such a way that it will not, in all probability, be damaged in the event of attack (Article 8, para 2, CultPropConv);
- The cultural property must not be used for military purposes (Article 8, para. 1 lit. b, CultPropConv). A centre containing monuments shall be deemed to be used for military purposes whenever it is used for the movement of military forces or material, even by way of transit, or whenever activities directly connected with military operations, the stationing of military forces or the production of military material take place within the centre (Article 8, para. 3, CultPropConv). The guarding of cultural property by specially authorised armed custodians or the presence in the vicinity of police forces responsible for the maintenance of public order shall not be deemed to be use for military purposes (Article 8, para. 4 CultPropConv).

16.11 If during an armed conflict a contracting party is induced by unforeseen circumstances to set up an improvised refuge for movable cultural property, and if in the view of the Commissioner-General for Cultural Property accredited to that party (Articles 2, 4, 6, 8–10 RegExCultPropConv) the refuge fulfils the criteria for special protection, the refuge may, subject to the consent of the delegates of the Protecting Powers accredited to the opposing parties (Articles 2, 3, 5, 8–10 RegExCultPropConv), be granted special protection by its entry in the International Register of Cultural Property under Special Protection (Article 11 RegExCultPropConv).

16.12 Contracting parties shall ensure the immunity of cultural property under special protection by refraining from any act of hostility against such property, except in exceptional cases of unavoidable military necessity (Articles 9 and 11, para. 2, CultPropConv).

16.13 Contracting parties shall ensure the immunity of cultural property under special protection by refraining from any use of such property or its surroundings for military purposes, except in exceptional cases of unavoidable military necessity (Articles 9 and 11, para. 2, CultPropConv).

16.14 Unavoidable military necessity can be established only by the commander of a division or higher ranking officer. When circumstances permit, the opposing party shall be notified a reasonable time in advance of the decision (Article 11, para. 2, CultPropConv). The contracting party taking the decision shall, as soon as possible, and in writing, inform the Commissioner-General for Cultural Property accredited to it of the decision, giving reasons (Article 11, para. 3, CultPropConv).

16.15 If a contracting party violates one of its obligations towards cultural property under special protection, the opposing party shall, for as long as the violation persists, be released from its obligation to ensure the immunity of the property concerned, although whenever possible the latter party shall first request the cessation of the violation within a reasonable time (Article 11, para. 1, CultPropConv). The contracting party taking the decision shall, as soon as possible, and in writing, inform the Commissioner-General for Cultural Property accredited to it of the decision, giving reasons (Article 11, para. 3, CultPropConv). The

cultural property in question shall remain protected by the general rules on respect for cultural property.

### *3. Enhanced Protection*

**16.16** Contracting parties may request that cultural property be placed under enhanced protection (Article 10 Prot2CultPropConv).

**16.17** The grant of enhanced protection is subject to the following criteria:

- The cultural property must be cultural heritage of the greatest importance for humanity (Article 10, lit. a, Prot2CultPropConv);
- The cultural property must be protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection (Article 10, lit. b, Prot2CultPropConv);
- The cultural property must not be used for military purposes or to shield military sites, and the party having control over the cultural property must make a declaration that it will not be so used (Article 10, lit. c, Prot2CultPropConv).

Enhanced protection is granted to cultural property by its entry in the International List of Cultural Property under Enhanced Protection (Article 11, para. 10, Prot2CultPropConv) maintained by the Committee for the Protection of Cultural Property in the Event of Armed Conflict (Arts 11, 24 and 27, para. 1 lit. b, Prot2CultPropConv).

**16.18** The parties to the conflict shall ensure the immunity of cultural property under enhanced protection by refraining from making such property the object of attack (Article 12 Prot2CultPropConv). Cultural property under enhanced protection may, however, be made the object of attack if

- it becomes, by its use, a military objective (Article 13, para. 1, lit. b, Prot2CultPropConv);
- **the attack is the only feasible means of terminating such use** (Article 13, para. 2 lit. a, Prot2CultPropConv);– all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimizing, damage to the cultural property (Article 13, para. 2 lit. b, Prot2CultPropConv);
- unless circumstances do not permit owing to requirements of immediate self-defence, the attack is ordered at the highest operational level of command, effective advance warning is issued to the opposing forces requiring the termination of the use, and reasonable time is given to the opposing forces to redress the situation (Article 13, para. 2 lit. c, Prot2CultPropConv).

**16.19** The parties to the conflict shall ensure the immunity of cultural property under enhanced protection by refraining from any use of such property or its immediate surroundings in support of military action (Article 12 Prot2CultPropConv).

**16.20** Where cultural property under enhanced protection no longer meets any of the criteria for such protection, the Committee for the Protection of Cultural Property in the Event of Armed Conflict may suspend this protection or may cancel this protection by removing the cultural property from the International List of Cultural Property under Enhanced Protection (Article 14, para. 1 Prot2CultPropConv). The Committee may also suspend the enhanced protection granted to cultural property in the case of a serious violation of the immunity of that property through its use in support of military action. Where such violation is continuous, the Committee may exceptionally cancel the enhanced protection granted to the property by removing the property from the List (Article 14, para. 2 Prot2CultPropConv). The Committee shall afford an opportunity to the contracting parties to make their views known before taking a decision to suspend or cancel the enhanced protection (Article 14, para. 3 Prot2CultPropConv).

### *4. Transport of Cultural Property*

**16.21** Means of transport engaged exclusively in the transport of cultural property may, at the request of the contracting party concerned, be placed under special protection (Article 12, para. 1, CultPropConv and Article 17, paras. 1 and 2, RegExCultPropConv). Such transport shall take place under international supervision (Article 12, para. 2, CultPropConv and Article 17, para. 3, RegExCultPropConv). All acts of hostility directed against such means of transport are prohibited (Article 12, para. 3, CultPropConv).

**16.22** Contracting parties shall grant immunity from seizure, placing in prize, and capture to cultural property

transported under special protection or transported in urgent cases, as well as to the means of such transport (Article 14, para. 1, CultPropConv).

### **III. PROTECTION OF CULTURAL PROPERTY DURING OCCUPATION**

- 16.23 All acts of hostility against cultural property are prohibited during belligerent occupation unless imperatively demanded by military necessity (Arts 56 and 23, lit. g, HagueReg; Article 53 GC IV; Article 4, paras. 1 and 2, CultPropConv).
- 16.24 It is prohibited during belligerent occupation to make any use of cultural property or its immediate surroundings for purposes likely to expose it to destruction or damage unless no choice is possible between such use and another feasible method for obtaining a similar military advantage (Article 4, paras. 1 and 2 CultPropConv and Article 6, lit. b, Prot2CultPropConv).
- 16.25 All forms of theft, pillage, misappropriation, confiscation, and vandalism of cultural property are prohibited during belligerent occupation (Articles 47 and 56 HagueReg; Article 4, para. 3 CultPropConv). The occupying power shall prohibit, prevent and, if necessary, put a stop to all such acts (Article 43 HagueReg; Article 4, para. 3, CultPropConv). It shall refrain from seizing or requisitioning cultural property situated in the occupied territory (Article 56 HagueReg; Article 4, para. 3, CultPropConv).
- 16.26 The occupying power shall as far as possible support the competent authorities of the occupied country in safeguarding and preserving cultural property (Article 5, para. 1, CultPropConv). Should it prove necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and should the competent authorities be unable to take such measures, the occupying power shall, as far as possible, and in close cooperation with these authorities, take the most necessary measures of preservation (Article 5, para. 2, CultPropConv).
- 16.27 The occupying power shall prohibit and prevent in relation to the territory any illicit export, other removal or transfer of ownership of cultural property (Article 5 CultPropConv; Section 1 Prot1CultPropConv; Article 9, para. 1 lit. a, Prot2CultPropConv; Article 2, para. 2, and Article 11 IllicitImpExpTransConv).
- 16.28 A contracting party in occupation of the whole or part of the territory of another contracting party shall prohibit and prevent any archaeological excavation in the occupied territory, save where this is strictly required to safeguard, record or preserve cultural property (Article 9, para. 1 lit. b, Prot2CultPropConv). The same shall apply in respect of any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence (Article 9, para. 1 lit. c, Prot2CultPropConv). Any archaeological excavation of, alteration to, or change of use of, cultural property in the occupied territory shall, unless circumstances do not permit, be carried out in close cooperation with the competent authorities of that territory (Article 9, para. 2, Prot2CultPropConv).

### **IV. PREPARATORY MEASURES DURING PEACETIME**

- 16.29 Contracting parties shall prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate (Article 3 CultPropConv). Such measures shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision of adequate *in situ* protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property (Article 5 Prot2CultPropConv).
- 16.30 Contracting parties shall plan or establish in peacetime, within their armed forces, services or specialist personnel whose purpose will be to secure respect for cultural property and to cooperate with the civilian authorities responsible for safeguarding it (Article 7, para. 2, CultPropConv).

## **VI. PERSONNEL ENGAGED IN THE PROTECTION OF CULTURAL PROPERTY**

- 16.31 Personnel engaged in the protection of cultural property shall, as far as is consistent with the interests of security, be respected. Should such personnel fall into the hands of the opposing party, they shall be allowed to continue to carry out their duties whenever the cultural property for which they are responsible has also fallen into the hands of the opposing party (Article 15 CultPropConv).
- 16.32 Personnel engaged in the protection of cultural property may wear an armlet bearing the distinctive emblem of cultural property, issued and stamped by the competent authorities of the contracting party concerned (Article 17, para. 2 lit. c, CultPropConv and Article 21, para. 1, RegExCultPropConv). They shall carry a special identity card bearing the distinctive emblem (Article 21, para. 2 RegExCultPropConv). Such personnel may not, without legitimate reason, be deprived of their identity card or of the right to wear the armlet (Article 21, para. 4, RegExCultPropConv).

