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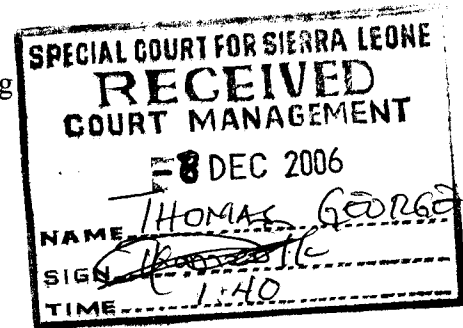
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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Hon. Justice Richard Lussick, Presiding
Hon. Justice Teresa Doherty
Hon. Justice Julia Sebutinde

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 8 December 2006



THE PROSECUTOR

Against

Alex Tamba Brima
Brima Bazzy Kamara
Santigie Borbor Kanu

Case No. SCSL-04-16-T

PUBLIC

ADDITIONAL PROSECUTION AUTHORITIES FOR THE PROSECUTION FINAL TRIAL BRIEF

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I. INTRODUCTION

1. Pursuant to Trial Chamber's request for clarification of citations found in the Prosecution Final Trial Brief, the Prosecution hereby files a copy of the authorities cited in its Brief at pages 264 and 268.¹

Filed in Freetown,
8 December 2006

For the Prosecution,



Karim Agha

Senior Trial Attorney

¹ *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-596, "Prosecution Final Trial Brief", 1 December 2006, pp. 264 & 268.

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Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume I: Rules, Cambridge University Press, 2005

FUNDAMENTAL GUARANTEES

Introduction

The fundamental guarantees identified in this chapter apply to all civilians in the power of a party to the conflict and who do not take a direct part in hostilities, as well as to all persons who are *hors de combat*. Because these fundamental guarantees are overarching rules that apply to all persons, they are not sub-divided into specific rules relating to different types of persons. The rules applicable to specific categories of persons are to be found in Chapters 33–39.

The fundamental guarantees listed in this chapter all have a firm basis in international humanitarian law applicable in both international and non-international armed conflicts. Most of the rules set out in this chapter are couched in traditional humanitarian law language, because this best reflects the substance of the corresponding customary rule. Some rules, however, are drafted so as to capture the essence of a range of detailed provisions relating to a specific subject, in particular the rules relating to detention (see Rule 99), forced labour (see Rule 95) and family life (see Rule 105). In addition, references to human rights law instruments, documents and case-law have been included. This was done, not for the purpose of providing an assessment of customary human rights law, but in order to support, strengthen and clarify analogous principles of humanitarian law. While it is the majority view that international human rights law only binds governments and not armed opposition groups,¹ it is accepted that international humanitarian law binds both.

It is beyond the scope of this study to determine whether these guarantees apply equally outside armed conflict although collected practice appears to indicate that they do.

Continued applicability of human rights law during armed conflict

Human rights law applies at all times although some human rights treaties allow for certain derogations in a "state of emergency".² As stated by the

¹ But see, e.g., Christian Tomuschat, "The Applicability of Human Rights Law to Insurgent Movements", in Horst Fischer *et al.*, *Crisis Management and Humanitarian Protection*, Berliner Wissenschafts-Verlag, Berlin, 2004.

² International Covenant on Civil and Political Rights, Article 4; European Convention on Human Rights, Article 15; American Convention on Human Rights, Article 27 (which also expressly

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International Court of Justice in its advisory opinion in the *Nuclear Weapons case*:

The protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.³

Having recognised the continued applicability of human rights law during armed conflict, the Court analysed the interplay between the application of international humanitarian law and international human rights law in a situation of armed conflict with respect to the non-derogable human right not to be arbitrarily deprived of life. The Court stated that "the test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities".⁴

In its General Comment on Article 4 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee stated that:

During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if, and to the extent that, the situation constitutes a threat to the life of the nation.⁵

If an armed conflict occurs, a State will need to consider whether the situation is one that amounts to an emergency "threatening the life of the nation". According to international case-law, this phrase does not require that the whole nation be involved in the emergency but that the essence of the emergency consist of the fact that the normal application of human rights law – taking into account limitations that are allowed in relation to a number of rights for public safety and order – cannot be ensured in view of the nature of the emergency. If that is the case, a State party to a human rights treaty is entitled to declare a state of emergency and inform the appropriate organs, as required by the treaty concerned – or else the State continues to be bound by the whole treaty.⁶

refers to the period of time strictly required). The African Charter on Human and Peoples' Rights contains no derogation clause, but limitations are possible on the basis of Article 27(2), which states that "the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest". In practice, this has been strictly interpreted by the African Commission on Human and Peoples' Rights.

³ ICJ, *Nuclear Weapons case*, Advisory Opinion, § 25.

⁴ ICJ, *Nuclear Weapons case*, Advisory Opinion (cited in Vol. II, Ch. 32, § 926).

⁵ UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights), 24 July 2001, § 3.

⁶ For a more complete description of the interpretation of these treaties by the treaty bodies in relation to detention, judicial guarantees and states of emergency, see Louise Doswald-Beck and

Most of the human rights provisions cited in this chapter are listed in the major human rights treaties as rights that may not be derogated from in any circumstance, and these treaties are widely ratified.⁷ However, this chapter also cites some rights that are not listed as "non-derogable" as such in those treaties, not only because these rights are seen as particularly important to both international humanitarian law and human rights law, but also because human rights case-law has in practice treated them as largely non-derogable.

It should be noted that it is the consistent practice of human rights treaty bodies to insist on a strict interpretation of the provision that any derogation measures during a state of emergency be limited "to the extent strictly required by the exigencies of the situation". The UN Human Rights Committee stressed that:

This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency... The mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice this will ensure that no provision of the Covenant, however validly derogated from, will be entirely inapplicable to the behaviour of a State party.⁸

The European and Inter-American Courts of Human Rights have taken the same approach when examining derogation measures from specific rights, stressing the need for safeguards so that the essence of the right is not totally eliminated, as well as the need for proportionality so that the measures are only those strictly required and not more.⁹ The African Commission on Human and Peoples' Rights, in a case concerning killings and disappearances during a civil

Robert Kolb, *Judicial Process and Human Rights: United Nations, European, American and African Systems, Texts and Summaries of International Case-law*, International Commission of Jurists, N.P. Engel Publisher, Kehl, 2004.

⁷ The International Covenant on Civil and Political Rights has been ratified by 152 States, the European Convention on Human Rights by 45 States (i.e., all members of the Council of Europe), the African Charter on Human and Peoples' Rights by 53 States (i.e., all members of the African Union) and the American Convention on Human Rights by 25 States (i.e., all States party to the Organization of American States except Antigua and Barbuda, Bahamas, Belize, Canada, Guyana, St. Kitts and Nevis, Santa Lucia, St. Vincent and the Grenadines and the United States; Belize, Canada, Guyana, St. Vincent and the Grenadines and the United States have, however, ratified the International Covenant on Civil and Political Rights). This means that 34 States are not party to either the Covenant nor one of the regional human rights conventions (Antigua and Barbuda, Bahamas, Bahrain, Bhutan, Brunei, China, Cook Islands, Cuba, Indonesia, Kazakhstan, Kiribati, Laos, Malaysia, Maldives, Marshall Islands, Micronesia, Myanmar, Nauru, Niue, Oman, Pakistan, Palau, Papua New Guinea, Qatar, Saint Kitts and Nevis, Saint Lucia, Samoa, Saudi Arabia, Singapore, Solomon Islands, Tonga, Tuvalu, United Arab Emirates and Vanuatu).

⁸ UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights), 24 July 2001, § 4.

⁹ See, e.g., European Court of Human Rights, *Fox, Campbell and Hartley*, Judgement, 30 August 1990, § 32, *Lawless case*, Judgement, 1 July 1961, § 37, *Brannigan and McBride v. UK*, Judgement, 25 May 1993, §§ 43 and 61–65; *Aksoy v. Turkey*, Judgement, 18 December 1996, §§ 83–84; Inter-American Court of Human Rights, *Castillo Petruzzi and Others case*, Judgement, 30 May 1999, § 109.

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war, confirmed that no derogation was possible under the African Charter on Human and Peoples' Rights, and that the government remained responsible for securing the safety and liberty of its citizens and for conducting investigations into murders.¹⁰ In another case, the Commission confirmed that no derogations were possible and referred to Article 27(2) of the African Charter on Human and Peoples' Rights, which states that the rights "shall be exercised with due regard to the rights of others, collective security, morality and common interest". The Commission added that this provision must be interpreted as meaning that "limitations must be strictly proportionate with and absolutely necessary for the advantages which follow. Most important, a limitation may not erode a right such that the right itself becomes illusory."¹¹

The UN Human Rights Committee also relied on crimes against humanity and international humanitarian law to establish the impermissibility of derogations, even if the rights concerned were not listed as "non-derogable". With respect to crimes against humanity, the Human Rights Committee stated that:

If action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action, article 4 of the Covenant cannot be used as a justification that a state of emergency exempted the State in question from its responsibility in relation to the same conduct. Therefore, the recent codification of crimes against humanity ... in the Rome Statute of the International Criminal Court is of relevance in the interpretation of Article 4 of the Covenant.¹²

In relation to international humanitarian law, the Human Rights Committee stated that:

Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence.¹³

The above comments show how international humanitarian law and human rights law reinforce each other, not only to reaffirm rules applicable in times of armed conflict, but in all situations.

¹⁰ African Commission on Human and Peoples' Rights, *Civil Liberties Organisation v. Chad*, Communication No. 74/92, 18th Ordinary Session, Praia, 11 October 1995, 9th Annual Activity Report, §§ 21-22.

¹¹ African Commission on Human and Peoples' Rights, *Constitutional Rights Project v. Nigeria*, Communication Nos. 140/94, 141/94 and 145/95, 26th Ordinary Session, Kigali, 1-15 November 1999, 13th Annual Activity Report 1999-2000, Doc. AHG/222 (XXIV), Annex V, §§ 41-42.

¹² UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights), 24 July 2001, § 12.

¹³ UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights), 24 July 2001, § 16.

State practice requiring respect for human rights during armed conflicts

There is extensive State practice to the effect that human rights law must be applied during armed conflicts. The resolutions adopted at the International Conference on Human Rights in Teheran in 1968 and by the UN General Assembly the same year referred to "human rights in armed conflict", whereas the content of the resolutions related primarily to international humanitarian law.¹⁴ However, shortly afterwards the approach changed. UN General Assembly Resolution 2675 (XXV) on basic principles for the protection of civilian populations in armed conflicts, adopted in 1970, referred in its preamble to the four Geneva Conventions and also specifically to the Fourth Geneva Convention, as well as to "the progressive development of the international law of armed conflict". In its first operative paragraph, the resolution stated that "fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict".¹⁵ Since then, the understanding that both human rights law and international humanitarian law apply in armed conflicts has been confirmed by numerous resolutions condemning violations of both these areas of law in specific armed conflicts and by United Nations investigations into violations of both areas of law in armed conflict situations.

Human rights violations have been condemned, for example, in the context of armed conflicts or military occupations in Afghanistan,¹⁶ Iraq,¹⁷ Sudan,¹⁸ Russia,¹⁹ the former Yugoslavia²⁰ and Uganda.²¹ The United Nations has also conducted investigations into violations of human rights, for example,

¹⁴ International Conference on Human Rights, Teheran, 12 May 1968, Res. XXIII; UN General Assembly, Res. 2444 (XXIII), 19 December 1968.

¹⁵ UN General Assembly, Res. 2675 (XXV), 9 December 1970 (adopted by 109 in favour, none against and 8 abstentions), preamble and § 1.

¹⁶ UN General Assembly, Res. 52/145, 12 December 1997 (adopted by consensus), § 2 ("notes with deep concern the intensification of armed hostilities in Afghanistan") and § 3 ("condemns the violations and abuses of human rights and humanitarian law, including the rights to life, liberty and security of person, freedom from torture and from other forms of cruel, inhuman or degrading treatment or punishment, freedom of opinion, expression, religion, association and movement").

¹⁷ UN Commission on Human Rights, Res. 1992/60, 3 March 1992, preamble (§§ 3, 6 and 8) indicating respectively that the resolution is guided by, *inter alia*, the international covenants on human rights and the Geneva Conventions of 1949, that it expresses "deep concern at the grave violations of human rights and fundamental freedoms during the occupation of Kuwait" and notes "with grave concern the information to the effect that the treatment of prisoners of war and detained civilians does not conform to the internationally recognised principles of humanitarian law". There are similar statements in UN General Assembly, Res. 46/135, 17 December 1991.

¹⁸ UN Commission on Human Rights, Res. 1996/73, 23 April 1996.

¹⁹ UN Commission on Human Rights, Res. 2000/58, 25 April 2000, preamble (§ 10) ("the need to ... observe international human rights and humanitarian law in situations of conflict") and § 4 (calling on Russia to "investigate promptly alleged violations of human rights and breaches of international humanitarian law committed in the Republic of Chechnya").

²⁰ UN Security Council, Res. 1019, 9 November 1995; UN Security Council, Res. 1034, 21 December 1995; UN General Assembly, Res. 50/193, 22 December 1995; UN Commission on Human Rights, Res. 1996/71, 23 April 1996.

²¹ UN Commission on Human Rights, Res. 1998/75, 22 April 1998.

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in connection with the conflicts in Liberia²² and Sierra Leone,²³ Israel's military occupation of the Palestinian territories,²⁴ Iraq's military occupation of Kuwait,²⁵ and the situation in Afghanistan during and after the Soviet occupation.²⁶ The UN High Commissioner for Human Rights also has national offices that monitor and promote respect for both human rights and humanitarian law in non-international armed conflicts.²⁷

The reports of the investigations into the situation in Afghanistan from 1985 onwards and into the situation in Kuwait during the Iraqi occupation, as well as States' reaction to them, are examples of the acceptance of the simultaneous applicability of both areas of international law.

The various reports of the UN Special Rapporteurs for Afghanistan referred to aspects of both human rights and humanitarian law, for example, in the report submitted to the UN Commission on Human Rights in 1987.²⁸ This report was commended in a resolution adopted by consensus by the UN Commission on Human Rights, in which it expressed concern that "the Afghan authorities, with heavy support from foreign troops, are acting... without any respect for the international human rights obligations which they have assumed", voiced "its deep concern about the number of persons detained for seeking to exercise their fundamental human rights and freedoms, and their detention contrary to internationally recognized standards", noted "with concern that such widespread violations of human rights... are still giving rise to large flows of refugees" and called on "the parties to the conflict to apply fully the principles and rules of international humanitarian law".²⁹

²² UN Secretary-General, Progress report on UNOMIL, UN Doc. S/1996/47, 23 January 1996.

²³ UN Secretary-General, Progress report on UNOMSIL, UN Doc. S/1998/750, 12 August 1998.

²⁴ UN Commission on Human Rights, Res. S-5/1, 19 October 2000, § 6 (decided "to establish... a human rights inquiry commission... to gather and compile information on violations of human rights and acts which constitute grave breaches of international humanitarian law by the Israeli occupying Power in the occupied Palestinian territories"). Its first and last preambular paragraphs refer specifically to human rights treaties and to humanitarian law treaties respectively.

²⁵ UN Commission on Human Rights, Res. 1991/67, 6 March 1991, § 9 (mandated a Special Rapporteur "to examine the human rights violations committed in occupied Kuwait by the invading and occupying forces of Iraq").

²⁶ UN Economic and Social Council, Decision 1985/147, 30 May 1985, approving UN Commission on Human Rights Res. 1985/38 of 13 May 1985 "to extend for one year the mandate of the Special Rapporteur on the question of human rights and fundamental freedoms in Afghanistan and to request him to report to the General Assembly... and to the Commission [on Human Rights]... on the situation of human rights in that country", reprinted in UN Doc. E/1985/85, 1985. The mandate was renewed on many occasions. See UN Doc. A/52/493, 16 October 1997, the introduction to which lists the reports submitted by Special Rapporteurs for Afghanistan between 1985 and 1997.

²⁷ For example, the field office in Santafé de Bogotá, Colombia, established by agreement in November 1996, which has the mandate to monitor the situation and to "promote respect for and observance of human rights and international humanitarian law in Colombia" (see www.unhcr.ch/html/menu2/5/colombia.html).

²⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Report, UN Doc. E/CN.4/1987/22, 19 February 1987.

²⁹ UN Commission on Human Rights, Res. 1987/58, 11 March 1987, §§ 2, 7, 9 and 10.

The report on the Iraqi occupation of Kuwait examined issues such as arbitrary arrest, disappearances, right to life, right to food, right to health in the light of the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, but also of international humanitarian law. In particular, the report states that "there is consensus within the international community that the fundamental human rights of all persons are to be respected and protected both in times of peace and during periods of armed conflict".³⁰ Resolutions adopted by the UN General Assembly and by the UN Commission on Human Rights on the situation of human rights in Kuwait under Iraqi occupation in 1991 expressed these bodies' appreciation of the Special Rapporteur's report.³¹

Territorial scope of application of human rights law

Most human rights treaties specify that they are to be applied by States parties wherever they have jurisdiction. However, it should be noted that treaty bodies, and significant State practice, have interpreted this as meaning wherever State organs have effective control.

Article 2 of the International Covenant on Civil and Political Rights specifies that States parties are to "respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant". State practice has interpreted this widely. In particular, the UN Special Rapporteur for Iraqi-occupied Kuwait was instructed by States to report on respect for or the violation of human rights by Iraq in Kuwait, even though Kuwait could not be considered to be its "territory" and recognition of any formal jurisdiction did not occur. As mentioned above, the Special Rapporteur analysed the implementation of the provisions of the Covenant by Iraq in Kuwait and his report was welcomed by States.

Article 1 of the European and American Conventions on Human Rights specify that the Conventions are to be applied by States parties to persons within their jurisdiction. This has been interpreted by their treaty bodies as meaning "effective control". In *Loizidou v. Turkey* in 1995 concerning the situation in northern Cyprus, the European Court of Human Rights held that a State party is bound to respect the Convention when, as a consequence of military action, it exercises effective control over an area outside its national territory.³²

³⁰ UN Commission on Human Rights, UN Doc. E/CN.4/1992/26, 16 January 1992, § 33; see also the introduction to this report by Walter Kälin and Larisa Gabriel, which catalogues and analyses the bases for the applicability of both human rights law and humanitarian law during armed conflicts and occupation, reprinted in Walter Kälin (ed.), *Human Rights in Times of Occupation: The Case of Kuwait*, Law Books in Europe, Berne, 1994.

³¹ UN General Assembly, Res. 46/135, 17 December 1991 (adopted by consensus), § 2; UN Commission on Human Rights, Res. 1991/67, 6 March 1991 (adopted by 41 votes in favour, 1 against and no abstentions), § 1.

³² European Court of Human Rights, *Loizidou v. Turkey*, Preliminary Objections, Judgement, 23 March 1995, § 62.

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In the case of *Banković* against seventeen NATO States, the European Court confirmed that it applied the European Convention extra-territorially when a "State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government".³³ The same yardstick of effective control to evaluate the applicability of the Inter-American Convention on Human Rights was made by the Inter-American Commission on Human Rights in *Alejandre and Others v. Cuba*, in which the Commission cited the *Loizidou v. Turkey* case with approval.³⁴

Rule 87. Civilians and persons *hors de combat* must be treated humanely.

Practice

Volume II, Chapter 32, Section A.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

The obligation to treat prisoners of war humanely was already recognised in the Lieber Code, the Brussels Declaration and the Oxford Manual and was codified in the Hague Regulations.³⁵ The requirement of humane treatment for civilians and persons *hors de combat* is set forth in common Article 3 of the Geneva Conventions, as well as in specific provisions of all four Conventions.³⁶ This requirement is recognised as a fundamental guarantee by both Additional Protocols I and II.³⁷

³³ European Court of Human Rights, *Banković v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, Decision as to Admissibility, 12 December 2001, § 71.

³⁴ Inter-American Commission on Human Rights, Case 11.589, *Alejandre and Others v. Cuba*, Report No. 86/99, 29 September 1999, §§ 24–25.

³⁵ Lieber Code, Article 76 (cited in Vol. II, Ch. 32, § 215); Brussels Declaration, Article 23(2) (*ibid.*, § 216); Oxford Manual, Article 63 (*ibid.*, § 217); Hague Regulations, Article 4, second paragraph (*ibid.*, § 206).

³⁶ Geneva Conventions, common Article 3 (*ibid.*, § 1); First Geneva Convention, Article 12, first paragraph (*ibid.*, § 143); Second Geneva Convention, Article 12, first paragraph (*ibid.*, § 144); Third Geneva Convention, Article 13 (*ibid.*, § 208); Fourth Geneva Convention, Articles 5 and 27, first paragraph (*ibid.*, §§ 82–83).

³⁷ Additional Protocol I, Article 75(1) [adopted by consensus] (*ibid.*, § 2); Additional Protocol II, Article 4(1) [adopted by consensus] (*ibid.*, § 3).

The requirement of humane treatment is set forth in numerous military manuals.³⁸ It has been reaffirmed in national and international case-law.³⁹

Human rights law is similarly based on the principle of humane treatment of persons. In particular, human rights instruments stress the requirement of humane treatment and respect for human dignity of persons deprived of their liberty.⁴⁰ In its General Comment on Article 4 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee declared Article 10, which requires that persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the human person, to be non-derogable and therefore applicable at all times.⁴¹

Definition of humane treatment

The actual meaning of "humane treatment" is not spelled out, although some texts refer to respect for the "dignity" of a person or the prohibition of "ill-treatment" in this context.⁴² The requirement of humane treatment is an

³⁸ See, e.g., the military manuals of Argentina (*ibid.*, §§ 9–10 and 90–91), Australia (*ibid.*, §§ 11 and 92–93), Belgium (*ibid.*, §§ 12 and 94), Benin (*ibid.*, §§ 13 and 95), Burkina Faso (*ibid.*, § 14), Cameroon (*ibid.*, §§ 15–16), Canada (*ibid.*, § 17), Colombia (*ibid.*, §§ 18–20), Congo (*ibid.*, § 21), Croatia (*ibid.*, § 22), Dominican Republic (*ibid.*, § 23), France (*ibid.*, §§ 24–26), Germany (*ibid.*, § 27), India (*ibid.*, § 28), Kenya (*ibid.*, § 30), Madagascar (*ibid.*, § 31), Mali (*ibid.*, § 32), Morocco (*ibid.*, § 33), Netherlands (*ibid.*, §§ 34–35), New Zealand (*ibid.*, § 36), Nicaragua (*ibid.*, § 37), Peru (*ibid.*, § 38), Philippines (*ibid.*, § 39), Romania (*ibid.*, § 40), Russia (*ibid.*, § 41), Senegal (*ibid.*, §§ 42–43), Sweden (*ibid.*, § 44), Switzerland (*ibid.*, § 45), Togo (*ibid.*, § 46), United Kingdom (*ibid.*, § 47) and United States (*ibid.*, §§ 48–51) and the reported practice of Israel (*ibid.*, § 29).

³⁹ See, e.g., Chile, Appeal Court of Santiago, *Videla case* (*ibid.*, § 57); Russia, Constitutional Court, *Situation in Chechnya case* (*ibid.*, § 58); ICJ, *Nicaragua case (Merits)*, Judgement (*ibid.*, § 69); ICTY, *Aleksovski case*, Judgement (*ibid.*, § 70); Inter-American Commission on Human Rights, *Case 10.559 (Peru)* (*ibid.*, § 71).

⁴⁰ See American Declaration on the Rights and Duties of Man, Article XXV (*ibid.*, § 218); International Covenant on Civil and Political Rights, Article 10(1) (*ibid.*, § 211); American Convention on Human Rights, Article 5(1) (*ibid.*, § 212); European Prison Rules, Rule 1 (*ibid.*, § 219); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 1 (*ibid.*, § 220); Basic Principles for the Treatment of Prisoners, para. 1 (*ibid.*, § 221).

⁴¹ UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights) (*ibid.*, § 321).

⁴² Texts which use the term "dignity" include, e.g., International Covenant on Civil and Political Rights, Article 10(1) (*ibid.*, § 211); American Convention on Human Rights, Article 5 (*ibid.*, § 212); African Charter on Human and Peoples' Rights, Article 5; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 1 (*ibid.*, § 220); Basic Principles for the Treatment of Prisoners, para. 1 (*ibid.*, § 221); UN Secretary-General's Bulletin, Section 8 (*ibid.*, § 224); the military manuals of France (*ibid.*, § 246), Germany (*ibid.*, § 248) Peru (*ibid.*, § 38) and United States (*ibid.*, §§ 122 and 284); the legislation of Paraguay (*ibid.*, § 55) and Uruguay (*ibid.*, § 294); UN Human Rights Committee, General Comment No. 21 (Article 10 of the International Covenant on Civil and Political Rights) (*ibid.*, § 320) and General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights) (*ibid.*, § 321); ICTY, *Aleksovski case* (*ibid.*, § 70); ICRC, Communication to the Press No. 01/47 (*ibid.*, § 80). Texts which refer to the prohibition of "ill-treatment" include, e.g., IMT Charter (Nuremberg), Article 6 (*ibid.*, § 982); the military manual of Romania (*ibid.*, § 111); UN Commission on Human Rights, Res. 1989/67, 1990/53, 1991/78 and 1992/68 (*ibid.*, § 311) and Res. 1991/67 and 1992/60 (*ibid.*, § 312); ICRC, Memorandum on Respect for International Humanitarian Law in Angola (*ibid.*, § 343) and Memorandum on Compliance

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overarching concept. It is generally understood that the detailed rules found in international humanitarian law and human rights law give expression to the meaning of "humane treatment". The rules in Chapters 33-39 contain specific applications of the requirement of humane treatment for certain categories of persons: the wounded, sick and shipwrecked, persons deprived of their liberty, displaced persons, women, children, the elderly, the disabled and infirm. However, these rules do not necessarily express the full meaning of what is meant by humane treatment, as this notion develops over time under the influence of changes in society. This is shown, for example, by the fact that the requirement of humane treatment has been mentioned in international instruments since the mid-19th century, but the detailed rules which stem from this requirement have developed since then, and may do so still further.

Rule 88. Adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited.

Practice

Volume II, Chapter 32, Section B.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

The prohibition of adverse distinction in the treatment of civilians and persons *hors de combat* is stated in common Article 3 of the Geneva Conventions, as well in the Third and Fourth Geneva Conventions.⁴³ It is recognised as a fundamental guarantee by Additional Protocols I and II.⁴⁴ It is contained in

with International Humanitarian Law by the Forces Participating in Opération Turquoise (*ibid.*, § 344).

⁴³ Geneva Conventions, common Article 3 (*ibid.*, § 356); Third Geneva Convention, Article 16; Fourth Geneva Convention, Article 13.

⁴⁴ Additional Protocol I, Article 75(1) (adopted by consensus) [cited in Vol. II, Ch. 32, § 368]; Additional Protocol II, Article 4(1) (adopted by consensus) (*ibid.*, § 370); see also Additional Protocol I, preamble (*ibid.*, § 366), Article 9(1) (adopted by consensus) (*ibid.*, § 367), Article 69(1) (adopted by consensus) (*ibid.*, § 462) and Article 70(1) (adopted by consensus) (*ibid.*, § 463); Additional Protocol II, Article 2(1) (adopted by consensus) (*ibid.*, § 369) and Article 18(2) (adopted by consensus) (*ibid.*, § 464).

numerous military manuals.⁴⁵ It is also supported by official statements and other practice.⁴⁶

The notion of "adverse distinction" implies that while discrimination between persons is prohibited, a distinction may be made to give priority to those in most urgent need of care. In application of this principle, no distinction may be made among the wounded, sick and shipwrecked on any grounds other than medical (see Rule 110). Another application can be found in Article 16 of the Third Geneva Convention, which provides that all prisoners of war must be treated alike, "taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications".⁴⁷ There is no indication that adverse distinction is lawful in relation to some rules, and no State has asserted that any such exception exists.

The human rights law equivalent of the prohibition of adverse distinction is the principle of non-discrimination. The prohibition of discrimination in the application of human rights law is included in the Charter of the United Nations and in the major human rights treaties.⁴⁸ With respect to the derogability of the right to non-discrimination, the UN Human Rights Committee stated in its General Comment on Article 4 of the International Covenant on Civil and Political Rights that:

Even though article 26 or the other Covenant provisions related to non-discrimination... have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular,

⁴⁵ See, e.g., the military manuals of Argentina (*ibid.*, §§ 385-386, 469, 499 and 554-555), Australia (*ibid.*, §§ 387, 500-501 and 556), Belgium (*ibid.*, §§ 388 and 502-503), Benin (*ibid.*, §§ 389, 504 and 557), Bosnia and Herzegovina (*ibid.*, §§ 390 and 505), Burkina Faso (*ibid.*, § 391), Cameroon (*ibid.*, § 392), Canada (*ibid.*, §§ 393, 470-471, 506 and 558-559), Colombia (*ibid.*, §§ 394-395), Congo (*ibid.*, § 396), Croatia (*ibid.*, § 507), Dominican Republic (*ibid.*, § 508), Ecuador (*ibid.*, §§ 509 and 560), El Salvador (*ibid.*, § 397), France (*ibid.*, §§ 398-399 and 510), Germany (*ibid.*, §§ 472, 511 and 561-562), Israel (*ibid.*, §§ 400 and 512), Italy (*ibid.*, §§ 473 and 513), Kenya (*ibid.*, § 401), Madagascar (*ibid.*, § 402), Mali (*ibid.*, § 403), Morocco (*ibid.*, §§ 404 and 514), Netherlands (*ibid.*, §§ 405-406, 515-516 and 563), New Zealand (*ibid.*, §§ 407, 474 and 564), Nicaragua (*ibid.*, §§ 408, 475 and 517), Nigeria (*ibid.*, §§ 518-519 and 565), Peru (*ibid.*, § 409), Senegal (*ibid.*, §§ 410-411), Spain (*ibid.*, §§ 520 and 566), Sweden (*ibid.*, §§ 412 and 476), Switzerland (*ibid.*, §§ 477, 521 and 567), Togo (*ibid.*, §§ 413, 522 and 508), United Kingdom (*ibid.*, §§ 414, 478-479, 523-524 and 569), United States (*ibid.*, §§ 415-417, 480-481, 525-527 and 570-572) and Yugoslavia (*ibid.*, § 528).

⁴⁶ See, e.g., the statements of Bosnia and Herzegovina (*ibid.*, § 534) and United States (*ibid.*, § 440), the practice of Iraq (*ibid.*, § 438) and the reported practice of China (*ibid.*, § 487) and United States (*ibid.*, § 441).

⁴⁷ Third Geneva Convention, Article 16.

⁴⁸ UN Charter, Article 1(3) [cited in Vol. II, Ch. 32, § 355]; International Covenant on Civil and Political Rights, Article 2(1) (*ibid.*, § 359); International Covenant on Economic, Social and Cultural Rights, Articles 2(2) and 3 (*ibid.*, §§ 362-363); European Convention on Human Rights, Article 14 (*ibid.*, § 357); American Convention on Human Rights, Article 1(1) (*ibid.*, § 364); African Charter on Human and Peoples' Rights, Article 2 (*ibid.*, § 372); Convention on the Elimination of Racial Discrimination, Article 2 (*ibid.*, § 358); Convention on the Elimination of Discrimination against Women, Article 2 (*ibid.*, § 371); Convention on the Rights of the Child, Article 2(1) (*ibid.*, § 373).

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the provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.⁴⁹

Article 4(1) of the Covenant provides that measures that derogate from it may not involve "discrimination solely on the ground of race, colour, sex, language, religion or social origin".⁵⁰ While discrimination on grounds of political or other opinion, national origin, property, birth or other status is prohibited under Article 2(1) of the Covenant, these grounds are not listed in Article 4(1) dealing with derogations.⁵¹ It is significant, however, that the Additional Protocols prohibit discrimination on grounds of political or other opinion, national origin, wealth, birth or other status and thus recognise that the prohibition of discrimination on such grounds cannot be dispensed with, even during armed conflict.⁵² This is also the approach of the African Charter on Human and Peoples' Rights and the Convention on the Rights of the Child, which prohibit discrimination on grounds of political or other opinion, national origin, property, birth or other status and do not allow for any derogation.⁵³

Apartheid

According to Additional Protocol I, "practices of apartheid and other inhuman or degrading practices involving outrages upon personal dignity, based on racial discrimination" constitute grave breaches.⁵⁴ This rule is set forth in several military manuals.⁵⁵ The legislation of many States also contains this rule.⁵⁶ In addition, apartheid constitutes a crime against humanity under several

⁴⁹ UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights) (*ibid.*, § 450).

⁵⁰ International Covenant on Civil and Political Rights, Article 4(1) (*ibid.*, § 360); see also American Convention on Human Rights, Article 27(1), which contains a similar provision (*ibid.*, § 365).

⁵¹ International Covenant on Civil and Political Rights, Article 2(1) (*ibid.*, § 359) and Article 4(1) (*ibid.*, § 360).

⁵² Additional Protocol I, preamble (*ibid.*, § 366), Article 9(1) (adopted by consensus) (*ibid.*, § 367) and Article 75(1) (adopted by consensus) (*ibid.*, § 368); Additional Protocol II, Article 2(1) (adopted by consensus) (*ibid.*, § 369) and Article 4(1) (adopted by consensus) (*ibid.*, § 370).

⁵³ African Charter on Human and Peoples' Rights, Article 2 (*ibid.*, § 372); Convention on the Rights of the Child, Article 2(1) (*ibid.*, § 373).

⁵⁴ Additional Protocol I, Article 85(4)(c) (adopted by consensus) (*ibid.*, § 584).

⁵⁵ See, e.g., the military manuals of Argentina (*ibid.*, § 589), Canada (*ibid.*, § 590), Germany (*ibid.*, § 592), Italy (*ibid.*, § 593), Netherlands (*ibid.*, § 594), New Zealand (*ibid.*, § 595), South Africa (*ibid.*, § 597), Spain (*ibid.*, § 598) and Switzerland (*ibid.*, § 599).

⁵⁶ See, e.g., the legislation of Armenia (*ibid.*, § 600), Australia (*ibid.*, §§ 601–602), Azerbaijan (*ibid.*, § 603), Belgium (*ibid.*, § 604), Bulgaria (*ibid.*, § 605), Canada (*ibid.*, § 607), Colombia (*ibid.*, § 609), Cook Islands (*ibid.*, § 611), Cyprus (*ibid.*, § 612), Czech Republic (*ibid.*, § 613), Georgia (*ibid.*, § 615), Hungary (*ibid.*, § 616), Ireland (*ibid.*, § 617), Moldova (*ibid.*, § 621), Netherlands (*ibid.*, § 622), New Zealand (*ibid.*, § 623), Niger (*ibid.*, § 626), Norway (*ibid.*, § 627), Peru (*ibid.*, § 628), Slovakia (*ibid.*, § 629), Spain (*ibid.*, § 630), Tajikistan (*ibid.*, § 631), United Kingdom (*ibid.*, § 633) and Zimbabwe (*ibid.*, § 635); see also the draft legislation of El Salvador (*ibid.*, § 614), Jordan (*ibid.*, § 618), Lebanon (*ibid.*, § 619) and Nicaragua (*ibid.*, § 625).

international treaties and other international instruments.⁵⁷ The legislation of several States also prohibits apartheid as a crime against humanity.⁵⁸

Rule 89. Murder is prohibited.

Practice

Volume II, Chapter 32, Section C.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

The prohibition of murder of civilians was already recognised in the Lieber Code.⁵⁹ Murder of civilians and prisoners of war was included as a war crime in the Charter of the International Military Tribunal at Nuremberg.⁶⁰ Common Article 3 of the Geneva Conventions prohibits "violence to life and person, in particular murder of all kinds" of civilians and persons *hors de combat*.⁶¹ All four Geneva Conventions list "wilful killing" of protected persons as a grave breach.⁶² The prohibition of murder is recognised as a fundamental guarantee by Additional Protocols I and II.⁶³ Murder is also specified as a war crime under the Statute of the International Criminal Court with respect to both international and non-international armed conflicts and under the Statutes of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone.⁶⁴

⁵⁷ International Convention on the Suppression and Punishment of the Crime of Apartheid, Article I (*ibid.*, § 583); ICC Statute, Article 7(1)(j) (*ibid.*, § 585); UNTAET Regulation 2000/15, Section 6(1)(j) (*ibid.*, § 588).

⁵⁸ See, e.g., the legislation of Australia (*ibid.*, § 602), Canada (*ibid.*, § 608), Congo (*ibid.*, § 610), Mali (*ibid.*, § 620), New Zealand (*ibid.*, § 624) and United Kingdom (*ibid.*, § 634); see also the draft legislation of Burundi (*ibid.*, § 606) and Trinidad and Tobago (*ibid.*, § 632).