## **VII. DISTINCTIVE MARKING OF CULTURAL PROPERTY**

- 16.33 The distinctive emblem of cultural property takes the form of a shield, pointed below, per saltire blue and white (Article 16, para. 1, CultPropConv, *see* below, Annex 'Distinctive Emblems' No. 8).
- 16.34 Contracting parties may, so as to facilitate its recognition, mark cultural property with the distinctive emblem used once (Articles 6 and 17, para. 2, CultPropConv).
- 16.35 During international armed conflict, contracting parties shall mark cultural property under special protection with the distinctive emblem repeated three times in triangular formation with one shield below (Articles 10, 16, para. 2, and 17, para. 1 lit. a, CultPropConv, *see* below, Annex 'Distinctive Emblems' No. 9). The same shall apply in respect of means of transport engaged exclusively in the transport of cultural property (Articles 12, para. 2; 13, para. 1; 16, para. 2; and 17, para. 1 lit. b, CultPropConv) and improvised refuges for cultural property (Articles 16, para. 2, and 17, para. 1 lit. c, CultPropConv and Article 11, para. 2, RegEx CultPropConv).
- 16.36 During armed conflict, contracting parties may mark cultural property under enhanced protection with the distinctive emblem for cultural property under enhanced protection, which takes the form of the distinctive emblem outlined by a detached external red band (Chapter III, Section E and Annex IV Guidelines2ProtCultPropConv; *see* below, Annex 'Distinctive Emblems' No. 10).
- 16.37 During international armed conflict, the deliberate misuse of the distinctive emblem is prohibited (Article 38, para. 1, AP I; Article 17, para. 3, CultPropConv), as is the use for any purpose whatsoever of a sign resembling the distinctive emblem (Article 17, para. 3, CultPropConv).

## Chapter 17

# THE LAW OF ARMED CONFLICT AT SEA

## I. GENERAL

### 1. Definitions

- 17.01 ‘Ship’ means manned surface and submarine vessels. ‘Aircraft’ means all manned means of transport that are or can be used in the air above sea or land.
- 17.02 ‘Warships’ are ships belonging to the (naval) armed forces of a state bearing the external marks distinguishing warships of its nationality, are under the command of an officer duly commissioned by the government whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline. Warships need not be armed.
- 17.03 ‘Government ships’ are ships owned or operated by a state and used only in governmental non-commercial service (e.g. customs and police vessels, state yachts).
- 17.04 ‘Merchant vessels’ are ships other than warships as defined in Section 17.02 and used for commercial or fishery purposes or profit passenger transport (whether private or owned or controlled by the state) or private ships of non-commercial character (e.g. yachts). The mere fact that a merchant vessel is armed does not change its legal status unless it fulfils the conditions described below in Section 17.25.
- 17.05 Merchant ships converted into warships in accordance with the VIIth Hague Convention of 1907, thus fulfilling the conditions of the definition of warships described in Section 17.02, have the same status as warships. The state which converts a merchant ship into a warship has to publish this as soon as possible in its list of warships.
- 17.06 ‘Support ships’ are ships with civilian crew owned or operated by the government—i.e. government ships as defined in Section 17.03—and which perform support services for the naval forces without being warships.
- 17.07 ‘Military aircraft’ are all aircraft belonging to the armed forces of a state and bearing external marks distinguishing such aircraft of their nationality. The commanding soldier must be a member of the armed forces, and the crew must be subject to military discipline. Military aircraft need not be armed.
- 17.08 ‘State aircraft’ are all aircraft belonging to or used by the state and serving exclusively state functions (e.g. in customs or police service).
- 17.09 ‘Civilian aircraft’ are all aircraft other than military aircraft as described in Section 17.07 and state aircraft as described in Section 17.08, serving exclusively civilian transport of passengers or cargo.

### 2. Scope of Application

- 17.10 The geographical scope of application of the law of armed conflict at sea, i.e. the area in which acts of naval warfare within the meaning of Section 17.14 may be performed, comprises:
- the territory of the parties to the conflict accessible to naval forces,
  - internal waters, archipelagic waters, and the territorial sea of the parties to the conflict,
  - the high seas including exclusive economic zones and
  - the airspace above these land and sea areas
- with the exception of demilitarized zones as mentioned above in Section 3.17.
- 17.11 ‘Internal waters’ are waters on the landward side of the baseline of the territorial sea. ‘Archipelagic’ waters are waters on the landward side of archipelagic baselines. The ‘territorial sea’ comprises the waters on the seaward side of the baseline or archipelagic baseline in a breadth not exceeding twelve nautical miles. The so-called ‘contiguous zone’ does not belong to the territorial sea.

- 17.12 Exclusive economic zones may not be extended more than 200 nautical miles from the baselines which are relevant for the landward limitation of the territorial sea. While coastal states and archipelagic states exercise full sovereignty within their internal waters, archipelagic waters, and territorial sea, they have only certain sovereign rights in exclusive economic zones. The latter do not belong to the high seas, but third states also enjoy freedom of navigation and overflight and certain other freedoms within them. Hence as a matter of principle for naval warfare purposes, the exclusive economic zones of neutral or non-belligerent states belong to the high seas. The rights of coastal and archipelagic states must, however, be taken into due consideration.
- 17.13 The 'high seas' comprise all parts of the sea which do not belong to the exclusive economic zone, the territorial sea, the internal waters, or archipelagic waters. The high seas also comprise the continental shelf of neutral or non-belligerent states. The rights of coastal and archipelagic states must, however, be taken into due consideration.

### *3. Acts of Naval Warfare, Entitlement, and Principles*

- 17.14 Acts of naval warfare within the meaning of this chapter are the use of weapons including the (special) methods of naval warfare and the following measures of economic warfare at sea:

- visit and search,
- ordering to take a specific course (diversion),
- capture,
- requisitioning of cargo,
- bringing in, and
- confiscation.

- 17.15 The following vessels and units are entitled to perform acts of naval warfare:

- warships and other units of naval forces,
- military aircraft, and
- units of land and air forces.

- 17.16 The following vessels and persons may not perform acts of naval warfare:

- state ships other than warships, even when carrying out support services for the naval forces,
- state aircraft other than military aircraft,
- merchant ships,
- fishing boats and other civil ships,
- civil aircraft, and
- prize crews of captured ships.

The crews of all ships and aircraft are, however, entitled to defend themselves against attacks by enemy forces.

- 17.17 Without prejudice to other conditions described in this chapter the following principles shall be observed in all acts of naval warfare, in particular those involving the use of arms:

- The right of the parties to the conflict to adopt methods of warfare is not unlimited.
- Neither the civilian population nor individual civilians may be the object of attacks.
- The parties to the conflict shall at all times distinguish between combatants and civilians.
- Attacks shall be limited strictly to military objectives. The definition of military objectives (*see* above, Sections 7.02-7.05) is applicable also in naval warfare.
- In planning or deciding upon acts of war at sea or in the air all parties to the conflict shall ensure that all feasible precautions are taken in accordance with international law applicable in armed conflicts to avoid losses of civilian lives and damage to civilian objects.

- Ships and aircraft which surrender, e.g. by turning down the flag, communicating their intention on a common radio channel such as a distress frequency or by any other means of clear surrender, shall not be attacked any longer.
  - After each engagement the parties to the conflict shall without delay take all possible action to search for and rescue the shipwrecked, wounded, and sick, to protect them against deprivation and maltreatment, to ensure necessary care, as well as to search for the dead and to protect them from pillage.
- 17.18 Ruses of war are permissible also in naval warfare. Unlike land and aerial warfare, naval warfare permits the use of false flags or military emblems (Article 39, para. 3, AP I). Before opening fire, however, the true flag shall always be displayed.
- 17.19 Perfidy is prohibited also in naval warfare. In particular, it is prohibited to misuse the emblem of the Red Cross or to give a ship, in any other way, the appearance of a hospital ship for the purpose of camouflage. It is also prohibited to make improper use of other distinctive signs equal in status with that of the Red Cross (Article 45 GC II; Article 37 AP I) and of the flag of truce, or to feign surrender or distress by sending a distress signal or by the crew taking to life-rafts. In addition, the principles described in Section 7.38 apply.
- 17.20 It is prohibited to employ weapons or warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment (Article 35, para. 3, AP I).

## II. MILITARY OBJECTIVES AND PROTECTED OBJECTS IN ARMED CONFLICTS AT SEA

### 1. Enemy Warships and Military Aircraft

- 17.21 Without prejudice to the principles applicable in the law of armed conflict at sea, enemy warships and military aircraft may be attacked, sunk, or seized at any time without warning. Upon seizure such ships and the cargo on board become war booty and property of the seizing state, as they do not fall under prize law. Members of the crew falling into the hands of the adversary become prisoners of war. The same applies to persons on board who accompany the armed forces.