⁵⁹ Lieber Code, Articles 23 and 44 (*ibid.*, §§ 678–679).

⁶⁰ IMT Charter (Nuremberg), Article 6(b) (*ibid.*, § 654).

⁶¹ Geneva Conventions, common Article 3 (*ibid.*, § 655).

⁶² First Geneva Convention, Article 50 (*ibid.*, § 662); Second Geneva Convention, Article 51 (*ibid.*, § 662); Third Geneva Convention, Article 130 (*ibid.*, § 662); Fourth Geneva Convention, Article 147 (*ibid.*, § 662).

⁶³ Additional Protocol I, Article 75(2)(a) (adopted by consensus) (*ibid.*, § 669); Additional Protocol II, Article 4(2)(a) (adopted by consensus) (*ibid.*, § 670).

⁶⁴ ICC Statute, Article 8(2)(a)(i) and (c)(i) (*ibid.*, §§ 675–676); ICTY Statute, Article 2(a) (*ibid.*, § 695); ICTR Statute, Article 4(a) (*ibid.*, § 696); Statute of the Special Court for Sierra Leone, Article 3(a) (*ibid.*, § 677).

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The prohibition on killing civilians and persons *hors de combat* is set forth in numerous military manuals.⁶⁵ It is also contained in the legislation of a large number of States.⁶⁶ This prohibition has been upheld extensively in national and international case-law.⁶⁷ Furthermore, it is supported by official statements and other practice.⁶⁸

⁶⁵ See, e.g., the military manuals of Argentina (*ibid.*, §§ 702–703), Australia (*ibid.*, §§ 704–705), Belgium (*ibid.*, § 706), Benin (*ibid.*, § 707), Bosnia and Herzegovina (*ibid.*, § 708), Burkina Faso (*ibid.*, § 709), Cameroon (*ibid.*, §§ 710–711), Canada (*ibid.*, § 712), Colombia (*ibid.*, §§ 713–715), Congo (*ibid.*, § 716), Croatia (*ibid.*, §§ 717–718), Ecuador (*ibid.*, § 719), El Salvador (*ibid.*, § 720), France (*ibid.*, §§ 721–724), Germany (*ibid.*, §§ 725–726), Hungary (*ibid.*, § 727), Israel (*ibid.*, § 728), Italy (*ibid.*, § 729), Kenya (*ibid.*, § 730), South Korea (*ibid.*, § 731), Madagascar (*ibid.*, § 732), Mali (*ibid.*, § 733), Morocco (*ibid.*, § 734), Netherlands (*ibid.*, § 735), New Zealand (*ibid.*, § 736), Nicaragua (*ibid.*, § 737), Nigeria (*ibid.*, §§ 738–740), Peru (*ibid.*, §§ 741–742), Philippines (*ibid.*, § 743), Romania (*ibid.*, § 744), Russia (*ibid.*, § 745), Senegal (*ibid.*, §§ 746–747), South Africa (*ibid.*, § 748), Spain (*ibid.*, § 749), Switzerland (*ibid.*, §§ 750–751), Togo (*ibid.*, § 752), Uganda (*ibid.*, § 753), United Kingdom (*ibid.*, §§ 755–756) and United States (*ibid.*, §§ 757–761).
⁶⁶ See, e.g., the legislation (*ibid.*, §§ 762–853).

⁶⁷ See, e.g., Australia, Military Court at Rabaul, *Ohashi case* and *Baba Masao case* (*ibid.*, § 854); Belgium, Court-Martial of Brussels, *Sergeant W. case*, (*ibid.*, § 855); Chile, Appeal Court of Santiago, *Videla case* (*ibid.*, § 856); China, War Crimes Military Tribunal of the Ministry of National Defence at Nanking, *Takashi Sakai case* (*ibid.*, § 854); Colombia, Constitutional Court, *Constitutional Case No. C-225/95* (*ibid.*, § 857); Israel, District Court of Jerusalem and Supreme Court, *Eichmann case* (*ibid.*, § 854); Netherlands, Temporary Court-Martial at Makassar, *Motomura case* (*ibid.*, § 854); Netherlands, Temporary Court-Martial at Makassar, *Notomi Suetake case* (*ibid.*, § 854); Netherlands, Temporary Court-Martial at Amboina, *Motosuke case* (*ibid.*, § 854); Netherlands, Special Court of Cassation, *Silbertanne murders case* (*ibid.*, § 854) and *Burghof case* (*ibid.*, § 854); Netherlands, Special Court (War Criminals) at Arnhem, *Enkelstroth case* (*ibid.*, § 854); Norway, Court of Appeal, *Bruns case* (*ibid.*, § 854) and *Hans case* (*ibid.*, § 854); United Kingdom, Military Court at Almelo, *Sandrock case* (*ibid.*, § 854); United States, Military Commission at Rome, *Dostler case* (*ibid.*, § 854); United States, Military Tribunal at Nuremberg, *List (Hostages Trial) case* (*ibid.*, § 854); United States, Military Commission in the Far East, *Jaluit Atoll case* (*ibid.*, § 858); United States, Court of Military Appeals, *Schultz case* (*ibid.*, § 859); ICJ, *Nicaragua case (Merits)*, Judgement (*ibid.*, § 925); ICJ, *Nuclear Weapons case*, Advisory Opinion (*ibid.*, § 926); ICTR, *Ntakirutimana case*, Amended Indictment (*ibid.*, § 927); ICTY, *Tadić case*, Interlocutory Appeal, Second Amended Indictment and Judgement (*ibid.*, §§ 928–930), *Mrkšić case*, Initial Indictment and Review of the Indictment (*ibid.*, § 931), *Erde-mović case*, Sentencing Judgement, Judgement on Appeal and Sentencing Judgement *bis* (*ibid.*, § 932), *Delalić case*, Judgement (*ibid.*, § 933), *Jelisić case*, Judgement (*ibid.*, § 934), *Kupreškić case*, Judgement (*ibid.*, § 935), *Blaskić case*, Judgement (*ibid.*, § 936) and *Kordić and Čerkez case*, First Amended Indictment and Judgement (*ibid.*, § 937); UN Human Rights Committee, General Comment No. 6 [Article 6 of the International Covenant on Civil and Political Rights] (*ibid.*, § 938); UN Human Rights Committee, *Camargo v. Colombia* (*ibid.*, § 939); African Commission on Human and Peoples' Rights, *Civil Liberties Organisation v. Chad* (*ibid.*, § 940); European Commission of Human Rights, *Dujardin and Others v. France* (*ibid.*, § 941); European Court of Human Rights, *McCann and Others v. UK* (*ibid.*, § 942), *Ergi v. Turkey* (*ibid.*, § 943), *Yasa v. Turkey* (*ibid.*, § 943), *Kurt v. Turkey* (*ibid.*, § 944), *Kaya v. Turkey* (*ibid.*, § 945), *Avsar v. Turkey* (*ibid.*, § 946) and *K.-H. W. v. Germany* (*ibid.*, § 947); Inter-American Commission on Human Rights, Resolution adopted at the 1968 Session (*ibid.*, § 948), *Case 10.559 (Peru)* (*ibid.*, § 949), *Case 6724 (El Salvador)*, *Case 10.190 (El Salvador)* and *Case 10.284 (El Salvador)* (*ibid.*, § 950), *Case 10.287 (El Salvador)* (*ibid.*, § 951), Report on the situation of human rights in Peru (*ibid.*, § 952), *Case 11.137 (Argentina)* (*ibid.*, § 953) and *Case of the Ríofrío massacre (Colombia)* (*ibid.*, § 954); Inter-American Court of Human Rights, *Velásquez Rodríguez case* (*ibid.*, § 955) and *Neira Alegria and Others case* (*ibid.*, § 956).

⁶⁸ See, e.g., the statements of Botswana (*ibid.*, § 860), Brazil (*ibid.*, § 861), China (*ibid.*, § 863), Colombia (*ibid.*, §§ 864–865), Costa Rica (*ibid.*, § 866), Egypt (*ibid.*, § 867), Indonesia (*ibid.*, § 870), Israel (*ibid.*, § 871), Malaysia (*ibid.*, § 872), Mexico (*ibid.*, § 873), Nauru (*ibid.*, § 874), Netherlands (*ibid.*, § 875), Nigeria (*ibid.*, § 877), Oman (*ibid.*, § 878), Qatar (*ibid.*, § 879),

Alleged violations of this rule have consistently been condemned by States and international organisations, for example, by the UN Security Council, UN General Assembly and UN Commission on Human Rights with respect to the conflicts in Afghanistan, Burundi and the former Yugoslavia.⁶⁹ Allegations of such violations have also been denied by the States concerned, for example, during the Iran–Iraq War.⁷⁰

The ICRC has on numerous occasions condemned the killing of civilians and persons *hors de combat*, stating that such behaviour is prohibited under international humanitarian law.⁷¹

Murder of civilians and persons *hors de combat* is also prohibited under international human rights law, albeit in different terms. Human rights treaties prohibit the “arbitrary deprivation of the right to life”.⁷² This prohibition is non-derogable under these treaties and therefore applicable at all times.⁷³ In their statements before the International Court of Justice in the *Nuclear Weapons case* and *Nuclear Weapons (WHO) case*, several States which were not at the time party to the main human rights treaties stressed the elementary and non-derogable character of the right to life.⁷⁴

The prohibition of “arbitrary deprivation of the right to life” under human rights law, however, also encompasses unlawful killing in the conduct of hostilities, i.e., the killing of civilians and persons *hors de combat* not in the

Russia (*ibid.*, § 880), Rwanda (*ibid.*, § 882), South Africa (*ibid.*, § 884) and United States (*ibid.*, §§ 886–887 and 889), the practice of China (*ibid.*, § 862), France (*ibid.*, § 869) and Rwanda (*ibid.*, § 883) and the reported practice of Nigeria (*ibid.*, § 876) and United States (*ibid.*, § 890).

⁶⁹ See, e.g., UN Security Council, Res. 827 (*ibid.*, § 896), Res. 1019 (*ibid.*, § 897) and Res. 1072 (*ibid.*, § 898); UN General Assembly, Res. 50/193 (*ibid.*, § 902); UN Commission on Human Rights, Res. 1989/67, 1990/53, 1991/78 and 1992/68 (*ibid.*, § 904).

⁷⁰ See the reported practice of Iran and Iraq (*ibid.*, § 916).

⁷¹ See, e.g., ICRC, *Annual Report 1982* (*ibid.*, § 958), Conflict between Iraq and Iran: ICRC Appeal (*ibid.*, § 959), Memorandum on the Applicability of International Humanitarian Law (*ibid.*, § 961), Appeal in behalf of civilians in Yugoslavia (*ibid.*, § 962), Communication to the Press No. 94/16 (*ibid.*, § 964), Memorandum on Respect for International Humanitarian Law in Angola (*ibid.*, § 965), Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Operation Turquoise (*ibid.*, § 966) and Communication to the Press No. 01/47 (*ibid.*, § 969).

⁷² See International Covenant on Civil and Political Rights, Article 6(1) (*ibid.*, § 666); American Convention on Human Rights, Article 4 (*ibid.*, § 667); African Charter on Human and Peoples' Rights, Article 4 (*ibid.*, § 671). The European Convention on Human Rights, Article 2 (*ibid.*, § 664), does not use the term “arbitrary” but specifies a general right to life and gives an exhaustive list of when a deprivation of the right to life may be lawful.

⁷³ See International Covenant on Civil and Political Rights, Article 4(2) (*ibid.*, § 666); American Convention on Human Rights, Article 27(2) (*ibid.*, § 667); European Convention on Human Rights, Article 15(2) (*ibid.*, § 664). The African Charter on Human and Peoples' Rights does not provide for any derogation of its provisions in a state of emergency and Article 15 of the European Convention states that the right to life is non-derogable, except for “lawful acts of war” in a situation which amounts to armed conflict.

⁷⁴ See the statements before the ICJ in the *Nuclear Weapons case* and *Nuclear Weapons (WHO) case* of Indonesia (cited in Vol. II, Ch. 32, § 870), Malaysia (*ibid.*, § 872), Mexico (*ibid.*, § 873), Nauru (*ibid.*, § 874) and Qatar (*ibid.*, § 879).

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power of a party to the conflict not justified under the rules on the conduct of hostilities. In its advisory opinion in the *Nuclear Weapons case*, the International Court of Justice stated that "the test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities".⁷⁵ As discussed in the chapters that deal with the conduct of hostilities, unlawful killings can result, for example, from a direct attack against a civilian (see Rule 1), from an indiscriminate attack (see Rule 11) or from an attack against military objectives causing excessive loss of civilian life (see Rule 14), all of which are prohibited by the rules on the conduct of hostilities.

The Inter-American Commission on Human Rights has also used international humanitarian law as a method of interpreting the right to life during hostilities in situations amounting to armed conflict.⁷⁶ However, in other cases, human rights bodies have directly applied human rights law, without reference to international humanitarian law, in assessing whether there has been a violation of the right to life during hostilities.⁷⁷ In a number of cases relating to non-international armed conflicts or serious internal disturbances (including those involving the use of military force), the UN Human Rights Committee, the African Commission on Human and Peoples' Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have stressed the need for proper precautions to be taken, for limitation of the use of force to the degree strictly necessary and for investigations to be undertaken in the case of suspicious deaths in order to ensure that a loss of life is not "arbitrary".⁷⁸

⁷⁵ ICJ, *Nuclear Weapons case*, Advisory Opinion (*ibid.*, § 926).

⁷⁶ See Inter-American Commission on Human Rights, *Case 11.137 (Argentina)* (*ibid.*, § 953) and *Case of the Riofrio massacre (Colombia)* (*ibid.*, § 954).

⁷⁷ See, e.g., African Commission on Human and Peoples' Rights, *Civil Liberties Organisation v. Chad* (*ibid.*, § 940); Inter-American Commission on Human Rights, *Case 6724 (El Salvador)* (*ibid.*, § 950), *Case 10.190 (El Salvador)* (*ibid.*, § 950) and *Case 10.284 (El Salvador)* (*ibid.*, § 950).

⁷⁸ See UN Human Rights Committee, General Comment No. 6 (Article 6 of the International Covenant on Civil and Political Rights) (*ibid.*, § 938) and *Camargo v. Colombia* (*ibid.*, § 939); African Commission on Human and Peoples' Rights, *Civil Liberties Organisation v. Chad* (*ibid.*, § 940); European Court of Human Rights, *McCann and Others v. UK* (*ibid.*, § 942), *Ergi v. Turkey* (*ibid.*, § 943) and *Yasa v. Turkey* (*ibid.*, § 943); Inter-American Commission on Human Rights, Report on the situation of human rights in Peru (*ibid.*, § 952); Inter-American Court of Human Rights, *Neira Alegria and Others case* (*ibid.*, § 956). Judicial or quasi-judicial practice confirming the need to investigate suspicious deaths, including in armed conflict situations, includes: UN Human Rights Committee, General Comment No. 6 (Article 6 of the International Covenant on Civil and Political Rights) (*ibid.*, § 938); African Commission on Human and Peoples' Rights, *Civil Liberties Organisation v. Chad* (*ibid.*, § 940); European Court of Human Rights, *Kaya v. Turkey* (*ibid.*, § 945) and *Avsar v. Turkey* (*ibid.*, § 946); Inter-American Commission on Human Rights, *Case 10.559 (Peru)* (*ibid.*, § 949); Inter-American Court of Human Rights, *Velásquez Rodríguez case* (*ibid.*, § 955).

Rule 90. Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited.

Practice

Volume II, Chapter 32, Section D.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

The prohibition of torture was already recognised in the Lieber Code.⁷⁹ The Charter of the International Military Tribunal at Nuremberg included "ill-treatment" of civilians and prisoners of war as a war crime.⁸⁰ Common Article 3 of the Geneva Conventions prohibits "cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment" of civilians and persons *hors de combat*.⁸¹ Torture and cruel treatment are also prohibited by specific provisions of the four Geneva Conventions.⁸² In addition, "torture or inhuman treatment" and "wilfully causing great suffering or serious injury to body or health" constitute grave breaches of the Geneva Conventions and are war crimes under the Statute of the International Criminal Court.⁸³

The prohibition of torture and outrages upon personal dignity, in particular humiliating and degrading treatment, is recognised as a fundamental guarantee for civilians and persons *hors de combat* by Additional Protocols I and II.⁸⁴ Torture, cruel treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, constitute war crimes in non-international armed conflicts under the Statutes of the International Criminal

⁷⁹ Lieber Code, Article 16 (*ibid.*, § 1010).

⁸⁰ IMT Charter (Nuremberg), Article 6(b) (*ibid.*, § 982).

⁸¹ Geneva Conventions, common Article 3 (*ibid.*, § 984).

⁸² First Geneva Convention, Article 12, second paragraph ("torture") (*ibid.*, § 985); Second Geneva Convention, Article 12, second paragraph ("torture") (*ibid.*, § 986); Third Geneva Convention, Article 17, fourth paragraph ("physical or mental torture") (*ibid.*, § 987); Article 87, third paragraph ("torture or cruelty") (*ibid.*, § 988) and Article 89 ("inhuman, brutal or dangerous" disciplinary punishment) (*ibid.*, § 989); Fourth Geneva Convention, Article 32 ("torture" and "other measures of brutality") (*ibid.*, § 990).

⁸³ First Geneva Convention, Article 50 (*ibid.*, § 991); Second Geneva Convention, Article 51 (*ibid.*, § 991); Third Geneva Convention, Article 130 (*ibid.*, § 991); Fourth Geneva Convention, Article 147 (*ibid.*, § 991); ICC Statute, Article 8(2)(a)(ii) and (iii) and (c)(i) (*ibid.*, §§ 1006-1007).

⁸⁴ Additional Protocol I, Article 75(2) (adopted by consensus) (*ibid.*, § 996); Additional Protocol II, Article 4(2) (adopted by consensus) (*ibid.*, § 997).

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Court, of the International Criminal Tribunal for Rwanda and of the Special Court for Sierra Leone.⁸⁵

The prohibition of torture, cruel or inhuman treatment and outrages upon personal dignity is contained in numerous military manuals.⁸⁶ This prohibition is also set forth in the legislation of a large number of States.⁸⁷ It has been upheld in national case-law,⁸⁸ as well as in international case-law.⁸⁹ It is also supported by official statements and other practice.⁹⁰ The case-law of the International Criminal Tribunal for the Former Yugoslavia in the *Furundžija case* and *Kunarac case* provides further evidence of the customary nature of the prohibition of torture in both international and non-international armed conflicts.⁹¹

Allegations of torture, cruel or inhuman treatment, whether in international or non-international armed conflicts, have invariably been condemned by the UN Security Council, UN General Assembly and UN Commission on Human Rights, as well as by regional organisations and International Conferences of

⁸⁵ ICC Statute, Article 8(2)(c)(i) and (ii) (*ibid.*, §§ 1007–1008); ICTR Statute, Article 4(a) and (e) (*ibid.*, § 1028); Statute of the Special Court for Sierra Leone, Article 3(a) and (c) (*ibid.*, § 1009).
⁸⁶ See, e.g., the military manuals of Argentina (*ibid.*, §§ 1039–1040); Australia (*ibid.*, §§ 1041–1042), Belgium (*ibid.*, §§ 1043–1044), Benin (*ibid.*, § 1045), Bosnia and Herzegovina (*ibid.*, § 1046), Burkina Faso (*ibid.*, § 1047), Canada (*ibid.*, §§ 1048–1049), China (*ibid.*, § 1050), Colombia (*ibid.*, §§ 1051–1052), Congo (*ibid.*, § 1053), Croatia (*ibid.*, §§ 1054–1055), Dominican Republic (*ibid.*, § 1056), Ecuador (*ibid.*, § 1057), El Salvador (*ibid.*, §§ 1058–1059), France (*ibid.*, §§ 1060–1063), Germany (*ibid.*, § 1064), Hungary (*ibid.*, § 1065), India (*ibid.*, § 1066), Indonesia (*ibid.*, §§ 1067–1068), Israel (*ibid.*, § 1069), Italy (*ibid.*, § 1070), Kenya (*ibid.*, § 1071), Madagascar (*ibid.*, § 1072), Mali (*ibid.*, § 1073), Morocco (*ibid.*, § 1074), Netherlands (*ibid.*, § 1075), New Zealand (*ibid.*, § 1076), Nicaragua (*ibid.*, § 1077), Nigeria (*ibid.*, §§ 1078–1079), Peru (*ibid.*, § 1080), Philippines (*ibid.*, §§ 1081–1082), Romania (*ibid.*, § 1083), Russia (*ibid.*, § 1084), Senegal (*ibid.*, §§ 1085–1086), South Africa (*ibid.*, § 1087), Spain (*ibid.*, § 1088), Sweden (*ibid.*, §§ 1089–1090), Switzerland (*ibid.*, § 1091), Togo (*ibid.*, § 1092), Uganda (*ibid.*, § 1093), United Kingdom (*ibid.*, §§ 1094–1095) and United States (*ibid.*, §§ 1096–1100).

⁸⁷ See, e.g., the legislation (*ibid.*, §§ 1101–1215).

⁸⁸ See, e.g., Australia, Military Court at Rabaul, *Baba Masao case* (*ibid.*, § 1216); Australia, Military Court at Rabaul, *Tanaka Chuichi case* (*ibid.*, § 1217); Bosnia and Herzegovina, Cantonal Court in Tuzla, *Drago case* (*ibid.*, § 1218); Canada, Court Martial Appeal Court, *Brocklebank case* (*ibid.*, § 1219); Chile, Appeal Court of Santiago, *Benado Medwinsky case* (*ibid.*, § 1220); Chile, Appeal Court of Santiago, *Videla case* (*ibid.*, § 1221); China, War Crimes Military Tribunal of the Ministry of National Defence at Nanking, *Takashi Sakai case* (*ibid.*, § 1216); Colombia, Constitutional Court, *Constitutional Case No. C-225/95* (*ibid.*, § 1222); Israel, District Court of Jerusalem, *Eichmann case* (*ibid.*, § 1216); Israel, Supreme Court, *Eichmann case* (*ibid.*, § 1223); Israel, High Court, *General Security Service case* (*ibid.*, § 1224); Netherlands, Temporary Court-Martial at Makassar, *Motomura case* (*ibid.*, § 1216) and *Notomi Sueo case* (*ibid.*, § 1216); Norway, Court of Appeal, *Bruns case* (*ibid.*, § 1216); United Kingdom, Military Court at Hanover, *Heering case* (*ibid.*, § 1225); United States, Military Tribunal at Nuremberg, *List (Hostages Trial) case* (*ibid.*, § 1216); United States, District Court of the Eastern District of New York, *Filartiga case* (*ibid.*, § 1226).

⁸⁹ See, e.g., ICJ, *Nicaragua case (Merits)*, Judgement (*ibid.*, § 1278); ICTY, *Tadić case*, Second Amended Indictment and Judgement (*ibid.*, § 1279), *Mrkšić case*, Initial Indictment (*ibid.*, § 1280), *Delalić case*, Judgement (*ibid.*, § 1281), *Furundžija case*, Judgement (*ibid.*, § 1282), *Jelisić case*, Judgement (*ibid.*, § 1283), *Kupreškić case*, Judgement (*ibid.*, § 1284), *Blaškić case*, Judgement (*ibid.*, § 1285), *Kunarac case*, Judgement (*ibid.*, § 1286) and *Kordić and Čerkez case*, Judgement (*ibid.*, § 1287).

⁹⁰ See, e.g., the statements of Egypt (*ibid.*, § 1230), Netherlands (*ibid.*, § 1233) and United States (*ibid.*, §§ 1234–1238) and the practice of Azerbaijan (*ibid.*, § 1228), China (*ibid.*, § 1229), France (*ibid.*, § 1231) and Yugoslavia (*ibid.*, § 1241).

⁹¹ ICTY, *Furundžija case*, Judgement (*ibid.*, § 1282) and *Kunarac case*, Judgement (*ibid.*, § 1286).

the Red Cross and Red Crescent.⁹² Such allegations have generally been denied by the authorities concerned.⁹³

The prohibition of torture and cruel, inhuman or degrading treatment or punishment is to be found in general human rights treaties,⁹⁴ as well as in specific treaties that seek to prevent and punish these practices.⁹⁵ This prohibition is non-derogable under these instruments.

Definition of torture

The Elements of Crimes for the International Criminal Court provides that the war crime of torture consists of the infliction of "severe physical or mental pain or suffering" for purposes such as "obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind".⁹⁶ Contrary to human rights law, e.g. Article 1 of the Convention against Torture, the Elements of Crimes does not require that such pain or suffering be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

In its early case-law in the *Delalić case* and *Furundžija case* in 1998, the International Criminal Tribunal for the Former Yugoslavia considered the definition contained in Article 1 of the Convention against Torture to be part of customary international law applicable in armed conflict.⁹⁷ In its subsequent case-law in the *Kunarac case* in 2001, however, the Tribunal concluded that "the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law". In particular, the Tribunal held that "the presence of a state official or of any other authority-wielding person in the torture process

⁹² See, e.g., UN Security Council, Res. 674 (*ibid.*, § 1248), Res. 770 (*ibid.*, § 1249), Res. 771 (*ibid.*, § 1250) and Res. 1072 (*ibid.*, § 1251); UN General Assembly, Res. 2547 (XXIV) (*ibid.*, § 1253), Res. 3103 (XXVIII) (*ibid.*, § 1253), Res. 3318 (XXIX) (*ibid.*, § 1254), Res. 34/93 H (*ibid.*, § 1253), Res. 41/35 (*ibid.*, § 1253), Res. 50/193 (*ibid.*, § 1255) and Res. 53/164 (*ibid.*, § 1256); UN Commission on Human Rights, Res. 1989/67 (*ibid.*, § 1257), Res. 1990/53 (*ibid.*, § 1257), Res. 1991/67 (*ibid.*, § 1258), Res. 1991/78 (*ibid.*, § 1257), Res. 1992/60 (*ibid.*, § 1258), Res. 1992/68 (*ibid.*, § 1257), Res. 1994/72 (*ibid.*, § 1259), Res. 1996/71 (*ibid.*, § 1260) and Res. 1996/73 (*ibid.*, § 1261); 21st International Conference of the Red Cross, Res. XI (*ibid.*, § 1270); 23rd International Conference of the Red Cross, Res. XIV (*ibid.*, § 1271); 24th International Conference of the Red Cross, Res. XIV (*ibid.*, § 1272); 25th International Conference of the Red Cross, Res. X (*ibid.*, § 1273).

⁹³ See, e.g., the practice reported in ICRC archive documents (*ibid.*, §§ 1243–1244 and 1246–1247).

⁹⁴ See International Covenant on Civil and Political Rights, Article 7 (*ibid.*, § 993); European Convention on Human Rights, Article 3 (*ibid.*, § 992); American Convention on Human Rights, Article 5(2) (*ibid.*, § 994); African Charter on Human and Peoples' Rights, Article 5 (*ibid.*, § 998); Convention on the Rights of the Child, Article 37(a) (*ibid.*, § 1002).

⁹⁵ See Convention against Torture (*ibid.*, § 999), Inter-American Convention to Prevent and Punish Torture (*ibid.*, § 1000) and European Convention for the Prevention of Torture (*ibid.*, § 1001).

⁹⁶ Elements of Crimes for the ICC, Definition of torture as a war crime (ICC Statute, Article 8(2)(a)(ii) and (c)(i)).

⁹⁷ ICTY, *Delalić case*, Judgement (cited in Vol. II, Ch. 32, § 1329) and *Furundžija case*, Judgement (*ibid.*, § 1330).

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is not necessary for the offence to be regarded as torture under international humanitarian law". It defined torture as the intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, in order to obtain information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate on any ground, against the victim or a third person.⁹⁸

The International Criminal Tribunal for the Former Yugoslavia, as well as regional human rights bodies, have held that rape can constitute torture.⁹⁹ On the prohibition of rape and other forms of sexual violence, see Rule 93.

Definition of inhuman treatment

The term "inhuman treatment" is defined in the Elements of Crimes for the International Criminal Court as the infliction of "severe physical or mental pain or suffering".¹⁰⁰ The element that distinguishes inhuman treatment from torture is the absence of the requirement that the treatment be inflicted for a specific purpose. The International Criminal Tribunal for the Former Yugoslavia has used a wider definition determining that inhuman treatment is that which "causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity".¹⁰¹ The element of "a serious attack on human dignity" was not included in the definition of inhuman treatment under the Elements of Crimes for the International Criminal Court because the war crime of "outrages upon personal dignity" covers such attacks.¹⁰²

In their case-law, human rights bodies apply a definition which is similar to the one used in the Elements of Crimes for the International Criminal Court, stressing the severity of the physical or mental pain or suffering. They have found violations of the prohibition of inhuman treatment in cases of active maltreatment but also in cases of very poor conditions of detention,¹⁰³ as well as in cases of solitary confinement.¹⁰⁴ Lack of adequate food, water or medical

⁹⁸ ICTY, *Kunarac case*, Judgement (*ibid.*, § 1333).

⁹⁹ See, e.g., ICTY, *Delalić case*, Judgement (*ibid.*, §§ 1329 and 1733); European Court of Human Rights, *Aydin v. Turkey* (*ibid.*, §§ 1346 and 1743); Inter-American Commission on Human Rights, *Case 10.970 (Peru)* (*ibid.*, §§ 1351 and 1745).

¹⁰⁰ Elements of Crimes for the ICC, Definition of inhuman treatment as a war crime (ICC Statute, Article 8(2)(a)(iii)).

¹⁰¹ See ICTY, *Delalić case*, Judgement (cited in Vol. II, Ch. 32, § 1329) and *Kordić and Čerkez case*, Judgement (*ibid.*, § 1331).

¹⁰² Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, pp. 63–64.

¹⁰³ See, e.g., UN Human Rights Committee, *Améndola Massiotti and Baritussio v. Uruguay* (cited in Vol. II, Ch. 32, § 1335) and *Deidrick v. Jamaica* (*ibid.*, § 1336); African Commission on Human and Peoples' Rights, *Civil Liberties Organisation v. Nigeria* (151/96) (*ibid.*, § 1339); European Commission of Human Rights, *Greek case* (*ibid.*, § 1341).

¹⁰⁴ See, e.g., UN Human Rights Committee, General Comment No. 20 (Article 7 of the International Covenant on Civil and Political Rights) (*ibid.*, § 1334); *Gómez de Voituret v. Uruguay* (*ibid.*, § 1334) and *Espinoza de Polay v. Peru* (*ibid.*, § 1334); European Committee for the Prevention of Torture, Second General Report (*ibid.*, § 1348); Inter-American Court of Human Rights,

treatment for detained persons has also been found to amount to inhuman treatment.¹⁰⁵

Definition of outrages upon personal dignity, in particular humiliating and degrading treatment

The notion of "outrages upon personal dignity" is defined in the Elements of Crimes for the International Criminal Court as acts which humiliate, degrade or otherwise violate the dignity of a person to such a degree "as to be generally recognized as an outrage upon personal dignity". The Elements of Crimes further specifies that degrading treatment can apply to dead persons and that the victim need not be personally aware of the humiliation.¹⁰⁶ The last point was made in order to cover the deliberate humiliation of unconscious or mentally handicapped persons. The Elements of Crimes adds that the cultural background of the person needs to be taken into account, thereby covering treatment that is humiliating to someone of a particular nationality or religion, for example.

The notion of "degrading treatment" has been defined by the European Commission of Human Rights as treatment or punishment that "grossly humiliates the victim before others or drives the detainee to act against his/her will or conscience".¹⁰⁷

Rule 91. Corporal punishment is prohibited.

Practice

Volume II, Chapter 32, Section E.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

The prohibition of corporal punishment is set forth in the Third and Fourth Geneva Conventions.¹⁰⁸ The prohibition is recognised by Additional Protocols I

Velásquez Rodríguez case (*ibid.*, § 1349); Inter-American Court of Human Rights, *Castillo Petruzzi and Others case* (*ibid.*, § 1353).

¹⁰⁵ UN Human Rights Committee, *Essono Mika Miha v. Equatorial Guinea*. Communication No. 414/1990, 8 July 1994, § 6.4; UN Human Rights Committee, *Williams v. Jamaica*. Communication No. 609/1995, § 6.5; European Court of Human Rights, *Keenan v. United Kingdom*, Judgement, 3 April 2001, § 115; African Commission on Human and Peoples' Rights, *Civil Liberties Organisation v. Nigeria*, Communication No. 151/96, 15 November 1999, § 27.

¹⁰⁶ Elements of Crimes for the ICC, Definition of outrages upon personal dignity, in particular humiliating and degrading treatment, as a war crime (ICC Statute, Article 8(2)(b)(xxi) and (c)(ii)).

¹⁰⁷ European Commission of Human Rights, *Greek case* (cited in Vol. II, Ch. 32, § 1340).

¹⁰⁸ Third Geneva Convention, Article 87, third paragraph (*ibid.*, § 1355); Fourth Geneva Convention, Article 32 (*ibid.*, § 1356).

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and II as a fundamental guarantee for civilians and persons *hors de combat*.¹⁰⁹ Corporal punishment constitutes a war crime in non-international armed conflicts under the Statutes of the International Criminal Tribunal for Rwanda and of the Special Court for Sierra Leone.¹¹⁰ The prohibition of corporal punishment is contained in numerous military manuals.¹¹¹ It is also provided for in the legislation of some States.¹¹²

The prohibition of corporal punishment is not explicitly spelled out in international human rights treaties. However, human rights case-law has held that corporal punishment is prohibited when it amounts to inhuman or degrading treatment or punishment.¹¹³ In its General Comment on Article 7 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee stated that the prohibition of torture and cruel, inhuman or degrading treatment or punishment "must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure".¹¹⁴ The prohibition of inhuman or degrading treatment or punishment is non-derogable under human rights law.

Rule 92. Mutilation, medical or scientific experiments or any other medical procedure not indicated by the state of health of the person concerned and not consistent with generally accepted medical standards are prohibited.

Practice

Volume II, Chapter 32, Section F.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

¹⁰⁹ Additional Protocol I, Article 75(2)(iii) (adopted by consensus) (*ibid.*, § 1358); Additional Protocol II, Article 4(2)(a) (adopted by consensus) (*ibid.*, § 1359).

¹¹⁰ ICTR Statute, Article 4(a) (*ibid.*, § 1363); Statute of the Special Court for Sierra Leone, Article 3 (*ibid.*, § 1360).

¹¹¹ See, e.g., the military manuals of Argentina (*ibid.*, § 1367), Australia (*ibid.*, § 1368), Benin (*ibid.*, § 1369), Canada (*ibid.*, § 1370), Colombia (*ibid.*, § 1371), Croatia (*ibid.*, § 1372), France (*ibid.*, §§ 1373–1374), Israel (*ibid.*, § 1375), Italy (*ibid.*, § 1376), Madagascar (*ibid.*, § 1377), Netherlands (*ibid.*, § 1378), New Zealand (*ibid.*, § 1379), Nicaragua (*ibid.*, § 1380), Romania (*ibid.*, § 1381), Spain (*ibid.*, § 1382), Sweden (*ibid.*, § 1383), Switzerland (*ibid.*, § 1384), Togo (*ibid.*, § 1385), United Kingdom (*ibid.*, §§ 1386–1387) and United States (*ibid.*, § 1388).

¹¹² See, e.g., the legislation of Azerbaijan (*ibid.*, § 1389), Bangladesh (*ibid.*, § 1390), Ireland (*ibid.*, § 1391), Mozambique (*ibid.*, § 1392), Norway (*ibid.*, § 1393) and Poland (*ibid.*, § 1394).

¹¹³ See, e.g., European Court of Human Rights, *Tyrer case* (*ibid.*, § 1403) and *A. v. UK case* (*ibid.*, § 1404).

¹¹⁴ UN Human Rights Committee, General Comment No. 20 (Article 7 of the International Covenant on Civil and Political Rights) (*ibid.*, § 1402).