### 2. Enemy Merchant Ships, their Cargo, Passengers, and Crew

#### a) Enemy merchant ships

- 17.22 In principle, the enemy character of a merchant ship is determined by the flag which the ship is entitled to fly (Article 57 LondonDecl 1909).
- 17.23 In relation to enemy merchant ships all acts of economic warfare at sea may be performed, without consideration of the cargo and its owner. The same applies in principle to other seagoing private vessels, such as yachts and pleasure-boats, subject to particular provisions of protection. Prize law also applies to wrecks and to ships still in construction. After the capture of an enemy merchant vessel it must be decided in a prize court procedure whether the capture was lawful. Upon confirmation by the prize court the ship becomes property of the capturing state.
- 17.24 A merchant ship belonging to one of the parties to the conflict located in an enemy port at the commencement of the hostilities shall be allowed to depart freely within a reasonable time. It may be furnished with a pass permitting it to proceed to its port of destination or any other port indicated (Article 1HC VI). Merchant ships unable, owing to circumstances of *force majeure*, to leave the enemy port within the period fixed, or which have not been allowed to leave, cannot be confiscated. The belligerent may only detain such ships subject to the obligation to return them after the armed conflict or requisition them on payment of compensation (Article 2 HC VI). These rules do not affect merchant ships whose design shows that they are intended for conversion into warships (Article 5 HC VI).
- 17.25 Without prejudice to the principles applicable in the law of armed conflict at sea enemy merchant ships are military objectives and may be attacked at any time without warning, if they are:
- engaging in acts of war (e.g. laying mines, mine-sweeping, cutting submarine cables and pipelines,

visiting, searching or attacking other merchant ships);

- making an effective contribution to military action (e.g. by carrying military material, troop-carrying or replenishing);
- incorporated into or assisting the enemy's intelligence system, subject to, where necessary, a prior political determination;
- sailing in convoy with enemy warships or military aircraft;
- refusing an order to stop or actively resisting visit, search, or capture;
- armed to an extent that they could inflict damage on a warship; or
- engaging in any other activity bringing them within the definition of a military objective.

**17.26** Enemy merchant ships may only be destroyed if it is impossible to bring them into a port of one's own or that of an ally, and without having first brought the passengers, crews, and ships' papers to a safe place (Article 2 LondonProt 1936). The ship's boats are not regarded as a safe place unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board (Article 2 LondonProt 1936). Where possible, the personal belongings of the passengers and crew shall also be recovered.

### **b) Cargo of enemy merchant ships**

**17.27** The enemy or neutral character of cargo is determined by the nationality of the owner or, if the owner is a stateless person, by his residence (Article 57 LondonDecl 1909). In the case of corporations and companies, their registered office is relevant. Where after the outbreak of hostilities enemy ownership of goods is transferred in transit they retain their enemy character until they reach their destination (Article 60 LondonDecl 1909).

**17.28** Enemy cargo on board enemy ships may be requisitioned and confiscated no matter whether such cargo is contraband or whether it is state or private property.

**17.29** Neutral cargo on board enemy ships is exempt. Such cargo may, however, be requisitioned and confiscated if:

- the cargo is contraband, e.g. goods designated for the adversary and apt to be used for war purposes;
- the ship is breaching a blockade, unless the shipper proves that at the time of loading he neither knew nor should have known of the intention to breach the blockade; or
- the ship is sailing in convoy with enemy warships or engaging in any other activity bringing it within the definition of a military objective.

**17.30** Private and official postal correspondence found on board enemy ships is inviolable. If a ship conveying such postal correspondence is captured the captor shall ensure that the correspondence is forwarded without delay (Article 1 HC XI). Before sinking a ship postal correspondence shall as far as possible be recovered and forwarded. The enemy ship itself, even a mail ship, shall be liable to capture. The prohibition relating to the seizure of postal correspondence does not apply to postal consignments destined for or proceeding from a blockaded port. Parcels are exempt from seizure if they are destined for neutral persons and do not contain any contraband. The captor shall be entitled to open mail bags and inspect their contents. Inviolability shall not apply to contraband contained in letter post.

**17.31** The following objects shall not be confiscated:

- objects belonging to the passengers or crew of a captured ship and intended for their personal use;
- material exclusively intended for the treatment of the wounded and sick, the prevention of disease, or religious purposes, provided that the transport of such materiel has been approved by the capturing party (Article 35 GC I; Article 38 GC II);
- instruments and other material belonging to relief societies;
- cultural property;
- postal correspondence of the national Prisoner of War Information Bureaux (Article 122 GC III) and the Central Prisoners of War Information Agency (Article 123 GC III);

- postal consignments and relief shipments destined for prisoners of war and civilian internees as well as postal consignments dispatched by these persons;
- relief shipments intended for the population of occupied territory, provided that the conditions attached by the capturing party to the conveyance of such shipments are observed (Article 59 GC IV); and
- relief shipments intended for the population of any territory under the control of a party to the conflict other than occupied territory (Article 70 AP I).

### **c) Crews and passengers of enemy merchant ships**

- 17.32 The masters, officers, and crews of enemy merchant ships, if they are nationals of the enemy state, become prisoners of war (Article 4 A No. 5 GC III) unless they promise in writing not to undertake, while hostilities last, any service connected with the armed conflict (Article 6 HC XI). If they prove that they are nationals of a neutral state, they do not become prisoners of war (Article 5 HC XI). The provisions on releasing crew members do not apply if the ship has been engaging in any activity bringing it within the definition of a military objective.
- 17.33 Passengers of enemy merchant ships shall, in general, be released. Passengers who have taken part in hostilities or are travelling to join the enemy armed forces may be detained. They become prisoners of war if they belong to one of the categories enumerated in Article 4 of the Third Geneva Convention. Should any doubt arise as to whether they belong to any of these categories, they enjoy the protection of prisoners of war until such time as their status has been determined by the competent tribunal (Article 5 GC III). Passengers who are members of enemy armed forces shall become prisoners of war.

### *3. Protected Enemy Vessels (Except Hospital Ships and Ships Under Similar Protection)*

- 17.34 The following enemy ships enjoying special protection may neither be attacked nor seized:
- vessels carrying material intended exclusively for the treatment of wounded and sick or for the prevention of disease, provided that the particulars regarding the consignment have been approved (Article 38 GC II),
  - vessels carrying relief goods for the civilian population of an occupied territory, provided that the conditions connected with the transport are fulfilled (Article 23 GC IV),
  - vessels that, with the consent of the belligerent parties, are carrying relief consignments for the civilian population of territory under the control of a party to the conflict other than occupied territory (Article 70 AP I),
  - vessels used exclusively for fishing along the coast or small boats employed in local trade (Article 3 HC XI),
  - vessels charged with religious, non-military scientific, or philanthropic missions (Article 4 HC XI),
  - vessels engaged exclusively in the transfer of cultural property (Article 14 CultPropConv),
  - vessels used exclusively for the transport of parlementaires or exchanging prisoners of war (cartel ships),
  - vessels furnished with an acknowledged letter of safe conduct, provided that they observe the restrictions imposed on them, and
  - without prejudice to the right of capture, passenger ships on the high seas used exclusively for the transport of civilians while engaged in such transport.

The right to stop and search such ships remains unaffected.

- 17.35 The special protection ends if such vessels do not comply with conditions lawfully imposed upon them, if they abuse their mission, or engage in any other activity bringing them within the definition of a military objective.

### *4. Protected Enemy Aircraft (Except Medical Aircraft)*

17.36 The provisions of Sections 17.34 and 17.35 are also relevant for enemy aircraft serving the enumerated purposes and operating exclusively in established corridors. Such aircraft may be requested to put down on land or water to be searched.

### *5. Other Protected Objects*

17.37 Submarine cables and pipelines connecting occupied territory with neutral territory shall not be seized or destroyed. Submarine cables and pipelines connecting different parts of the territory of one party to the conflict, or connecting the territories of parties to the conflict and neutrals, may be interrupted within the law of naval warfare in case of military necessity.

### *6. Targets on Land*

17.38 The following rules apply to targets on land subject to the provisions on the protection of the civilian population and the general principles of the law of naval warfare:

- (a) The bombardment of defended localities, ports, and buildings situated on hostile coasts is permitted.
- (b) The mining of ports and coastal installations alone does not justify bombardment (Article 1 HC IX).
- (c) Military objectives located within undefended localities or ports may be bombarded if there are no other means available to destroy these objectives and when the local authorities have not complied with a summons within a reasonable period of time (Article 2 HC IX). The absence of such summons may be justified by urgent military reasons. If there is a possibility that these objectives could be destroyed by landing forces, bombardment shall not be permissible.

## **III. SPECIAL PROVISIONS CONCERNING MEANS AND METHODS OF NAVAL WARFARE**

### *1. Mine Warfare*

#### **a) Types of mine warfare: principles**

17.39 In laying mines the following purposes are distinguished:

- protective mining, i.e. in friendly territorial and internal waters;
- defensive mining, i.e. in international waters for the protection of passages, ports and their entrances; and
- offensive mining, i.e. in hostile territorial and internal waters or in waters pre-dominantly controlled by the adversary.

17.40 Any mode of minelaying, whether before or after the beginning of an armed conflict, shall be subject to the principles of effective surveillance, risk control, and warning (HC VIII). In particular, all feasible measures of precaution shall be observed for the safety of peaceful navigation.

#### **b) Mine laying prior to the beginning of an armed conflict**

17.41 Protective mining is permissible even in times of crisis, subject to the right of innocent passage of foreign ships through territorial waters. If it is indispensable for the protection of its security and if the ships have been appropriately warned, the coastal state may temporarily prohibit innocent passage through specific parts of its territorial waters. In the case of straits serving international navigation there is no right of protective mining in times of crisis.