International and non-international armed conflicts

The prohibition of mutilation was already recognised in the Lieber Code.¹¹⁵ Common Article 3 of the Geneva Conventions prohibits "mutilation" of civilians and persons *hors de combat*.¹¹⁶ Mutilation is also prohibited by specific provisions of the Third and Fourth Geneva Conventions.¹¹⁷ In addition, the prohibition of mutilation is recognised as a fundamental guarantee for civilians and persons *hors de combat* by Additional Protocols I and II.¹¹⁸ Mutilation constitutes a war crime in both international and non-international armed conflicts under the Statute of the International Criminal Court.¹¹⁹ It is also recognised as a war crime in non-international armed conflicts under the Statutes of the International Criminal Tribunal for Rwanda and of the Special Court for Sierra Leone.¹²⁰

"Biological experiments" are prohibited by the First and Second Geneva Conventions, while the Third and Fourth Geneva Conventions prohibit "medical or scientific experiments" not justified by the medical treatment of the person concerned.¹²¹ Conducting "biological experiments" on persons protected under the Geneva Conventions is a grave breach and a war crime under the Statutes of the International Criminal Court and of the International Criminal Tribunal for the Former Yugoslavia.¹²² Additional Protocol I prohibits "medical or scientific experiments".¹²³ In the *Brandt (The Medical Trial) case* in 1947, the US Military Tribunal at Nuremberg convicted 16 persons of carrying out medical experiments on prisoners of war and civilians.¹²⁴

Additional Protocol I also prohibits "any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards" and makes it a grave breach of the Protocol if the medical procedure undertaken seriously endangers the physical or mental health or integrity of the person concerned.¹²⁵ Additional

¹¹⁵ Lieber Code, Article 56 (*ibid.*, § 1425).

¹¹⁶ Geneva Conventions, common Article 3 (*ibid.*, § 1409).

¹¹⁷ Third Geneva Convention, Article 13 (*ibid.*, § 1412); Fourth Geneva Convention, Article 32 (*ibid.*, § 1414).

¹¹⁸ Additional Protocol I, Article 75(2) (adopted by consensus) (*ibid.*, § 1416); Additional Protocol II, Article 4(2) (adopted by consensus) (*ibid.*, § 1420).

¹¹⁹ ICC Statute, Article 8(2)(b)(x) and (e)(xi) (*ibid.*, § 1423).

¹²⁰ ICTR Statute, Article 4(a) (*ibid.*, § 1429); Statute of the Special Court for Sierra Leone, Article 3 (*ibid.*, § 1424).

¹²¹ First Geneva Convention, Article 12 (*ibid.*, § 1410); Second Geneva Convention, Article 12 (*ibid.*, § 1411); Third Geneva Convention, Article 13 (*ibid.*, § 1412); Fourth Geneva Convention, Article 32 (*ibid.*, § 1413).

¹²² ICC Statute, Article 8(2)(a)(iii) (*ibid.*, § 1422); ICTY Statute, Article 2(b) (*ibid.*, § 1428).

¹²³ Additional Protocol I, Article 11(2) (adopted by consensus) (*ibid.*, § 1415).

¹²⁴ United States, Military Tribunal at Nuremberg, *In re Brandt and Others (The Medical Trial)* (*ibid.*, § 1540).

¹²⁵ Additional Protocol I, Article 11(1) and (4) (adopted by consensus) (*ibid.*, § 1415).

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Protocol II contains the same prohibition with respect to persons deprived of their liberty for reasons related to the armed conflict.¹²⁶

Under the Statute of the International Criminal Court, subjecting persons who are in the power of another party to the conflict to "medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death or seriously endanger the health of such person or persons" constitutes a war crime in both international and non-international armed conflicts.¹²⁷

Numerous military manuals specify the prohibition of physical mutilation, medical or scientific experiments or any other medical procedure not indicated by the state of health of the patient and not consistent with generally accepted medical standards.¹²⁸ The prohibition is also found extensively in national legislation.¹²⁹

Most international instruments, official statements and case-law relating to war crimes refer to this prohibition without making any specific mention of a possible exception if the detained person consented to the procedure.¹³⁰ The issue was discussed during the negotiation of the Elements of Crimes for the International Criminal Court. The conference came to the conclusion that the prohibition was absolute, as a detained person cannot validly give consent.¹³¹

The prohibition of mutilation is not expressed in such terms in human rights treaties but would be covered by the prohibition of torture and cruel, inhuman or degrading treatment or punishment, from which no derogation is permissible. As regards the prohibition of medical or scientific experiments, the International Covenant on Civil and Political Rights expressly includes this in its

¹²⁶ Additional Protocol II, Article 5(2)(e) (adopted by consensus) (*ibid.*, § 1421).

¹²⁷ ICC Statute, Article 8(2)(b)(x) and (e)(xi) (*ibid.*, § 1423).

¹²⁸ See, e.g., the military manuals of Argentina (*ibid.*, §§ 1434–1435), Australia (*ibid.*, §§ 1436–1437), Belgium (*ibid.*, § 1438), Bosnia and Herzegovina (*ibid.*, § 1439), Burkina Faso (*ibid.*, § 1440), Canada (*ibid.*, § 1441), Ecuador (*ibid.*, § 1442), France (*ibid.*, §§ 1443–1445), Germany (*ibid.*, § 1446), Israel (*ibid.*, § 1447), Italy (*ibid.*, § 1448), Morocco (*ibid.*, § 1449), Netherlands (*ibid.*, § 1450), New Zealand (*ibid.*, § 1451), Nigeria (*ibid.*, §§ 1452–1453), Russia (*ibid.*, § 1454), Senegal (*ibid.*, §§ 1455–1456), South Africa (*ibid.*, § 1457), Spain (*ibid.*, § 1458), Sweden, (*ibid.*, § 1459), Switzerland (*ibid.*, § 1460), United Kingdom (*ibid.*, §§ 1461–1462) and United States (*ibid.*, §§ 1463–1466).

¹²⁹ See, e.g., the legislation (*ibid.*, §§ 1467–1535).

¹³⁰ See First Geneva Convention, Article 50 (*ibid.*, § 1410); Second Geneva Convention, Article 51 (*ibid.*, § 1411); Third Geneva Convention, Article 130 (*ibid.*, § 1412); Fourth Geneva Convention, Article 147 (*ibid.*, § 1413); Additional Protocol I, Articles 11 and 85 (adopted by consensus) (*ibid.*, §§ 1415 and 1417); ICC Statute, Article 8(2)(a)(ii), (b)(x) and (e)(xi) (*ibid.*, §§ 1422–1423); Statute of the Special Court for Sierra Leone, Article 3 (*ibid.*, § 1424); United States, Concurrent resolution of the Congress (*ibid.*, § 1545); Chile, Appeal Court of Santiago, *Videla Case* (*ibid.*, § 1536); Poland, Supreme National Tribunal at Poznan, *Hoess trial* (*ibid.*, § 1538); United States, Military Tribunal at Nuremberg, *Milch case* (*ibid.*, § 1539) and *Brandt (The Medical Trial) case* (*ibid.*, § 1540); United States, Court of Military Appeals, *Schultz case* (*ibid.*, § 1541).

¹³¹ Elements of Crimes for the ICC, Definition of physical mutilation or medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, as war crimes (Footnote 46 relating to Article 8(2)(b)(x) and Footnote 68 relating to Article 8(2)(e)(xi) of the ICC Statute).

non-derogable Article 7, which prohibits torture and cruel, inhuman or degrading treatment or punishment.¹³² The UN Human Rights Committee, in its General Comment on Article 7, specifies that special protection against such experiments is necessary in the case of persons not capable of giving valid consent, in particular those under any form of detention or imprisonment.¹³³ The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by consensus by the UN General Assembly, prohibits medical or scientific experimentation which may be detrimental to health, even with the detainee's consent.¹³⁴ The European Court of Human Rights has held that those medical measures taken in relation to a detainee that are dictated by therapeutic necessity cannot be regarded as inhuman or degrading.¹³⁵

Rule 93. Rape and other forms of sexual violence are prohibited.

Practice

Volume II, Chapter 32, Section G.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

The prohibition of rape was already recognised in the Lieber Code.¹³⁶ While common Article 3 of the Geneva Conventions does not explicitly mention rape or other forms of sexual violence, it prohibits "violence to life and person" including cruel treatment and torture and "outrages upon personal dignity".¹³⁷ The Third Geneva Convention provides that prisoners of war are in all circumstances entitled to "respect for their persons and their honour".¹³⁸ The prohibition of "outrages upon personal dignity" is recognised in Additional Protocols I and II as a fundamental guarantee for civilians and persons

¹³² International Covenant on Civil and Political Rights, Article 7 (cited in Vol. II, Ch. 32, § 1414).

¹³³ UN Human Rights Committee, General Comment No. 20 (Article 7 of the International Covenant on Civil and Political Rights) (*ibid.*, § 1551).

¹³⁴ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 22 (*ibid.*, § 1426).

¹³⁵ European Court of Human Rights, *Herczegfalvy v. Austria* (*ibid.*, § 1552). The Court held that forcible administration of food and drugs to a violent and mentally ill patient on hunger strike was not a breach of Article 3 of the European Convention on Human Rights.

¹³⁶ Lieber Code, Article 44 (*ibid.*, § 1572).

¹³⁷ Geneva Conventions, common Article 3 (*ibid.*, § 1557).

¹³⁸ Third Geneva Convention, Article 14, first paragraph.

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hors de combat.¹³⁹ Article 75 of Additional Protocol I specifies that this prohibition covers in particular "humiliating and degrading treatment, enforced prostitution and any form of indecent assault", while Article 4 of Additional Protocol II specifically adds "rape" to this list.¹⁴⁰ The Fourth Geneva Convention and Additional Protocol I require protection for women and children against rape, enforced prostitution or any other form of indecent assault.¹⁴¹ Rape, enforced prostitution and any form of indecent assault are war crimes under the Statutes of the International Criminal Tribunal for Rwanda and of the Special Court for Sierra Leone.¹⁴² The expressions "outrages upon personal dignity" and "any form of indecent assault" refer to any form of sexual violence. Under the Statute of the International Criminal Court, "committing rape, sexual slavery, enforced prostitution, forced pregnancy... enforced sterilization, or any other form of sexual violence" also constituting a grave breach of the Geneva Conventions or also constituting a serious violation of common Article 3 of the Geneva Conventions constitutes a war crime in international and non-international armed conflicts respectively.¹⁴³ Furthermore, "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" constitutes a crime against humanity under the Statute of the International Criminal Court and "rape" constitutes a crime against humanity under the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.¹⁴⁴

Numerous military manuals state that rape, enforced prostitution and indecent assault are prohibited and many of them specify that these acts are war crimes.¹⁴⁵ The legislation of many States provides that rape and other forms of sexual violence are war crimes.¹⁴⁶ National case-law has confirmed that rape

¹³⁹ Additional Protocol I, Article 75(2) (adopted by consensus) (cited in Vol. II, Ch. 32, § 996); Additional Protocol II, Article 4(2) (adopted by consensus) (*ibid.*, § 997).

¹⁴⁰ Additional Protocol I, Article 75(2) (adopted by consensus) (*ibid.*, § 1560); Additional Protocol II, Article 4(2) (adopted by consensus) (*ibid.*, § 1561).

¹⁴¹ Fourth Geneva Convention, Article 27, second paragraph (*ibid.*, § 1558); Additional Protocol I, Articles 76–77 (adopted by consensus) (*ibid.*, §§ 1562–1563).

¹⁴² ICTR Statute, Article 4(e) (*ibid.*, § 1579); Statute of the Special Court for Sierra Leone, Article 3(e) (*ibid.*, § 1571).

¹⁴³ ICC Statute, Article 8(2)(b)(xxii) and (e)(vi) (*ibid.*, § 1567).

¹⁴⁴ ICC Statute, Article 7(1)(g) (*ibid.*, § 1566); ICTY Statute, Article 5(g) (*ibid.*, § 1578); ICTR Statute, Article 3(g) (*ibid.*, § 1579).

¹⁴⁵ See, e.g., the military manuals of Argentina (*ibid.*, §§ 1586–1587), Australia (*ibid.*, §§ 1588–1589), Canada (*ibid.*, § 1590–1591), China (*ibid.*, § 1592), Dominican Republic (*ibid.*, § 1593), El Salvador (*ibid.*, § 1594), France (*ibid.*, §§ 1596–1597), Germany (*ibid.*, § 1598), Israel (*ibid.*, § 1599), Madagascar (*ibid.*, § 1600), Netherlands (*ibid.*, § 1601), New Zealand (*ibid.*, § 1602), Nicaragua (*ibid.*, § 1603), Nigeria (*ibid.*, § 1604), Peru (*ibid.*, § 1605), Senegal (*ibid.*, § 1606), Spain (*ibid.*, § 1607), Sweden (*ibid.*, § 1608), Switzerland (*ibid.*, § 1609), Uganda (*ibid.*, § 1610), United Kingdom (*ibid.*, §§ 1611–1612), United States (*ibid.*, §§ 1613–1617) and Yugoslavia (*ibid.*, § 1618).

¹⁴⁶ See, e.g., the legislation of Armenia (*ibid.*, § 1620), Australia (*ibid.*, §§ 1621–1623), Azerbaijan (*ibid.*, § 1625), Bangladesh (*ibid.*, § 1626), Belgium (*ibid.*, § 1627), Bosnia and Herzegovina (*ibid.*, § 1628), Canada (*ibid.*, § 1630), China (*ibid.*, § 1631), Colombia (*ibid.*, § 1632), Congo (*ibid.*, § 1633), Croatia (*ibid.*, § 1634), Estonia (*ibid.*, § 1636), Ethiopia (*ibid.*, § 1637), Georgia (*ibid.*, § 1638), Germany (*ibid.*, § 1639), South Korea (*ibid.*, § 1643), Lithuania (*ibid.*, § 1644), Mali

constitutes a war crime, as early as 1946 in the *Takashi Sakai case* before the War Crimes Military Tribunal of the Chinese Ministry of National Defence.¹⁴⁷ In the *John Schultz case* in 1952, the US Court of Military Appeals held that rape was a "crime universally recognized as properly punishable under the law of war".¹⁴⁸

Violations of the prohibition of rape and other forms of sexual violence have been widely condemned by States and international organisations.¹⁴⁹ For example, the UN Security Council, UN General Assembly and UN Commission on Human Rights condemned the sexual violence that occurred during the conflicts in Rwanda, Sierra Leone, Uganda and the former Yugoslavia.¹⁵⁰ The European Parliament, Council of Europe and Gulf Cooperation Council have condemned rape in the former Yugoslavia as a war crime.¹⁵¹ It is significant that in 1993 Yugoslavia acknowledged in its report to the Committee on the Elimination of Discrimination Against Women that abuses of women in war zones were crimes contrary to international humanitarian law and apologised for an earlier statement giving the false impression that rape was considered normal behaviour in times of war.¹⁵²

Sexual violence is prohibited under human rights law primarily through the prohibition of torture and cruel, inhuman or degrading treatment or punishment. Thus, both the European Court of Human Rights and the Inter-American Commission on Human Rights have, in their case-law, found instances of rape of detainees to amount to torture.¹⁵³ The European Court of Human Rights has also found the strip-searching of a male prisoner in the presence of a female prison officer to be degrading treatment.¹⁵⁴ The Committee on the Elimination of Discrimination Against Women stated in a General Recommendation that

(*ibid.*, § 1645), Mozambique (*ibid.*, § 1646), Netherlands (*ibid.*, §§ 1648–1649), New Zealand (*ibid.*, § 1650), Paraguay (*ibid.*, § 1653), Slovenia (*ibid.*, § 1654), Spain (*ibid.*, § 1656), United Kingdom (*ibid.*, § 1658) and Yugoslavia (*ibid.*, §§ 1659–1660); see also the draft legislation of Argentina (*ibid.*, § 1619), Burundi (*ibid.*, § 1629) and Trinidad and Tobago (*ibid.*, § 1657).

¹⁴⁷ China, War Crimes Military Tribunal of the Ministry of National Defence, *Takashi Sakai case* (*ibid.*, § 1661).

¹⁴⁸ United States, Court of Military Appeals, *John Schultz case* (*ibid.*, § 1663).

¹⁴⁹ See, e.g., the statements of Germany (*ibid.*, §§ 1667–1668), Netherlands (*ibid.*, § 1669) and United States (*ibid.*, §§ 1674–1675).

¹⁵⁰ See, e.g., UN Security Council, Res. 798 (*ibid.*, § 1680), Res. 820 (*ibid.*, § 1681), Res. 827 (*ibid.*, § 1682), Res. 1019 (*ibid.*, § 1683) and Res. 1034 (*ibid.*, § 1684); UN Security Council, Statement by the President (*ibid.*, § 1687); UN General Assembly, Res. 48/143 (*ibid.*, § 1690), Res. 49/196 (*ibid.*, § 1691), Res. 50/192 (*ibid.*, § 1692), Res. 50/193 (*ibid.*, §§ 1692–1693), Res. 51/114 (*ibid.*, § 1694) and Res. 51/115 (*ibid.*, § 1692); UN Commission on Human Rights, Res. 1994/72 (*ibid.*, § 1696), Res. 1996/71 (*ibid.*, § 1697) and Res. 1998/75 (*ibid.*, § 1698).

¹⁵¹ See European Parliament, Resolution on the rape of women in the former Yugoslavia (*ibid.*, § 1714); Council of Europe, Committee of Ministers, Declaration on the Rape of Women and Children in the Territory of Former Yugoslavia (*ibid.*, § 1711); Gulf Cooperation Council, Supreme Council, Final Communiqué of the 13th Session (*ibid.*, § 1717).

¹⁵² Yugoslavia, Statement before the Committee on the Elimination of Discrimination Against Women (*ibid.*, § 1680).

¹⁵³ See, e.g., European Court of Human Rights, *Aydin v. Turkey* (*ibid.*, § 1743); Inter-American Commission on Human Rights, *Case 10.970 (Peru)* (*ibid.*, § 1745).

¹⁵⁴ European Court of Human Rights, *Valasinas v. Lithuania* (*ibid.*, § 1744).

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discrimination includes gender-based violence.¹⁵⁵ There is also an increasing number of treaties and other international instruments which state that trafficking in women and children for the purpose of prostitution is a criminal offence,¹⁵⁶ as well as an increased recognition of the need to punish all persons responsible for sexual violence.¹⁵⁷ The prohibition of using sexual violence as an official punishment is clear; not only is such a punishment not officially provided for by States, but also any confirmed reports of such an incident have either been denied or the relevant persons prosecuted.¹⁵⁸

Definition of rape

With respect to the definition of rape, the International Criminal Tribunal for the Former Yugoslavia considered in its judgement in the *Furundžija* case in 1998 that rape required "coercion or force or threat of force against the victim or a third person".¹⁵⁹ In its later case-law in the *Kunarac* case in 2001, however, the Tribunal considered that there might be other factors "which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim" and that this consideration defined the accurate scope of the definition of rape under international law.¹⁶⁰ The International Criminal Tribunal for Rwanda in the *Akayesu* case in 1998 held that "rape is a form of aggression" and that "the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts". It defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".¹⁶¹

¹⁵⁵ Committee on the Elimination of Discrimination Against Women, General Recommendation 19 (Violence against Women) (*ibid.*, § 1737).

¹⁵⁶ See, e.g., Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Article 1 (*ibid.*, § 1559); Protocol on Trafficking in Persons, Article 1 (*ibid.*, § 1569); SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (not yet in force), Article 3 (*ibid.*, § 1570); UN High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking (*ibid.*, §§ 1709–1710); ECOWAS, Declaration on the Fight against Trafficking in Persons (*ibid.*, § 1716); OAS Inter-American Commission of Women, Res. CIM/RES 225 (XXXI-0/02) (*ibid.*, § 1718).

¹⁵⁷ See, e.g., UN General Assembly, Res. 48/104 proclaiming the UN Declaration on the Elimination of Violence against Women (*ibid.*, § 1689); Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19 (Violence against Women) (*ibid.*, § 1728); European Court of Human Rights, *S. W. v. UK* (*ibid.*, § 1742).

¹⁵⁸ For example, when a Pakistani tribal council ordered the rape of a girl as a punishment, widespread outrage resulted in the Chief Justice of Pakistan ordering the prosecution of the persons concerned and resulting in conviction and a severe punishment. See news.bbc.co.uk/1/world/south_asia/2089624.stm, 3 July 2002 and the official reply of Pakistan dated 7 January 2003 to the letter of the International Commission of Jurists protesting this event and pointing out the government's international responsibility (on file with the authors); see also Committee on the Elimination of Discrimination Against Women, General Recommendation 19 (Violence against Women), 29 January 1992, § 8.

¹⁵⁹ ICTY, *Furundžija* case, Judgement (cited in Vol. II, Ch. 32, § 1734).

¹⁶⁰ ICTY, *Kunarac* case, Judgement (*ibid.*, § 1736).

¹⁶¹ ICTR, *Akayesu* case, Judgement (*ibid.*, § 1728).

Rape and sexual violence can also be constituent elements of other crimes under international law. The International Criminal Tribunal for the Former Yugoslavia in the *Delalić* case held that rape could constitute torture when the specific conditions of torture were fulfilled.¹⁶² The International Criminal Tribunal for Rwanda in the *Akayesu* case and *Musema* case held that rape and sexual violence could constitute genocide when the specific conditions of genocide were fulfilled.¹⁶³

It has been specified in practice that the prohibition of sexual violence is non-discriminatory, i.e., that men and women, as well as adults and children, are equally protected by this prohibition. Except for forced pregnancy, the crimes of sexual violence in the Statute of the International Criminal Court are prohibited when committed against "any person", not only women. In addition, in the Elements of Crimes for the International Criminal Court, the concept of "invasion" used to define rape is "intended to be broad enough to be gender-neutral".¹⁶⁴

Rule 94. Slavery and the slave trade in all their forms are prohibited.

Practice

Volume II, Chapter 32, Section H.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

The prohibition of slavery was specified as early as the Lieber Code.¹⁶⁵ Although not actually spelled out in the Hague and Geneva Conventions, nor in Additional Protocol I, it is clear that enslaving persons in an international armed conflict is prohibited. The various rules in the Geneva Conventions relating to the labour of prisoners of war and civilians, concerning their release and return, as well as the prohibition in the Hague Regulations of the forced allegiance of persons in occupied territory, presuppose the prohibition of slavery.¹⁶⁶

¹⁶² ICTY, *Delalić* case, Judgement (*ibid.*, § 1733).

¹⁶³ ICTR, *Akayesu* case, Judgement (*ibid.*, § 1728) and *Musema* case, Judgement (*ibid.*, § 1730).

¹⁶⁴ Elements of Crimes for the ICC, Definition of rape as a war crime (Footnote 50 relating to Article 8(2)(b)(xxii) and Footnote 62 relating to Article 8(2)(e)(vi) of the ICC Statute).

¹⁶⁵ Lieber Code, Article 23 (cited in Vol. II, Ch. 32, § 1784), Article 42 (*ibid.*, § 1785) and Article 58 (*ibid.*, § 1786).

¹⁶⁶ Third Geneva Convention, Articles 49–68 (*ibid.*, §§ 1762–1764) and Articles 109–119 (cited in Vol. II, Ch. 37, §§ 606–607); Fourth Geneva Convention, Article 40 (cited in Vol. II, Ch. 32,

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The prohibition of "slavery and the slave trade in all their forms" has been recognised in Additional Protocol II as a fundamental guarantee for civilians and persons *hors de combat*.¹⁶⁷

"Enslavement" was considered a crime against humanity in the Charters of the International Military Tribunals at Nuremberg and Tokyo.¹⁶⁸ "Enslavement" is also listed as a crime against humanity under the Statutes of the International Criminal Court and of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda.¹⁶⁹

The military manuals and the legislation of many States prohibit slavery and the slave trade, or "enslavement", which is often, but not always, referred to as a crime against humanity.¹⁷⁰ In the *Krnjelac case*, the International Criminal Tribunal for the Former Yugoslavia found the defendants guilty of "enslavement as a crime against humanity" and of "slavery as a violation of the laws or customs of war".¹⁷¹

Slavery and the slave trade are equally prohibited in international human rights law. The first universal treaty outlawing slavery and the slave trade was the Slavery Convention in 1926.¹⁷² This was supplemented in 1956 by the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery, outlawing debt bondage, serfdom and inheritance or transfer of women or children.¹⁷³ The prohibition of slavery, servitude and the slave trade is a non-derogable right under the International Covenant on Civil and Political Rights and the regional human rights conventions.¹⁷⁴ A series of recent treaties criminalise trafficking in persons, such as

§ 1765), Articles 51–52 (*ibid.*, § 1766), Articles 95–96 (*ibid.*, § 1767) and Articles 132–135 (cited in Vol. II, Ch. 37, §§ 608–610); Hague Regulations, Article 45.

¹⁶⁷ Additional Protocol II, Article 4(2)(f) (adopted by consensus) (cited in Vol. II, Ch. 32, § 1774).

¹⁶⁸ IMT Charter (Nuremberg), Article 6 (*ibid.*, § 1761); IMT Charter (Tokyo), Article 5(c) (*ibid.*, § 1789).

¹⁶⁹ ICTY Statute, Article 5(c) (*ibid.*, § 1795); ICTR Statute, Article 3(c) (*ibid.*, § 1796); ICC Statute, Article 7(1)(c) (*ibid.*, § 1779).

¹⁷⁰ See, e.g., the military manuals of Canada (*ibid.*, § 1802), France (*ibid.*, § 1804), Israel (*ibid.*, § 1805), Netherlands (*ibid.*, § 1806), New Zealand (*ibid.*, § 1807), Senegal (*ibid.*, § 1809) and United States (*ibid.*, § 1815) and the legislation of Armenia (*ibid.*, § 1817), Australia (*ibid.*, § 1820), Belgium (*ibid.*, § 1825), Canada (*ibid.*, § 1828), China (*ibid.*, § 1829), Congo (*ibid.*, § 1831), Croatia (*ibid.*, § 1833), France (*ibid.*, § 1835), Ireland (*ibid.*, § 1836), Kenya (*ibid.*, § 18390), Mali (*ibid.*, § 1843), Netherlands (*ibid.*, § 1844), New Zealand (*ibid.*, § 1846), Niger (*ibid.*, § 1848), Norway (*ibid.*, § 1849), Philippines (*ibid.*, § 1851), United Kingdom (*ibid.*, § 1855) and United States (*ibid.*, §§ 1856–1857); see also the draft legislation of Burundi (*ibid.*, § 1827) and Trinidad and Tobago (*ibid.*, § 1853).

¹⁷¹ ICTY, *Krnjelac case*, Judgement (*ibid.*, § 1897).

¹⁷² Slavery Convention, Article 2 (*ibid.*, § 1758).

¹⁷³ Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions similar to Slavery, Article 1 (*ibid.*, § 1769).

¹⁷⁴ International Covenant on Civil and Political Rights, Article 8 (slavery, slave-trade and servitude) (*ibid.*, § 1772); European Convention on Human Rights, Article 4(1) (slavery and servitude) (*ibid.*, § 1768); American Convention on Human Rights, Article 6(1) (slavery, involuntary servitude and slave trade) (*ibid.*, § 1773); African Charter on Human and Peoples' Rights, Article 5 (slavery and slave trade) (*ibid.*, § 1776).

the Protocol on the Trafficking in Persons adopted in 2000.¹⁷⁵ Slavery and the slave trade are also prohibited in other international instruments.¹⁷⁶

Definition of slavery and slave trade

The Slavery Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". It defines slave trade as including:

all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.¹⁷⁷

These definitions have served as the basis for the definition of "enslavement" in the Statute of the International Criminal Court as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children".¹⁷⁸

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery defines serfdom as "the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status".¹⁷⁹ In the *Pohl case* in 1947, the US Military Tribunal at Nuremberg held that "involuntary servitude, even if tempered by humane treatment, is still slavery".¹⁸⁰

Sexual slavery

Under the Statute of the International Criminal Court, sexual slavery is a war crime in both international and non-international armed conflicts.¹⁸¹ The elements of crimes for this offence were deliberately drafted to avoid too narrow an interpretation of "sexual slavery", defining it as the exercise of "any or all of the powers attaching to the right of ownership over one or more persons,

¹⁷⁵ Protocol on Trafficking in Persons, Articles 1, 3 and 5 (*ibid.*, § 1783).

¹⁷⁶ See, e.g., Universal Declaration on Human Rights, Article 4 (*ibid.*, § 1790); Cairo Declaration on Human Rights in Islam, Article 11(a) (*ibid.*, § 1793); EU Charter of Fundamental Rights, Article 5 (*ibid.*, § 1800).

¹⁷⁷ Slavery Convention, Article 1 (*ibid.*, § 1758).

¹⁷⁸ ICC Statute, Article 7(2)(c) (*ibid.*, § 1779).

¹⁷⁹ Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions similar to Slavery, Article 1(b). For an application of this definition, see European Commission of Human Rights, *Van Droogenbroeck v. Belgium* (*ibid.*, § 1900).

¹⁸⁰ United States, Military Tribunal at Nuremberg, *Pohl case* (*ibid.*, § 1869).

¹⁸¹ ICC Statute, Article 8(2)(b)(xxii) and (e)(vi) (*ibid.*, § 1780).

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such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty" combined with the causing of such person or persons "to engage in one or more acts of a sexual nature". In relation to the first element of this war crime, the Elements of Crimes specifies that "it is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status" as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery and that "it is also understood that the conduct described in this element includes trafficking in persons, in particular women and children".¹⁸²

In a report submitted in 1998 to the UN Sub-Commission on Human Rights, the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime stated that "sexual slavery is slavery and its prohibition is a *jus cogens* norm".¹⁸³ In the ongoing debate surrounding the so-called "comfort women" during the Second World War, both the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime and the Special Rapporteur on Violence against Women, its Causes and Consequences have stated that they consider the practice of "comfort women" to be a case of sexual slavery. Japan, on the other hand, maintains that the definition of slavery does not apply to the treatment of the women in question.¹⁸⁴

Rule 95. Uncompensated or abusive forced labour is prohibited.

Practice

Volume II, Chapter 32, Section H.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

In the context of international armed conflicts, the Third Geneva Convention provides that "the Detaining Power may utilize the labour of prisoners of war

¹⁸² Elements of Crimes for the ICC, Definition of sexual slavery (ICC Statute, Article 8(2)(b)(xxii), including Footnote 53, and Article 8(2)(e)(vi), including Footnote 65).

¹⁸³ UN Sub-Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Final report (cited in Vol. II, Ch. 32, § 1887).

¹⁸⁴ UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report (*ibid.*, § 1885); UN Sub-Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Final report (*ibid.*, § 1887).

who are physically fit, taking into account their age, sex, rank and physical aptitude, and with a view particularly to maintaining them in a good state of physical and mental health".¹⁸⁵

The Convention lists in detail the types of work a prisoner of war may be compelled to perform, "besides work connected with camp administration, installation or maintenance".¹⁸⁶ This list builds upon the general prohibition found in the 1929 Geneva Convention Relative to the Treatment of Prisoners of War that "work done by prisoners of war shall have no direct connection with the operations of the war".¹⁸⁷ In addition, the Third Geneva Convention provides that "unless he be a volunteer, no prisoner of war may be employed on labour which is of an unhealthy or dangerous nature. No prisoner of war shall be assigned to labour which would be looked upon as humiliating for a member of the Detaining Power's own forces. The removal of mines or similar devices shall be considered as dangerous labour."¹⁸⁸ The Convention contains further detailed provisions concerning working conditions, duration of labour, working pay, occupational accidents and medical supervision.¹⁸⁹

The Fourth Geneva Convention provides that protected civilians may be compelled to work, but only under strict conditions, excluding work which is "directly related to the conduct of military operations" or which would involve them "in the obligation of taking part in military operations", and payment of a wage is required.¹⁹⁰ Lastly, the Fourth Geneva Convention provides that civilian internees shall not be employed "unless they so desire", in which case they must also receive a salary.¹⁹¹

The military manuals and the legislation of many States state that imposing forced labour on prisoners of war or civilians,¹⁹² as well as compelling prisoners of war or civilians to perform prohibited work, are criminal offences.¹⁹³ In several national war crimes trials, the accused were found guilty of

¹⁸⁵ Third Geneva Convention, Article 49.

¹⁸⁶ Third Geneva Convention, Article 50 (cited in Vol. II, Ch. 32, § 1763).

¹⁸⁷ 1929 Geneva Convention Relative to the Treatment of Prisoners of War, Article 31 (*ibid.*, § 1759).

¹⁸⁸ Third Geneva Convention, Article 52 (*ibid.*, § 1764).

¹⁸⁹ See Third Geneva Convention, Articles 51 and 53-55.

¹⁹⁰ Fourth Geneva Convention, Article 40 (cited in Vol. II, Ch. 32, § 1765) and Article 51 (*ibid.*, § 1766).

¹⁹¹ Fourth Geneva Convention, Article 95 (*ibid.*, § 1767).

¹⁹² See, e.g., the military manuals of Ecuador (*ibid.*, § 1803) and United States (*ibid.*, § 1815) and the legislation of Australia (*ibid.*, §§ 1818-1819), Azerbaijan (*ibid.*, § 1822), Bosnia and Herzegovina (*ibid.*, § 1826), Democratic Republic of the Congo (*ibid.*, § 1830), Côte d'Ivoire (*ibid.*, § 1832), Croatia (*ibid.*, § 1833), Ethiopia (*ibid.*, § 1834), Latvia (*ibid.*, § 1840), Lithuania (*ibid.*, § 1841), Paraguay (*ibid.*, § 1850), Slovenia (*ibid.*, § 1852), Uzbekistan (*ibid.*, § 1858) and Yugoslavia (*ibid.*, §§ 1859-1860).

¹⁹³ See, e.g., the military manuals of Netherlands (*ibid.*, § 1806), Nigeria (*ibid.*, § 1808), South Africa (*ibid.*, § 1810), United Kingdom (*ibid.*, § 1811) and United States (*ibid.*, §§ 1812-1815), the legislation of Bangladesh (*ibid.*, § 1823), China (*ibid.*, § 1829), Ireland (*ibid.*, § 1836), Italy (*ibid.*, § 1838), Luxembourg (*ibid.*, § 1842), Nicaragua (*ibid.*, § 1847) and Norway (*ibid.*, § 1849).

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having forced prisoners of war or civilians to engage in work related to the war.¹⁹⁴

In the context of non-international armed conflicts, Additional Protocol II provides that persons who are deprived of their liberty for reasons related to the armed conflict "shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population".¹⁹⁵

The Forced Labour Convention and Convention concerning the Abolition of Forced Labour, as well as the International Covenant on Civil and Political Rights and the regional human rights conventions, prohibit "forced or compulsory labour".¹⁹⁶ The Forced Labour Convention defines this as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".¹⁹⁷ But human rights law provides for exceptions to the general rule in that certain types of labour would not amount to unlawful forced labour, for example, labour by prisoners within prison establishments, labour required for the community to overcome calamity situations or normal civic obligations.¹⁹⁸ In addition, contrary to the prohibition of slavery and the slave trade, the prohibition of forced or compulsory labour may be derogated from, for example, in case of armed conflict where the above-mentioned specific rules of international humanitarian law become applicable.¹⁹⁹

Deportation to slave labour

Deportation to slave labour violates the prohibition of deportation (see Rule 129) but has also been specified as a separate war crime in international armed

¹⁹⁴ See, e.g., Canada, Federal Court of Appeal, *Rudolph and Minister of Employment and Immigration case* [use of civilians in the production of V2 rockets] (*ibid.*, § 1861); France, General Tribunal at Rastadt of the Military Government for the French Zone of Occupation in Germany, *Roehling case* (prisoners of war working in the metallurgical industry) (*ibid.*, § 1863); Netherlands, Temporary Court-Martial of Makassar, *Koshiro case* (prisoners of war building and filling up ammunition depots) (*ibid.*, § 1865); Netherlands, Special Court of Cassation, *Rohrig and Others case* (civilians constructing fortifications) (*ibid.*, § 1866); United Kingdom, Military Court at Lüneberg, *Student case* (prisoners of war unloading arms, ammunition and warlike stores from aircraft) (*ibid.*, § 1868); United States, Military Tribunal at Nuremberg, *Krauch (I. G. Farben Trial) case* (prisoners of war working in coal mines) (*ibid.*, § 1872) and *Von Leeb (High Command) case* (civilians constructing fortifications) (*ibid.*, § 1874).

¹⁹⁵ Additional Protocol II, Article 5(1)(e) (adopted by consensus) (*ibid.*, § 1775).

¹⁹⁶ Forced Labour Convention, Article 1 (*ibid.*, § 1760); Convention concerning the Abolition of Forced Labour, Articles 1 and 2 (*ibid.*, §§ 1770–1771); International Covenant on Civil and Political Rights, Article 8(3) (*ibid.*, § 1772); European Convention on Human Rights, Article 4(2) (*ibid.*, § 1768); American Convention on Human Rights, Article 6(2); African Charter on Human and Peoples' Rights, Article 15 (right to work under equitable and satisfactory conditions).

¹⁹⁷ Forced Labour Convention, Article 2 (cited in Vol. II, Ch. 32, § 1760); see the further interpretation provided by the European Court of Human Rights, *Van der Musselle v. Belgium* (*ibid.*, § 1901).

¹⁹⁸ See International Covenant on Civil and Political Rights, Article 8(3)(b) and (c); European Convention on Human Rights, Article 4(3); American Convention on Human Rights, Article 6(3).

¹⁹⁹ See, e.g., International Covenant on Civil and Political Rights, Articles 4(2) and 8(3) (cited in Vol. II, Ch. 32, § 1772) and European Convention on Human Rights, Articles 4(2) and 15(2) (*ibid.*, § 1768).

conflicts. The Charter of the International Military Tribunal at Nuremberg included "deportation to slave labour or for any other purpose of civilian population of or in occupied territory" as a war crime.²⁰⁰ Several defendants before the Tribunal were charged with and convicted of deporting thousands of civilians for slave labour, i.e., performing compulsory uncompensated labour.²⁰¹ Deportation to slave labour is also prohibited by the military manuals and legislation of several States.²⁰² Several national courts have found persons guilty of this crime, including in the *List (Hostages Trial) case*, in which the accused was found guilty of "deportation to slave labour of prisoners of war and members of the civilian populations in territories occupied by the German Armed Forces".²⁰³

Compelling persons to serve in the forces of a hostile power

Compelling persons to serve in the forces of a hostile power is a specific type of forced labour that is prohibited in international armed conflicts. The Hague Regulations specify that it is forbidden to compel nationals of the hostile party to take part in operations of war directed against their own country, even if they were in the belligerent's service before the war.²⁰⁴ The Third and Fourth Geneva Conventions state that so compelling a prisoner of war or a protected civilian is a grave breach.²⁰⁵ The prohibition is repeated in the list of war crimes in the Statute of the International Criminal Court.²⁰⁶

The prohibition on compelling persons to serve in the forces of a hostile power is contained in numerous military manuals.²⁰⁷ It is also set forth in the legislation of a large number of States.²⁰⁸ The reasoning behind the rule is

²⁰⁰ IMT Charter (Nuremberg), Article 6 (*ibid.*, § 1761).

²⁰¹ See International Military Tribunal at Nuremberg, *Case of the Major War Criminals* (*ibid.*, § 1892).

²⁰² See, e.g., the military manuals of Nigeria (*ibid.*, § 1808) and United Kingdom (*ibid.*, § 1811) and the legislation of Australia (*ibid.*, § 1819), Bangladesh (*ibid.*, § 1823), Belarus (*ibid.*, § 1824), Ethiopia (*ibid.*, § 1834), Israel (*ibid.*, § 1837) and Ukraine (*ibid.*, § 1854).

²⁰³ See, e.g., Canada, Federal Court of Appeal, *Rudolph and Minister of Employment and Immigration case* (*ibid.*, § 1861); Netherlands, Special Court of Cassation, *Rohrig and Others case* (*ibid.*, § 1866); Poland, Supreme National Tribunal of Poland at Poznan, *Greiser case* (*ibid.*, § 1867); United States, Military Tribunal at Nuremberg, *List (Hostages Trial) case* (*ibid.*, § 1870), *Milch case* (*ibid.*, § 1871), *Krauch (I. G. Farben Trial) case* (*ibid.*, § 1872) and *Krupp case* (*ibid.*, § 1873).

²⁰⁴ Hague Regulations, Article 23(h) (*ibid.*, § 1909).

²⁰⁵ Third Geneva Convention, Article 130 (*ibid.*, § 1912); Fourth Geneva Convention, Article 147 (*ibid.*, § 1912).

²⁰⁶ ICC Statute, Article 8(2)(a)(v) and (b)(xv) (*ibid.*, § 1914).

²⁰⁷ See, e.g., the military manuals of Argentina (*ibid.*, § 1920), Australia (*ibid.*, §§ 1921–1922), Belgium (*ibid.*, § 1923), Benin (*ibid.*, § 1924), Burkina Faso (*ibid.*, § 1925), Cameroon (*ibid.*, § 1926), Canada (*ibid.*, § 1927), France (*ibid.*, §§ 1928–1930), Germany (*ibid.*, § 1931), Israel (*ibid.*, § 1932), Italy (*ibid.*, § 1933), Kenya (*ibid.*, § 1934), South Korea (*ibid.*, § 1935), Mali (*ibid.*, § 1936), Morocco (*ibid.*, § 1937), Netherlands (*ibid.*, § 1938), New Zealand (*ibid.*, § 1939), Nigeria (*ibid.*, §§ 1940–1941), Russia (*ibid.*, § 1942), Senegal (*ibid.*, § 1943), South Africa (*ibid.*, § 1944), Sweden (*ibid.*, § 1945), Switzerland (*ibid.*, § 1946), Togo (*ibid.*, § 1947), United Kingdom (*ibid.*, §§ 1948–1949) and United States (*ibid.*, §§ 1950–1952).

²⁰⁸ See, e.g., the legislation (*ibid.*, §§ 1953–2034).

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the distressing and dishonourable nature of making persons participate in military operations against their own country – whether or not they are remunerated.

Rule 96. The taking of hostages is prohibited.

Practice

Volume II, Chapter 32, Section I.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

Common Article 3 of the Geneva Conventions prohibits the taking of hostages.²⁰⁹ It is also prohibited by the Fourth Geneva Convention and is considered a grave breach thereof.²¹⁰ These provisions were to some extent a departure from international law as it stood at that time, articulated in the *List (Hostages Trial) case* in 1948, in which the US Military Tribunal at Nuremberg did not rule out the possibility of an occupying power taking hostages as a measure of last resort and under certain strict conditions.²¹¹ However, in addition to the provisions in the Geneva Conventions, practice since then shows that the prohibition of hostage-taking is now firmly entrenched in customary international law and is considered a war crime.

The prohibition of hostage-taking is recognised as a fundamental guarantee for civilians and persons *hors de combat* in Additional Protocols I and II.²¹² Under the Statute of the International Criminal Court, the “taking of hostages” constitutes a war crime in both international and non-international armed conflicts.²¹³ Hostage-taking is also listed as a war crime under the Statutes of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone.²¹⁴ Numerous military manuals prohibit

²⁰⁹ Geneva Conventions, common Article 3 (*ibid.*, § 2048).

²¹⁰ Fourth Geneva Convention, Article 34 (*ibid.*, § 2049) and Article 147 (*ibid.*, § 2050).

²¹¹ United States, Military Tribunal at Nuremberg, *List (Hostages Trial) case* (*ibid.*, § 2197).

²¹² Additional Protocol I, Article 75(2)(c) (adopted by consensus) (*ibid.*, § 2052); Additional Protocol II, Article 4(2)(c) (adopted by consensus) (*ibid.*, § 2053).

²¹³ ICC Statute, Article 8(2)(a)(viii) and (c)(iii) (*ibid.*, § 2056).

²¹⁴ ICTY Statute, Article 2(h) (*ibid.*, § 2064); ICTR Statute, Article 4(c) (*ibid.*, § 2065); Statute of the Special Court for Sierra Leone, Article 3(c) (*ibid.*, § 2057).

the taking of hostages.²¹⁵ This prohibition is also set forth in the legislation of numerous States.²¹⁶

Instances of hostage-taking, whether in international or non-international armed conflicts, have been condemned by States.²¹⁷ International organisations, in particular the United Nations, have also condemned such instances with respect to the Gulf War and the conflicts in Cambodia, Chechnya, El Salvador, Kosovo, Middle East, Sierra Leone, Tajikistan and the former Yugoslavia.²¹⁸

In the *Karadžić and Mladić case* in 1995 before the International Criminal Tribunal for the Former Yugoslavia, the accused were charged with grave breaches for taking UN peacekeepers as hostages. In its review of the indictments, the Tribunal confirmed this charge.²¹⁹ In the *Blaškić case* in 2000, the Tribunal found the accused guilty of the taking of hostages as a violation of the laws and customs of war and the taking of civilians as hostages as a grave breach of the Fourth Geneva Convention.²²⁰ In the *Kordić and Čerkez case* before the Tribunal in 2001, the accused were found guilty of the grave breach of taking civilians’ hostage.²²¹

The ICRC has called on parties to both international and non-international armed conflicts to refrain from taking hostages.²²²

²¹⁵ See, e.g., the military manuals of Argentina (*ibid.*, § 2070), Australia (*ibid.*, §§ 2071–2072), Belgium (*ibid.*, §§ 2073–2074), Benin (*ibid.*, § 2075), Burkina Faso (*ibid.*, § 2076), Cameroon (*ibid.*, §§ 2077–2078), Canada (*ibid.*, § 2079), Colombia (*ibid.*, § 2080), Congo (*ibid.*, § 2081), Croatia (*ibid.*, §§ 2082–2083), Dominican Republic (*ibid.*, § 2084), Ecuador (*ibid.*, § 2085), France (*ibid.*, §§ 2086–2089), Germany (*ibid.*, § 2090), Hungary (*ibid.*, § 2091), Italy (*ibid.*, §§ 2092–2093), Kenya (*ibid.*, § 2094), South Korea (*ibid.*, § 2095), Madagascar (*ibid.*, § 2096), Mali (*ibid.*, § 2097), Morocco (*ibid.*, § 2098), Netherlands (*ibid.*, § 2099), New Zealand (*ibid.*, § 2100), Nicaragua (*ibid.*, § 2101), Nigeria (*ibid.*, § 2102), Philippines (*ibid.*, § 2103), Romania (*ibid.*, § 2104), Russia (*ibid.*, § 2105), Senegal (*ibid.*, § 2106), South Africa (*ibid.*, § 2107), Spain (*ibid.*, § 2108), Sweden (*ibid.*, § 2109), Switzerland (*ibid.*, § 2110), Togo (*ibid.*, § 2111), United Kingdom (*ibid.*, §§ 2112–2113), United States (*ibid.*, §§ 2114–2117) and Yugoslavia (*ibid.*, § 2118).

²¹⁶ See, e.g., the legislation (*ibid.*, §§ 2119–2194).

²¹⁷ See, e.g., the statements of Germany (in the context of the conflict in Nagorno-Karabakh) (*ibid.*, § 2200), Italy (*ibid.*, § 2201), Pakistan (in the context of the conflict in Kashmir) (*ibid.*, § 2204), United States (in relation to the Gulf War) (*ibid.*, §§ 2206–2207) and Yugoslavia (*ibid.*, § 2209).

²¹⁸ See, e.g., UN Security Council, Res. 664 (*ibid.*, § 2212), Res. 674 (*ibid.*, § 2212), Res. 686 (*ibid.*, § 2212) and Res. 706 (*ibid.*, § 2212); UN Security Council, Statements by the President (*ibid.*, §§ 2213–2214); UN General Assembly, Res. 53/164 (*ibid.*, § 2215); UN Commission on Human Rights, Res. 1992/71 (*ibid.*, § 2216), Res. 1992/S-1/1 (*ibid.*, § 2217), Res. 1995/55 (*ibid.*, § 2218), Res. 1998/60 (*ibid.*, § 2219) and Res. 1998/62 (*ibid.*, § 2220); Council of Europe, Parliamentary Assembly, Res. 950 (*ibid.*, § 2226); European Parliament, Resolution on violations of human rights and humanitarian law in Chechnya (*ibid.*, § 2227); OAS, Permanent Council, Resolution on Hostages in El Salvador (*ibid.*, § 2228).

²¹⁹ ICTY, *Karadžić and Mladić case*, Initial Indictment and Review of the Indictments (*ibid.*, § 2233).

²²⁰ ICTY, *Blaškić case*, Judgement (*ibid.*, § 2234).

²²¹ ICTY, *Kordić and Čerkez case*, Judgement (*ibid.*, § 2235).

²²² See, e.g., ICRC, Memorandum on the Applicability of International Humanitarian Law (*ibid.*, § 2238), Press Release, Tajikistan: ICRC urges respect for humanitarian rules (*ibid.*, § 2240), Communication to the Press No. 93/25 (*ibid.*, § 2242), Memorandum on Respect for International Humanitarian Law in Angola (*ibid.*, § 2243), Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise (*ibid.*, § 2244),

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International human rights law does not specifically prohibit "hostage-taking", but the practice is prohibited by virtue of non-derogable human rights law because it amounts to an arbitrary deprivation of liberty (see Rule 99). The UN Commission on Human Rights has stated that hostage-taking, wherever and by whoever committed, is an illegal act aimed at the destruction of human rights and is never justifiable.²²³ In its General Comment on Article 4 of the International Covenant on Civil and Political Rights (concerning states of emergency), the UN Human Rights Committee stated that States parties may "in no circumstances" invoke a state of emergency "as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages".²²⁴

Definition of hostage-taking

The International Convention against the Taking of Hostages defines the offence as the seizure or detention of a person (the hostage), combined with threatening to kill, to injure or to continue to detain the hostage, in order to compel a third party to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage.²²⁵ The Elements of Crimes for the International Criminal Court uses the same definition but adds that the required behaviour of the third party could be a condition not only for the release of the hostage but also for the safety of the hostage.²²⁶ It is the specific intent that characterises hostage-taking and distinguishes it from the deprivation of someone's liberty as an administrative or judicial measure.

Although the prohibition of hostage-taking is specified in the Fourth Geneva Convention and is typically associated with the holding of civilians as hostages, there is no indication that the offence is limited to taking civilians hostage. Common Article 3 of the Geneva Conventions, the Statute of the International Criminal Court and the International Convention against the Taking of Hostages do not limit the offence to the taking of civilians, but apply it to the taking of any person. Indeed, in the Elements of Crimes for the International Criminal Court, the definition applies to the taking of any person protected by the Geneva Conventions.²²⁷

Press Release No. 1793 (*ibid.*, § 2245) and Communication to the Press of ICRC Moscow (*ibid.*, § 2246).

²²³ UN Commission on Human Rights, Res. 1998/73 (*ibid.*, § 2221) and Res. 2001/38 (*ibid.*, § 2222).

²²⁴ UN Human Rights Committee, General Comment No. 29 [Article 4 of the International Covenant on Civil and Political Rights] (*ibid.*, § 2236).

²²⁵ International Convention against the Taking of Hostages, Article 1 (*ibid.*, § 2054).

²²⁶ Elements of Crimes for the ICC, Definition of the taking of hostages as a war crime (ICC Statute, Article 8(2)(a)(viii) and (c)(iii)).

²²⁷ Elements of Crimes for the ICC, Definition of the taking of hostages as a war crime (ICC Statute, Article 8(2)(a)(viii)).

Rule 97. The use of human shields is prohibited.

Practice

Volume II, Chapter 32, Section J.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

In the context of international armed conflicts, this rule is set forth in the Third Geneva Convention (with respect to prisoners of war), the Fourth Geneva Convention (with respect to protected civilians) and Additional Protocol I (with respect to civilians in general).²²⁸ Under the Statute of the International Criminal Court, "utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations" constitutes a war crime in international armed conflicts.²²⁹

The prohibition of using human shields is contained in numerous military manuals, many of which extend the prohibition to all civilians.²³⁰ Using human shields constitutes a criminal offence under the legislation of many States.²³¹ This practice includes that of States not, or not at the time, party to Additional Protocol I or to the Statute of the International Criminal Court.²³² In 1990 and 1991, there was extensive condemnation by States of the use of prisoners of

²²⁸ Third Geneva Convention, Article 23, second paragraph (cited in Vol. II, Ch. 32, § 2253); Fourth Geneva Convention, Article 28 (*ibid.*, § 2254); Additional Protocol I, Article 51(7) (adopted by consensus) (*ibid.*, § 2256).

²²⁹ ICC Statute, Article 8(2)(b)(xxiii) (*ibid.*, § 2257).

²³⁰ See, e.g., the military manuals of Argentina (*ibid.*, § 2261), Australia (*ibid.*, §§ 2262–2263), Belgium (*ibid.*, § 2264), Cameroon (*ibid.*, § 2265), Canada (*ibid.*, § 2266), Colombia (*ibid.*, § 2267), Croatia (*ibid.*, § 2268), Dominican Republic (*ibid.*, § 2269), Ecuador (*ibid.*, § 2270), France (*ibid.*, §§ 2271–2273), Germany (*ibid.*, § 2274), Israel (*ibid.*, § 2275), Italy (*ibid.*, § 2276), Kenya (*ibid.*, § 2277), Netherlands (*ibid.*, § 2278), New Zealand (*ibid.*, § 2279), Spain (*ibid.*, § 2280), Switzerland (*ibid.*, § 2281), United Kingdom (*ibid.*, §§ 2282–2283) and United States (*ibid.*, §§ 2284 and 2286).

²³¹ See, e.g., the legislation of Australia (*ibid.*, § 2287), Azerbaijan (*ibid.*, §§ 2288–2289), Bangladesh (*ibid.*, § 2290), Belarus (*ibid.*, § 2291), Canada (*ibid.*, § 2293), Democratic Republic of the Congo (*ibid.*, § 2294), Congo (*ibid.*, § 2295), Germany (*ibid.*, § 2296), Georgia (*ibid.*, § 2297), Ireland (*ibid.*, § 2298), Lithuania (*ibid.*, § 2299), Mali (*ibid.*, § 2300), Netherlands (*ibid.*, § 2301), New Zealand (*ibid.*, § 2302), Norway (*ibid.*, § 2303), Peru (*ibid.*, § 2304), Poland (*ibid.*, § 2305), Tajikistan (*ibid.*, § 2306), United Kingdom (*ibid.*, § 2308) and Yemen (*ibid.*, § 2309); see also the draft legislation of Burundi (*ibid.*, § 2292) and Trinidad and Tobago (*ibid.*, § 2307).

²³² See, e.g., the military manuals of France (*ibid.*, § 2271), Kenya (*ibid.*, § 2277), United Kingdom (*ibid.*, § 2283) and United States (*ibid.*, §§ 2284 and 2286) and the legislation of Azerbaijan (*ibid.*, §§ 2288–2289), Bangladesh (*ibid.*, § 2290), Belarus (*ibid.*, § 2291), Democratic Republic of the Congo (*ibid.*, § 2294), Georgia (*ibid.*, § 2297), Lithuania (*ibid.*, § 2299), Peru (*ibid.*, § 2304), Poland (*ibid.*, § 2305), Tajikistan (*ibid.*, § 2306) and Yemen (*ibid.*, § 2309); see also the draft legislation of Burundi (*ibid.*, § 2292).

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war and civilians by Iraq as human shields, and the United States declared that such use amounted to a war crime.²³³ The use of prisoners of war as human shields during the Second World War was the subject of war crimes trials by the UK Military Court at Lüneberg in the *Student case* in 1946 and by the US Military Tribunal at Nuremberg in the *Von Leeb (The High Command Trial)* case in 1948.²³⁴ In the *Karadžić and Mladić case* in 1995 before the International Criminal Tribunal for the Former Yugoslavia, the accused were charged with war crimes for using UN peacekeepers as human shields. In its review of the indictments, the Tribunal upheld this charge.²³⁵

With respect to non-international armed conflicts, Additional Protocol II does not explicitly mention the use of human shields, but such practice would be prohibited by the requirement that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations".²³⁶ It is significant, furthermore, that the use of human shields has often been equated with the taking of hostages,²³⁷ which is prohibited by Additional Protocol II,²³⁸ and by customary international law (see Rule 96). In addition, deliberately using civilians to shield military operations is contrary to the principle of distinction and violates the obligation to take feasible precautions to separate civilians and military objectives (see Rules 23–24).

Several military manuals which apply in non-international armed conflicts prohibit the use of human shields.²³⁹ The legislation of several States criminalizes the use of human shields in non-international armed conflicts.²⁴⁰ The use of human shields in non-international armed conflicts has been condemned by States and by the United Nations, for example, with respect to the conflicts in Liberia, Rwanda, Sierra Leone, Somalia, Tajikistan and the former Yugoslavia.²⁴¹

²³³ See, e.g., the statements of El Salvador (*ibid.*, § 2314), Germany (*ibid.*, § 2316), Italy (*ibid.*, § 2319), Kuwait (*ibid.*, § 2321), Senegal (*ibid.*, § 2326), United Kingdom (*ibid.*, §§ 2329–2330) and United States (*ibid.*, §§ 2337–2345) and the reported practice of Spain (*ibid.*, § 2327).

²³⁴ United Kingdom, Military Court at Lüneberg, *Student case* (*ibid.*, § 2310); United States, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) case* (*ibid.*, § 2311).

²³⁵ ICTY, *Karadžić and Mladić case*, First Indictment and Review of the Indictments (*ibid.*, § 2366).

²³⁶ Additional Protocol II, Article 13(1) (adopted by consensus) (cited in Vol. II, Ch. 5, § 2).

²³⁷ See, e.g., the practice of El Salvador (cited in Vol. II, Ch. 32, § 2314) and the European Community (*ibid.*, § 2361).

²³⁸ Additional Protocol II, Article 4(2)(c) (adopted by consensus) (*ibid.*, § 2053).

²³⁹ See, e.g., the military manuals of Australia (*ibid.*, § 2262), Canada (*ibid.*, § 2266), Colombia (*ibid.*, § 2267), Croatia (*ibid.*, § 2268), Ecuador (*ibid.*, § 2270), Germany (*ibid.*, § 2274), Italy (*ibid.*, § 2276) and Kenya (*ibid.*, § 2277).

²⁴⁰ See, e.g., the legislation of Azerbaijan (*ibid.*, §§ 2288–2289), Belarus (*ibid.*, § 2291), Democratic Republic of the Congo (*ibid.*, § 2294), Germany (*ibid.*, § 2296), Georgia (*ibid.*, § 2297), Lithuania (*ibid.*, § 2299), Poland (*ibid.*, § 2305) and Tajikistan (*ibid.*, § 2306); see also the legislation of Peru (*ibid.*, § 2304) and Yemen (*ibid.*, § 2309), the application of which is not excluded in time of non-international armed conflict, and the draft legislation of Burundi (*ibid.*, § 2292).

²⁴¹ See, e.g., the statements of Chile (*ibid.*, § 2312), Tajikistan (*ibid.*, § 2328) and Yugoslavia (*ibid.*, § 2348); the reported practice of Rwanda (*ibid.*, § 2325); UN Commission on Human Rights, Res. 1995/89 (*ibid.*, § 2350); UN Secretary-General, Progress report on UNOMIL (*ibid.*, § 2351), Progress report on UNOMSIL (*ibid.*, § 2352) and Report pursuant to paragraph 5 of Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on the UN forces in Somalia conducted on behalf of the UN Security Council (*ibid.*, § 2353).

No official contrary practice was found in the context of either international or non-international armed conflicts.

The ICRC has reminded parties to both international and non-international armed conflicts of the prohibition of using human shields.²⁴²

International human rights law does not prohibit the use of human shields as such, but this practice would constitute, among other things, a violation of the non-derogable right not to be arbitrarily deprived of the right to life (see commentary to Rule 89). The UN Human Rights Committee and regional human rights bodies have indicated that this right involves not only the right not to be killed, but also the duty of States to take measures to protect life.²⁴³ In *Demiray v. Turkey*, in which the applicant submitted that her husband had been used as a human shield, the European Court of Human Rights stated that "Article 2 may... imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual for which they are responsible".²⁴⁴

Definition of human shields

The prohibition of using human shields in the Geneva Conventions, Additional Protocol I and the Statute of the International Criminal Court are couched in terms of using the presence (or movements) of civilians or other protected persons to render certain points or areas (or military forces) immune from military operations.²⁴⁵ Most examples given in military manuals, or which have been the object of condemnations, have been cases where persons were actually taken to military objectives in order to shield those objectives from attacks. The military manuals of New Zealand and the United Kingdom give as examples the placing of persons in or next to ammunition trains.²⁴⁶ There were many condemnations of the threat by Iraq to round up and place prisoners of war and civilians in strategic sites and around military defence points.²⁴⁷ Other condemnations on the basis of this prohibition related to rounding up civilians

²⁴² See, e.g., ICRC, Communication to the Press No. 93/17 (*ibid.*, § 2369) and archive document (*ibid.*, § 2370).

²⁴³ UN Human Rights Committee, General Comment No. 6 (Article 6 of the International Covenant on Civil and Political Rights) (*ibid.*, § 2367); African Commission on Human and Peoples' Rights, *Civil Liberties Organisation v. Chad* (*ibid.*, § 940); European Court of Human Rights, *Demiray v. Turkey* (*ibid.*, § 2368).

²⁴⁴ European Court of Human Rights, *Demiray v. Turkey* (*ibid.*, § 2368).

²⁴⁵ Third Geneva Convention, Article 23, second paragraph (*ibid.*, § 2253); Fourth Geneva Convention, Article 28 (*ibid.*, § 2254); Additional Protocol I, Article 12(4) (adopted by consensus) (*ibid.*, § 2255) and Article 51(7) (*ibid.*, § 2256); ICC Statute, Article 8(2)(b)(xxiii) (*ibid.*, § 2257).

²⁴⁶ See the military manuals of New Zealand (*ibid.*, § 2279) and United Kingdom (*ibid.*, § 2282).

²⁴⁷ See, e.g., the statements of Germany (*ibid.*, § 2316), Italy (*ibid.*, § 2319), Kuwait (*ibid.*, § 2321), Senegal (*ibid.*, § 2326), United Kingdom (*ibid.*, §§ 2329–2334) and United States (*ibid.*, §§ 2337–2342 and 2344–2345); UN Commission on Human Rights, Res. 1992/71 (*ibid.*, § 2349); EC, Declaration on the situation of foreigners in Iraq and Kuwait (*ibid.*, § 2358), Statement before the Third Committee of the UN General Assembly (*ibid.*, § 2359), Statement on the situation of prisoners of war (*ibid.*, § 2360) and Declaration on the Gulf crisis (*ibid.*, § 2361).

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and putting them in front of military units in the conflicts in the former Yugoslavia and Liberia.²⁴⁸

In the Review of the Indictments in the *Karadžić and Mladić case*, the International Criminal Tribunal for the Former Yugoslavia qualified physically securing or otherwise holding peacekeeping forces against their will at potential NATO air targets, including ammunition bunkers, a radar site and a communications centre, as using "human shields".²⁴⁹

It can be concluded that the use of human shields requires an intentional collocation of military objectives and civilians or persons *hors de combat* with the specific intent of trying to prevent the targeting of those military objectives.

Rule 98. Enforced disappearance is prohibited.

Practice

Volume II, Chapter 32, Section K.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

International humanitarian law treaties do not refer to the term "enforced disappearance" as such. However, enforced disappearance violates, or threatens to violate, a range of customary rules of international humanitarian law, most notably the prohibition of arbitrary deprivation of liberty (see Rule 99), the prohibition of torture and other cruel or inhuman treatment (see Rule 90) and the prohibition of murder (see Rule 89). In addition, in international armed conflicts, the extensive requirements concerning registration, visits and transmission of information with respect to persons deprived of their liberty are aimed, *inter alia*, at preventing enforced disappearances (see Chapter 37). In non-international armed conflicts, parties are also required to take steps to prevent disappearances, including through the registration of persons deprived of their liberty (see Rule 123). This prohibition should also be viewed in the light of the rule requiring respect for family life (see Rule 105) and the rule that each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and to provide their family members with information it has on their fate (see Rule 117). The cumulative

²⁴⁸ See, e.g., the statement of Yugoslavia (*ibid.*, § 2348); UN Commission on Human Rights, Res. 1995/89 (*ibid.*, § 2350); UN Secretary-General, Progress report on UNOMIL (*ibid.*, § 2351).

²⁴⁹ ICTY, *Karadžić and Mladić case*, Review of the Indictments (*ibid.*, § 2366).

effect of these rules is that the phenomenon of "enforced disappearance" is prohibited by international humanitarian law.

Although the articulation of the prohibition of enforced disappearance in military manuals and national legislation is in its early stages, the prohibition is expressly provided for in the military manuals of Colombia, El Salvador, Indonesia and Peru.²⁵⁰ The legislation of many States also specifically prohibits this practice.²⁵¹

The 24th International Conference of the Red Cross in 1981 considered that enforced disappearances "imply violations of fundamental human rights such as the right to life, freedom and personal safety, the right not to be subjected to torture or cruel, inhuman or degrading treatment, the right not to be arbitrarily arrested or detained, and the right to a just and public trial".²⁵² The 25th International Conference of the Red Cross in 1986 condemned "any act leading to the forced or involuntary disappearance of individuals or groups of individuals".²⁵³ The Plan of Action for the years 2000–2003, adopted by the 27th International Conference of the Red Cross and Red Crescent in 1999, requested all parties to an armed conflict to take effective measures to ensure that "strict orders are given to prevent all serious violations of international humanitarian law, including... enforced disappearances".²⁵⁴ All these resolutions were adopted by consensus.

No official contrary practice was found in the sense that no State has claimed the right to enforce the disappearance of persons. In addition, alleged instances of enforced disappearances have generally been condemned by States and the United Nations. Disappearances during the conflict in the former Yugoslavia, for example, were condemned in UN Security Council debates in 1995 by Botswana, Honduras and Indonesia.²⁵⁵ They were condemned in resolutions adopted by consensus by the UN Security Council and UN Commission on Human Rights.²⁵⁶ The UN General Assembly also condemned enforced disappearances in the former Yugoslavia in a resolution adopted in 1995.²⁵⁷ The

²⁵⁰ Colombia, *Basic Military Manual* (*ibid.*, § 2386); El Salvador, *Human Rights Charter of the Armed Forces* (*ibid.*, § 2387); Indonesia, *Directive on Human Rights in Irian Jaya and Maluku* (*ibid.*, § 2388); Peru, *Human Rights Charter of the Security Forces* (*ibid.*, § 2389).

²⁵¹ See, e.g., the legislation of Armenia (*ibid.*, § 2390), Australia (*ibid.*, § 2391), Azerbaijan (*ibid.*, § 2392), Belarus (*ibid.*, § 2393), Canada (*ibid.*, § 2395), Congo (*ibid.*, § 2396), El Salvador (*ibid.*, § 2397), France (*ibid.*, § 2398), Germany (*ibid.*, § 2399), Mali (*ibid.*, § 2400), Netherlands (*ibid.*, § 2401), New Zealand (*ibid.*, § 2403), Niger (*ibid.*, § 2402), Paraguay (*ibid.*, § 2405), Peru (*ibid.*, § 2406) and United Kingdom (*ibid.*, § 2408); see also the draft legislation of Burundi (*ibid.*, § 2394), Nicaragua (*ibid.*, § 2404) and Trinidad and Tobago (*ibid.*, § 2407).

²⁵² 24th International Conference of the Red Cross, Res. II (*ibid.*, § 2434).

²⁵³ 25th International Conference of the Red Cross, Res. XIII (*ibid.*, § 2435).

²⁵⁴ 27th International Conference of the Red Cross and Red Crescent, Res. I (adopted by consensus) (*ibid.*, § 2437).

²⁵⁵ See the statements of Botswana (*ibid.*, § 2411), Honduras (*ibid.*, § 2413) and Indonesia (*ibid.*, § 2414).

²⁵⁶ UN Security Council, Res. 1034 (*ibid.*, § 2416); UN Commission on Human Rights, Res. 1994/72 (*ibid.*, § 2421) and Res. 1996/71 (*ibid.*, § 2422).

²⁵⁷ UN General Assembly, Res. 50/193 (*ibid.*, § 2417). The resolution was adopted by 114 votes in favour, one against and 20 abstentions. However, the explanation of vote of Russia, which

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General Assembly again condemned enforced disappearances in a resolution on Sudan adopted in 2000.²⁵⁸

Under the Statute of the International Criminal Court, the systematic practice of enforced disappearance constitutes a crime against humanity.²⁵⁹ The Inter-American Convention on the Forced Disappearance of Persons also prohibits enforced disappearance as "a grave and abominable offence against the inherent dignity of the human being" and states that it "violates numerous non-derogable and essential human rights".²⁶⁰ The UN Declaration on Enforced Disappearance, adopted by consensus, specifies that enforced disappearance constitutes a violation of the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment and that it violates or constitutes a grave threat to the right to life.²⁶¹

It is significant that in the *Kupreškić* case in 2000, the International Criminal Tribunal for the Former Yugoslavia found that enforced disappearance could be characterised as a crime against humanity, although it was not listed as such in the Tribunal's Statute. The Tribunal took into account the fact that enforced disappearances consisted of the violation of several human rights and were prohibited under the UN Declaration on Enforced Disappearance and the Inter-American Convention on the Forced Disappearance of Persons. It therefore decided that it fell into the category of "other inhumane acts" provided for in Article 5(i) of its Statute.²⁶²

In addition, regional human rights bodies found in several cases that enforced disappearances violate several rights. For example, the Inter-American Commission and Court of Human Rights have found that enforced disappearances

voted against the resolution, shows that it did not object to the principle of condemning forced disappearance but thought that the resolution was too one-sided. See the statement of Russia in the Third Committee of the UN General Assembly, UN Doc. A/C.3/50/SR.58, 14 December 1995, § 17.

²⁵⁸ UN General Assembly, Res. 55/116 (cited in Vol. II, Ch. 32, § 2418). The resolution was adopted by 85 votes in favour, 32 against and 49 abstentions. However, in explanations of vote given by Canada, Bangladesh, Libya, Thailand and the United States, there is no indication that there was a disagreement on the principle which is under discussion here; see the explanations of vote of these States given in the Third Committee of the UN General Assembly, 10 October 2000, UN Doc. A/C.3/55/SR.55, 29 November 2000, § 138 (Canada), § 139 (United States), § 146 (Bangladesh), § 147 (Thailand) and § 148 (Libya).

²⁵⁹ ICC Statute, Article 7(1)(i) (cited in Vol. II, Ch. 32, § 2373). Article 7(2)(i) (*ibid.*, § 2374) defines enforced disappearance as "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time".

²⁶⁰ Inter-American Convention on the Forced Disappearance of Persons, preamble (*ibid.*, § 2372); see also UN Commission on Human Rights, Res. 2001/46 (*ibid.*, § 2423); World Conference on Human Rights, Vienna Declaration and Programme of Action (*ibid.*, § 2436).

²⁶¹ UN Declaration on Enforced Disappearance, Article 1 (*ibid.*, § 2380).

²⁶² ICTY, *Kupreškić* case, Judgement (*ibid.*, § 2438).

violate the right to liberty and security of person, the right to fair trial and the right to life.²⁶³ In addition, as stated in the UN Declaration on Enforced Disappearance, enforced disappearances inflict severe suffering, not only on the victims but also on their families.²⁶⁴ The UN Human Rights Committee and the European Court of Human Rights have similarly found that the enforced disappearance of a close family member constitutes inhuman treatment of the next-of-kin.²⁶⁵ The UN Human Rights Committee also stressed in its General Comment on Article 4 of the International Covenant on Civil and Political Rights that the prohibition of abductions and unacknowledged detention were not subject to derogation and stated that "the absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law".²⁶⁶ It should therefore be noted that, although it is the widespread or systematic practice of enforced disappearance that constitutes a crime against humanity, any enforced disappearance is a violation of international humanitarian law and human rights law.

There is extensive practice indicating that the prohibition of enforced disappearance encompasses a duty to investigate cases of alleged enforced disappearance.²⁶⁷ The duty to prevent enforced disappearances is further supported by the requirement to record the details of persons deprived of their liberty (see Rule 123).

²⁶³ See, e.g., Inter-American Commission on Human Rights, *Case 9466 (Peru)* (*ibid.*, § 2447), *Case 9786 (Peru)* (*ibid.*, § 2449) and Third report on the human rights situation in Colombia (*ibid.*, § 2450) and Inter-American Court of Human Rights, *Velásquez Rodríguez case* (*ibid.*, § 2451); see also African Commission on Human and Peoples' Rights, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso* (*ibid.*, § 2442) (violation of the right to recognition before the law, right to freedom and security of person).

²⁶⁴ UN Declaration on Enforced Disappearance, Article 1(2) (*ibid.*, § 2380).

²⁶⁵ UN Human Rights Committee, *Quinteros v. Uruguay* (*ibid.*, § 2440), *Lyashkevich v. Belarus* (*ibid.*, § 2441); European Court of Human Rights, *Kurt v. Turkey* (*ibid.*, § 2443), *Timurtas v. Turkey* (*ibid.*, § 2444) and *Cyprus case* (*ibid.*, § 2445).

²⁶⁶ UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights) (*ibid.*, § 2439).