#### **c) Mine laying during armed conflicts**

17.42 During an armed conflict protective mining is permissible without the limitations applicable before it begins. As a matter of principle, defensive mining is permissible only after the beginning of the armed

conflict; the shipping lanes of neutral and non-belligerent states shall be kept open to an appropriate extent, if military circumstances so permit. Acts of aggression not amounting to armed attacks do not suffice as a motive. Offensive mining may not be undertaken solely to interdict merchant shipping.

#### **d) Duties after the cessation of hostilities**

17.43 At the close of hostilities the conflicting parties must do their utmost to remove, for the sake of safe shipping, the mines they have laid (Article 5 HC VIII).

#### **2. Torpedoes**

17.44 Torpedoes which have missed their mark must become harmless (Article 1 HC VIII). When using torpedoes, action shall be taken in accordance with the principles of naval warfare to ensure that only military objectives and not other ships and objects are damaged.

#### **3. Missiles**

17.45 For the use of missiles at sea, including cruise missiles, the general principles of the law of naval warfare apply.

#### **4. Submarine Warfare**

17.46 Submarines are subject to the same rules of international law as surface vessels (Article 1 LondonProt 1936).

17.47 Merchant ships which meet the requirements of a military objective may also be attacked and sunk by submarines without prior warning. A submarine intending to capture a hostile merchant ship which does not meet the requirements of a military objective must first surface. It may not sink a merchant ship without having first brought the passengers, crew, and ship's papers to a safe place (Article 2 LondonProt 1936). If the merchant ship refuses to stop on being duly summoned or puts up active resistance to visit or search, the submarine shall be allowed to attack without warning.

#### **5. Maritime Exclusion Zones**

17.48 A belligerent may establish an exclusion ('no-fly') zone as an exceptional measure in pursuance of one of the following aims, or a combination thereof:

- (a) to identify the geographic area of military operations;
- (b) to subject civil navigation and aviation to restrictions, especially in the immediate vicinity of military operations; or
- (c) to enhance the protection of
  - (i) works and installations containing dangerous forces;
  - (ii) objects indispensable for the survival of the civilian population;
  - (iii) objects and installations for the medical treatment of wounded and sick civilians or combatants;
  - (iv) persons and objects protected under international humanitarian law; or
  - (v) other objects and installations of high value.

17.49 Should a belligerent establish an exclusion zone, both inside and outside the zone the same legal norms would apply.

- 17.50
- a) A belligerent is not absolved of its duties under the international law of armed conflict by establishing exclusion zones.
  - b) The establishment of an exclusion ('no-fly') zone does not diminish the obligation to respect within the zone the protection of civilians and civilian objects.
  - c) Nothing in Sections 1048–1049 should be deemed to derogate from the right of a party to an armed conflict to control navigation and civil aviation in the immediate vicinity of military operation.

## 6. Blockade

- 17.51 A blockade is a method of naval warfare that aims at preventing all vessels or aircraft from entering or exiting enemy coastal areas or ports. The purpose of blockades is to block supplies to the adversary without directly meaning to occupy territory. Starvation of the civilian population as a method of warfare is prohibited (Article 49, para. 3, in connection with Article 54, para. 1, AP I). It is also prohibited to hinder relief shipments for the civilian population (Article 70 AP I).
- 17.52 A blockade shall be declared and notified by the government of the party to the conflict concerned or by a commander authorized by that government (Article 8 LondonDecl 1909). It shall also be notified to the neutral powers (Article 11 LondonDecl 1909). Any extension and lifting of the blockade shall be declared and announced in the same manner (Article 12 LondonDecl 1909). A declaration of blockade shall contain the following details:
- the date on which the blockade begins;
  - geographical boundaries of the blockaded coastal strip;
  - the period granted to neutral ships for departure (Article 9 LondonDecl 1909).
- 17.53 A blockade, in order to be binding, must be effective (Article 4 ParisDecl 1856). It must be maintained by armed forces sufficient to prevent access to the blockaded coast. Long-distance blockades are also permissible, i.e. the obstruction and control of the blockaded coast or ports by armed forces keeping a longer distance from the coastline. A naval blockade shall be considered to be effective if ship-to-shore supplies are cut off. Air transport need not be stopped. A barricade achieved by other means, e.g. by ships scuttled in the entrance, does not constitute a blockade. Neither will the mining of coasts and ports compensate for the absence of warships even if all movements are temporarily stopped by mines. The effectiveness of a blockade is not suspended if the blockading force is temporarily withdrawn on account of bad weather (Article 4 LondonDecl 1909) or in pursuit of a blockade runner. A blockade which ceases to be effective is no longer binding. The blockade shall end with the repulse of the blockading forces by the enemy or with their complete or partial destruction, even if new forces are charged with this task without delay. In this case the blockade must be declared and notified anew (Article 12 LondonDecl 1909).

# IV. HOSPITAL SHIPS

## 1. General

- 17.54 The following ships and boats enjoy special protection in naval warfare in accordance with the following provisions, so that they shall not be attacked, sunk, or captured under any circumstances:
- military hospital ships (Article 22 GC II),
  - hospital ships operated by national Red Cross and Red Crescent societies, officially recognized relief societies, or private persons, whether or not they are members of a party to the conflict, or citizens of a state not party to the conflict (Articles 24, 26 GC II),
  - coastal rescue craft operated by a state or by officially recognized relief societies, as far as military necessity permits (Article 22, 24 GC II), and
  - ships specially designed to transport wounded and sick civilians (Article 21 GC IV; Article 22, para. 1, AP I)

## 2. Conditions for Protection and Identification

- 17.55 Hospital ships are ships exclusively designed to assist, treat, and transport the wounded, sick, and shipwrecked. Their names and descriptions shall be notified to the parties to the conflict not later than ten days before they are employed for the first time (Article 22 GC II).
- 17.56 Hospital ships shall be distinctively marked as follows:
- all exterior surfaces shall be white;
  - the distinctive emblem of the Red Cross shall be painted once or several times on each side of the hull and on the horizontal surfaces, as large as possible, so as to be clearly visible from sea and air;

- a white flag with a red cross shall be flown as high as possible, visible from all sides.

In addition, all hospital ships shall fly their national flags; neutral ships shall further hoist the flag of the party to the conflict whose direction they have accepted (Article 43 GC II). As far as possible, their painting and distinctive emblems shall be rendered visible at night. Other identification systems, e.g. internationally recognized light, radio, and electronic signals, are also permissible (Articles 5–6 Annex I AP I). Lifeboats of hospital ships, coastal rescue boats, and all small craft used by the medical service shall be marked in the same manner as hospital ships (Article 43, paras. 3 and 4, GC II; Article 23, para. 1, AP I).

### *3. Rights and Obligations*

**17.57** Hospital ships shall afford assistance to all wounded, sick, and shipwrecked without distinction of nationality (Article 30 GC II). They shall by no means be employed for any military purposes.

**1058** Hospital ships may be equipped with radio systems. They may not, however, possess or use a secret code for their wireless or other means of communication (Article 34 GC II). Also permissible is (Article 35 GC II):

- the use of apparatus designed to facilitate navigation or communication;
- the transport of medical supplies and personnel over and above the ship's requirements (Article 35 GC II);
- the use of portable arms by the personnel of a hospital ship for the maintenance of order, for their own defence, or for that of the wounded and sick;
- the carrying of portable arms and ammunitions taken from the wounded, sick, or shipwrecked and not yet handed over to the proper service; and
- the taking on board of wounded, sick, or shipwrecked civilians (Article 22, para. 1, AP I).

**17.59** Any hospital ship in a port which falls into the hands of the adversary shall be authorized to leave the said port (Article 29 GC II). During and after an engagement, hospital ships will act at their own risk. Hospital ships shall not hamper the movements of the combatants (Article 30 GC II).

**17.60** While hospital ships are not liable to capture, they are subject to the right of control and visit accorded to the parties to the conflict (Article 31 GC II). Any warship may request the handing over of the wounded, sick, and shipwrecked by hospital or other ships, no matter which nationality such ships have, provided that the state of health of the wounded and sick allows such action and that the receiving warship can provide the facilities necessary for medical treatment (Article 14 GC II; Article 30 AP I).

**17.61** The belligerents are not obliged to accept assistance from hospital ships. They may order them off, make them follow a certain course, control the use of their means of communication, and, if the gravity of the circumstances requires, detain them for a period of up to seven days (Article 31, para. 1, GC II). A commissioner may temporarily be put on board to monitor the execution of such orders (Article 31, para. 2 GC II). For the purpose of control, the parties to the conflict may also send neutral observers on board (Article 31, para. 4, GC II).

### *4. Discontinuance of Protection*

**17.62** If such ships are misused for military purposes or act in any other way contrary to their obligations, in particular by clearly resisting an order to stop, to turn away, or to follow a distinct course, they lose their protected status, after due warning has been given (Article 34 GC II).

### *5. Personnel and Crew*

**17.63** The religious, medical, and hospital personnel of hospital ships and their crews shall be respected and protected; they may not be captured during the time they are in the service of the hospital ship, whether there are wounded and sick on board or not (Article 36 GC II; *see* above, Sections 12.13-12.19 and 15.18-15.26).

**17.64** The personnel of hospital ships, including the crew, shall wear a white armlet bearing the distinctive emblem. Their armlets or identity cards may not be taken away from them (Article 42 GC II).

## Chapter 18

# THE LAW OF NEUTRALITY

## I. GENERAL

- 18.01 Neutrality (derived from the Latin *neuter*: neither of both) is defined in international law as the status of a state which is not participating in an armed conflict between other states. Neutral status gives rise to rights and duties in the relationship between the neutral state on one hand and the parties to the conflict on the other.
- 18.02 The sources of the international law of neutrality are customary law and, for certain questions, international treaties (HC V; HC XIII).
- 18.03 The Charter of the United Nations and decisions of the Security Council based on the Charter may in certain circumstances modify the traditional law of neutrality. Therefore, enforcement measures taken by the United Nations are governed by particular rules different from the traditional law of neutrality. The general law of neutrality, however, has not been revoked by the Charter of the United Nations.
- 18.04 Every state is free to participate in an armed conflict, but only on the side of the victim of an armed attack (collective self-defence), not on that of the aggressor.
- 18.05 Permanent neutrality is a status under which a state undertakes in peacetime a legal obligation to remain neutral in case of an armed conflict between two other states. This status requires the neutral state in peacetime not to accept any military obligations and to abstain from acts which would render the fulfilment of its obligations of neutrality impossible should the armed conflict occur. A distinction must be made between such a *legal obligation* to remain neutral and a *neutrality policy*.
- 18.06 Except for those rules which, in a legally based permanent neutrality, apply in times of peace, neutrality begins with the outbreak of an armed conflict of significant scope between two other states.
- 18.07 Neutral status ceases with the end of an armed conflict or by the neutral state becoming a party to the conflict. However, neither limited actions of armed defence of neutrality nor breaches of single duties of neutrality by the state alone necessarily result in that state becoming a party to the conflict.

## II. THE RIGHTS AND DUTIES OF NEUTRAL STATES

### 1. General provisions

- 18.08 The territory of a neutral state is inviolable. It is prohibited to commit any act of hostility whatsoever on such territory (Article 1HCV).
- 18.09 The neutral state is bound to repel any violation of its neutrality, if necessary by force (Article 5 HC V; Articles 2, 9, 24 HC XIII). This obligation, however, is limited by the international legal prohibition of the use of force. The use of military force outside the neutral state's own territory for the purpose of defending its neutrality is permissible only if it is legitimate self-defence against an armed attack.
- 18.10 A neutral state must not assist a party to the conflict. It is especially prohibited to supply warships, ammunition, or other war materials (Article 6 HC XIII). Humanitarian assistance for victims of the conflict does not constitute a violation of neutrality even where it is for the benefit of only one party to the conflict (Article 14 HC V).
- 18.11 A neutral state may in no circumstances participate in acts of war by a party to the conflict.
- 18.12 State practice has modified the former rule of both customary and treaty law that a neutral state is not bound to prohibit export and transit of war material by private persons for the benefit of one of the parties to the conflict (Article 7 HC V). To the extent that arms export is subject to control by the state, the permission of such export is to be considered as a non-neutral service.

- 18.13 Citizens of neutral states may, at their own risk, enter into the service of one of the parties to the conflict (Article 6 HC V). In such a case, they must be treated as nationals of the respective party to the conflict (Article 17 HC V). The prohibition against recruiting, using, financing, or training mercenaries must be respected (Article 47 AP I; Mercenary Convention; *see* above, Section 5.03).
- 18.14 It is prohibited to recruit and raise troops on neutral territory to assist one of the parties to the conflict (Article 4 HC V).

## 2. War on Land

- 18.15 Troop or supply movements must not be carried out on neutral territory (Article 2 HC V). The neutral state may allow the transit of wounded persons and relief goods (Article 14 HC V).
- 18.16 It is not considered a non-neutral service if a neutral state permits the use by a party to the conflict of generally accessible means of communications on its territory. The neutral state must not, however, install or permit on its territory special means of communication for a party to the conflict (Article 3 HC V).
- 18.17 Neutral states must intern forces of the parties to the conflict trespassing on neutral territory (Articles 11 and 12 HC V). Escaped prisoners of war who are allowed to remain in the territory of the neutral state may be assigned a specific place of residence (Article 13 HC V).

## 3. Naval Warfare

### a) General

- 18.18 The internal waters, archipelagic waters, and territorial sea of neutral states must be respected (Article 1 HC XIII). It is prohibited to commit any act of war in such waters (Article 2 HC XIII).
- 18.19 The parties to the conflict may not use neutral ports or territorial waters as a base for naval operations (Article 5 HC XIII).
- 18.20 Acts of war are prohibited in neutral waters to the same extent as on neutral territory (Article 2 HC XIII). The acts of war which are forbidden include stop, visit, and search, orders to follow a specific course, the exercise of the law of prize, and capture of merchant ships (Article 2 HC XIII).
- 18.21 When a ship has been captured by a party to the conflict in the waters of a neutral state, the latter must, as long as the prize is still within its waters, use all means at its disposal to obtain the release of the prize and its crew. The prize crew must be interned (Article 3, para. 1, HC XIII).
- 18.22 A neutral state may demand the release of a ship captured within its waters even if the ship has already left those neutral waters (Article 3, para. 2, HC XIII).
- 18.23 If a ship of a neutral state takes wounded, sick, or shipwrecked persons on board, it must, to the extent required by international law, ensure that these persons take no further part in hostilities (Article 15 GC II).
- 18.24 As regards the laying of sea mines, neutral states are subject to the same safety regulations as the parties to the conflict (Article 4, para. 1, HC VIII). They must notify the location of minefields to the government of maritime states without delay (Article 4, para. 2, HC VIII).
- 18.25 A neutral state is bound to use all means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to be engaged in acts of war against the party to a conflict. It is also bound to prevent the departure of any vessel that has been adapted entirely or partly within its jurisdiction for use in war (Article 8 HC XIII).

### b) Innocent passage through territorial sea and archipelagic waters; transit passage

- 18.26 Passage through the territorial sea and archipelagic sea lanes of a neutral state by warships belonging to and prizes taken by a party to the conflict does not constitute a violation of neutrality (Article 10 HC XIII). While transit passage through international straits and archipelagic sea lanes passage include the right of overflight (Articles 38 and 53 of the United Nations Convention on the Law of the Sea) and the right of submarine navigation, there are no such rights of innocent passage outside those waterways. The right of transit or innocent passage is subject to the provisions set out in Sections 17.27-17.37.

- 18.27 Warships of the parties to the conflict are, as a matter of principle, not permitted to remain in neutral ports, roadsteads or territorial sea for more than twenty-four hours. The neutral state may prolong this period, but may also altogether prohibit such vessels from remaining in its waters (Article 12 HC XIII). Warships of the parties to the conflict may not extend their stay beyond the permissible time except on account of damage or bad weather. They must depart as soon as the cause of the delay has ceased to exist (Article 14 HC XIII).
- 18.28 In neutral ports and roadsteads, warships of the parties to the conflict may only carry out such repairs as are absolutely necessary to restore their seaworthiness. Restoring the combat readiness of these ships is no cause for extending the permissible duration of their stay. Activities to increase their fighting capability are also prohibited (Article 17 HC XIII).
- 18.29 Warships of the parties to the conflict may neither complete their crews nor replenish or increase their armament or their military supplies in neutral waters (Article 18 HC XIII).
- 18.30 Warships of the parties to the conflict may only revictual in neutral ports and roadsteads to bring up their supplies to a normal peacetime level (Article 19 HC XIII).
- 18.31 In neutral ports and roadsteads, warships of the parties to the conflict may only ship sufficient fuel to enable them to reach the nearest port in their own country (Article 19 HC XIII). These ships may not again replenish their fuel supplies in a port of the same neutral state before three months have passed (Article 20 HC XIII).
- 18.32 If a warship of a party to the conflict stays in a neutral port without being entitled to do so and does not leave this port notwithstanding notification, the neutral state may detain the ship and prevent it from departing for the duration of the armed conflict (Article 24 HC XIII). The crew of the detained ship may also be detained. Its members may be left on the ship or brought either to another vessel or ashore. In any case, a number of personnel sufficient to look after the vessel must be left on board.
- 18.33 A prize may only be brought into a neutral port if it is absolutely necessary on account of unseaworthiness of the prize, bad weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end (Article 21 HC XIII).
- 18.34 If, after the cause for a stay has ceased to exist, a prize does not leave even after it has been ordered to do so by the neutral authorities, the neutral state must seek to release the prize and its crew. The prize crew must be interned (Article 21 HC XIII). The same rule applies when a prize has entered a neutral port without authorization (Article 22 HC XIII).
- 18.35 When warships of several parties to the conflict are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ships belonging to one party and the departure of the ships belonging to the other party (Article 16 HC XIII).
- 18.36 A neutral state may allow warships of a party to the conflict to employ its pilots (Article 11 HC XIII). It is bound to prevent, within the means at its disposal, any violation of the rules of neutrality within its waters and to exercise such surveillance as is required for this purpose (Article 25 HC XIII).
- 18.37 A neutral state must apply impartially to all parties to the conflict any conditions, restrictions, or prohibitions which it imposes on admission into its ports, roadsteads, or waters of warships or prizes belonging to the parties to the conflict (Article 9 HC XIII). A neutral state may forbid a warship which has failed to comply with its directions or which has violated its neutrality to enter its ports or roadsteads (Article 9 HC XIII).