²⁶⁷ See, e.g., UN Declaration on Enforced Disappearance, Article 13 (*ibid.*, § 2485); Inter-American Convention on the Enforced Disappearance of Persons, Article 12 (*ibid.*, § 2482); the practice of Argentina (National Commission concerning Missing Persons) (*ibid.*, § 2490), Chile (Special Panel) (*ibid.*, § 2412), Croatia (Commission for Tracing Persons Missing in War Activities in the Republic of Croatia) (*ibid.*, § 2491), Philippines (Task Force on Involuntary Disappearances) (*ibid.*, § 2493), Sri Lanka (Commission of Inquiry into Involuntary Removal or Disappearances of Persons in certain provinces) (*ibid.*, § 2415), former Yugoslavia (Joint Commission to Trace Missing Persons and Mortal Remains) (*ibid.*, § 2486) and Iraq, on the one hand, France, Kuwait, Saudi Arabia, United Kingdom and United States, on the other hand (Tripartite Commission set up under the auspices of the ICRC) (*ibid.*, § 2515); UN Human Rights Committee, General Comment No. 6 (Article 6 of the International Covenant on Civil and Political Rights) (*ibid.*, § 2505) and *Quinteros v. Uruguay* (*ibid.*, § 2506); UN General Assembly, Res. 40/140 (*ibid.*, § 2494); UN Commission on Human Rights, Res. 2001/46 (*ibid.*, § 2496); 24th International Conference of the Red Cross, Res. II (*ibid.*, § 2503); World Conference on Human Rights, Vienna Declaration and Programme of Action (*ibid.*, § 2504); European Court of Human Rights, *Kurt v. Turkey* (*ibid.*, § 2507), *Timurtas v. Turkey* (*ibid.*, § 2505) and *Cyprus case* (*ibid.*, § 2506); Inter-American Court of Human Rights, *Velásquez Rodríguez case* (*ibid.*, § 2513).

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Rule 99. Arbitrary deprivation of liberty is prohibited.*Practice*

Volume II, Chapter 32, Section L.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts. It should be noted that common Article 3 of the Geneva Conventions, as well as both Additional Protocols I and II, require that all civilians and persons *hors de combat* be treated humanely (see Rule 87), whereas arbitrary deprivation of liberty is not compatible with this requirement.

The concept that detention must not be arbitrary is part of both international humanitarian law and human rights law. Although there are differences between these branches of international law, both international humanitarian law and human rights law aim to prevent arbitrary detention by specifying the grounds for detention based on needs, in particular security needs, and by providing for certain conditions and procedures to prevent disappearance and to supervise the continued need for detention.

*International armed conflicts**Grounds for detention*

Rules on the reasons for which persons may be deprived of their liberty by a party to an international armed conflict are to be found in all four Geneva Conventions.²⁶⁸

- The First Geneva Convention regulates the detention or retention of medical and religious personnel.²⁶⁹
- The Second Geneva Convention regulates the detention or retention of medical and religious personnel of hospital ships.²⁷⁰
- The Third Geneva Convention is based on the long-standing custom that prisoners of war may be interned for the duration of active hostilities.²⁷¹ There are additional conditions in the Third Geneva Convention with respect to disciplinary punishments, judicial investigations and repatriation of seriously wounded or sick prisoners of war.²⁷²
- The Fourth Geneva Convention specifies that a civilian may only be interned or placed in assigned residence if "the security of the Detaining Power makes

²⁶⁸ Deprivation of liberty by neutral States is governed by Hague Conventions (V) and (XIII). Articles 11, 13 and 14 of Hague Convention (V) state the grounds for detention of belligerent persons by neutral States. Article 24 of Hague Convention (XIII) states the grounds for the detention of belligerent ships, their officers and crew by neutral States.

²⁶⁹ First Geneva Convention, Articles 28, 30 and 32.

²⁷⁰ Second Geneva Convention, Articles 36 and 37.

²⁷¹ Third Geneva Convention, Articles 21 and 118.

²⁷² Third Geneva Convention, Articles 90, 95, 103 and 109.

it absolutely necessary" (Article 42) or, in occupied territory, for "imperative reasons of security" (Article 78).²⁷³ In the *Delalić case*, the International Criminal Tribunal for the Former Yugoslavia interpreted Article 42 as permitting internment only if there are "serious and legitimate reasons" to think that the interned persons may seriously prejudice the security of the detaining power by means such as sabotage or espionage.²⁷⁴

The grounds for initial or continued detention have been limited to valid needs, as evidenced by the list above. For example, the detention of "enemy aliens" has been restricted in the Fourth Geneva Convention to those "absolutely necessary" for security purposes, and the Third Geneva Convention requires the repatriation of seriously wounded and sick prisoners of war because they are no longer likely to take part in hostilities against the Detaining Power.

Procedural requirements

In addition to valid grounds, certain procedures must be followed in order for a deprivation of liberty to be lawful. Article 43 of the Fourth Geneva Convention provides that any person interned or placed in assigned residence is entitled to have such decision reconsidered as soon as possible by an appropriate court or administrative board and if the decision is maintained to have it reviewed periodically, and at least twice yearly.²⁷⁵ Article 78 of the Fourth Geneva Convention provides that decisions regarding assigned residence or internment in occupied territory must be made according to a regular procedure to be prescribed by the occupying power in accordance with the provisions of the Convention. It also provides that such decision is subject to an appeal to be decided with the least possible delay. If the appeal is upheld it must be subject to periodical review, if possible every six months, by a competent body set up by the occupying power.²⁷⁶ These procedures are also set forth in a number of military manuals.²⁷⁷ In addition, the Third Geneva Convention requires the examination of sick or wounded prisoners of war by a Mixed Medical Commission in order to establish whether they should be repatriated or accommodated in neutral countries.²⁷⁸

Apart from the specific provisions of Articles 43 and 78 of the Fourth Geneva Convention, the Geneva Conventions provide for the appointment of Protecting Powers to try and prevent arbitrary detention and the ill-treatment that

²⁷³ Fourth Geneva Convention, Article 42 (cited in Vol. II, Ch. 32, § 2517) and Article 78 (*ibid.*, § 2664).

²⁷⁴ ICTY, *Delalić case*, Judgement (*ibid.*, § 2644).

²⁷⁵ Fourth Geneva Convention, Article 43, first paragraph (*ibid.*, § 2747).

²⁷⁶ Fourth Geneva Convention, Article 78 (*ibid.*, §§ 2664 and 2748).

²⁷⁷ See, e.g., the military manuals of Argentina (*ibid.*, §§ 2756-2757), Canada (*ibid.*, § 2758), Germany (*ibid.*, § 2760), New Zealand (*ibid.*, § 2761), United Kingdom (*ibid.*, § 2762) and United States (*ibid.*, §§ 2763-2764).

²⁷⁸ Third Geneva Convention, Articles 110 and 112.

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often accompanies such detention. The Protecting Powers must be impartial supervisors who scrutinise the implementation of the Conventions in order to safeguard the interests of the parties to the conflict.²⁷⁹ In particular, a Detaining Power must immediately inform the Protecting Powers, as well as the Information Bureau and Central Information Agency, of the capture of prisoners of war or the internment of civilians.²⁸⁰

Furthermore, Additional Protocol I provides that "any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken".²⁸¹ This rule is set forth in a number of military manuals.²⁸²

Detention that is not in conformity with the various rules provided by the Geneva Conventions is referred to as "unlawful confinement". "Unlawful confinement" of civilians is a grave breach of the Fourth Geneva Convention.²⁸³ "Unlawful confinement" of a person protected under the Geneva Conventions is a grave breach under the Statute of the International Criminal Court, the Statute of the International Criminal Tribunal for the Former Yugoslavia and UNTAET Regulation 2000/15 for East Timor.²⁸⁴ The Elements of Crimes for the International Criminal Court states that unlawful confinement may be in relation to any person protected under one of the Geneva Conventions and not only in relation to civilians.²⁸⁵

The military manuals of many States prohibit unlawful confinement.²⁸⁶ This prohibition is also contained in the legislation of numerous States.²⁸⁷ The terminology used in these manuals and legislation varies: unlawful/illegal confinement, unlawful/illegal detention, arbitrary detention, unnecessary detention, arrest or deprivation of liberty contrary to international law, unjustified restriction of liberty and indiscriminate mass arrests. The prohibition of unlawful detention was also upheld in several cases after the Second World War.²⁸⁸

²⁷⁹ First Geneva Convention, Articles 8 and 10; Second Geneva Convention, Articles 8 and 10; Third Geneva Convention, Articles 8 and 10; Fourth Geneva Convention, Articles 9 and 11.
²⁸⁰ Third Geneva Convention, Articles 69 and 122–123; Fourth Geneva Convention, Articles 43, 105 and 136–137.

²⁸¹ Additional Protocol I, Article 75(3) (adopted by consensus) (cited in Vol. II, Ch. 32, § 2694).

²⁸² See, e.g., the military manuals of Canada (*ibid.*, § 2698), New Zealand (*ibid.*, § 2700), Sweden (*ibid.*, § 2701) and Switzerland (*ibid.*, § 2702).

²⁸³ Fourth Geneva Convention, Article 147 (*ibid.*, § 2518).

²⁸⁴ ICC Statute, Article 8(2)(a)(vii) (*ibid.*, § 2524); ICTY Statute, Article 2(g) (*ibid.*, § 2530); UNTAET Regulation 2000/15, Section 6(1)(a)(vii) (*ibid.*, § 2535).

²⁸⁵ Elements of Crimes for the ICC, Definition of unlawful confinement as a war crime (ICC Statute, Article 8(2)(a)(vii)).

²⁸⁶ See, e.g., the military manuals of Argentina (cited in Vol. II, Ch. 32, § 2536), Australia (*ibid.*, § 2537), Canada (*ibid.*, § 2538), Croatia (*ibid.*, § 2540), France (*ibid.*, §§ 2542–2543), Germany (*ibid.*, § 2544), Hungary (*ibid.*, § 2545), Netherlands (*ibid.*, § 2546), New Zealand (*ibid.*, § 2547), Nigeria (*ibid.*, § 2549), South Africa (*ibid.*, § 2550), Switzerland (*ibid.*, § 2551), Uganda (*ibid.*, § 2552), United Kingdom (*ibid.*, § 2553) and United States (*ibid.*, § 2554).

²⁸⁷ See, e.g., the legislation (*ibid.*, §§ 2555–2626).

²⁸⁸ See, e.g., Netherlands, Temporary Court-Martial at Makassar, *Motomura case* and *Notomi Suen case* (*ibid.*, § 2627); Netherlands, Special Court (War Criminals) at The Hague and Special Court of Cassation, *Rauter case* (*ibid.*, § 2627); Netherlands Special Court in Amsterdam and Special

Non-international armed conflicts

Grounds for detention

The prohibition of arbitrary deprivation of liberty in non-international armed conflicts is established by State practice in the form of military manuals, national legislation and official statements, as well as on the basis of international human rights law (see *infra*). While all States have legislation specifying the grounds on which a person may be detained, more than 70 of them were found to criminalise unlawful deprivation of liberty during armed conflict.²⁸⁹ Most of this legislation applies the prohibition of unlawful deprivation of liberty to both international and non-international armed conflicts.²⁹⁰ Several military manuals which are applicable in or have been applied in non-international armed conflicts also prohibit unlawful deprivation of liberty.²⁹¹ As indicated above, the terminology used in these manuals and legislation varies from unlawful/illegal confinement and unlawful/illegal detention to arbitrary or unnecessary detention.

No official contrary practice was found with respect to either international or non-international armed conflicts. Alleged cases of unlawful deprivation of liberty have been condemned. The UN Security Council, for example, has condemned "arbitrary detention" in the conflicts in Bosnia and Herzegovina and Burundi.²⁹² Similarly, the UN General Assembly has expressed its deep concern over serious violations of international humanitarian law and of human rights in the former Yugoslavia and Sudan, including "unlawful detention" and "arbitrary detention".²⁹³ The UN Commission on Human Rights has also

Court of Cassation, *Zühlke case* (*ibid.*, § 2627); United Kingdom, Military Court at Lüneberg, *Auschwitz and Belsen case* (*ibid.*, § 2627); United States, Military Tribunal at Nuremberg, *Pohl case* (*ibid.*, § 2627).

²⁸⁹ See, e.g., the legislation (*ibid.*, §§ 2555–2626).

²⁹⁰ See, e.g., the legislation of Armenia (*ibid.*, § 2556), Australia (*ibid.*, § 2557), Azerbaijan (*ibid.*, § 2560), Belgium (*ibid.*, § 2563), Bosnia and Herzegovina (*ibid.*, § 2564), Cambodia (*ibid.*, § 2568), Democratic Republic of the Congo (*ibid.*, § 2573), Croatia (*ibid.*, § 2577), Ethiopia (*ibid.*, § 2580), Georgia (*ibid.*, § 2581), Moldova (*ibid.*, § 2594), Nicaragua (*ibid.*, § 2599), Niger (*ibid.*, § 2601), Paraguay (*ibid.*, § 2606), Poland (*ibid.*, § 2607), Portugal (*ibid.*, § 2608), Slovenia (*ibid.*, § 2612), Spain (*ibid.*, § 2614), Sweden (*ibid.*, § 2616), Tajikistan (*ibid.*, § 2617) and Yugoslavia (*ibid.*, § 2625); see also the legislation of Bulgaria (*ibid.*, § 2566) and Romania (*ibid.*, § 2609), the application of which is not excluded in time of non-international armed conflict, and the draft legislation of Argentina (*ibid.*, § 2555), Burundi (*ibid.*, § 2567), El Salvador (*ibid.*, § 2579), Jordan (*ibid.*, § 2585) and Nicaragua (*ibid.*, § 2600).

²⁹¹ See, e.g., the military manuals of Australia (*ibid.*, § 2537), Croatia (*ibid.*, § 2540), Germany (*ibid.*, § 2544) and South Africa (*ibid.*, § 2550).

²⁹² UN Security Council, Res. 1019 and 1034 (*ibid.*, § 2630) and Res. 1072 (*ibid.*, § 2631).

²⁹³ UN General Assembly, Res. 50/193 (*ibid.*, § 2634) and Res. 55/116 (*ibid.*, § 2635). Resolution 50/193 was adopted by 114 votes in favour, one against and 20 abstentions. However, the explanation of Russia, which voted against the resolution, shows that it did not object to the principle of condemning unlawful detention but thought that the resolution was too one-sided; see the statement by Russia in the Third Committee of the UN General Assembly, UN Doc. A/C.3/50/SR.58, 14 December 1995, § 17. Resolution 55/116 was adopted by 85 votes in favour, 32 against and 49 abstentions. In explanations given by Canada, Bangladesh, Libya, Thailand and the United States, there is no indication that there was a disagreement on the principle which is under discussion here; see the explanations of vote of these States given in

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condemned "detentions" in the former Yugoslavia and "arbitrary detention" in Sudan in resolutions adopted without a vote.²⁹⁴

The International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the regional human rights treaties recognise the right to liberty and security of person and/or provide that no one may be deprived of his or her liberty except for reasons and under conditions previously provided by law.²⁹⁵ These principles are also provided for in other international instruments.²⁹⁶

The International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the European and American Conventions on Human Rights provide that no one may be subjected to arbitrary arrest or detention.²⁹⁷ The European Convention on Human Rights spells out the grounds on which a person may be deprived of his or her liberty.²⁹⁸ In its General Comment on Article 4 of the International Covenant on Civil and Political Rights (concerning states of emergency), the UN Human Rights Committee stated that States parties may "in no circumstances" invoke a state of emergency "as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance... through arbitrary deprivations of liberty".²⁹⁹ The prohibition of arbitrary arrest or detention is also set forth in other international instruments.³⁰⁰

The need for a valid reason for the deprivation of liberty concerns both the initial reason for such deprivation and the continuation of such deprivation. Detention which continues beyond that provided for by law is a violation of the principle of legality and amounts to arbitrary detention. This point was

- the Third Committee of the UN General Assembly, 10 October 2000, UN Doc. A/C.3/55/SR.55, 29 November 2000, § 138 (Canada), § 139 (United States), § 146 (Bangladesh), § 147 (Thailand) and § 148 (Libya).
- ²⁹⁴ UN Commission on Human Rights, Res. 1996/71 (cited in Vol. II, Ch. 32, § 2636) and Res. 1996/73 (*ibid.*, § 2637).
- ²⁹⁵ International Covenant on Civil and Political Rights, Article 9(1) (*ibid.*, §§ 2520 and 2666); Convention on the Rights of the Child, Article 37(b) (*ibid.*, §§ 2523 and 2669) [no general reference to liberty and security of person; limited to requirement of arrest, detention or imprisonment in conformity with law]; European Convention on Human Rights, Article 5(1) (*ibid.*, §§ 2519 and 2665); American Convention on Human Rights, Article 7 (*ibid.*, §§ 2521 and 2667); African Charter on Human and Peoples' Rights, Article 6 (*ibid.*, §§ 2522 and 2668).
- ²⁹⁶ See, e.g., Universal Declaration on Human Rights, Article 3 (*ibid.*, § 2527); American Declaration on the Rights and Duties of Man, Articles I and XXV (*ibid.*, §§ 2528 and 2673); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 2 (*ibid.*, § 2674); Cairo Declaration on Human Rights in Islam, Article 20 (*ibid.*, § 2529); EU Charter of Fundamental Rights, Article 6 (*ibid.*, § 2534).
- ²⁹⁷ International Covenant on Civil and Political Rights, Article 9(1) (*ibid.*, § 2520); Convention on the Rights of the Child, Article 37(b) (*ibid.*, § 2523); American Convention on Human Rights, Article 7(3) (*ibid.*, § 2521); African Charter on Human and Peoples' Rights, Article 6 (*ibid.*, § 2522).
- ²⁹⁸ European Convention on Human Rights, Article 5(1); see also UN Human Rights Committee, General Comment No. 8 (Article 9 of the International Covenant on Civil and Political Rights) (*ibid.*, § 2645) (the prohibition of arbitrary deprivation of liberty applies to all such deprivations, "whether in criminal cases or in other cases such as, e.g., mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.").
- ²⁹⁹ UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights) (*ibid.*, § 2646).
- ³⁰⁰ See, e.g., Universal Declaration on Human Rights, Article 9 (*ibid.*, § 2527).

made by the UN Human Rights Committee and the African Commission on Human and Peoples' Rights in cases concerning persons who continued to be detained after their prison term was completed,³⁰¹ or despite an acquittal,³⁰² or despite an order for their release.³⁰³

Procedural requirements

Since the adoption of the Geneva Conventions, there has been a significant development in international human rights law relating to the procedures required to prevent arbitrary deprivation of liberty. Human rights law establishes (i) an obligation to inform a person who is arrested of the reasons for arrest, (ii) an obligation to bring a person arrested on a criminal charge promptly before a judge, and (iii) an obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention (so-called writ of *habeas corpus*). Although obligations (i) and (iii) are not listed as non-derogable in the relevant human rights treaties, human rights case-law has held that they may never be dispensed with altogether.³⁰⁴

(i) *Obligation to inform a person who is arrested of the reasons for arrest.* The requirement that persons who are arrested be informed promptly of the reasons therefor is contained in the International Covenant on Civil and Political Rights and the European and American Conventions on Human Rights.³⁰⁵ While the African Charter on Human and Peoples' Rights does not explicitly provide for this right, the African Commission on Human and Peoples' Rights has specified that it is part and parcel of the right to fair trial.³⁰⁶ This requirement is also provided for in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly without a vote.³⁰⁷ In its General Comment on Article 9 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee held that "if so-called preventive detention is used, for reasons of public security, it must be controlled by these

- ³⁰¹ UN Human Rights Committee, *García Lanza de Netto v. Uruguay* (*ibid.*, § 2647); African Commission on Human and Peoples' Rights, *Pagnouille v. Cameroon* (*ibid.*, § 2650).
- ³⁰² African Commission on Human and Peoples' Rights, *Constitutional Rights Project v. Nigeria* (148/96) (*ibid.*, § 2652).
- ³⁰³ UN Human Rights Committee, *Torres Ramirez v. Uruguay* (*ibid.*, § 2648).
- ³⁰⁴ With respect to the obligation to inform a person who is arrested of the reasons for arrest, see e.g., Inter-American Commission on Human Rights, Report on Terrorism and Human Rights (*ibid.*, § 3020), Doctrine concerning judicial guarantees and the right to personal liberty and security, reprinted in *Ten years of activities (1971-1981)*, Washington, D.C., 1982, p. 337. With respect to the obligation to bring a person arrested on a criminal charge promptly before a judge, see, e.g., Human Rights Committee, General Comment No. 8 (*ibid.*, § 2736); European Court of Human Rights, *Aksoy v. Turkey*, (*ibid.*, 2743) and *Brogan and Others case* (*ibid.*, § 2741); Inter-American Court of Human Rights, *Castillo Petruzzi and Others case*, (*ibid.*, § 2744).
- ³⁰⁵ International Covenant on Civil and Political Rights, Article 9(2) (*ibid.*, § 2692); European Convention on Human Rights, Article 5(2) (*ibid.*, § 2691); American Convention on Human Rights, Article 7(4) (*ibid.*, § 2693).
- ³⁰⁶ African Commission on Human and Peoples' Rights, Resolution on the Right to Recourse and Fair Trial (*ibid.*, § 2713).
- ³⁰⁷ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 10 (*ibid.*, § 2695).

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same provisions, i.e. . . . information of the reasons must be given".³⁰⁸ This rule is part of the domestic law of most, if not all, States in the world.³⁰⁹ It was included in the agreements concluded between the parties to the conflicts in the former Yugoslavia.³¹⁰

(ii) *Obligation to bring a person arrested on a criminal charge promptly before a judge.* The International Covenant on Civil and Political Rights and the European and American Conventions on Human Rights require the prompt appearance of a person who is arrested or detained before a judge or other officer authorised to exercise judicial power.³¹¹ While the African Charter on Human and Peoples' Rights does not explicitly provide for this right, the African Commission on Human and Peoples' Rights has specified that it is part and parcel of the right to fair trial.³¹² This requirement is also provided for in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the UN Declaration on Enforced Disappearance, both adopted by the UN General Assembly without a vote.³¹³ This rule is part of the domestic law of most, if not all, States in the world.³¹⁴ In its General Comment on Article 9 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee stated that a prompt appearance means that "delays must not exceed a few days".³¹⁵ There is now also significant case-law by regional human rights courts on the application of this principle during states of emergency.³¹⁶

(iii) *Obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention.* The International Covenant on Civil and

³⁰⁸ UN Human Rights Committee, General Comment No. 8 (Article 9 of the International Covenant on Civil and Political Rights) (*ibid.*, § 2711).

³⁰⁹ See, e.g., the legislation of India (*ibid.*, § 2703), Spain (*ibid.*, § 2706) and Zimbabwe (*ibid.*, § 2707).

³¹⁰ Memorandum of Understanding on the Application of International Humanitarian Law between Croatia and the SFRY, para. 4 (*ibid.*, § 2696); Agreement on the Application of International Humanitarian Law between the Parties to the Conflict in Bosnia and Herzegovina, para. 2.3 (*ibid.*, § 2697).

³¹¹ International Covenant on Civil and Political Rights, Article 9(3) (*ibid.*, § 2721); European Convention on Human Rights, Article 5(3) (*ibid.*, § 2720); American Convention on Human Rights, Article 7(5) (*ibid.*, § 2722).

³¹² African Commission on Human and Peoples' Rights, Resolution on the Right to Recourse and Fair Trial (*ibid.*, § 2738).

³¹³ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 11 and 37 (*ibid.*, §§ 2725-2726); UN Declaration on Enforced Disappearance, Article 10 (*ibid.*, § 2727).

³¹⁴ See, e.g., the legislation of India (*ibid.*, § 2730), Myanmar (*ibid.*, § 2731) and Uganda (*ibid.*, § 2732).

³¹⁵ UN Human Rights Committee, General Comment No. 8 (Article 9 of the International Covenant on Civil and Political Rights) (*ibid.*, § 2736).

³¹⁶ See European Court of Human Rights, *Brogan and Others case* (*ibid.*, § 2741) (delay must not exceed three days), *Brannigan and McBride v. UK* (*ibid.*, § 2742) (delay of up to seven days not found to be excessive because the detainees were allowed to consult a lawyer, contact a family member or friend and to be examined by a doctor within 48 hours) and *Aksoy v. Turkey* (*ibid.*, § 2743) (delay of 14 days incommunicado detention found to be excessive); Inter-American Court of Human Rights, *Castillo Petruzzi and Others case* (*ibid.*, § 2744) (delay of 36 days found to be excessive).

Political Rights and European and American Conventions on Human Rights provide for the right to have the lawfulness of detention reviewed by a court and the release ordered in case it is not lawful (so-called writ of *habeas corpus*).³¹⁷ This right is also provided for in the American Declaration on the Rights and Duties of Man and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly without a vote.³¹⁸ This rule is part of the domestic law of most, if not all, States in the world.³¹⁹ It was included in the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines.³²⁰

In its General Comment on Article 4 of the International Covenant on Civil and Political Rights (states of emergency), the UN Human Rights Committee stated that "in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant".³²¹ In its advisory opinions in the *Habeas Corpus case* and the *Judicial Guarantees case* in 1987, the Inter-American Court of Human Rights concluded that the writ of *habeas corpus* is among those judicial remedies that are "essential" for the protection of various rights whose derogation is prohibited under the American Convention on Human Rights and which is non-derogable in itself as a result.³²²

The African Commission on Human and Peoples' Rights has held that proceedings to decide on the lawfulness of detention must be brought before a court that is independent of the executive authority that ordered the detention, in particular in emergency-type situations where administrative detention is practiced.³²³ The European Court of Human Rights has similarly stressed the requirement that the review of detention be undertaken by a body which is independent of the executive.³²⁴

³¹⁷ International Covenant on Civil and Political Rights, Article 9(4) (*ibid.*, § 2750); European Convention on Human Rights, Article 5(4) (*ibid.*, § 2749); American Convention on Human Rights, Article 7(6) (*ibid.*, § 2751).

³¹⁸ American Declaration on the Rights and Duties of Man, Article XXV (*ibid.*, § 2753); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 32 (*ibid.*, § 2754).

³¹⁹ See, e.g., the legislation of Russia (*ibid.*, § 2765).

³²⁰ Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines, Part II, Article 5 (*ibid.*, § 2755).

³²¹ UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights) (*ibid.*, § 2777).

³²² Inter-American Court of Human Rights, *Habeas Corpus case* (*ibid.*, § 2782) and *Judicial Guarantees case* (*ibid.*, § 2783); see also *Neira Alegria and Others case* (*ibid.*, § 2784).

³²³ African Commission on Human and Peoples' Rights, Communication Nos. 48/90, 50/91, 52/91 and 89/93, *Amnesty International and Others v. Sudan*, Decision, 26th Session, Kigali, 1-15 November 1999, § 60; Communication Nos. 143/95 and 159/96, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, 26th Session, Kigali, 1-15 November 1999, §§ 31 and 34.

³²⁴ European Court of Human Rights, *Lawless case*, Judgement (Merits), 1 July 1961, § 14; *Ireland v. UK*, Judgement (Merits and just satisfaction), 18 January 1978, §§ 199-200.

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There is, in addition, extensive practice to the effect that persons deprived of their liberty must have access to a lawyer.³²⁵ The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly without a vote, also specifies that "a detained person shall be entitled to have the assistance of a legal counsel".³²⁶ In particular, the opportunity to challenge the lawfulness of one's detention requires the assistance of a lawyer, in order to be effective.

It should be noted, however, that all persons deprived of their liberty for reasons related to a non-international armed conflict must be given the opportunity to challenge the legality of the detention unless the government of the State affected by the non-international armed conflict claimed for itself belligerent rights, in which case captured enemy "combatants" should benefit from the same treatment as granted to prisoners of war in international armed conflicts and detained civilians should benefit from the same treatment as granted to civilian persons protected by the Fourth Geneva Convention in international armed conflicts.

Rule 100. No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees.

Practice

Volume II, Chapter 32, Section M.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

Several trials held after the Second World War, but before the adoption of the Geneva Conventions in 1949, found the defendants guilty of denying fair trial to prisoners of war or civilians.³²⁷ The right to fair trial is provided for in all

³²⁵ See, e.g., UN Human Rights Committee, Concluding observations on the report of Senegal (cited in Vol. II, Ch. 32, § 3277); UN Committee against Torture, Report of the Committee against Torture on the Situation in Turkey, UN Doc. A/48/44/Add.1, 15 November 1993, § 48; European Court of Human Rights, *Aksoy v. Turkey*, Judgement, 18 December 1996, Reports of Judgements and Decisions 1996-VI, § 83.

³²⁶ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 17 (*ibid.*, § 3230).

³²⁷ See, e.g., Australia, Military Court at Rabaul, *Ohashi case* (*ibid.*, § 2958); United Kingdom, Military Court at Almelo, *Almelo case* (*ibid.*, § 2960); United States, Military Commission at Rome, *Dostler case* (*ibid.*, § 2961); United States, Military Commission at Shanghai, *Sawada*

four Geneva Conventions and in Additional Protocols I and II.³²⁸ Depriving a protected person of a fair and regular trial is a grave breach under the Third and Fourth Geneva Conventions and under Additional Protocol I.³²⁹ Common Article 3 of the Geneva Conventions prohibits the sentencing of persons or the carrying out of executions without previous judgement pronounced by a regularly constituted court.³³⁰ Depriving a person of the right to a fair trial is listed as a war crime in the Statutes of the International Criminal Court, of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone.³³¹

The right to fair trial is set forth in numerous military manuals.³³² The denial of fair trial is a criminal offence under the legislation of a very large number of States, most being applicable in both international and non-international armed conflicts.³³³ The right to fair trial is also supported by official statements and

case (*ibid.*, § 2962) and *Isayama case* (*ibid.*, § 2963); United States, Military Court at Wuppertal, *Rhode case* (*ibid.*, § 2964); United States, Military Tribunal at Nuremberg, *Altstötter case* (*ibid.*, § 2965).

³²⁸ First Geneva Convention, Article 49, fourth paragraph (*ibid.*, § 2789); Second Geneva Convention, Article 50, fourth paragraph (*ibid.*, § 2789); Third Geneva Convention, Articles 102-108 (*ibid.*, § 2790); Fourth Geneva Convention, Articles 5 and 66-75 (*ibid.*, §§ 2792-2793); Additional Protocol I, Articles 71(1) (*ibid.*, § 2799) and 75(4) (adopted by consensus) (*ibid.*, § 2800); Additional Protocol II, Article 6(2) (adopted by consensus) (*ibid.*, § 3046). The principle of the right to fair trial is also provided for in Article 17(2) of the Second Protocol to the Hague Convention for the Protection of Cultural Property (*ibid.*, § 2808).

³²⁹ Third Geneva Convention, Article 130 (*ibid.*, § 2791); Fourth Geneva Convention, Article 147 (*ibid.*, § 2795); Additional Protocol I, Article 85(4)(e) (adopted by consensus) (*ibid.*, § 2801).

³³⁰ Geneva Conventions, common Article 3 (*ibid.*, § 2788).

³³¹ ICC Statute, Article 8(2)(a)(vi) and (c)(iv) (*ibid.*, § 2804); ICTY Statute, Article 2(f) (*ibid.*, § 2823); ICTR Statute, Article 4(g) (*ibid.*, § 2826); Statute of the Special Court for Sierra Leone, Article 3(g) (*ibid.*, § 2809).

³³² See, e.g., the military manuals of Argentina (*ibid.*, §§ 2837-2838), Australia (*ibid.*, §§ 2839-2840), Belgium (*ibid.*, § 2841), Benin (*ibid.*, § 2842), Burkina Faso (*ibid.*, § 2843), Cameroon (*ibid.*, § 2844), Canada (*ibid.*, § 2845), Colombia (*ibid.*, §§ 2846-2849), Congo (*ibid.*, § 2850), Ecuador (*ibid.*, § 2851), El Salvador (*ibid.*, § 2853), France (*ibid.*, §§ 2854-2857), Germany (*ibid.*, § 2858), Indonesia (*ibid.*, § 2859), Italy (*ibid.*, § 2860), Kenya (*ibid.*, § 2861), South Korea (*ibid.*, § 2862), Madagascar (*ibid.*, § 2863), Mali (*ibid.*, § 2864), Morocco (*ibid.*, § 2865), Netherlands (*ibid.*, § 2866), New Zealand (*ibid.*, § 2867), Nigeria (*ibid.*, § 2869), Peru (*ibid.*, §§ 2870-2871), Russia (*ibid.*, § 2872), Senegal (*ibid.*, §§ 2873-2874), South Africa (*ibid.*, § 2875), Spain (*ibid.*, § 2876), Sweden (*ibid.*, §§ 2877-2878), Switzerland (*ibid.*, § 2879), Togo (*ibid.*, § 2880), United Kingdom (*ibid.*, §§ 2881-2882) and United States (*ibid.*, §§ 2883-2888).

³³³ See in general the legislation (*ibid.*, §§ 2889-2957) and in particular the legislation of Armenia (*ibid.*, § 2890), Australia (*ibid.*, § 2892), Azerbaijan (*ibid.*, § 2893), Bangladesh (*ibid.*, § 2894), Belarus (*ibid.*, § 2896), Belgium (*ibid.*, § 2897), Bosnia and Herzegovina (*ibid.*, § 2898), Cambodia (*ibid.*, § 2902), Canada (*ibid.*, § 2904), Colombia (*ibid.*, § 2905), Congo (*ibid.*, § 2906), Croatia (*ibid.*, § 2908), Estonia (*ibid.*, § 2912), Ethiopia (*ibid.*, § 2913), Georgia (*ibid.*, § 2914), Germany (*ibid.*, § 2915), Ireland (*ibid.*, § 2918), Lithuania (*ibid.*, § 2924), Moldova (*ibid.*, § 2930), Netherlands (*ibid.*, § 2931), New Zealand (*ibid.*, § 2933), Nicaragua (*ibid.*, § 2934), Niger (*ibid.*, § 2936), Norway (*ibid.*, § 2938), Poland (*ibid.*, § 2940), Slovenia (*ibid.*, § 2944), Spain (*ibid.*, §§ 2945-2946), Tajikistan (*ibid.*, § 2948), Thailand (*ibid.*, § 2949), United Kingdom (*ibid.*, § 2953), United States (*ibid.*, § 2954) and Yugoslavia (*ibid.*, § 2956); see also the legislation of Bulgaria (*ibid.*, § 2900), Hungary (*ibid.*, § 2916), Italy (*ibid.*, § 2919) and Romania (*ibid.*, § 2941), the application of which is not excluded in time of non-international armed conflict, and the draft legislation of Argentina (*ibid.*, § 2889), Burundi (*ibid.*, § 2901), El Salvador (*ibid.*, § 2911), Jordan (*ibid.*, § 2920), Nicaragua (*ibid.*, § 2935) and Trinidad and Tobago (*ibid.*, § 2950).

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other practice in relation to non-international armed conflicts.³³⁴ There is also national case-law to the effect that a violation of this rule in non-international armed conflicts amounts to a war crime.³³⁵

The right to fair trial is also included in the Statutes of the International Criminal Court, of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone for accused persons appearing before them.³³⁶

The International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the regional human rights conventions provide for the right to fair trial.³³⁷ This right is also set forth in other international instruments.³³⁸ In its General Comment on Article 4 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee stated that "fundamental principles of fair trial" may never be derogated from.³³⁹ This conclusion is supported by the practice of regional human rights bodies.³⁴⁰

Definition of a fair trial affording all essential judicial guarantees

Both international humanitarian law and human rights law incorporate a series of judicial guarantees aimed at ensuring that accused persons receive a fair trial.

Trial by an independent, impartial and regularly constituted court

Pursuant to common Article 3 of the Geneva Conventions, only a "regularly constituted court" may pass judgement on an accused person.³⁴¹ The Third Geneva Convention requires that courts judging prisoners of war offer the essential guarantees of "independence" and "impartiality".³⁴² This

³³⁴ See, e.g., the statements of Belgium (*ibid.*, § 2967) and United States (*ibid.*, § 2972) and the practice of China (*ibid.*, § 2968).

³³⁵ See, e.g., Chile, Appeal Court of Santiago, *Videla case* (*ibid.*, § 2959).

³³⁶ ICC Statute, Article 67(1) (*ibid.*, § 2806); ICTY Statute, Article 21(2) (*ibid.*, § 2825); ICTR Statute, Article 20(2) (*ibid.*, § 2828); Statute of the Special Court for Sierra Leone, Article 17(2) (*ibid.*, § 2810).

³³⁷ International Covenant on Civil and Political Rights, Article 14(1) (*ibid.*, § 2797); Convention on the Rights of the Child, Article 40(2)(b)(iii) (*ibid.*, § 2803); European Convention on Human Rights, Article 6(1) (*ibid.*, § 2796); American Convention on Human Rights, Article 8(1) (*ibid.*, § 2798); African Charter on Human and Peoples' Rights, Article 7 (*ibid.*, § 2802).

³³⁸ See, e.g., Universal Declaration on Human Rights, Article 10 (*ibid.*, § 2813); American Declaration on the Rights and Duties of Man, Article XVIII (*ibid.*, § 2814); Cairo Declaration on Human Rights in Islam, Article 19(e) (*ibid.*, § 2819); EU Charter on Fundamental Rights, Article 47 (*ibid.*, § 2834).

³³⁹ UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights) (*ibid.*, § 2999).

³⁴⁰ See, e.g., African Commission on Human and Peoples' Rights, *Civil Liberties Organisation and Others v. Nigeria* (*ibid.*, § 3008); Inter-American Commission on Human Rights, Resolution concerning the law applicable to emergency situations (*ibid.*, § 3017) and Report on Terrorism and Human Rights (*ibid.*, § 3020); Inter-American Court of Human Rights, *Judicial Guarantees case* (*ibid.*, § 3021).

³⁴¹ Geneva Conventions, common Article 3 (*ibid.*, § 3039).

³⁴² Third Geneva Convention, Article 84, second paragraph (*ibid.*, § 3040).

requirement is also set forth in Additional Protocol II.³⁴³ Additional Protocol I requires an "impartial and regularly constituted court".³⁴⁴

The requirements that courts be independent, impartial and regularly constituted are set forth in a number of military manuals.³⁴⁵ These requirements are also contained in national legislation and are supported by official statements and reported practice.³⁴⁶ Several of these sources stress that these requirements may not be suspended during emergencies.³⁴⁷

Whereas common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I require a "regularly constituted" court, human rights treaties require a "competent" tribunal,³⁴⁸ and/or a tribunal "established by law".³⁴⁹ A court is regularly constituted if it has been established and organised in accordance with the laws and procedures already in force in a country.

The International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the regional human rights conventions specify that for a trial to be fair it must be conducted by a court that is "independent" and "impartial".³⁵⁰ The requirements of independence and impartiality are also to be found in a number of other international instruments.³⁵¹ Both the UN Human Rights Committee and the Inter-American Commission on Human Rights have indicated that the requirement for courts to be independent and impartial can never be dispensed with.³⁵²

³⁴³ Additional Protocol II, Article 6(2) (adopted by consensus) (*ibid.*, § 3046).

³⁴⁴ Additional Protocol I, Article 75(4) (adopted by consensus) (*ibid.*, § 3045).

³⁴⁵ See, e.g., the military manuals of Argentina (*ibid.*, §§ 3059-3060), Belgium (*ibid.*, § 3061), Canada (*ibid.*, § 3062), Croatia (*ibid.*, § 3063), Netherlands (*ibid.*, § 3064), New Zealand (*ibid.*, § 3065), Spain (*ibid.*, § 3066), Sweden (*ibid.*, § 3067), Switzerland (*ibid.*, § 3068), United Kingdom (*ibid.*, § 3069) and United States (*ibid.*, §§ 3070-3071).

³⁴⁶ See, e.g., the legislation of Bangladesh (*ibid.*, § 3072), Czech republic (*ibid.*, § 3073), Georgia (*ibid.*, § 3074), Germany (*ibid.*, § 3075), Ireland (*ibid.*, § 3076), Kenya (*ibid.*, § 3077), Kuwait (*ibid.*, § 3078), Kyrgyzstan (*ibid.*, § 3079), Lithuania (*ibid.*, § 3080), Norway (*ibid.*, § 3082), Netherlands (*ibid.*, § 3081) and Slovakia (*ibid.*, § 3083), the statements of the United States (*ibid.*, §§ 3086-3087) and the reported practice of Nicaragua (*ibid.*, § 3086) and Cambodia (*ibid.*, § 3086).

³⁴⁷ See, e.g., the military manual of Croatia (*ibid.*, § 3063) and the legislation of Georgia (*ibid.*, § 3074), Kuwait (*ibid.*, § 3078) and Kyrgyzstan (*ibid.*, § 3079).

³⁴⁸ International Covenant on Civil and Political Rights, Article 14(1) (*ibid.*, § 3043); American Convention on Human Rights, Article 8(1) (*ibid.*, § 3044); Convention on the Rights of the Child, Article 40(2)(b)(iii) (*ibid.*, § 3049).

³⁴⁹ International Covenant on Civil and Political Rights, Article 14(1) (*ibid.*, § 2797); European Convention on Human Rights, Article 6(1) (*ibid.*, § 2796); American Convention on Human Rights, Article 8(1) (*ibid.*, § 2798).

³⁵⁰ International Covenant on Civil and Political Rights, Article 14(1) (*ibid.*, § 3043); Convention on the Rights of the Child, Article 40(2)(b)(iii) (*ibid.*, § 3049); European Convention on Human Rights, Article 6(1) (*ibid.*, § 3042); American Convention on Human Rights, Article 8(1) (*ibid.*, § 3044); African Charter on Human and Peoples' Rights, Article 7(1)(d) (*ibid.*, § 3047) and Article 26 (*ibid.*, § 3048).

³⁵¹ See, e.g., Universal Declaration on Human Rights, Article 10 (*ibid.*, § 3051); American Declaration on the Rights and Duties of Man, Article XXVI (*ibid.*, § 3052); Basic Principles on the Independence of the Judiciary, paras. 1 and 2 (*ibid.*, § 3053); EU Charter of Fundamental Rights, Article 47 (*ibid.*, § 3058).

³⁵² UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights) (*ibid.*, § 2999); Inter-American Commission on Human Rights, Report on Terrorism and Human Rights (*ibid.*, § 3020).

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The meaning of an independent and impartial tribunal has been considered in case-law. In order to be independent, a court must be able to perform its functions independently of any other branch of the government, especially the executive.³⁵³ In order to be impartial, the judges composing the court must not harbour preconceptions about the matter before them, nor act in a way that promotes the interests of one side.³⁵⁴ In addition to this requirement of subjective impartiality, regional human rights bodies have pointed out that a court must also be impartial from an objective viewpoint, i.e., it must offer sufficient guarantees to exclude any legitimate doubt about its impartiality.³⁵⁵

The need for independence of the judiciary from the executive, as well as subjective and objective impartiality, has meant that in a number of cases, military tribunals and special security courts have been found not to be independent and impartial. While none of these cases concluded that military tribunals inherently violate these requirements, they all stressed that military tribunals and special security courts must respect the same requirements of independence and impartiality as civilian tribunals.³⁵⁶

In this context, it should also be noted that the Third Geneva Convention provides that prisoners of war are to be tried by a military court, unless the laws of the detaining power would allow civilian courts to try its own soldiers for the same type of offence. However, this provision is conditioned by the requirement that "in no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality".³⁵⁷

Furthermore, the Fourth Geneva Convention provides that the occupying power may hand over persons who violate penal provisions promulgated by it to "its properly constituted, non-political military courts, on condition that the said courts sit in the occupied territory. Courts of appeal shall preferably sit in the occupied territory."³⁵⁸ Regional human rights bodies have found, however,

³⁵³ UN Human Rights Committee, *Bahamonde v. Equatorial Guinea* (*ibid.*, § 3092); African Commission on Human and Peoples' Rights, *Centre For Free Speech v. Nigeria* (206/97) (*ibid.*, § 3095); European Court of Human Rights, *Belilos case* (*ibid.*, § 3099) and *Findlay v. UK* (*ibid.*, § 3101). The Inter-American Commission on Human Rights underlined the need for freedom from interference from the executive and security of tenure of the judges in its *Annual Report 1992-1993* (*ibid.*, § 3105) and *Case 11.006 (Peru)* (*ibid.*, § 3107).

³⁵⁴ See Australia, Military Court at Rabaul, *Ohashi case* (*ibid.*, § 3084); UN Human Rights Committee, *Karttunen v. Finland* (*ibid.*, § 3091).

³⁵⁵ See African Commission on Human and Peoples' Rights, *Constitutional Rights Project v. Nigeria* (60/91) (*ibid.*, § 3094) and *Malawi African Association and Others v. Mauritania* (*ibid.*, § 3096); European Court of Human Rights, *Piersack case* (*ibid.*, § 3098) and *Findlay case* (*ibid.*, § 3101); Inter-American Commission on Human Rights, *Case 10.970 (Peru)* (*ibid.*, § 3108).

³⁵⁶ See African Commission on Human and Peoples' Rights, *Constitutional Rights Project v. Nigeria* (60/91) (*ibid.*, § 3094) and *Civil Liberties Organisation and Others v. Nigeria* (*ibid.*, § 3097); European Court of Human Rights, *Findlay v. UK* (*ibid.*, § 3101), *Ciraklar v. Turkey* (*ibid.*, § 3102) and *Sahiner v. Turkey* (*ibid.*, § 3104); Inter-American Commission on Human Rights, *Case 11.084 (Peru)* (*ibid.*, § 3106).

³⁵⁷ Third Geneva Convention, Article 84 (*ibid.*, § 3040).

³⁵⁸ Fourth Geneva Convention, Article 66 (*ibid.*, § 3041).

that the trial of civilians by military courts constitutes a violation of the right to be tried by an independent and impartial tribunal.³⁵⁹

Presumption of innocence

The presumption of innocence is provided for in Additional Protocols I and II.³⁶⁰ It is also included in the Statutes of the International Criminal Court, of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone for accused persons appearing before these tribunals.³⁶¹

The presumption of innocence is included in several military manuals and is part of most, if not all, national legal systems.³⁶² In the *Ohashi case*, a war crimes trial in 1946, the judge advocate stressed the need for no preconceived notions on the part of the judges and that the court must satisfy itself that the accused was guilty.³⁶³

The presumption of innocence is set forth in the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the regional human rights conventions.³⁶⁴ It is also contained in several other international instruments.³⁶⁵ Both the UN Human Rights Committee and the Inter-American Commission on Human Rights have indicated that the presumption of innocence can never be dispensed with.³⁶⁶

³⁵⁹ African Commission on Human and Peoples' Rights, *Media Rights Agenda v. Nigeria* (224/98) (*ibid.*, § 3004) (trial of a civilian "by a Special Military Tribunal, presided over by serving military officers, who are still subject to military commands, without more, [is] prejudicial to the basic principles of fair hearing") and *Civil Liberties Organisation and Others v. Nigeria* (*ibid.*, § 3097) ("the military tribunal fails the independence test"); European Court of Human Rights, *Cyprus case* (*ibid.*, § 3103) (because of "the close structural links between the executive power and the military officers serving on the 'TRNC' military courts"); Inter-American Commission on Human Rights, *Doctrine concerning judicial guarantees and the right to personal liberty and security* (*ibid.*, § 3020).

³⁶⁰ Additional Protocol I, Article 75(4)(d) (adopted by consensus) (*ibid.*, § 3116); Additional Protocol II, Article 6(2)(d) (adopted by consensus) (*ibid.*, § 3117).

³⁶¹ ICC Statute, Article 66 (*ibid.*, § 3120); ICTY Statute, Article 21(3) (*ibid.*, § 3129); ICTR Statute, Article 20(3) (*ibid.*, § 3130); Statute of the Special Court for Sierra Leone, Article 17(3) (*ibid.*, § 3121).

³⁶² See, e.g., the military manuals of Argentina (*ibid.*, § 3134), Canada (*ibid.*, § 3135), Colombia (*ibid.*, §§ 3136-3137), New Zealand (*ibid.*, § 3138) and Sweden (*ibid.*, § 3139) and the legislation of Bangladesh (*ibid.*, § 3141), Ethiopia (*ibid.*, § 3140), Georgia (*ibid.*, § 3140), Ireland (*ibid.*, § 3142), Kenya (*ibid.*, § 3140), Kyrgyzstan (*ibid.*, § 3140), Norway (*ibid.*, § 3143) and Russia (*ibid.*, § 3140).

³⁶³ Australia, Military Court at Rabaul, *Ohashi case* (*ibid.*, § 3144).

³⁶⁴ International Covenant on Civil and Political Rights, Article 14(2) (*ibid.*, § 3114); Convention on the Rights of the Child, Article 40(2)(b)(i) (*ibid.*, § 3119); European Convention on Human Rights, Article 6(2) (*ibid.*, § 3113); American Convention on Human Rights, Article 8(2) (*ibid.*, § 3115); African Charter on Human and Peoples' Rights, Article 7(1) (*ibid.*, § 3118).

³⁶⁵ See, e.g., Universal Declaration on Human Rights, Article 11 (*ibid.*, § 3122); American Declaration on the Rights and Duties of Man, Article XXVI (*ibid.*, § 3123); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 36 (*ibid.*, § 3124); Cairo Declaration on Human Rights in Islam, Article 19 (*ibid.*, § 3125); EU Charter of Fundamental Rights, Article 48(1) (*ibid.*, § 3133).

³⁶⁶ UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights) (*ibid.*, § 2999); Inter-American Commission on Human Rights, Report on Terrorism and Human Rights (*ibid.*, § 3020).

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The presumption of innocence means that any person subject to penal proceedings must be presumed to be not guilty of the act he or she is charged with until proven otherwise. This means that the burden of proof lies on the prosecution, while the defendant has the benefit of the doubt.³⁶⁷ It also means that guilt must be proven according to a determined standard: "beyond a reasonable doubt" (in common law countries) or "to the intimate conviction of the trier of fact" (in civil law countries). It is, moreover, the duty of all officials involved in a case, as well as of public authorities, to refrain from prejudging the outcome of a trial.³⁶⁸ The African Commission on Human and Peoples' Rights found a violation of the presumption of innocence in a case where a court presumed the guilt of the defendants because they refused to defend themselves.³⁶⁹

Information on the nature and cause of the accusation

The obligation to inform the accused of the nature and cause of the accusation is provided for in the Third and Fourth Geneva Conventions, as well as in Additional Protocols I and II.³⁷⁰ This obligation is also included in the Statutes of the International Criminal Court, of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone for accused persons appearing before these tribunals.³⁷¹

The obligation to inform the accused of the nature and cause of the accusation is set forth in several military manuals and is part of most, if not all, national legal systems.³⁷² This obligation was recalled in war crimes trials after the Second World War.³⁷³

The obligation to inform the accused of the nature and cause of the charges is also contained in the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the European and American

³⁶⁷ See, e.g., UN Human Rights Committee, General Comment No. 13 (Article 14 of the International Covenant on Civil and Political Rights) (*ibid.*, § 3148).

³⁶⁸ See, e.g., UN Human Rights Committee, General Comment No. 13 (Article 14 of the International Covenant on Civil and Political Rights) (*ibid.*, § 3148) and *Gridin v. Russia* (*ibid.*, § 3149); European Court of Human Rights, *Allenet de Ribemont v. France* (*ibid.*, § 3154).

³⁶⁹ African Commission on Human and Peoples' Rights, *Malawi African Association and Others v. Mauritania* (54/91) (*ibid.*, § 3152).

³⁷⁰ Third Geneva Convention, Article 96, fourth paragraph (*ibid.*, § 3162) and Article 105, fourth paragraph (*ibid.*, § 3163); Fourth Geneva Convention, Article 71, second paragraph (*ibid.*, § 3164) and Article 123, second paragraph (*ibid.*, § 3165); Additional Protocol I, Article 75(4)(a) (adopted by consensus) (*ibid.*, § 3169); Additional Protocol II, Article 6(2)(a) (adopted by consensus) (*ibid.*, § 3170).

³⁷¹ ICC Statute, Article 67(1)(a) (*ibid.*, § 3174); ICTY Statute, Article 21(4)(a) (*ibid.*, § 3181); ICTR Statute, Article 20(4)(a) (*ibid.*, § 3182); Statute of the Special Court for Sierra Leone, Article 17(4)(a) (*ibid.*, § 3175).

³⁷² See, e.g., the military manuals of Argentina (*ibid.*, §§ 3184–3185), Australia (*ibid.*, § 3186), Canada (*ibid.*, § 3187), Indonesia (*ibid.*, § 3188), Netherlands (*ibid.*, § 3189), New Zealand (*ibid.*, § 3190), Spain (*ibid.*, § 3191), Sweden (*ibid.*, § 3192), Switzerland (*ibid.*, § 3193), United Kingdom (*ibid.*, § 3194) and United States (*ibid.*, §§ 3195–3197) and the legislation of Bangladesh (*ibid.*, § 3199), Ethiopia (*ibid.*, § 3198), Georgia (*ibid.*, § 3198), India (*ibid.*, § 3198), Ireland (*ibid.*, § 3200), Kenya (*ibid.*, § 3198), Kyrgyzstan (*ibid.*, § 3198), Mexico (*ibid.*, § 3198) and Norway (*ibid.*, § 3201).

³⁷³ See, e.g., Australia, Military Court at Rabaul, *Ohashi case* (*ibid.*, § 3202); United States, Military Tribunal at Nuremberg, *Altstötter (The Justice Trial) case* (*ibid.*, § 2965).

Conventions on Human Rights.³⁷⁴ The African Commission on Human and Peoples' Rights held that compliance with this obligation was indispensable for the enjoyment of the right to fair trial.³⁷⁵ This obligation is also set forth in other international instruments.³⁷⁶ Both the UN Human Rights Committee and the Inter-American Commission on Human Rights have indicated that the obligation to inform the accused of the nature and cause of the charges can never be dispensed with.³⁷⁷

Most of the treaty provisions specify that information on the nature and cause of the charge must be given to the accused "without delay" or "promptly" and that the information must be provided in a language the accused understands.³⁷⁸

Necessary rights and means of defence

The requirement that an accused must have the necessary rights and means of defence is contained in all four Geneva Conventions, as well as in Additional Protocols I and II.³⁷⁹

This requirement is provided for in a number of military manuals and is part of most, if not all, national legal systems.³⁸⁰

The right to defence is also set forth in the International Covenant on Civil and Political Rights and the regional human rights conventions.³⁸¹ It is also

³⁷⁴ International Covenant on Civil and Political Rights, Article 14(3)(a) (*ibid.*, § 3167); Convention on the Rights of the Child, Article 40(2)(b)(ii) (*ibid.*, § 3171); European Convention on Human Rights, Article 6(3)(a) (*ibid.*, § 3166); American Convention on Human Rights, Article 8(2)(b) (*ibid.*, § 3168).

³⁷⁵ African Commission on Human and Peoples' Rights, *Malawi African Association and Others v. Mauritania*, Communications 54/91, 61/91, 98/93, 164/97–196/97 and 210/98, Decision, 27th Session, Algiers, 11 May 2000, § 97.

³⁷⁶ See, e.g., Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 10 (*ibid.*, § 3177).

³⁷⁷ UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights) (*ibid.*, § 2999); Inter-American Commission on Human Rights, Report on Terrorism and Human Rights (*ibid.*, § 3020).

³⁷⁸ See Third Geneva Convention, Article 105, fourth paragraph (*ibid.*, § 3163); Fourth Geneva Convention, Article 71, second paragraph (*ibid.*, § 3164); Additional Protocol I, Article 75(4)(a) (adopted by consensus) (*ibid.*, § 3169); Additional Protocol II, Article 6(2)(a) (adopted by consensus) (*ibid.*, § 3170).

³⁷⁹ First Geneva Convention, Article 49, fourth paragraph (*ibid.*, § 3210); Second Geneva Convention, Article 50, fourth paragraph (*ibid.*, § 3211); Third Geneva Convention, Article 84, second paragraph (*ibid.*, § 3212) and Article 96, fourth paragraph (*ibid.*, § 3213); Fourth Geneva Convention, Article 72, first paragraph (*ibid.*, § 3216) and Article 123, first paragraph (*ibid.*, § 3217); Additional Protocol I, Article 75(4)(a) (adopted by consensus) (*ibid.*, § 3221); Additional Protocol II, Article 6(2)(a) (adopted by consensus) (*ibid.*, § 3222).

³⁸⁰ See, e.g., the military manuals of Argentina (*ibid.*, §§ 3245–3246), Australia (*ibid.*, § 3247), Canada (*ibid.*, § 3248), Colombia (*ibid.*, § 3249), Ecuador (*ibid.*, § 3250), Germany (*ibid.*, § 3251), Hungary (*ibid.*, § 3252), Netherlands (*ibid.*, § 3253), New Zealand (*ibid.*, § 3254), Spain (*ibid.*, § 3256), Sweden (*ibid.*, § 3257), Switzerland (*ibid.*, § 3258), United Kingdom (*ibid.*, § 3259) and United States (*ibid.*, §§ 3260–3263) and the legislation of Argentina (*ibid.*, § 3265), Bangladesh (*ibid.*, § 3266), Ethiopia (*ibid.*, § 3264), Georgia (*ibid.*, § 3264), India (*ibid.*, § 3264), Ireland (*ibid.*, § 3267), Kenya (*ibid.*, § 3264), Kuwait (*ibid.*, § 3264), Kyrgyzstan (*ibid.*, § 3264), Mexico (*ibid.*, § 3264), Norway (*ibid.*, § 3268) and Russia (*ibid.*, § 3264).

³⁸¹ International Covenant on Civil and Political Rights, Article 14(3) (*ibid.*, § 3219); European Convention on Human Rights, Article 6(3) (*ibid.*, § 3218); American Convention on Human Rights, Article 8(2) (*ibid.*, § 3220); African Charter on Human and Peoples' Rights, Article 7(1) (*ibid.*, § 3223). Article 14(3) of the International Covenant on Civil and Political Rights and

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contained in other international instruments.³⁸² The UN Human Rights Committee has indicated that the right of an accused to necessary rights and means of defence can never be dispensed with.³⁸³

These sources specify that the necessary rights and means of defence include the following:

(i) *Right to defend oneself or to be assisted by a lawyer of one's own choice.* The right to have the assistance of counsel was set forth in the Charters of the International Military Tribunals at Nuremberg and at Tokyo.³⁸⁴ This right is also set forth in the Third and Fourth Geneva Conventions.³⁸⁵ The Statutes of the International Criminal Court, of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone provide that accused persons appearing before the tribunals are entitled to defend themselves or to be assisted by counsel of their own choice and to be informed of this right if they have no legal assistance.³⁸⁶

Denial of the right to counsel of one's own choice or to counsel altogether was one of the bases for the finding of a violation of the right to fair trial in several war crimes trials after the Second World War.³⁸⁷ In a resolution on the human rights situation in the former Yugoslavia adopted in 1996, the UN Commission on Human Rights called upon Croatia "to pursue vigorously prosecutions against those suspected of past violations of international humanitarian law and human rights, while ensuring that the rights... to legal representation are afforded to all persons suspected of such crimes".³⁸⁸

The right to defence, including the right to be defended by a lawyer of one's own choice is also contained in the International Covenant on Civil and Political Rights and the regional human rights conventions.³⁸⁹ The Inter-American

Article 8(2) of the American Convention on Human Rights state that during the proceedings the defendant must benefit with "full equality" from the judicial guarantees listed in these articles.

³⁸² See, e.g., Universal Declaration on Human Rights, Article 11 (*ibid.*, § 3229); Cairo Declaration on Human Rights in Islam, Article 19(e) (*ibid.*, § 3233); EU Charter of Fundamental Rights, Article 48(2) (*ibid.*, § 3222).

³⁸³ UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights) (*ibid.*, § 2999).

³⁸⁴ IMT Charter (Nuremberg), Article 16(d) (*ibid.*, § 3209); IMT Charter (Tokyo), Article 9(c) (*ibid.*, § 3228).

³⁸⁵ Third Geneva Convention, Article 99, third paragraph ("assistance of a qualified advocate or counsel") (*ibid.*, § 3214) and Article 105, first paragraph ("defence by a qualified advocate or counsel of his own choice") (*ibid.*, § 3215); Fourth Geneva Convention, Article 72, first paragraph ("right to be assisted by a qualified advocate or counsel of their own choice") (*ibid.*, § 3216).

³⁸⁶ ICC Statute, Article 67(1) (*ibid.*, § 3226); ICTY Statute, Article 21(4) (*ibid.*, § 3238); ICTR Statute, Article 20(4) (*ibid.*, § 3240); Statute of the Special Court for Sierra Leone, Article 17(4) (*ibid.*, § 3227).

³⁸⁷ See United States, Military Commission at Shanghai, *Isayama case* (*ibid.*, § 2963); Military Tribunal at Nuremberg, *Altstötter (The Justice Trial) case* (*ibid.*, § 2965) and Supreme Court, *Ward case* (*ibid.*, § 3269).

³⁸⁸ UN Commission on Human Rights, Res. 1996/71 (*ibid.*, § 3273).

³⁸⁹ International Covenant on Civil and Political Rights, Article 14(3)(d) (*ibid.*, § 3219); European Convention on Human Rights, Article 6(3)(c) (*ibid.*, § 3218); American Convention on Human

Commission on Human Rights has indicated that the right to be defended by a lawyer of one's own choice can never be dispensed with.³⁹⁰ Human rights case-law has held that this requirement means that an accused cannot be forced to accept a government's choice of lawyer.³⁹¹

The Geneva Conventions do not indicate how soon a person has the right to a lawyer except to specify that a lawyer must be had, not only during the trial, but before it as well.³⁹² The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly without a vote, specifies that communication with counsel may not be denied for more than "a matter of days".³⁹³ The Basic Principles on the Role of Lawyers specifies that this must be the case "not later than forty-eight hours from the time of arrest or detention".³⁹⁴ The need for early access to a lawyer before the trial, as well as at all important stages of the trial, has been stated in the case-law of the UN Human Rights Committee and regional human rights bodies.³⁹⁵

(ii) *Right to free legal assistance if the interests of justice so require.* This right is implicitly recognised in the Third and Fourth Geneva Conventions.³⁹⁶ It is also provided for in the Statutes of the International Criminal Court, of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone.³⁹⁷

Rights, Article 8(2)(d) (*ibid.*, § 3220); African Charter on Human and Peoples' Rights, Article 7(1)(c) (*ibid.*, § 3223). With the exception of the European Convention, these treaties also provide that the accused must be informed of the right to counsel if they do not have legal assistance.

³⁹⁰ Inter-American Commission on Human Rights, Report on Terrorism and Human Rights (*ibid.*, § 3020).

³⁹¹ See, e.g., UN Human Rights Committee, *Saldías López v. Uruguay* (*ibid.*, § 3281); African Commission on Human and Peoples' Rights, *Civil Liberties Organisation and Others v. Nigeria* (218/98) (*ibid.*, § 3285).

³⁹² Third Geneva Convention, Article 105, third paragraph (counsel must have at least two weeks to prepare before the opening of the trial) (*ibid.*, § 3215); Fourth Geneva Convention, Article 72, first paragraph (counsel must enjoy the necessary facilities for preparing the defence) (*ibid.*, § 3216).

³⁹³ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 15 (*ibid.*, § 3230).

³⁹⁴ Basic Principles on the Role of Lawyers, Principle 7 (*ibid.*, § 3242).

³⁹⁵ See, e.g., UN Human Rights Committee, *Sala de Tourón v. Uruguay*, *Pietrarola v. Uruguay*, *Wight v. Madagascar*, *Lafuente Peñarrieta and Others v. Bolivia* (*ibid.*, § 3278) and *Little v. Jamaica* (*ibid.*, § 3280); African Commission on Human and Peoples' Rights, *Avocats Sans Frontières v. Burundi* (231/99) (*ibid.*, § 3284); European Court of Human Rights, *Campbell and Fell case* (*ibid.*, § 3288), *Can case* (*ibid.*, § 3289), *Imbrioscia v. Switzerland* (*ibid.*, § 3291) and *Averill v. UK* (*ibid.*, § 3292); Inter-American Commission on Human Rights, *Case 10.198 (Nicaragua)* (*ibid.*, § 3293).

³⁹⁶ Third Geneva Convention, Article 105, second paragraph ("failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel" or if that fails "the Detaining Power shall appoint a competent advocate or counsel to conduct the defence"); Fourth Geneva Convention, Article 72, second paragraph ("failing a choice by the accused, the Protecting Power may provide him with an advocate or counsel" or if that fails "the Occupying Power, subject to the consent of the accused, shall provide an advocate or counsel").

³⁹⁷ ICC Statute, Article 67(1)(d) (cited in Vol. II, Ch. 32, § 3226); ICTY Statute, Article 21(4)(d) (*ibid.*, § 3238); ICTR Statute, Article 20(4)(d) (*ibid.*, § 3240); Statute of the Special Court for Sierra Leone, Article 17(4)(d) (*ibid.*, § 3227).

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The right to the services of a lawyer free of charge if the interests of justice so require is also set forth in the International Covenant on Civil and Political Rights and the European and American Conventions on Human Rights.³⁹⁸ This right is also contained in other international instruments.³⁹⁹ The Inter-American Commission on Human Rights has indicated that the right to free legal assistance if the interests of justice so require can never be dispensed with.⁴⁰⁰ A number of criteria have been identified in human rights case-law on the basis of which it must be determined whether the interests of justice require the free services of a lawyer, in particular the complexity of the case, the seriousness of the offence and the severity of the sentence the accused risks.⁴⁰¹

(iii) *Right to sufficient time and facilities to prepare the defence.* The Third and Fourth Geneva Conventions specify that the necessary means of defence include sufficient time and facilities before the trial to prepare the defence.⁴⁰² This requirement is also set forth in the Statutes of the International Criminal Court, of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone.⁴⁰³

The right to sufficient time and facilities to prepare the defence is contained in the International Covenant on Civil and Political Rights and the European and American Conventions on Human Rights.⁴⁰⁴ It is also included in other international instruments.⁴⁰⁵ The Inter-American Commission on Human Rights has indicated that the right to sufficient time and facilities to prepare the defence can never be dispensed with.⁴⁰⁶

³⁹⁸ International Covenant on Civil and Political Rights, Article 14(3)(d) (*ibid.*, § 3219); European Convention on Human Rights, Article 6(3)(c) (*ibid.*, § 3218); American Convention on Human Rights, Article 8(2)(e) (*ibid.*, § 3220). The American Convention actually refers to payment depending on the requirement of domestic law, but the Inter-American Court of Human Rights has interpreted this as requiring the free services of a lawyer if the accused cannot afford one and if the fairness of the hearing would be affected by the lack of such a lawyer, see Inter-American Court of Human Rights, *Exceptions to the Exhaustion of Domestic Remedies case* (*ibid.*, § 3294).

³⁹⁹ See, e.g., Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 17 (*ibid.*, § 3231); Basic Principles on the Role of Lawyers, Principle 6 (*ibid.*, § 3242).

⁴⁰⁰ Inter-American Commission on Human Rights, Report on Terrorism and Human Rights (*ibid.*, § 3020).

⁴⁰¹ See, e.g., UN Human Rights Committee, *Currie v. Jamaica* and *Thomas v. Jamaica* (*ibid.*, § 3279); African Commission on Human and Peoples' Rights, *Avocats Sans Frontières v. Burundi* (231/99) (*ibid.*, § 3284); European Court of Human Rights, *Pakelli case* (*ibid.*, § 3287) and *Quaranta v. Switzerland* (*ibid.*, § 3290).

⁴⁰² Third Geneva Convention, Article 105, third paragraph (*ibid.*, § 3215); Fourth Geneva Convention, Article 72, first paragraph (*ibid.*, § 3216).

⁴⁰³ ICC Statute, Article 67(1)(b) (*ibid.*, § 3226); ICTY Statute, Article 21(4)(b) (*ibid.*, § 3238); ICTR Statute, Article 20(4)(b) (*ibid.*, § 3240); Statute of the Special Court for Sierra Leone, Article 17(4)(b) (*ibid.*, § 3227).

⁴⁰⁴ International Covenant on Civil and Political Rights, Article 14(3)(b) (*ibid.*, § 3219); European Convention on Human Rights, Article 6(3)(b) (*ibid.*, § 3218); American Convention on Human Rights, Article 8(2)(c) (*ibid.*, § 3220).

⁴⁰⁵ See, e.g., Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 17–18 (*ibid.*, §§ 3231–3232); Basic Principles on the Role of Lawyers, Principle 8 (*ibid.*, § 3242).

⁴⁰⁶ Inter-American Commission on Human Rights, Report on Terrorism and Human Rights (*ibid.*, § 3020).

As specified in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly without a vote, this right requires that "a detained person shall be allowed adequate time and facilities for consultation with his legal counsel".⁴⁰⁷

(iv) *Right of the accused to communicate freely with counsel.* The right of counsel to visit the accused freely is provided for in the Third and Fourth Geneva Conventions.⁴⁰⁸ The right of the accused to communicate freely with counsel is also provided for in the Statutes of the International Criminal Court, of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone.⁴⁰⁹

The right of the accused to communicate freely with counsel is provided for in the American Convention on Human Rights and in other international instruments.⁴¹⁰ The UN Human Rights Committee and regional human rights bodies have stressed the importance of the right of the accused to communicate freely with counsel in order to have a fair trial.⁴¹¹

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly without a vote, specifies that "interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within hearing, of a law enforcement official".⁴¹²

Trial without undue delay

The right to a trial without undue delay is provided for in the Third and Fourth Geneva Conventions.⁴¹³ This right is also set forth in the Statutes of the International Criminal Court, of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone.⁴¹⁴

⁴⁰⁷ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18(2) (*ibid.*, § 3232).

⁴⁰⁸ Third Geneva Convention, Article 105, third paragraph (*ibid.*, § 3215); Fourth Geneva Convention, Article 72, first paragraph (*ibid.*, § 3216).

⁴⁰⁹ ICC Statute, Article 67(1)(b) (*ibid.*, § 3226); ICTY Statute, Article 21(4)(b) (*ibid.*, § 3238); ICTR Statute, Article 20(4)(b) (*ibid.*, § 3240); Statute of the Special Court for Sierra Leone, Article 17(4)(b) (*ibid.*, § 3227).

⁴¹⁰ American Convention on Human Rights, Article 8(2)(d) (*ibid.*, § 3220); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18 (*ibid.*, § 3232); Basic Principles on the Role of Lawyers, Principle 8 (*ibid.*, § 3242).

⁴¹¹ See, e.g., UN Human Rights Committee, General Comment No. 13 (Article 14 of the International Covenant on Civil and Political Rights) (*ibid.*, § 3276); African Commission on Human and Peoples' Rights, Resolution on the Right to Recourse and Fair Trial (*ibid.*, § 3282) and *Civil Liberties Organisation and Others v. Nigeria* (218/98) (*ibid.*, § 3285); European Court of Human Rights, *Can case* (*ibid.*, § 3289).

⁴¹² Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18(4) (*ibid.*, § 3232).

⁴¹³ Third Geneva Convention, Article 103, first paragraph (*ibid.*, § 3297) ("as soon as possible"); Fourth Geneva Convention, Article 71, second paragraph (*ibid.*, § 3298) ("as rapidly as possible").

⁴¹⁴ ICC Statute, Article 64(2) and (3) ("expeditious") (*ibid.*, § 3306) and Article 67(1)(c) ("without undue delay") (*ibid.*, § 3307); ICTY Statute, Article 20(1) ("expeditious") (*ibid.*, § 3311) and Article 21(4)(c) ("without undue delay") (*ibid.*, § 3312); ICTR Statute, Article 19(1) ("expeditious") (*ibid.*, § 3313) and Article 20(4)(c) ("without undue delay") (*ibid.*, § 3314).

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The right to trial without delay is set forth in several military manuals and is part of most, if not all, national legal systems.⁴¹⁵

The right to a trial without undue delay (or within a reasonable time) is provided for in the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the regional human rights conventions.⁴¹⁶ It is also provided for in other international instruments.⁴¹⁷

The actual length of time is not specified in any instrument and must be judged on a case-by-case basis taking into account factors such as the complexity of the case, the behaviour of the accused and the diligence of the authorities.⁴¹⁸ The proceedings subject to this requirement are those from the time of the charge to the final trial on the merits, including appeal.⁴¹⁹

Examination of witnesses

The right of the accused to examine and to have examined witnesses is provided for by the Third and Fourth Geneva Conventions and Additional Protocol I.⁴²⁰ This right is also set forth in the Statutes of the International Criminal Court, of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone.⁴²¹

Several military manuals specify this right, and it is part of most, if not all, national legal systems.⁴²² The inability to examine and to have examined

Statute of the Special Court for Sierra Leone, Article 17(4)(c) ("without undue delay") (*ibid.*, § 3308).

⁴¹⁵ See, e.g., the military manuals of Argentina (*ibid.*, § 3317), Australia (*ibid.*, § 3318), Canada (*ibid.*, § 3319), Colombia (*ibid.*, § 3320), New Zealand (*ibid.*, § 3321), Spain (*ibid.*, § 3322), United Kingdom (*ibid.*, § 3323) and United States (*ibid.*, § 3324) and the legislation of Bangladesh (*ibid.*, § 3326), Ireland (*ibid.*, § 3327), Kenya (*ibid.*, § 3325) and Norway (*ibid.*, § 3328).