### **c) Control by the parties to the conflict**

- 18.38 Warships of a party to the conflict are entitled to stop, visit, and search merchant ships flying the flag of a neutral state on the high seas and control the contents and destination of their cargo.
- 18.39 Warships of a party to the conflict may use only such force as is necessary against neutral merchant ships to exercise such control. In particular, neutral merchant ships which, although subject to control by a party to the conflict, resist inspection may be damaged or destroyed if it is not possible to prevent them from continuing their voyage by other means. The captain of the neutral ship shall be warned in an appropriate manner. Rescue of shipwrecked persons must be ensured.
- 18.40 To simplify inspection, a party to the conflict may, subject to the approval of the neutral state concerned, issue an inspection document (navicert) to the neutral vessel in the port of loading. A navicert issued by one

party to the conflict is not binding on the other party. The fact that the ship carries a navicert of another party to the conflict does not justify any more far-reaching measures of control.

- 18.41 The right of control shall not apply to merchant ships flying neutral flags and escorted by a neutral warship (convoy). In this case, however, a warship of a party to the conflict may request the commander of the neutral warship to specify the type and destination of the cargo.
- 18.42 If the cargo contains goods essential for war which are destined for the port of an adversary, such goods may be captured by the warship of the party to the conflict ('absolute contraband'). The parties to the conflict may notify to the neutral states lists of the goods which they deem to be essential for war. Any goods destined for the administration or the armed forces of the opposing party to the conflict will likewise be deemed contraband ('conditional contraband').
- 18.43 A ship carrying contraband is also subject to capture.
- 18.44 A captured ship (prize) must be brought as safely as possible to a port of a party to the conflict or of a state allied with that party. In that port the permissibility of the capture of ship and cargo are to be reviewed by a prize court. Ship and cargo may be confiscated by the order of a prize court.
- 18.45 If suspicion that a ship is carrying contraband, which led to control measures, proves unfounded, and if the neutral ship has not given rise to that suspicion, the party to the conflict is obliged to compensate for any damage caused by the delay.
- 18.46 The parties to the conflict may not hold prize court proceedings on neutral territory or on a vessel in neutral waters (Article 4 HC XIII).

#### **d) Protection of neutral merchant shipping**

- 18.47 Warships of neutral states may escort merchant ships flying the flag of the same or another neutral state.
- 18.48 On international shipping routes and on the high seas, warships of neutral states may sweep mines to the extent necessary to protect and maintain neutral shipping. Such minesweeping operations do not constitute a non-neutral service for the benefit of the adversary of the minelaying party.

#### **4. Air Warfare**

- 18.49 The airspace of a neutral state is inviolable (Article 40 HRAW 1923; Rules 170 and 171 HPCR Manual).
- 18.50 Parties to a conflict are forbidden to send military aircraft, missiles, or unmanned aerial vehicles into neutral airspace (Article 40 HRAW 1923; Rule 170 HPCR Manual). This is without prejudice to the right of transit passage through straits used for international navigation or archipelagic sea lanes passage and to the entry by military aircraft in distress (Rules 170, 172 HPCR Manual; *see* above, Section 1126).
- 18.51 A neutral state is bound to prevent violations of its airspace. Aircraft which enter such space must be forced to leave or to put down. The crews of military aircraft of a party to the conflict who have been brought down must be interned (Article 42 HRAW 1923; Rules 168 and 172, lit. b HPCR Manual).
- 18.52 Medical aircraft may be allowed to overfly the territory of a neutral state and to land therein (Article 37 GC I; Article 40 GC II; Article 31 AP I; Article 17 HRAW 1923).
- 18.53 Overflight and stopover require permission. A neutral state may place conditions and restrictions on overflight (Article 37, para. 2, GC I; Article 40, para. 2, GC II; Article 31 AP I).
- 18.54 The right of neutral aircraft to overfly the territory of the parties to the conflict is regulated by the general rules of international law on the protection of national airspace and the rules of international air traffic.
- 18.55 The relevant rules of naval warfare apply to the control, capture, and confiscation of neutral aircraft above sea areas and to the treatment of their passengers and crew (Article 35 HRAW 1923). An aircraft which does not carry clearly visible neutral national emblems may be treated as enemy aircraft.

#### **5. Military Uses of Outer Space**

- 18.56 Where military activities conducted in outer space relate to an armed conflict, the general rules of the law of neutrality must be observed.

## Chapter 19

# THE LAW OF NON-INTERNATIONAL ARMED CONFLICT

## I. GENERAL

- 19.01 Many armed conflicts today take place largely within the boundaries of a state and involve confrontations between the authorities of a state and armed groups or among armed groups that do not operate under state authority at all. Such armed conflicts are referred to as non-international and although, by definition, they do not occur between sovereign states, there is a body of international law which applies to them nonetheless.
- 19.02 To better understand the law of non-international armed conflict, it is important to consider how two separate bodies of law for armed conflict – international and non-international – originally arose. Throughout the course of 20th century international law-making, many states took the position that a number of the rules applicable in *international* armed conflict – particularly those associated with the status of combatants – would limit their rights of action if applied in *non-international* armed conflicts. The concern that the application of the law applicable in international armed conflict to internal situations could obstruct the state's ability to pursue the conflict was not fundamentally based on concern about restrictions related to the conduct of hostilities. It was based, instead, on uneasiness about the legal implications for the status of parties to the conflict, and, in particular, on states' concerns about restrictions on their ability to prosecute and punish individuals under domestic law for their belligerent acts which constituted crimes under that law. These considerations gave rise to the legal conclusion that the application of provisions on humanitarian protection should not affect the legal status of the parties to the conflict.
- 19.03 Certain general principles of conduct underpin all military operations, regardless of the nature of the conflict. These principles are
- the distinction between fighters and civilians, as well as between military objectives and civilian objects,
  - the prohibition of superfluous injury or unnecessary suffering and
  - humane treatment without discrimination.
- 19.04 There is an important trend in the law towards expanding the scope of application of the rules related to the conduct of hostilities originally contained only in the law of international armed conflict to situations of non-international armed conflict, while, at the same time, respecting the distinction which continues to exist in these two types of conflicts, in particular on matters of status of the fighters.
- 19.05 International humanitarian law generally does not apply to internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- 19.06 Even in cases not covered by existing treaty rules, the principles of humanity must guide all parties.

## II. APPLICABLE LAW

- 19.07 Specific conventional rules on humanitarian protection in non-international armed conflicts have first been developed with Article 3 common to the Geneva Conventions. They provide for fundamental protections of persons taking no part or no longer an active part in hostilities, a right of initiative of impartial humanitarian bodies, such as the International Committee of the Red Cross, and an encouragement to the parties to the conflict to bring into force, by means of special agreements, all or part of the other provisions of the Geneva Conventions.
- 19.08 Certain subsequent treaties also provide for fundamental protections in non-international armed conflicts (Article 19 CultPropConv).
- 19.09 An attempt to develop and supplement Article 3 common to the Geneva Conventions led to controversial negotiations from 1970 to 1977 and had to be reduced to a number of provisions applicable to armed

conflicts which take place in the territory of a contracting party between its armed forces and ‘dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement’ the rules so achieved (AP II).

- 19.10 For some treaties the scope of applicability was subsequently expanded to include armed conflicts not of an international character (BlindingWeaponsProt; MinesProt as of 1996; Prot2CultPropConv; Article 1, paras. 2–6, Inhumane WeaponsConv as of 2001). Other treaties were enacted with a broad scope right from their first entry into force (LandMinesConv; ClusterConv; BiologicalWeaponsConv; ChemicalWeaponsConv).
- 19.11 Article 8, sub-para. 2 e, of the Rome Statute on the International Criminal Court confirms the existence of rules limiting methods and means of combat in non-international armed conflicts.
- 19.12 As confirmed by current customary international humanitarian law, many rules on means and methods of fighting and protection are likewise applicable in international as in non-international armed conflicts.

### **III. LEGAL DISTINCTION BETWEEN INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS**

- 19.13 A distinction between international and non-international armed conflict remains part of the law of armed conflict, most especially for purposes of the status of fighters.
- 19.14 The right to participate in armed hostilities is generally limited to combatants of a state who meet the requisite elements. Such right may be exercised only by forces sufficiently organised within a system of international accountability to ensure to the maximum extent possible its responsible exercise.
- 19.15 In non-international armed conflicts fighters cannot claim status as prisoners of war upon detention, neither are their actions exempt from criminal prosecution.

### **IV. COMPLIANCE**

- 19.16 Armed forces should comply with the rules applicable in international armed conflicts in the conduct of their operations in all armed conflicts, however such conflicts are characterized (*see* above, Section 3.09).
- 19.17 Also unprivileged fighters must be treated humanely.
- 19.18 All fighters in non-international armed conflicts must comply with the rules applicable in such conflicts.
- 19.19 Reciprocal compliance with international humanitarian law should be encouraged, but in no case may humanitarian protection be made subject to compliance by the other side.
- 19.20 The detaining state must endeavour to grant amnesties for mere participation in hostilities.

### **V. TERMINATION OF HOSTILITIES**

- 19.21 The termination of hostilities in non-international armed conflicts is often a complex process in which rules of international humanitarian law continue to exist and may influence post-conflict peacebuilding (*see* above, Section 3.57).