⁴¹⁶ International Covenant on Civil and Political Rights, Article 9(3) ("within a reasonable time") (*ibid.*, § 3301) and Article 14(3)(c) ("without undue delay") (*ibid.*, § 3302); Convention on the Rights of the Child, Article 40(2)(b)(iii) ("without delay") (*ibid.*, § 3306); European Convention on Human Rights, Article 5(3) (*ibid.*, § 3299) and Article 6(1) ("within a reasonable time") (*ibid.*, § 3300); American Convention on Human Rights, Article 8(1) ("within a reasonable time") (*ibid.*, § 3303); African Charter on Human and Peoples' Rights, Article 7(1)(d) ("within a reasonable time") (*ibid.*, § 3304).

⁴¹⁷ See, e.g., Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 38 (*ibid.*, § 3309); EU Charter of Fundamental Rights, Article 47 (*ibid.*, § 3316).

⁴¹⁸ See European Court of Human Rights, *Wemhoff case*, *Matznetter v. Austria*, *Stögmüller case*, *König v. Germany*, *Letellier v. France*, *Kemmache v. France*, *Tomasi v. France*, *Olsson v. Sweden* and *Scopelliti v. Italy* (*ibid.*, § 3339); Inter-American Commission on Human Rights, *Case 11.245 (Argentina)* (*ibid.*, § 3342).

⁴¹⁹ See UN Human Rights Committee, General Comment No. 13 (Article 14 of the International Covenant on Civil and Political Rights) (*ibid.*, § 3335).

⁴²⁰ Third Geneva Convention, Article 96, third paragraph (*ibid.*, § 3346) and Article 105, first paragraph (*ibid.*, § 3347); Fourth Geneva Convention, Article 72, first paragraph (*ibid.*, § 3348) and Article 123, second paragraph (*ibid.*, § 3349); Additional Protocol I, Article 75(4)(g) (adopted by consensus) (*ibid.*, § 3353).

⁴²¹ ICC Statute, Article 67(1)(e) (*ibid.*, § 3355); ICTY Statute, Article 21(4)(e) (*ibid.*, § 3361); ICTR Statute, Article 20(4)(e) (*ibid.*, § 3362); Statute of the Special Court for Sierra Leone, Article 17(4)(e) (*ibid.*, § 3356).

⁴²² See, e.g., the military manuals of Argentina (*ibid.*, §§ 3364–3365), Canada (*ibid.*, § 3366), New Zealand (*ibid.*, § 3367), Spain (*ibid.*, § 3368), Sweden (*ibid.*, § 3369), United Kingdom (*ibid.*,

witnesses for the prosecution was one of the bases of the finding of a violation of the right to fair trial in war crimes trials after the Second World War.⁴²³

The right to examine and to have examined witnesses is provided for by the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the European and American Conventions on Human Rights.⁴²⁴ While the African Charter on Human and Peoples' Rights does not explicitly provide for this right, the African Commission on Human and Peoples' Rights has specified that it is part and parcel of the right to fair trial.⁴²⁵ Both the UN Human Rights Committee and the Inter-American Commission on Human Rights have indicated that the right to examine and to have examined witnesses can never be dispensed with.⁴²⁶

Assistance of an interpreter

The right to the assistance of an interpreter, if the accused cannot understand the language used in the proceedings, is provided for in the Third and Fourth Geneva Conventions.⁴²⁷ It is included in the Statutes of the International Criminal Court, of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone for accused persons appearing before these tribunals.⁴²⁸

The right to the assistance of an interpreter, if the accused cannot understand the language used in the proceedings, is set forth in the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the European and American Conventions on Human Rights.⁴²⁹ While the African Charter on Human and Peoples' Rights does not explicitly provide for this right, the African Commission on Human and Peoples' Rights has specified that it

§ 3370) and United States (*ibid.*, §§ 3371–3373) and the legislation of Bangladesh (*ibid.*, § 3375), Ethiopia (*ibid.*, § 3374), Georgia (*ibid.*, § 3374), Ireland (*ibid.*, § 3376), Kenya (*ibid.*, § 3374), Mexico (*ibid.*, § 3374) and Norway (*ibid.*, § 3377).

⁴²³ See, e.g., United States, Military Commission at Shanghai, *Isayama case* (*ibid.*, § 2963) and Military Tribunal at Nuremberg, *Altstötter (The Justice Trial) case* (*ibid.*, § 2965).

⁴²⁴ International Covenant on Civil and Political Rights, Article 14(3)(e) (*ibid.*, § 3351); European Convention on Human Rights, Article 6(3)(d) (*ibid.*, § 3350); American Convention on Human Rights, Article 8(2)(f) (*ibid.*, § 3352).

⁴²⁵ African Commission on Human and Peoples' Rights, Resolution on the Right to Recourse and Fair Trial (*ibid.*, § 3383).

⁴²⁶ UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights) (*ibid.*, § 2999); Inter-American Commission on Human Rights, Report on Terrorism and Human Rights (*ibid.*, § 3020).

⁴²⁷ Third Geneva Convention, Article 96, fourth paragraph (*ibid.*, § 3389) and Article 105, first paragraph (*ibid.*, § 3390); Fourth Geneva Convention, Article 72, third paragraph (*ibid.*, § 3391) and Article 123, second paragraph (*ibid.*, § 3392).

⁴²⁸ ICC Statute, Article 67(1)(f) (*ibid.*, § 3398); ICTY Statute, Article 21(4)(f) (*ibid.*, § 3401); ICTR Statute, Article 20(4)(f) (*ibid.*, § 3402); Statute of the Special Court for Sierra Leone, Article 17(4)(f) (*ibid.*, § 3399).

⁴²⁹ International Covenant on Civil and Political Rights, Article 14(3)(f) (*ibid.*, § 3395); Convention on the Rights of the Child, Article 40(2)(b)(vi) (*ibid.*, § 3396); European Convention on Human Rights, Article 6(3)(e) (*ibid.*, § 3393); American Convention on Human Rights, Article 8(2)(a) (*ibid.*, § 3395).

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is part and parcel of the right to fair trial.⁴³⁰ The European Court of Human Rights has held that this right includes the obligation of the authorities to have translated or interpreted not only oral statements, but also documents used as evidence.⁴³¹

Presence of the accused at the trial

Additional Protocols I and II provide that accused persons have the right to be tried in their presence.⁴³² Upon ratification of the Additional Protocols, several States made a reservation to this right to the effect that this provision is subject to the power of a judge to exclude the accused from the courtroom, in exceptional circumstances, when the accused causes a disturbance and thereby impedes the progress of the trial.⁴³³ The right of an accused to be present at his or her trial is provided for in the Statutes of the International Criminal Court, of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone.⁴³⁴

The right of the accused to be present at the trial is contained in several military manuals and is part of most, if not all, national legal systems.⁴³⁵

The International Covenant on Civil and Political Rights and the European and American Conventions on Human Rights provide that an accused has the right to be present at the trial.⁴³⁶ The UN Human Rights Committee and the European Court of Human Rights have stated that a hearing *in absentia* is possible if the State has given effective notice of the hearing and the accused chooses not to appear.⁴³⁷ Both have also stated that the right to be present in person is also required in appeal proceedings if the appeal hears questions of both fact and law, and not only of law.⁴³⁸ There is clearly a trend, however, against trials

⁴³⁰ African Commission on Human and Peoples' Rights, Resolution on the Right to Recourse and Fair Trial (*ibid.*, § 3423).

⁴³¹ See, e.g., European Court of Human Rights, *Luedicke, Belkacem and Koç case* (*ibid.*, § 3364) and *Kamasinski case* (*ibid.*, § 3426).

⁴³² Additional Protocol I, Article 75(4)(e) (adopted by consensus) (*ibid.*, § 3434); Additional Protocol II, Article 6(2)(e) (adopted by consensus) (*ibid.*, § 3440).

⁴³³ See the reservations made upon ratification of the Additional Protocols by Austria (*ibid.*, §§ 3435 and 3441), Germany (*ibid.*, §§ 3436 and 3442), Ireland (*ibid.*, §§ 3437 and 3443), Liechtenstein (*ibid.*, §§ 3438 and 3444) and Malta (*ibid.*, §§ 3439 and 3445).

⁴³⁴ ICC Statute, Article 63(1) (*ibid.*, § 3446) and Article 67(1)(d) (*ibid.*, § 3447); ICTY Statute, Article 21(4)(d) (*ibid.*, § 3453); ICTR Statute, Article 20(4)(d) (*ibid.*, § 3454); Statute of the Special Court for Sierra Leone, Article 17(4)(d) (*ibid.*, § 3448).

⁴³⁵ See, e.g., the military manuals of Argentina (*ibid.*, § 3456), Canada (*ibid.*, § 3457), New Zealand (*ibid.*, § 3458) and Sweden (*ibid.*, § 3459) and the legislation of Bangladesh (*ibid.*, § 3461), Georgia (*ibid.*, § 3460), Ireland (*ibid.*, § 3462), Kenya (*ibid.*, § 3460), Kyrgyzstan (*ibid.*, § 3460), Norway (*ibid.*, § 3463) and Russia (*ibid.*, § 3460).

⁴³⁶ International Covenant on Civil and Political Rights, Article 14(3)(d) (*ibid.*, § 3432); European Convention on Human Rights, Article 6(3)(c) (*ibid.*, § 3431); American Convention on Human Rights, Article 8(2)(d) (*ibid.*, § 3433). The last two Articles in fact provide for the right to defend oneself, which implies the right to be present at the trial.

⁴³⁷ UN Human Rights Committee, *Daniel Monguya Mbenge v. Zaire* (*ibid.*, § 3470); European Court of Human Rights, *Colozza case* (*ibid.*, § 3472).

⁴³⁸ UN Human Rights Committee, *Karttunen v. Finland* (*ibid.*, § 3471); European Court of Human Rights, *Ekbatani v. Sweden* (*ibid.*, § 3473) and *Kremzov v. Austria* (*ibid.*, § 3473).

in absentia, as evidenced by the Statutes of the International Criminal Court, of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone, which do not allow such trials.⁴³⁹

Compelling accused persons to testify against themselves or to confess guilt

The prohibition on compelling accused persons to testify against themselves or to confess guilt is set forth in the Third Geneva Convention, as well as in Additional Protocols I and II.⁴⁴⁰ This prohibition is provided for in the Statutes of the International Criminal Court, of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone.⁴⁴¹

This prohibition is contained in several military manuals and is part of most, if not all, national legal systems.⁴⁴² In the *Ward case* in 1942, the US Supreme Court held that the use of a confession obtained under compulsion constituted a denial of due process.⁴⁴³

The International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the American Convention on Human Rights prohibit compelling accused persons to testify against themselves or to confess guilt.⁴⁴⁴ This prohibition is also to be found in several other international instruments.⁴⁴⁵ Both the UN Human Rights Committee and the Inter-American Commission on Human Rights have indicated that the prohibition against compelling accused persons to testify against themselves or to confess guilt can never be dispensed with.⁴⁴⁶

The UN Human Rights Committee has underlined that "the law should require that evidence provided by means of such methods or any other form of

⁴³⁹ ICC Statute, Article 63(1) (*ibid.*, § 3446) and Article 67(1)(d) (*ibid.*, § 3447); ICTY Statute, Article 21(4)(d) (*ibid.*, § 3453); ICTR Statute, Article 20(4)(d) (*ibid.*, § 3454); Statute of the Special Court for Sierra Leone, Article 17(4)(d) (*ibid.*, § 3448).

⁴⁴⁰ Third Geneva Convention, Article 99, second paragraph (*ibid.*, § 3477); Additional Protocol I, Article 75(4)(f) (adopted by consensus) (*ibid.*, § 3480); Additional Protocol II, Article 6(2)(f) (adopted by consensus) (*ibid.*, § 3481).

⁴⁴¹ ICC Statute, Article 55(1)(a) (*ibid.*, § 3483) and Article 67(1)(g) (*ibid.*, § 3484); ICTY Statute, Article 21(4)(g) (*ibid.*, § 3490); ICTR Statute, Article 20(4)(g) (*ibid.*, § 3491); Statute of the Special Court for Sierra Leone, Article 17(4)(g) (*ibid.*, § 3485).

⁴⁴² See, e.g., the military manuals of Argentina (*ibid.*, §§ 3494–3495), Canada (*ibid.*, § 3496), Colombia (*ibid.*, § 3497), New Zealand (*ibid.*, § 3498), Sweden (*ibid.*, § 3499), Switzerland (*ibid.*, § 3500) and United States (*ibid.*, § 3501) and the legislation of Bangladesh (*ibid.*, § 3503), Georgia (*ibid.*, § 3502), India (*ibid.*, § 3502), Ireland (*ibid.*, § 3504), Kenya (*ibid.*, § 3502), Mexico (*ibid.*, § 3502), Norway (*ibid.*, § 3505) and Russia (*ibid.*, § 3502).

⁴⁴³ United States, Supreme Court, *Ward case* (*ibid.*, § 3506).

⁴⁴⁴ International Covenant on Civil and Political Rights, Article 14(3)(g) (*ibid.*, § 3478); Convention on the Rights of the Child, Article 40(2)(b)(iv) (*ibid.*, § 3482); American Convention on Human Rights, Article 8(2)(g) (*ibid.*, § 3479).

⁴⁴⁵ See, e.g., Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 21 (*ibid.*, § 3486).

⁴⁴⁶ UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights) (*ibid.*, § 2999); Inter-American Commission on Human Rights, Report on Terrorism and Human Rights (*ibid.*, § 3020).

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compulsion is wholly unacceptable".⁴⁴⁷ The UN Convention against Torture provides that statements which have been made as a result of torture may not be invoked as evidence in any proceedings.⁴⁴⁸ This view is confirmed in national and international case-law.⁴⁴⁹

Public proceedings

The Third and Fourth Geneva Conventions provide that representatives of the protecting power are entitled to attend the trial, unless, exceptionally, it is held *in camera* in the interests of security, whereas Additional Protocol I states that the judgement must be pronounced publicly.⁴⁵⁰ The Statutes of the International Criminal Court, of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone similarly lay down the principle of a public hearing, subject to narrow exceptions, and the requirement of a public pronouncement of the judgement.⁴⁵¹

The requirement of public proceedings is set forth in several military manuals and is part of most, if not all, national legal systems.⁴⁵² In the war crimes trial of *Altstötter (The Justice Trial) case* in 1947, the US Military Tribunal at Nuremberg found a violation of the right to fair trial because proceedings were held in secret and no public record was kept.⁴⁵³

The requirement that the trial be held in public and judgement pronounced publicly, unless this would prejudice the interests of justice, is set forth in the International Covenant on Civil and Political Rights and the European and American Conventions on Human Rights.⁴⁵⁴ Although the right to public proceedings is not mentioned in the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights has stated that

⁴⁴⁷ UN Human Rights Committee, General Comment No. 13 (Article 14 of the International Covenant on Civil and Political Rights) (*ibid.*, § 3510).

⁴⁴⁸ UN Convention against Torture, Article 15.

⁴⁴⁹ See, e.g., United States, Supreme Court, *Ward case* (cited in Vol. II, Ch. 32, § 3506); European Court of Human Rights, *Coëme and Others v. Belgium* (*ibid.*, § 3512).

⁴⁵⁰ Third Geneva Convention, Article 105, fifth paragraph (*ibid.*, § 3518); Fourth Geneva Convention, Article 74, first paragraph (*ibid.*, § 3519); Additional Protocol I, Article 75(4)(i) (adopted by consensus) (*ibid.*, § 3523).

⁴⁵¹ ICC Statute, Article 64(7) (*ibid.*, § 3526), Article 67(1) (*ibid.*, § 3527), Article 68(2) (*ibid.*, § 3528) and Article 76(4) (*ibid.*, § 3529); ICTY Statute, Article 20(4) (*ibid.*, § 3538) and Article 23(2) (*ibid.*, § 3539); ICTR Statute, Article 19(4) (*ibid.*, § 3540) and Article 22(2) (*ibid.*, § 3541); Statute of the Special Court for Sierra Leone, Article 17(2) (*ibid.*, § 3530) and Article 18 (*ibid.*, § 3531).

⁴⁵² See, e.g., the military manuals of Argentina (*ibid.*, § 3544), Colombia (*ibid.*, § 3545), New Zealand (*ibid.*, § 3546) and Sweden (*ibid.*, § 3547) and the legislation of Bangladesh (*ibid.*, § 3550), Ethiopia (*ibid.*, § 3549), Ireland (*ibid.*, § 3551), Kenya (*ibid.*, § 3549), Kuwait (*ibid.*, § 3549), Mexico (*ibid.*, § 3549), Norway (*ibid.*, § 3552) and Russia (*ibid.*, § 3549).

⁴⁵³ United States, Military Tribunal at Nuremberg, *Altstötter (The Justice Trial) case* (*ibid.*, § 3553).

⁴⁵⁴ International Covenant on Civil and Political Rights, Article 14(1) (*ibid.*, § 3521); European Convention on Human Rights, Article 6(1) (*ibid.*, § 3520); American Convention on Human Rights, Article 8(5) (*ibid.*, § 3522).

this is required for a trial to be fair.⁴⁵⁵ The principle of a public trial is to be found in several other international instruments.⁴⁵⁶

Advising convicted persons of available remedies and of their time-limits

The Third and Fourth Geneva Conventions and both Additional Protocols provide that convicted persons are to be advised of their judicial or other remedies and the time-limits within which they may be exercised.⁴⁵⁷ Article 106 of the Third Geneva Convention states that convicted persons shall have a right to appeal in the same manner as members of the armed forces of the detaining power.⁴⁵⁸ Article 73 of the Fourth Geneva Convention states that a convicted person shall have the right to appeal provided for by the law applied by the court.⁴⁵⁹

The ICRC Commentary on the Additional Protocols states that at the time of the adoption of the Protocols in 1977 not enough national legislation provided for the right to appeal in order to make this an absolute requirement – even though no one should be denied the right to appeal where it exists.⁴⁶⁰ However, there have been significant developments since that time in both national and international law. The majority of States now have constitutions or legislation providing for the right to appeal, especially those adopted or amended since the adoption of the Additional Protocols.⁴⁶¹ In addition, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the regional human rights conventions all provide for the right to appeal to a higher tribunal.⁴⁶² The Inter-American Commission on Human Rights has stated that the right of appeal can never be dispensed with and must be provided in situations of non-international armed conflict.⁴⁶³

In conclusion, the influence of human rights law on this issue is such that it can be argued that the right of appeal proper – and not only the right to be

⁴⁵⁵ African Commission on Human and Peoples' Rights, *Civil Liberties Organisation and Others v. Nigeria* (218/98) (*ibid.*, § 3558).

⁴⁵⁶ See, e.g., Universal Declaration on Human Rights, Articles 10–11 (*ibid.*, §§ 3532–3533); American Declaration on the Rights and Duties of Man, Article XXVI (*ibid.*, § 3534); EU Charter of Fundamental Rights, Article 47(2) (*ibid.*, § 3543).

⁴⁵⁷ Third Geneva Convention, Article 106 (*ibid.*, § 3563); Fourth Geneva Convention, Article 73, first paragraph (*ibid.*, § 3564); Additional Protocol I, Article 75(4)(j) (adopted by consensus) (*ibid.*, § 3565); Additional Protocol II, Article 6(3) (adopted by consensus) (*ibid.*, § 3566).

⁴⁵⁸ Third Geneva Convention, Article 106 (*ibid.*, § 3563).

⁴⁵⁹ Fourth Geneva Convention, Article 73, first paragraph (*ibid.*, § 3564).

⁴⁶⁰ Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols* (*ibid.*, § 3588).

⁴⁶¹ See, e.g., the legislation of Colombia (*ibid.*, § 3606), Estonia (*ibid.*, § 3607), Ethiopia (*ibid.*, § 3605), Georgia (*ibid.*, § 3605), Hungary (*ibid.*, § 3608), Kuwait (*ibid.*, § 3605) and Russia (*ibid.*, § 3605).

⁴⁶² International Covenant on Civil and Political Rights, Article 14(5) (*ibid.*, § 3592); Convention on the Rights of the Child, Article 40(2)(b)(v) (*ibid.*, § 3595); Protocol 7 to the European Convention on Human Rights, Article 2(1) (*ibid.*, § 3596); American Convention on Human Rights, Article 8(2)(h) (*ibid.*, § 3593); African Charter on Human and Peoples' Rights, Article 7(1)(a) (*ibid.*, § 3594).

⁴⁶³ Inter-American Commission on Human Rights, *Case 11.137 (Argentina)* (*ibid.*, § 3622) and *Report on Terrorism and Human Rights* (*ibid.*, § 3623).

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informed whether appeal is available – has become a basic component of fair trial rights in the context of armed conflict.

Non bis in idem

The Third and Fourth Geneva Conventions provide that a prisoner of war and civilian internee, respectively, must not be punished more than once for the same act or on the same charge.⁴⁶⁴ Additional Protocol I provides that no one shall be prosecuted or punished by the same party for an offence in respect of which a final judgement has been pronounced.⁴⁶⁵ The same rule is set forth in the Statutes of the International Criminal Court, of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone.⁴⁶⁶

The principle of *non bis in idem* is set forth in several military manuals and is part of most, if not all, national legal systems.⁴⁶⁷

The International Covenant on Civil and Political Rights, the American Convention on Human Rights and Protocol 7 to the European Convention on Human Rights include the principle of *non bis in idem*.⁴⁶⁸ This principle is also included in other international instruments.⁴⁶⁹

It should be noted that the principle of *non bis in idem* does not prohibit the reopening of a trial in exceptional circumstances, and several States made a reservation to this effect upon ratification of Additional Protocol I.⁴⁷⁰ The UN Human Rights Committee has stated that most States make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of *non bis in idem* and has held that the principle of *non bis in idem* does not exclude prosecutions for the same offence in different States.⁴⁷¹ Protocol 7 to the European Convention on Human Rights provides that a case may be reopened if there is evidence of

⁴⁶⁴ Third Geneva Convention, Article 86 (*ibid.*, § 3626); Fourth Geneva Convention, Article 117, third paragraph (*ibid.*, § 3627).

⁴⁶⁵ Additional Protocol I, Article 75(4)(h) (adopted by consensus) (*ibid.*, § 3630).

⁴⁶⁶ ICC Statute, Article 20(2) (*ibid.*, § 3640); ICTY Statute, Article 10(1) (*ibid.*, § 3645); ICTR Statute, Article 9(1) (*ibid.*, § 3646); Statute of the Special Court for Sierra Leone, Article 9(1) (*ibid.*, § 3641).

⁴⁶⁷ See, e.g., the military manuals of Argentina (*ibid.*, §§ 3649–3650), Canada (*ibid.*, § 3651), Colombia (*ibid.*, § 3652), Germany (*ibid.*, § 3653), New Zealand (*ibid.*, § 3654), Spain (*ibid.*, § 3655), Sweden (*ibid.*, § 3656), Switzerland (*ibid.*, § 3657), United Kingdom (*ibid.*, § 3658) and United States (*ibid.*, §§ 3659–3660) and the legislation of Bangladesh (*ibid.*, § 3662), Ethiopia (*ibid.*, § 3661), Georgia (*ibid.*, § 3661), India (*ibid.*, § 3661), Ireland (*ibid.*, § 3663), Kenya (*ibid.*, § 3661), Kyrgyzstan (*ibid.*, § 3661), Mexico (*ibid.*, § 3661), Norway (*ibid.*, § 3664) and Russia (*ibid.*, § 3661).

⁴⁶⁸ International Covenant on Civil and Political Rights, Article 14(7) (*ibid.*, § 3628); American Convention on Human Rights, Article 8(4) (*ibid.*, § 3629); Protocol 7 to the European Convention on Human Rights, Article 4 (*ibid.*, § 3639).

⁴⁶⁹ See, e.g., EU Charter of Fundamental Rights, Article 50 (*ibid.*, § 3648).

⁴⁷⁰ See the reservations made upon ratification of the Additional Protocols by Austria (*ibid.*, § 3631), Denmark (*ibid.*, § 3632), Finland (*ibid.*, § 3633), Germany (*ibid.*, § 3634), Iceland (*ibid.*, § 3635), Liechtenstein (*ibid.*, § 3636), Malta (*ibid.*, § 3637) and Sweden (*ibid.*, § 3638).

⁴⁷¹ UN Human Rights Committee, General Comment No. 13 (Article 14 of the International Covenant on Civil and Political Rights) (*ibid.*, § 3669) and *A. P. v. Italy* (*ibid.*, § 3670).

new facts or if there has been a fundamental defect in the previous proceedings which could affect the outcome of the case.⁴⁷²

Rule 101. No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed.

Practice

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Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

The Third and Fourth Geneva Conventions provide that prisoners of war and civilians respectively may not be tried for acts that were not criminal offences, provided for by law, prior to the commission of those acts.⁴⁷³ Additional Protocols I and II repeat the same principle and add that a heavier penalty may not be imposed than that applicable at the time the act was committed but that if, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit from this.⁴⁷⁴ This principle of legality is also set forth in the Statute of the International Criminal Court.⁴⁷⁵

The principle of legality is set forth in several military manuals and is part of most, if not all, national legal systems.⁴⁷⁶

The principle of legality, including the prohibition on imposing a heavier penalty than that applicable at the time of the commission of the offence, is set forth in the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the regional human rights

⁴⁷² Protocol 7 to the European Convention on Human Rights, Article 4 (*ibid.*, § 3639).

⁴⁷³ Third Geneva Convention, Article 99, first paragraph (*ibid.*, § 3674); Fourth Geneva Convention, Article 67 (*ibid.*, § 3676).

⁴⁷⁴ Additional Protocol I, Article 75(4)(c) (adopted by consensus) (*ibid.*, § 3680); Additional Protocol II, Article 6(2)(c) (adopted by consensus) (*ibid.*, § 3681).

⁴⁷⁵ ICC Statute, Article 22(1) (*ibid.*, § 3684) and Article 24(1)–(2) (*ibid.*, § 3685).

⁴⁷⁶ See, e.g., the military manuals of Argentina (*ibid.*, §§ 3692–3693), Canada (*ibid.*, § 3694), Colombia (*ibid.*, § 3695), Netherlands (*ibid.*, § 3696), New Zealand (*ibid.*, § 3697), Spain (*ibid.*, § 3698), Sweden (*ibid.*, § 3699), United Kingdom (*ibid.*, §§ 3700–3701) and United States (*ibid.*, §§ 3702–3703) and the legislation of Bangladesh (*ibid.*, § 3705), India (*ibid.*, § 3704), Ireland (*ibid.*, § 3706), Kenya (*ibid.*, § 3704), Kuwait (*ibid.*, § 3704), Kyrgyzstan (*ibid.*, § 3704) and Norway (*ibid.*, § 3707).

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conventions.⁴⁷⁷ It is specifically listed as non-derogable in the International Covenant on Civil and Political Rights and the European and American Conventions on Human Rights,⁴⁷⁸ while the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights do not allow for the possibility of derogations. In addition, the International Covenant on Civil and Political Rights and the American Convention on Human Rights specify that if, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit from this.⁴⁷⁹ The principle of legality is also contained in other international instruments.⁴⁸⁰

Interpretation

The principle of legality has been interpreted by the European Court of Human Rights as embodying the principle that only the law can define a crime and prescribe a penalty and the principle that criminal law must not be extensively construed to an accused's detriment, for instance by analogy. This requires that the offence be clearly defined in law, so that "the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what acts and omissions will make him liable".⁴⁸¹ The European Court of Human Rights has stated that the principle of legality allows courts to gradually clarify the rules of criminal liability through judicial interpretation from case to case, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen".⁴⁸² The Inter-American Court of Human Rights has also stressed that the principle of legality requires that crimes be classified and described in "precise and unambiguous language that narrowly defines the punishable offence".⁴⁸³

Rule 102. No one may be convicted of an offence except on the basis of individual criminal responsibility.

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⁴⁷⁷ International Covenant on Civil and Political Rights, Article 15(1) (*ibid.*, § 3678); Convention on the Rights of the Child, Article 40(2)(a) (*ibid.*, § 3683); European Convention on Human Rights, Article 7(1) (*ibid.*, § 3677); American Convention on Human Rights, Article 9 (*ibid.*, § 3679); African Charter on Human and Peoples' Rights, Article 7(2) (*ibid.*, § 3682).

⁴⁷⁸ International Covenant on Civil and Political Rights, Article 4 (*ibid.*, § 3678); European Convention on Human Rights, Article 15(2) (*ibid.*, § 3677); American Convention on Human Rights, Article 27 (*ibid.*, § 3679).

⁴⁷⁹ International Covenant on Civil and Political Rights, Article 15(1) (*ibid.*, § 3678); American Convention on Human Rights, Article 9 (*ibid.*, § 3679).

⁴⁸⁰ See, e.g., Universal Declaration on Human Rights, Article 11 (*ibid.*, § 3686); EU Charter of Fundamental Rights, Article 49 (*ibid.*, § 3691).

⁴⁸¹ European Court of Human Rights, *Kokkinakis v. Greece* (*ibid.*, § 3713).

⁴⁸² European Court of Human Rights, *S. W. v. UK* (*ibid.*, § 3714).

⁴⁸³ Inter-American Court of Human Rights, *Castillo Petruzzi and Others case* (*ibid.*, § 3715).

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

The Hague Regulations specify that no penalty can be inflicted on persons for acts for which they are not responsible.⁴⁸⁴ The Fourth Geneva Convention provides that "no protected person may be punished for an offence he or she has not personally committed".⁴⁸⁵ The requirement of individual criminal responsibility is recognised as a fundamental rule of criminal procedure in Additional Protocols I and II.⁴⁸⁶

The requirement of individual criminal responsibility is explicitly provided for in several military manuals.⁴⁸⁷ It is a basic rule of most, if not all, national legal systems.⁴⁸⁸

The requirement of individual criminal responsibility is included in the American Convention on Human Rights (as a non-derogable right), the African Charter on Human and Peoples' Rights and the Cairo Declaration on Human Rights in Islam.⁴⁸⁹ The European Convention on Human Rights does not spell out this rule, but the European Court of Human Rights has stated that "it is a fundamental rule of criminal law that criminal liability does not survive the person who has committed the criminal act".⁴⁹⁰

Interpretation

It is a basic principle of criminal law that individual criminal responsibility for a crime includes attempting to commit such crime, as well as assisting in, facilitating, aiding or abetting, the commission of a crime. It also includes planning or instigating the commission of a crime. This is confirmed, for example, in the Statute of the International Criminal Court.⁴⁹¹ Article 28 of the Statute also confirms the principle of command responsibility for crimes under

⁴⁸⁴ Hague Regulations, Article 50 (*ibid.*, § 3719).

⁴⁸⁵ Fourth Geneva Convention, Article 33, first paragraph (*ibid.*, § 3722).

⁴⁸⁶ Additional Protocol I, Article 75(4)(b) (adopted by consensus) (*ibid.*, § 3724); Additional Protocol II, Article 6(2)(b) (adopted by consensus) (*ibid.*, § 3726).

⁴⁸⁷ See, e.g., the military manuals of Argentina (*ibid.*, § 3740), Canada (*ibid.*, § 3746), Colombia (*ibid.*, § 3747), France (*ibid.*, § 3752), Netherlands (*ibid.*, § 3761), New Zealand (*ibid.*, § 3762), Romania (*ibid.*, § 3764), Sweden (*ibid.*, § 3768), Switzerland (*ibid.*, § 3769) and United States (*ibid.*, §§ 3773-3774).

⁴⁸⁸ See, e.g., the legislation of Kyrgyzstan (*ibid.*, § 3788).

⁴⁸⁹ American Convention on Human Rights, Article 5(3) (*ibid.*, § 3723); African Charter on Human and Peoples' Rights, Article 7(2) (*ibid.*, § 3727); Cairo Declaration on Human Rights in Islam, Article 19(c) (*ibid.*, § 3732).

⁴⁹⁰ European Court of Human Rights, *A. P., M. P. and T. P. v. Switzerland* (*ibid.*, § 3811).

⁴⁹¹ ICC Statute, Article 25 (cited in Vol. II, Ch. 43, § 20).

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international law.⁴⁹² The principles of individual responsibility and command responsibility for war crimes are dealt with in Chapter 43.

Rule 103. Collective punishments are prohibited.

Practice

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Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts. This prohibition is an application, in part, of Rule 102 that no one may be convicted of an offence except on the basis of individual criminal responsibility. However, the prohibition of collective punishments is wider in scope because it does not only apply to criminal sanctions but also to "sanctions and harassment of any sort, administrative, by police action or otherwise".⁴⁹³

International and non-international armed conflicts

The prohibition of collective punishments is stated in the Hague Regulations and the Third and Fourth Geneva Conventions.⁴⁹⁴ The prohibition is recognised in Additional Protocols I and II as a fundamental guarantee for all civilians and persons *hors de combat*.⁴⁹⁵

The imposition of "collective penalties" was considered a war crime in the Report of the Commission on Responsibility set up after the First World War.⁴⁹⁶ The customary nature of this rule, already applicable during the Second World War, was affirmed by the Military Tribunal of Rome in the *Priebke case* in 1997.⁴⁹⁷ The specification that the imposition of collective punishments is a war crime is also to be found in the Statutes of the International Criminal Tribunal for Rwanda and of the Special Court for Sierra Leone.⁴⁹⁸

⁴⁹² ICC Statute, Article 28 (*ibid.*, § 574).

⁴⁹³ Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3055, see also § 4536.

⁴⁹⁴ Hague Regulations, Article 50 (cited in Vol. II, Ch. 32, § 3719); Third Geneva Convention, Article 87, third paragraph (*ibid.*, § 3721); Fourth Geneva Convention, Article 33, first paragraph (*ibid.*, § 3722).

⁴⁹⁵ Additional Protocol I, Article 75(2)(d) (adopted by consensus) (*ibid.*, § 3724); Additional Protocol II, Article 4(2)(b) (adopted by consensus) (*ibid.*, § 3725).

⁴⁹⁶ Report of the Commission on Responsibility (*ibid.*, § 3730).

⁴⁹⁷ Italy, Military Tribunal of Rome, *Priebke case* (*ibid.*, § 3796).

⁴⁹⁸ ICTR Statute, Article 4(b) (*ibid.*, § 3736); Statute of the Special Court for Sierra Leone, Article 3(b) (*ibid.*, § 3729).

The prohibition of collective punishments is contained in numerous military manuals.⁴⁹⁹ This prohibition is also set forth in the legislation of many States.⁵⁰⁰ It is further supported by official statements.⁵⁰¹

In the *Delalić case*, the International Criminal Tribunal for the Former Yugoslavia stated that internment or assigned residence under Article 78 of the Fourth Geneva Convention is an exceptional measure that may never be taken on a collective basis.⁵⁰²

While human rights law does not explicitly prohibit "collective punishments" as such, such acts would constitute a violation of specific human rights, in particular the right to liberty and security of person and the right to a fair trial. In its General Comment on Article 4 of the International Covenant on Civil and Political Rights (concerning states of emergency), the UN Human Rights Committee stated that States parties may "in no circumstances" invoke a state of emergency "as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance . . . by imposing collective punishments".⁵⁰³

Rule 104. The convictions and religious practices of civilians and persons *hors de combat* must be respected.

Practice

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Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts. A specific application of this rule for persons deprived of their liberty is contained in

⁴⁹⁹ See, e.g., the military manuals of Argentina (*ibid.*, §§ 3739–3740), Australia (*ibid.*, § 3741), Belgium (*ibid.*, § 3742), Benin (*ibid.*, § 3743), Burkina Faso (*ibid.*, § 3744), Cameroon (*ibid.*, § 3745), Canada (*ibid.*, § 3746), Congo (*ibid.*, § 3748), Ecuador (*ibid.*, § 3749), France (*ibid.*, §§ 3750 and 3752), Germany (*ibid.*, §§ 3753–3755), Israel (*ibid.*, § 3756), Italy (*ibid.*, § 3757), Mali (*ibid.*, § 3758), Morocco (*ibid.*, § 3760), Netherlands (*ibid.*, § 3761), New Zealand (*ibid.*, § 3762), Nicaragua (*ibid.*, § 3763), Romania (*ibid.*, § 3764), Russia (*ibid.*, § 3765), Senegal (*ibid.*, § 3766), Spain (*ibid.*, § 3767), Sweden (*ibid.*, § 3768), Switzerland (*ibid.*, § 3769), Togo (*ibid.*, § 3770), United Kingdom (*ibid.*, §§ 3771–3772), United States (*ibid.*, §§ 3773–3775) and Yugoslavia (*ibid.*, § 3776).

⁵⁰⁰ See, e.g., the legislation of Australia (*ibid.*, § 3778), Bangladesh (*ibid.*, § 3779), Bosnia and Herzegovina (*ibid.*, § 3780), Democratic Republic of the Congo (*ibid.*, § 3782), Côte d'Ivoire (*ibid.*, § 3783), Croatia (*ibid.*, § 3784), Ethiopia (*ibid.*, § 3785), Ireland (*ibid.*, § 3786), Italy (*ibid.*, § 3787), Lithuania (*ibid.*, § 3789), Norway (*ibid.*, § 3790), Romania (*ibid.*, § 3791), Slovenia (*ibid.*, § 3792), Spain (*ibid.*, § 3793) and Yugoslavia (*ibid.*, § 3794); see also the draft legislation of Argentina (*ibid.*, § 3777).