## Chapter 20

# THE LAW OF INTERNATIONAL PEACE OPERATIONS

## I. GENERAL

20.01 International peace operations comprise all peacekeeping operations and peace enforcement operations conducted in support of diplomatic efforts to establish and maintain peace. The modern concept of peace operations goes beyond traditional peacekeeping, as it combines elements of peacekeeping with peacemaking and peacebuilding.

## II. APPLICABLE LAW

20.02 In peace operations today, a complex legal regime comprising peacetime rules of international law, international humanitarian law and national law must be adhered to and properly implemented.

20.03 Where peace operations are mandated by the Security Council in accordance with Chapter VI or VII of the UN Charter, or by a regional arrangement under Chapter VIII, participating states will operate on the basis of relevant international resolutions. These resolutions may flow from cease-fire agreements, peace agreements and assessments and reports such as those from the UN Secretary-General.

20.04 In peace operations, the significance of human rights obligations may be seen under three different aspects:

- Ideally, there would be an express mandate by the Security Council and/or a regional organisation requesting not only all parties to the conflict, but also the peacekeeping force to protect human rights.
- Even where such commitment has not been expressly stated, peace operations are to respect the law of the receiving state including its obligations under international law of which human rights are an important part.
- Finally, the human rights obligations of the sending state apply extraterritorially for acts committed within their jurisdiction (*see above*, Chapter 14).

20.05 When peace operations include elements of peace enforcement, international humanitarian law must be applied.

## III. MANDATES

20.06 Mandates for peace operations should be issued by the Security Council in the exercise of its primary responsibility for the maintenance of international peace and security. In the absence of a Security Council mandate, operations must be based on another international legal basis, e.g. host state consent. The drafters of mandates should consider that the relevant provisions are to be implemented at different levels and for different purposes.

20.07 The term 'mandate' should be used to refer exclusively to the authorisation and tasks under public international law.

20.08 Mandates have to be rather broad to cover evolving scenarios. There is a clear need for realistic objectives and a reasonable degree of specificity in order to provide a precise legal framework for the mission.

20.09 Decision-makers should consider the adoption of a mandate allowing the international military force to intervene in cases of illegal use of force against civilians in the area of operations. When doing so, they should take the means and capabilities of the international military force into account.

## IV. RULES OF ENGAGEMENT (ROE) AND USE OF FORCE

## **BEYOND SELF-DEFENCE**

- 20.10 Rules of engagement are directives to operational commanders, which delineate the parameters within which force may be used by designated international peace operations personnel. They should be founded on Security Council resolutions and must be issued and implemented in accordance with the provisions of international law. ROE should be established for each peace operation. They should be clear and simple.
- 20.11 While remaining predominantly defensive in nature, the ROE allow for the potential need for offensive action if necessary, in order to ensure the implementation of the tasks assigned. The ROE also provide a definition of the circumstances under which the use of force may be justified.
- 20.12 The ROE define the degree and the manner in which force may be applied and are designed to ensure that the application of force is controlled and legal. They inform commanders of the constraints imposed and the degrees of freedom they have, in the course of carrying out their mission.
- 20.13 The ROE are to be translated in a clear and concise way into the language(s) of each participating nationality. Throughout the conduct of military operations, where armed force is to be used, peace operations personnel must comply with the international legal principles of proportionality, the minimum use of force and the requirement to minimise the potential for collateral damage.
- 20.14 Whenever the operational situation permits, every reasonable effort must be made to resolve any hostile confrontation by means other than the use of force (e.g. through negotiations). Any force used must be limited in its intensity and duration to what is necessary to achieve the objective. In some circumstances operational urgency may dictate the immediate use of deadly force. The use of force must be commensurate with the level of the threat and all necessary measures are to be taken to avoid collateral damage.
- 20.15 During peace operations, use of force beyond self-defence may only be used in the circumstances as specified in the ROE.
- 20.16 In the context of lessons learned studies a data base on the use of force should be developed and made available for future planning.

## **V. AUTHORITY COMMAND AND CONTROL**

- 20.17 A more distinct regulation of command and control in UN peace operations could add to their effectiveness and help to make responsibilities more transparent. Sending states and the UN should cooperate in its implementation.
- 20.18 The UN should recognise its human rights and international humanitarian law obligations and cooperate with sending states to ensure their accountability for wrongful acts.

## **VI. CHILD SOLDIERS**

- 20.19 International humanitarian law and the UN Convention on the Rights of the Child set 15 as the minimum age for military recruitment and participation in armed conflict (Article 77, para. 2, AP I; Article 38 ChildConv; *see* above, Sections 5.06 and 8.05). The Optional Protocol to the UN Convention on the Rights of the Child on the involvement of children in armed conflict states that governments and armed groups are prohibited from using children under the age of 18 years in armed conflict. It also bans compulsory recruitment of children under the age of 18 years and it bans voluntary recruitment of children under the age of 18 years by armed groups.
- 20.20 A child soldier is any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for force marriage. It does not, therefore only refer to a child who is carrying or has carried arms.
- 20.21 The considerable challenges in healing and reintegrating children into their communities in the aftermath of conflict is sometimes further compounded by severe addiction and dependency of children to drugs.

- 20.22 Monitoring, documentation and advocacy are fundamental to eliminating child recruitment and to informing programmes to this end. Special protection measures are needed to prevent recruitment of children in camps for refugees and internally displaced persons.
- 20.23 While it is standard practice for peacekeepers to defend themselves against hostile acts or hostile intent, complications are to be expected when they are confronted with threats from child soldiers. Peacekeepers should realize that armed children can be more volatile and unpredictable than adults, even if they are poorly trained.

## Chapter 21

# IMPLEMENTATION AND ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW

## I. GENERAL

- 21.01 Violations of international humanitarian law have been committed by parties to nearly every armed conflict. However, both published reports and internal findings show that the protective provisions of international humanitarian law have prevented or reduced great suffering in many cases.
- 21.02 Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control (Article 1 common to the Geneva Conventions; Article 1 para. 1 AP I; Rule 139 CIHL).
- 21.03 States engaged in military co-operation must ensure legal interoperability in the event of any difference in legal obligations that may become relevant for certain operations. While such a difference would not exclude military cooperation as such, no state may request any act or omission which would contravene any legal obligation of the requesting state or even the requested state. States bearing certain legal obligations may be obliged to encourage other states to accept them (Article 21 ClusterConv).
- 21.04 The following factors can induce the parties to an armed conflict to ensure compliance with and counteract breaches of international humanitarian law:
- consideration for public opinion,
  - reciprocal interests of the parties to the conflict,
  - maintenance of discipline,
  - fear of reprisals,
  - penal and disciplinary measures,
  - liability for compensation,
  - activities of protecting powers,
  - international fact finding,
  - the activities of the International Committee of the Red Cross (ICRC),
  - the activities of the United Nations,
  - diplomatic activities,
  - activities of non-governmental organizations (NGOs),
  - national implementing measures,
  - dissemination of humanitarian law, and
  - the personal conviction and responsibility of the individual.

## II. PUBLIC OPINION

21.05 Public reports on violations of international law may render an essential contribution to enforcing behaviour in compliance with international law. To this end, considering the global information network, the media (press, radio broadcasting, television, internet) can be employed today in an incomparably better and thus more efficient manner than has been the case in previous armed conflicts. When offences against international law become known, each party to the conflict must expect that truthful reports on its violations of international law will impair the fighting morale of its forces and support by its own population.

## III. RECIPROCAL INTERESTS OF THE PARTIES TO THE CONFLICT

21.06 Only those who themselves comply with the provisions of international humanitarian law can expect the adversary to observe the dictates of humanity in an armed conflict. No one shall be guided by the suspicion that soldiers of the other party to the conflict might not observe these rules. Soldiers must treat their opponents in the same manner that they themselves wish to be treated.

## IV. MAINTENANCE OF DISCIPLINE

21.07 Ordering or tolerating violations of international law leads to subordinates' doubts as to the justification of their own side's activities. It can also undermine the authority of the military leader giving such an order and can jeopardize the discipline of the forces.

## V. REPRISALS

21.08 The use of reprisals can cause an adversary who is contravening international law to cease that violation. Reprisals are permissible only in exceptional cases and for the purpose of enforcing compliance with international law. They require a decision at the highest political level (*see* Sections 7.40-7.43).

## VI. COMMAND RESPONSIBILITY

21.09 The command responsibility of superiors is not only relevant for the conduct of military operations (*see* above, Sections 2.39–2.47), but likewise for criminal and disciplinary procedures.

## VII. PENAL AND DISCIPLINARY MEASURES

21.10 Each member of the armed forces who has violated the rules of international humanitarian law must be aware of the fact that he or she can be prosecuted according to penal or disciplinary provisions.

### 1. War Crimes at National Courts

21.11 The four Geneva Conventions and Additional Protocol I oblige the contracting parties to make grave breaches of the protective provisions liable to punishment and to take all suitable measures to ensure compliance with international humanitarian law (Articles 49, 50 GC I; Articles 50, 51 GC II; Articles 129, 130 GC III; Articles 146, 147 GC IV; Article 85 AP I).

21.12 States shall make the following grave breaches of international humanitarian law liable to punishment and prosecution (Article 49 GC I; Article 50 GC II; Article 129 GC III; Article 146 GC IV; Article 85 AP I).

a) Indictable offences against protected persons (wounded, sick, medical personnel, chaplains, prisoners of war, inhabitants of occupied territory, other civilians), such as wilful killing, mutilation,

torture, or inhumane treatment, including biological experiments, wilfully causing great suffering, serious injury to body or health, taking of hostages (Articles 3, 49–51 GC I; Articles 3, 50, 51 GC II; Articles 3, 129, 130 GC III; Articles 3, 146, 147 GC IV; Articles 11, para. 2, and 85, para. 3 lit. a, AP I).

b) Compelling prisoners of war and civilians to serve in the forces of the adversary (Articles 129–131 GC III, 147 GC IV).

c) Deportation, illegal transfer, or confinement of protected civilians (Articles 146–148 GC IV; Articles 50, 51, 57, 85, para. 4 lit. a, AP I).

d) Starvation of civilians by destroying, removing, or rendering useless objects indispensable to the survival of the civilian population, e.g. foodstuffs, means for the production of foodstuffs, drinking water installations and supplies, irrigation works (Article 54 AP I; Article 14 AP II).

e) Destruction or appropriation of goods, carried out unlawfully and wantonly without any military necessity (Article 50 GC I; Article 147 GC IV).

f) Launching an indiscriminate attack in the knowledge that it will have adverse effects on civilian life and civilian objects (Article 85, para. 3 lit. b, AP I).

g) Launching an attack against works or installations containing dangerous forces (dams, dykes, and nuclear electricity generating stations), expecting that such an attack will cause excessive loss of life, injury to civilians, or damage to civilian objects (Article 85, para. 3 lit. c, AP I; Article 15 AP II).

h) Launching an attack against an undefended locality, demilitarized zone, or neutralized zone (Article 85, para. 3 lit. d, AP I; Article 15 AP II).

i) Launching an attack against defenceless persons (Article 85, para. 3 lit. e, AP I).

j) Unjustifiable delay in the repatriation of prisoners of war and civilians (Article 85, para. 4 lit. b, AP I).

k) The practice of apartheid and other inhumane and degrading practices based on racial discrimination (Article 85, para. 4 lit. c, AP I).

l) Extensive destruction of cultural property and places of worship (Article 85, para. 4 lit. d, AP I; Article 16 AP II).

m) Prevention of a fair and regular trial (Article 3, para. 3 lit. d, GC I; Article 3, para. 1 lit. d, GC III; Article 85, para. 4 lit. e, AP I).

n) Perfidious (Article 37 AP I) use of recognized protective signs (Article 53, para. 1 GC I; Article 45 GC II; Article 185, para. 3 lit. f, AP I; Article 12 AP II).

o) Use of prohibited weapons.

21.13 Serious violations of international humanitarian law are covered by the general subject matters in national penal codes, which particularly include offences against:

- life;
- body and health;
- personal liberty;
- personal property;
- offences constituting a public danger; and
- offences committed in execution of official duties.

21.14 The misuse of the emblem of the Red Cross, the Red Crescent or the Red Crystal or of the heraldic emblem of Switzerland should constitute an offence under national penal law, liable to a fine (*see* above Section 12.31).

21.15 The abuse of distinctive emblems and names which, according to the rules of international law, are equal in status to the Red Cross should also be prosecuted.

## 2. War Crimes at International Courts

21.16 War crimes and crimes against humanity which are not properly prosecuted in national penal procedures

may be brought to the International Criminal Court (ICC) or an *Ad Hoc* Tribunal established for such purpose.

### 3. *Disciplinary Action*

- 21.17 National disciplinary measures against members of the armed forces (*see* above, Section 2.51) remain unaffected.
- 21.18 A disciplinary superior who learns about incidents substantiating suspicion that international law has been violated, shall clarify the facts and consider whether disciplinary measures are to be taken. If the disciplinary offence constitutes a criminal offence, the case shall be referred to the appropriate criminal prosecution authority.

## VIII. REPARATION

- 21.19 A party to a conflict which does not comply with the provisions of international humanitarian law shall be liable to make reparation. It shall be responsible for all acts committed by persons forming part of its armed forces (Article 91 AP I; Article 3 HC IV). Forms of reparation include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

## IX. PROTECTING POWERS AND THEIR SUBSTITUTES

- 21.20 It is the duty of the parties to a conflict from the beginning of that conflict to appoint protecting powers to safeguard the interests of these parties (Article 5, para. 1, AP I). For this purpose, each party to the conflict shall designate a protecting power (Article 8, para. 1, GC I; Article 8, para. 1, GC II; Article 8, para. 1, GC III; Article 9, para. 1 GC IV). The party involved shall, without delay and for the same purpose, permit the activities of a protecting power which has been acknowledged by it as such after designation by the adverse party. The International Committee of the Red Cross may assist in the designation of protecting powers (Article 5, para. 3, AP I).
- 21.21 If there is no protecting power, the parties to the conflict are obliged to accept an offer of the International Committee of the Red Cross or of any other impartial and efficient organization to act as a substitute (Article 5, para. 4, AP I).

## X. INTERNATIONAL FACT-FINDING

- 21.22 The International Humanitarian Fact Finding Commission – IHFFC – (Article 90 AP I) was established in 1991. It is comprised of fifteen independent members and shall investigate any incident alleged to be a grave breach or a serious violation of the rules of international humanitarian law within states which have recognized the competence of the Commission.
- 21.23 In the case of serious violations, states are further bound to act, jointly or individually, in cooperation with the United Nations and in conformity with the UN Charter (Article 89 AP I).

## XI. THE INTERNATIONAL COMMITTEE OF THE RED CROSS

- 21.24 The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC is an organization based in Swiss law. The members of its governing board (the Committee) are Swiss citizens, yet its delegates acting in its name are of various nationality. The Geneva Conventions and their Additional Protocols recognize the special status of the ICRC at the international level and assign specific tasks to it, including

visiting prisoners of war and civilian internees and detainees, carrying out its activities in occupied territories, providing relief to persons in need, selecting and transmitting information concerning missing persons (Central Tracing Agency), and offering its good offices to facilitate the establishment of hospital and safety zones. The ICRC's mission is to promote the faithful application of the principles and rules of international humanitarian law by the parties to an armed conflict, whether international or not, and, in general, to strengthen the protection of victims of armed conflicts through international law. In humanitarian matters it serves as a neutral intermediary between belligerents and has a general right of initiative. Owing to its humanitarian activities in situations of violence which are guided by the principles of humanity, impartiality, neutrality, independence, voluntary service, unity, and universality, the ICRC enjoys high respect and deserves support.

## **XII. IMPLEMENTATION AND ENFORCEMENT ROLES OF THE UN**

- 21.25 Competent organs of the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms in peacetime as in times of armed conflict.
- 21.26 The competence of human rights bodies and courts established under human rights conventions is generally limited to the determination whether a given act was in violation of the relevant human rights norm. This does not preclude, however, taking into consideration provisions of international humanitarian law in order to interpret such norm. It may also be considered that human rights bodies have a responsibility to investigate those limitations of human rights in armed conflicts, which may apply under the *lex specialis* role of international humanitarian law (see above, Sections 14.02–14.04). Hence international humanitarian law may be dealt with even by human rights organs, which can thus provide support to ensure respect for international humanitarian law.

## **XIII. THE SECURITY COUNCIL AND INTERNATIONAL HUMANITARIAN LAW**

- 21.27 The Security Council may emphasize the direct responsibility of states and armed groups under international humanitarian law.
- 21.28 The Security Council may take action if the safe and unimpeded access of humanitarian personnel to civilian populations in need is denied.
- 21.29 The Security Council should initiate fact-finding missions to conflict areas with a view to identifying the specific requirements for humanitarian assistance, and in particular obtaining safe and meaningful access to vulnerable populations.
- 21.30 The Security Council should take effective measures to bring to justice perpetrators of grave violation of international humanitarian and human rights law.
- 21.31 The Security Council may consider the establishment of arrangements addressing post-conflict peacebuilding and reconciliation.

## **XIV. DIPLOMATIC ACTIVITIES**

- 21.32 Compliance with international law may be ensured by using protest, good offices, mediation, investigation, and diplomatic intervention, whether by neutral states or by international bodies and religious or humanitarian organizations, as well as by sanctions decided upon by the Security Council.

## **XV. THE ROLE OF NON-GOVERNMENTAL**

## **ORGANIZATIONS**

- 21.33 Non-governmental organizations (NGOs) have an important role to play in conflict prevention, conflict resolution and post-conflict reconstruction. The influence of NGOs has been supported by the courage, devotion and compassion of individuals and in turn the role of individuals for the implementation and development of international humanitarian law has clearly been increased by NGOs during their activities. This role has been indispensable already in the past and it is challenging states at present and in the foreseeable future.

## **XVI. NATIONAL IMPLEMENTING MEASURES**

- 21.34 The relative weakness of international measures to secure the performance of obligations under humanitarian law calls for national implementing efforts among which legislative measures, education programmes and military manuals are of particular importance.

## **XVII. DISSEMINATION OF HUMANITARIAN LAW**

- 21.35 Effective implementation is dependent upon dissemination of humanitarian law. Providing information about it is the necessary basis from which to educate and to further the attitude of peoples towards a greater acceptance of these principles as an achievement of the social and cultural development.

## **XVIII. PERSONAL RESPONSIBILITY OF THE INDIVIDUAL**

- 21.36 Each individual shall be responsible for realizing the ideals of international humanitarian law and observing its provisions. Military leaders shall highlight this by their own behaviour. They shall make clear that everyone is required by his or her conscience to stand up for the preservation of the law.