⁵⁰¹ See, e.g., the statements of the United States (*ibid.*, §§ 3799–3800).

⁵⁰² ICTY, *Delalić case*, Judgement (*ibid.*, § 3809).

⁵⁰³ UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights) (*ibid.*, § 3810).

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Rule 127 on respect for the convictions and religious practices of persons deprived of their liberty.

International and non-international armed conflicts

The obligation to respect the religious convictions and practices of persons in occupied territory was already recognised in the Lieber Code, the Brussels Declaration and the Oxford Manual.⁵⁰⁴ It was codified in the Hague Regulations.⁵⁰⁵ This obligation is extended to all protected persons under the Fourth Geneva Convention.⁵⁰⁶ The Geneva Conventions require respect for religion and religious practices in a series of detailed rules concerning burial rites and cremation of the dead, religious activities of prisoners of war and interned persons, and the education of orphaned children or children separated from their parents.⁵⁰⁷ Respect for convictions and religious practices is recognised in Additional Protocols I and II as a fundamental guarantee for civilians and persons *hors de combat*.⁵⁰⁸

The requirement to respect a person's convictions and religious practices is set forth in numerous military manuals.⁵⁰⁹ Violation of the right to respect for a person's convictions and religious practices, in particular forcible conversion to another faith, is a punishable offence under the legislation of several States.⁵¹⁰ This practice includes that of States not, or not at the time, party to

⁵⁰⁴ Lieber Code, Article 37 (*ibid.*, § 3831); Brussels Declaration, Article 38 (*ibid.*, § 3832); Oxford Manual, Article 49 (*ibid.*, § 3833).

⁵⁰⁵ Hague Regulations, Article 46 (*ibid.*, § 3819).

⁵⁰⁶ Fourth Geneva Convention, Article 27, first paragraph (*ibid.*, § 3820); Article 38, third paragraph (*ibid.*, § 3821) and Article 58 (*ibid.*, § 3822).

⁵⁰⁷ First Geneva Convention, Article 17, third paragraph (burial of the dead according to the rites of the religion to which they belong if possible); Third Geneva Convention, Articles 34–36 (religious activities of prisoners of war), Article 120, fourth paragraph (burial of prisoners of war deceased in captivity according to the rites of the religion to which they belonged if possible) and fifth paragraph (cremation of deceased prisoners of war on account of the religion of the deceased); Fourth Geneva Convention, Article 50, third paragraph (education of children who are orphaned or separated from their parents as a result of the war by persons of their own religion if possible), Article 76, third paragraph (spiritual assistance for persons detained in occupied territory), Article 86 (religious services for interned persons), Article 93 (religious activities of interned persons) and Article 130, first paragraph (burial of deceased internees according to the rites of the religion to which they belonged if possible) and second paragraph (cremation of deceased internees on account of the religion of the deceased).

⁵⁰⁸ Additional Protocol I, Article 75(1) (adopted by consensus) (cited in Vol. II, Ch. 32, § 3826); Additional Protocol II, Article 4(1) (adopted by consensus) (*ibid.*, § 3827).

⁵⁰⁹ See the military manuals of Argentina (*ibid.*, §§ 3841–3842), Australia (*ibid.*, § 3843), Canada (*ibid.*, §§ 3844–3845), Colombia (*ibid.*, §§ 3846–3847), Dominican Republic (*ibid.*, § 3848), Ecuador (*ibid.*, § 3849), France (*ibid.*, §§ 3850–3852), Germany (*ibid.*, § 3853), Hungary (*ibid.*, § 3854), Indonesia (*ibid.*, § 3855), Italy (*ibid.*, § 3856), Kenya (*ibid.*, § 3857), Madagascar (*ibid.*, § 3858), New Zealand (*ibid.*, § 3859), Nicaragua (*ibid.*, § 3860), Romania (*ibid.*, § 3861), Spain (*ibid.*, § 3862), Sweden (*ibid.*, § 3863), Switzerland (*ibid.*, § 3864), United Kingdom (*ibid.*, §§ 3865–3866) and United States (*ibid.*, §§ 3868–3870).

⁵¹⁰ See, e.g., the legislation of Bangladesh (*ibid.*, § 3872), Bosnia and Herzegovina (*ibid.*, § 3873), Croatia (*ibid.*, § 3874), Ethiopia (*ibid.*, § 3875), Ireland (*ibid.*, § 3876), Lithuania (*ibid.*, § 3877), Myanmar (*ibid.*, § 3878), Norway (*ibid.*, § 3879), Slovenia (*ibid.*, § 3880) and Yugoslavia (*ibid.*, §§ 3881–3882).

the Additional Protocols.⁵¹¹ This rule was upheld in several war crimes trials after the Second World War. In the *Zühlke case*, the Special Court of Cassation of the Netherlands found that the refusal to admit a clergyman or priest to a person awaiting execution of the death sentence constituted a war crime.⁵¹² In the *Tanaka Chuichi case*, the Australian Military Court at Rabaul found that forcing Sikh prisoners of war to cut their hair and beards and to smoke cigarettes, acts forbidden by their religion, amounted to a war crime.⁵¹³ It should also be noted that the Elements of Crimes for the International Criminal Court, in the context of the war crime of "outrages upon personal dignity", specifies that this crime takes into account relevant aspects of the cultural background of the victim.⁵¹⁴ This was inserted in order to include, as a war crime, forcing persons to act against their religious beliefs.⁵¹⁵

The International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the regional human rights treaties provide that everyone has the right to freedom of "thought, conscience and religion" or, alternatively, "conscience and religion".⁵¹⁶ These treaties also provide for the right to manifest one's religion and beliefs, subject only to limitations prescribed by law which are necessary to protect public safety, order, health, morals or the rights and freedoms of others.⁵¹⁷ The above-mentioned rights are specifically listed as non-derogable in the International Covenant on Civil and Political Rights and the American Convention on Human Rights,⁵¹⁸ while the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights do not allow for the possibility of derogations. The right to freedom of thought, conscience and religion, to manifest one's religion or

⁵¹¹ See, e.g., the military manuals of France (*ibid.*, § 3850), Indonesia (*ibid.*, § 3855), Kenya (*ibid.*, § 3857) and United Kingdom (*ibid.*, § 3866) and the legislation of Myanmar (*ibid.*, § 3878).

⁵¹² Netherlands, Special Court of Cassation, *Zühlke case* (*ibid.*, § 3883).

⁵¹³ Australia, Military Court at Rabaul, *Tanaka Chuichi case* (*ibid.*, § 3884).

⁵¹⁴ See Elements of Crimes for the ICC, Definition of outrages upon personal dignity as a war crime (ICC Statute, Footnote 49 relating to Article 8(2)(b)(xxi) and Footnote 57 relating to Article 8(2)(c)(iii)).

⁵¹⁵ See Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, Commentary on Article 8(2)(b)(xxii) of the ICC Statute, p. 315.

⁵¹⁶ International Covenant on Civil and Political Rights, Article 18(1) (cited in Vol. II, Ch. 32, § 3824); Convention on the Rights of the Child, Article 14(1) (*ibid.*, § 3829); European Convention on Human Rights, Article 9(1) (*ibid.*, § 3823); American Convention on Human Rights, Article 12(1) (*ibid.*, § 3825); African Charter on Human and Peoples' Rights, Article 8 (*ibid.*, § 3828).

⁵¹⁷ International Covenant on Civil and Political Rights, Article 18(3) (*ibid.*, § 3824); Convention on the Rights of the Child, Article 14(3) (*ibid.*, § 3829); European Convention on Human Rights, Article 9(2) (*ibid.*, § 3823); American Convention on Human Rights, Article 12(3) (*ibid.*, § 3825); African Charter on Human and Peoples' Rights, Article 8 (*ibid.*, § 3828).

⁵¹⁸ International Covenant on Civil and Political Rights, Article 4(2) (*ibid.*, § 3824); American Convention on Human Rights, Article 27(2) (*ibid.*, § 3825); see also UN Human Rights Committee, General Comment No. 22 (Article 18 of the International Covenant on Civil and Political Rights) (*ibid.*, § 3893); Inter-American Commission on Human Rights, Resolution concerning the law applicable to emergency situations (*ibid.*, § 3897).

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beliefs and to change religion or belief is also set forth in other international instruments.⁵¹⁹

Interpretation

The right to respect for religious or other personal convictions of persons is not subject to limitations, unlike their manifestation as explained further below. Humanitarian law treaties stress the requirement to respect the religion of protected persons. The International Covenant on Civil and Political Rights and the European and American Conventions on Human Rights specifically provide that the right to freedom of thought, conscience and religion includes the right of free choice of a religion or belief.⁵²⁰ Subjecting a person to coercion which would impair this right is explicitly prohibited under the International Covenant on Civil and Political Rights and the American Convention on Human Rights.⁵²¹ In its General Comment on Article 18 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee stated that the prohibition of coercion protects the right to change one's belief, to maintain the same belief or to adopt atheistic views. It added that policies or practices having the same intention or effect, such as, for example, those restricting access to medical care, education or employment, would violate this rule.⁵²² The same point was made by the European Court of Human Rights and by the African Commission on Human and Peoples' Rights, which also stressed the importance of respecting secular views.⁵²³

Any form of persecution, harassment or discrimination because of a person's convictions, religious or non-religious, would violate this rule. The Inter-American Commission on Human Rights, in its report on terrorism and human rights, stated that laws, methods of investigation and prosecution must not be purposefully designed or implemented in a way that distinguishes to their detriment members of a group based on, *inter alia*, their religion.⁵²⁴

The manifestation of personal convictions or the practice of one's religion must also be respected. This includes, for example, access to places of worship

⁵¹⁹ See, e.g., Universal Declaration on Human Rights, Article 18 (*ibid.*, § 3834); American Declaration on the Rights and Duties of Man, Article III (limited to freedom of religion) (*ibid.*, § 3835); Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, Article 1 (*ibid.*, § 3836); EU Charter of Fundamental Rights, Article 10 (*ibid.*, § 3840).

⁵²⁰ International Covenant on Civil and Political Rights, Article 18(1) (*ibid.*, § 3824); European Convention on Human Rights, Article 9(1) (freedom to change religion or belief) (*ibid.*, § 3823); American Convention on Human Rights, Article 12(1) (*ibid.*, § 3825).

⁵²¹ International Covenant on Civil and Political Rights, Article 18(2) (*ibid.*, § 3824); American Convention on Human Rights, Article 12(2) (*ibid.*, § 3825).

⁵²² UN Human Rights Committee, General Comment No. 22 (Article 18 of the International Covenant on Civil and Political Rights), 30 July 1993, § 5.

⁵²³ European Court of Human Rights, *Kokkinakis v. Greece* (*ibid.*, § 3833); African Commission on Human and Peoples' Rights, *Association of Members of the Episcopal Conference of East Africa v. Sudan* (*ibid.*, § 3832).

⁵²⁴ Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, October 2002, § 363.

and access to religious personnel.⁵²⁵ Limitations are only permitted if needed for order, security or the rights and freedoms of others. As stated in the commentary to Rule 127, the practice of detainees' religion may be subject to military regulations. However, the limitations on such practice may only be those that are reasonable and necessary in the specific context. In its General Comment on Article 18 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee stated that limitations must be directly related and proportionate to the specific need, and that limitations applied for the protection of morals must not derive exclusively from a single tradition. It added that persons under legal constraints, such as prisoners, continue to enjoy their right to manifest their religion or belief "to the fullest extent compatible with the specific nature of the constraint".⁵²⁶

Rule 105. Family life must be respected as far as possible.

Practice

Volume II, Chapter 32, Section Q.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

The obligation to respect the family rights of persons in occupied territory was already recognised in the Lieber Code, the Brussels Declaration and the Oxford Manual.⁵²⁷ It was codified in the Hague Regulations.⁵²⁸ This obligation is extended to all protected civilians in the Fourth Geneva Convention.⁵²⁹ The Fourth Geneva also provides that, as far as possible, interned families must be given "facilities for leading a proper family life".⁵³⁰ Although not articulated in these general terms in treaty rules relating to non-international armed conflicts, this rule is the basis of the more specific rules relating to family unity in treaty provisions governing such conflicts.⁵³¹

⁵²⁵ See, e.g., European Court of Human Rights, *Cyprus case* (cited in Vol. II, Ch. 32, § 3896); Netherlands, Special Court of Cassation, *Zühlke case* (*ibid.*, § 3883); ICRC Press release (*ibid.*, § 3900); see also practice referred to in the commentary to Rule 127.

⁵²⁶ UN Human Rights Committee, General Comment No. 22 (Article 18 of the International Covenant on Civil and Political Rights), 30 July 1993, § 8.

⁵²⁷ Lieber Code, Article 37 (cited in Vol. II, Ch. 32, § 3924); Brussels Declaration, Article 38 (*ibid.*, § 3925); Oxford Manual, Article 48 (*ibid.*, § 3926).

⁵²⁸ Hague Regulations, Article 46 (*ibid.*, § 3906).

⁵²⁹ Fourth Geneva Convention, Article 27, first paragraph (*ibid.*, § 3908).

⁵³⁰ Fourth Geneva Convention, Article 82, third paragraph.

⁵³¹ See Additional Protocol II, Article 4(3)(b) (adopted by consensus) (reunion of families temporarily separated) (cited in Vol. II, Ch. 32, § 3916); Additional Protocol II, Article 5(2)(a) (adopted

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Several military manuals refer in general terms to the duty to respect family rights, often without specific reference to the Fourth Geneva Convention.⁵³² There is also extensive practice in the form of post-conflict agreements and resolutions of the United Nations and other international organisations that stresses the need to respect family life.⁵³³

The protection of the family as the "natural and fundamental group unit of society" or, alternatively, "natural unit and basis of society" is provided for in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and in the three regional human rights conventions.⁵³⁴ Under the American Convention on Human Rights, the protection due to the family cannot be dispensed with.⁵³⁵ Such protection is also required under other international instruments.⁵³⁶

Interpretation

Collected practice shows that respect for family life requires, to the degree possible, the maintenance of family unity, contact between family members and the provision of information on the whereabouts of family members.

(i) *Maintenance of family unity.* The duty to avoid, as far as possible, separation of members of a family is provided for in the Fourth Geneva Convention in the context of transfers or evacuations of civilians by an occupying power.⁵³⁷ The commentary to Rule 131 on the treatment of displaced persons includes practice requiring respect for family unity in general terms not limited to displacement.

In addition, there is significant practice relating to the obligation to facilitate the reunion of dispersed families. The Fourth Geneva Convention provides that "each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with

by consensus) (accommodation of men and women of the same family in detention or internment) (cited in Vol. II, Ch. 37, § 106); Convention on the Rights of the Child, Article 37(c) (accommodation of children with their parents during deprivation of liberty) (*ibid.*, § 149).

⁵³² See, e.g., the military manuals of Australia (cited in Vol. II, Ch. 32, § 3936), Canada (*ibid.*, § 3937), Dominican Republic (*ibid.*, § 3938), El Salvador (*ibid.*, § 3939), Germany (*ibid.*, § 3940), Kenya (*ibid.*, § 3942), Nicaragua (*ibid.*, § 3944), Spain (*ibid.*, § 3946) and United Kingdom (*ibid.*, § 3949).

⁵³³ See commentary below and also the practice referred to in the commentaries to Rules 117, 119-120, 125-126 and 131.

⁵³⁴ International Covenant on Civil and Political Rights, Article 23(1) (*ibid.*, § 3911); International Covenant on Economic, Social and Cultural Rights, Article 10(1) (*ibid.*, § 3912); American Convention on Human Rights, Article 17(1) (*ibid.*, § 3914); Protocol of San Salvador, Article 15(1) (*ibid.*, § 3918); African Charter on Human and Peoples' Rights, Article 18 (*ibid.*, § 3917); see also UNHCR, Executive Committee, Conclusion No. 84 (XLVIII): Refugee Children and Adolescents (*ibid.*, § 3969).

⁵³⁵ American Convention on Human Rights, Article 17 (*ibid.*, § 3914) and Article 27(2).

⁵³⁶ See, e.g., Universal Declaration on Human Rights, Article 16(3) (cited in Vol. II, Ch. 32, § 3928); American Declaration on the Rights and Duties of Man, Article VI (*ibid.*, § 3930); Cairo Declaration on Human Rights in Islam, Article 5(b) (*ibid.*, § 3931).

⁵³⁷ Fourth Geneva Convention, Article 49, third paragraph (cited in Vol. II, Ch. 38, § 541).

one another and of meeting, if possible".⁵³⁸ Additional Protocols I and II provide that parties to a conflict must facilitate the reunion of families dispersed as a result of armed conflict.⁵³⁹ This obligation is set forth in several military manuals and in the legislation of several States.⁵⁴⁰ It is supported by official statements, including a statement of the United States which is not party to the Additional Protocols.⁵⁴¹ A number of agreements, laws and policies have been adopted by States involved in armed conflict and facing the problem of dispersed families, which seek to implement the principle of family reunification.⁵⁴² The obligation to facilitate the reunification of dispersed families is also supported by several resolutions adopted by consensus by International Conferences of the Red Cross and Red Crescent.⁵⁴³ The importance of family reunification in human rights law, in particular in relation to reuniting children with their parents, is reflected in treaties and other international instruments, case-law and resolutions.⁵⁴⁴

There is also practice relating to the maintenance of family unity during deprivation of liberty. The Fourth Geneva Convention requires that "whenever possible, interned members of the same family shall be housed together in the same premises and given separate accommodation from other internees".⁵⁴⁵ Further practice is referred to in the commentaries to Rules 119 and 120, which require that members of the same family be accommodated together during deprivation of liberty.

(ii) *Contact between family members.* The Fourth Geneva Convention provides that "all persons in the territory of a Party to the conflict, or in territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive

⁵³⁸ Fourth Geneva Convention, Article 26 (cited in Vol. II, Ch. 32, § 3907).

⁵³⁹ Additional Protocol I, Article 74 (adopted by consensus) ("in every possible way") (*ibid.*, § 3915); Additional Protocol II, Article 4(3)(b) (adopted by consensus) ("all appropriate steps") (*ibid.*, § 3916).

⁵⁴⁰ See, e.g., the military manuals of Argentina (*ibid.*, §§ 3934-3935), New Zealand (*ibid.*, § 3943), Spain (*ibid.*, § 3946) and United States (*ibid.*, § 3953) and the legislation of Angola (*ibid.*, § 3954), Colombia (*ibid.*, § 3956) and Philippines (*ibid.*, § 3960).

⁵⁴¹ See, e.g., the statements of South Korea (*ibid.*, § 3962) and United States (*ibid.*, § 3963).

⁵⁴² See, e.g., the Quadripartite Agreement on Georgian Refugees and Internally Displaced Persons (*ibid.*, § 3923), the legislation of Angola (*ibid.*, § 3954), Colombia (*ibid.*, § 3956) and Philippines (*ibid.*, § 3960) and the practice of South Korea (*ibid.*, § 3962).

⁵⁴³ 19th International Conference of the Red Cross, Res. XX; 25th International Conference of the Red Cross, Res. IX (*ibid.*, § 3971); 26th International Conference of the Red Cross and Red Crescent, Res. II (*ibid.*, § 3972).

⁵⁴⁴ See, e.g., Convention on the Rights of the Child, Article 10 (*ibid.*, § 3920) and Article 22(2) (*ibid.*, § 3922); Guiding Principles on Internal Displacement, Principle 17(3) (*ibid.*, § 3932); UN General Assembly, Res. 51/77 (*ibid.*, § 3965), Res. 52/107 (*ibid.*, § 3965) and Res. 53/128 (*ibid.*, § 3965); UN Commission on Human Rights, Res. 1997/78 (*ibid.*, § 3966) and Res. 1998/76 (*ibid.*, § 3966); UNHCR Executive Committee, Conclusion No. 24 (XXXII) (*ibid.*, § 3968); Committee on the Rights of the Child, Concluding observations on the report of Myanmar (*ibid.*, § 3974); European Court of Human Rights, *Eriksson case*, *Andersson v. Sweden*, *Rieme v. Sweden*, *Olsson v. Sweden*, *Hokkanen v. Finland* and *Gül v. Switzerland* (*ibid.*, § 3975).

⁵⁴⁵ Fourth Geneva Convention, Article 82, third paragraph.

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news from them".⁵⁴⁶ Rule 125 requires that persons deprived of their liberty be allowed to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by authorities. Rule 126 requires that persons deprived of their liberty must be allowed to receive visitors to the degree practicable. In addition to the practice cited in the commentaries to Rules 125 and 126, human rights case-law confirms that the right to family life includes the right of detainees to communicate with their families through correspondence and receiving visits, subject to reasonable restrictions concerning timing and censorship of mail.⁵⁴⁷

(iii) *Provision of information on the whereabouts of family members.* There is extensive practice on the measures to be taken by authorities to account for missing persons and on the duty to inform families of the whereabouts of persons when such information is available. Deliberately withholding such information has been found to amount to inhuman treatment in human rights case-law. This practice is to be found in the commentary to Rule 117 which provides that each party to a conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and to provide their family members with any information it has on their fate.

In addition, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the American Convention on Human Rights guarantee the right to be free from arbitrary, unlawful or abusive interference with one's family life.⁵⁴⁸ This is also provided for in other international instruments.⁵⁴⁹ The European Convention on Human Rights, meanwhile, contains a general right to respect for "private and family life" which may not be interfered with by a public authority

except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁵⁵⁰

⁵⁴⁶ Fourth Geneva Convention, Article 25, first paragraph (cited in Vol. II, Ch. 37, § 468).

⁵⁴⁷ See, e.g., African Commission on Human and Peoples' Rights, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Communication Nos. 143/95 and 150/96, 15 November 1999, § 29; Inter-American Commission on Human Rights, Report on the situation of human rights in Peru, 12 March 1993, p. 29; European Court of Human Rights, *Branigan and McBride v. UK*, Judgement, 26 May 1993, § 64.

⁵⁴⁸ International Covenant on Civil and Political Rights, Article 17(1) ("arbitrary or unlawful interference") (cited in Vol. II, Ch. 32, § 3910); Convention on the Rights of the Child, Article 16(1) ("arbitrary or unlawful interference") (*ibid.*, § 3921); American Convention on Human Rights, Article 11 ("arbitrary or abusive interference") (*ibid.*, § 3913).

⁵⁴⁹ See, e.g., Universal Declaration on Human Rights, Article 12 ("arbitrary interference") (*ibid.*, § 3927); American Declaration on the Rights and Duties of Man, Article V ("abusive attacks") (*ibid.*, § 3929); EU Charter of Fundamental Rights, Article 7 ("respect for his or her private and family life") (*ibid.*, § 3933).

⁵⁵⁰ European Convention on Human Rights, Article 8(2) (*ibid.*, § 3909).

The UN Human Rights Committee's General Comment on Article 17 of the International Covenant on Civil and Political Rights states that interference with family life will be "arbitrary" if the interference is not in accordance with the provisions, aims and objectives of the Covenant and if it is not "reasonable in the particular circumstances".⁵⁵¹

Definition of the term "family"

In its General Comment on Article 17 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee stated that, for the purposes of the Article, the term family should be interpreted as including "all those comprising the family as understood in the society of the State party concerned".⁵⁵² The European Court of Human Rights includes the relationship between husband and wife and the children dependent on them within the notion of family.⁵⁵³ It has also, depending on the circumstances and in particular when children are involved, included brothers and sisters, persons living together outside marriage and grandparents.⁵⁵⁴

⁵⁵¹ UN Human Rights Committee, General Comment No. 16 (Article 17 of the International Covenant on Civil and Political Rights) (*ibid.*, § 3973); see also Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, § 55.

⁵⁵² UN Human Rights Committee, General Comment No. 16 (Article 17 of the International Covenant on Civil and Political Rights) (cited in Vol. II, Ch. 32, § 3973).

⁵⁵³ European Court of Human Rights, *B. v. UK* (*ibid.*, § 3977) (the Court stated that "the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life").

⁵⁵⁴ European Court of Human Rights, *Johnston and Others v. Ireland* (*ibid.*, § 3976), *Moustaquim v. Belgium*, (*ibid.*, § 3978) and *Vermeire v. Belgium* (*ibid.*, § 3979).

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Additional Protocols use different age-limits with respect to different protective measures for children, although 15 is the most common.⁴⁶

Death penalty on children

The Fourth Geneva Convention provides that "the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence".⁴⁷ Additional Protocol I provides that "the death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed".⁴⁸ Additional Protocol II prohibits the imposition of the death penalty on children under 18 years of age.⁴⁹ These rules are also set forth in a number of military manuals.⁵⁰

The prohibition on imposing the death penalty on children under 18 years of age is also set forth in the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the Convention on the Rights of the Child.⁵¹

Rule 136. Children must not be recruited into armed forces or armed groups.

Practice

Volume II, Chapter 39, Section C.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

⁴⁶ 18 years of age: compulsion to work in occupied territory (Fourth Geneva Convention, Article 51), pronouncement of the death penalty (Fourth Geneva Convention, Article 68) (cited in Vol. II, Ch. 39, § 347), execution of the death penalty (Additional Protocol I, Article 77 (adopted by consensus)) (*ibid.*, § 350), pronouncement of the death penalty (Additional Protocol II, Article 6 (adopted by consensus)) (*ibid.*, § 351); 15 years of age: measures to ensure that orphans and children separated from their families are not left on their own (Fourth Geneva Convention, Article 24) (*ibid.*, § 140), same preferential treatment for aliens as for nationals (Fourth Geneva Convention, Article 38) (*ibid.*, § 141), preferential measures in regard to food, medical care and protection adopted prior to occupation (Fourth Geneva Convention, Article 50) (*ibid.*, § 142), additional food for interned children in proportion with their physiological needs (Fourth Geneva Convention, Article 89) (*ibid.*, § 144), participation in hostilities and recruitment (Additional Protocol I, Article 77 (adopted by consensus), and Additional Protocol II, Article 4 (adopted by consensus)) (*ibid.*, §§ 379-380); 12 years of age: arrangement for all children to be identified by the wearing of identity discs, or by some other means (Fourth Geneva Convention, Article 24).
⁴⁷ Fourth Geneva Convention, Article 68, fourth paragraph (cited in Vol. II, Ch. 39, § 347).
⁴⁸ Additional Protocol I, Article 77(5) (adopted by consensus) (*ibid.*, § 350).
⁴⁹ Additional Protocol II, Article 6(4) (adopted by consensus) (*ibid.*, § 351).
⁵⁰ See, e.g., the military manuals of Argentina (*ibid.*, §§ 355-356), Australia (*ibid.*, § 357), Canada (*ibid.*, § 358), Netherlands (*ibid.*, § 360), New Zealand (*ibid.*, § 361), Switzerland (*ibid.*, § 362), United Kingdom (*ibid.*, § 363) and United States (*ibid.*, § 364).
⁵¹ International Covenant on Civil and Political Rights, Article 6(5) (*ibid.*, § 348); American Convention on Human Rights, Article 4(5) (*ibid.*, § 349); Convention on the Rights of the Child, Article 37(a) (*ibid.*, § 352).

International and non-international armed conflicts

Additional Protocols I and II prohibit the recruitment of children.⁵² This prohibition is also found in the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and the Convention on the Worst Forms of Child Labour.⁵³ Under the Statute of the International Criminal Court, "conscripting or enlisting children" into armed forces or groups constitutes a war crime in both international and non-international armed conflicts.⁵⁴ This war crime is also included in the Statute of the Special Court for Sierra Leone.⁵⁵ In his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that the provisions of Article 4 of Additional Protocol II have long been regarded as part of customary international law.⁵⁶

The recruitment of children is prohibited in numerous military manuals,⁵⁷ including those which are applicable in non-international armed conflicts.⁵⁸ It is also prohibited under the legislation of many States.⁵⁹

No official contrary practice was found. Alleged practices of recruiting children have generally been condemned by States and international organisations, for example, in Burundi, the Democratic Republic of the Congo, Liberia, Myanmar and Uganda.⁶⁰ In a resolution on children in armed conflicts adopted in 1999, the UN Security Council strongly condemned the recruitment of children in violation of international law.⁶¹ In a resolution adopted in 1996 on the plight of African children in situation of armed conflicts, the OAU Council of Ministers exhorted all African countries, in particular the warring

⁵² Additional Protocol I, Article 77(2) (adopted by consensus) (*ibid.*, § 379); Additional Protocol II, Article 4(3)(c) (adopted by consensus) (*ibid.*, § 380).

⁵³ Convention on the Rights of the Child, Article 38(3) (*ibid.*, § 381); African Charter on the Rights and Welfare of the Child, Article 22(2) (*ibid.*, § 386); Convention on the Worst Forms of Child Labour, Articles 1 and 3 (*ibid.*, § 388).

⁵⁴ ICC Statute, Article 8(2)(b)(XXVI) and (c)(VII) (*ibid.*, § 387).

⁵⁵ Statute of the Special Court for Sierra Leone, Article 4 (*ibid.*, § 390).

⁵⁶ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone (*ibid.*, § 582).

⁵⁷ See, e.g., the military manuals of Cameroon (*ibid.*, § 395), France (*ibid.*, § 398), Germany (*ibid.*, § 399), Kenya (*ibid.*, § 400), Netherlands (*ibid.*, § 401), Nigeria (*ibid.*, § 403), Spain (*ibid.*, § 404) and United States (*ibid.*, § 405).

⁵⁸ See, e.g., the military manuals of Argentina (*ibid.*, § 394), Cameroon (*ibid.*, § 395), Canada (*ibid.*, § 396), Colombia (*ibid.*, § 397), France (*ibid.*, § 398), Germany (*ibid.*, § 399), Kenya (*ibid.*, § 400), New Zealand (*ibid.*, § 402), Nigeria (*ibid.*, § 403) and Spain (*ibid.*, § 404).

⁵⁹ See, e.g., the legislation of Australia (*ibid.*, § 407), Azerbaijan (*ibid.*, § 408), Bangladesh (*ibid.*, § 409), Belarus (*ibid.*, §§ 410-411), Canada (*ibid.*, § 413), Colombia (*ibid.*, §§ 414-415), Congo (*ibid.*, § 416), Georgia (*ibid.*, § 418), Germany (*ibid.*, § 419), Ireland (*ibid.*, § 420), Jordan (*ibid.*, § 421), Malawi (*ibid.*, § 422), Malaysia (*ibid.*, § 423), Netherlands (*ibid.*, § 425), New Zealand (*ibid.*, § 426), Norway (*ibid.*, § 427), Philippines (*ibid.*, § 428), Spain (*ibid.*, § 429), Ukraine (*ibid.*, § 431) and United Kingdom (*ibid.*, § 432); see also the draft legislation of Argentina (*ibid.*, § 406), Burundi (*ibid.*, § 412) and Trinidad and Tobago (*ibid.*, § 430).

⁶⁰ See, e.g., the statements of Italy (*ibid.*, § 441) and United States (*ibid.*, § 451); UN Security Council, Res. 1071 (*ibid.*, § 454) and Res. 1083 (*ibid.*, § 454); UN Security Council, Statement by the President (*ibid.*, § 458); UN Commission on Human Rights, Res. 1998/63 (*ibid.*, § 460), Res. 1998/75 (*ibid.*, § 465) and Res. 1998/82 (*ibid.*, § 467).

⁶¹ UN Security Council, Res. 1261 (*ibid.*, § 455).

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parties in those countries embroiled in civil wars, "to refrain from recruiting children".⁶²

The International Conferences of the Red Cross and Red Crescent in 1986 and 1995 adopted resolutions stressing the prohibition of recruitment of children.⁶³ The Plan of Action for the years 2000–2003, adopted by the 27th International Conference of the Red Cross and Red Crescent in 1999, requires that all parties to an armed conflict ensure that all measures, including penal measures, be taken to stop the recruitment of children into armed forces or armed groups.⁶⁴

Age-limit for the recruitment of children

Additional Protocols I and II, the Statute of the International Criminal Court and of the Special Court for Sierra Leone put the minimum age for recruitment in armed forces or armed groups at 15, as does the Convention on the Rights of the Child.⁶⁵ Upon ratification of the Convention on the Rights of the Child, Colombia, Netherlands, Spain and Uruguay expressed their disagreement with the age-limit (15) for the recruitment of children set by the Convention, favouring 18 years instead.⁶⁶ At the 27th International Conference of the Red Cross and Red Crescent in 1999, Canada, Denmark, Finland, Guinea, Iceland, Mexico, Mozambique, Norway, South Africa, Sweden, Switzerland, Thailand and Uruguay pledged support to raise the age-limit for recruitment to 18 years.⁶⁷ At the same conference, the International Red Cross and Red Crescent Movement stated that it would continue its efforts pursuant to the Plan of Action for Children Affected by Armed Conflict (CABAC) to promote the principle of non-recruitment of children under 18 years of age.⁶⁸ Eighteen is the age-limit set by the Convention on the Worst Forms of Child Labour.⁶⁹ It is also the

⁶² OAU, Council of Ministers, Res. 1659 (LXIV) (*ibid.*, § 477).

⁶³ 25th International Conference of the Red Cross, Res. IX (*ibid.*, § 481); 26th International Conference of the Red Cross and Red Crescent, Res. II (*ibid.*, § 482).

⁶⁴ 27th International Conference of the Red Cross and Red Crescent, Res. I (adopted by consensus) (*ibid.*, § 485).

⁶⁵ Additional Protocol I, Article 77(2) (adopted by consensus) (*ibid.*, § 502); Additional Protocol II, Article 4(3)(c) (adopted by consensus) (*ibid.*, § 503); ICC Statute, Article 8(2)(b)(XXVI) and (e)(VII) (*ibid.*, § 513); Statute of the Special Court for Sierra Leone, Article 4 (*ibid.*, § 515); Convention on the Rights of the Child, Article 38(3) (*ibid.*, § 381).

⁶⁶ Declarations and reservations made upon ratification of the Convention on the Rights of the Child by Colombia (*ibid.*, § 382), Netherlands (*ibid.*, § 383), Spain (*ibid.*, § 384) and Uruguay (*ibid.*, § 385).

⁶⁷ Pledges made at the 27th International Conference of the Red Cross and Red Crescent by Canada (*ibid.*, § 435), Denmark (*ibid.*, § 437), Finland (*ibid.*, § 438), Guinea (*ibid.*, § 439), Iceland (*ibid.*, § 440), Mexico (*ibid.*, § 442), Mozambique (*ibid.*, § 443), Norway (*ibid.*, § 444), South Africa (*ibid.*, § 446), Sweden (*ibid.*, § 447), Switzerland (*ibid.*, § 448), Thailand (*ibid.*, § 450) and Uruguay (*ibid.*, § 453).

⁶⁸ 27th International Conference of the Red Cross and Red Crescent, Res. I (adopted by consensus) (*ibid.*, § 485).

⁶⁹ Convention on the Worst Forms of Child Labour, Articles 2 and 3(a) (*ibid.*, § 388).

age-limit used in the African Charter on the Rights and Welfare of the Child and was supported by the OAU Council of Ministers in a resolution adopted in 1996.⁷⁰

Under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, States must ensure that persons who have not attained the age of 18 years are not *compulsorily* recruited into their armed forces, while armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit persons under the age of 18 years.⁷¹ The UN Secretary-General has announced a minimum age requirement for soldiers involved in UN peacekeeping missions and has asked States to send in their national contingents soldiers preferably not younger than 21 years of age, and in no case less than 18.⁷²

Although there is not, as yet, a uniform practice with respect to the minimum age for recruitment, there is agreement that it should not be below 15 years of age. In addition, Additional Protocol I and the Convention on the Rights of the Child require that, in recruiting persons between 15 and 18, priority be given to the older ones.⁷³

Rule 137. Children must not be allowed to take part in hostilities.

Practice

Volume II, Chapter 39, Section D.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International and non-international armed conflicts

Additional Protocols I and II prohibit the participation of children in hostilities.⁷⁴ The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child also contain this rule.⁷⁵ Under the Statute

⁷⁰ African Charter on the Rights and Welfare of the Child, Article 2, OAU, Council of Ministers, Res. 1659 (LXIV) (*ibid.*, § 477).

⁷¹ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Articles 2 and 4 (*ibid.*, § 389).

⁷² UN Secretary-General, Report on the protection of civilians in armed conflict (*ibid.*, § 472).

⁷³ Additional Protocol I, Article 77(2) (adopted by consensus) (*ibid.*, § 379); Convention on the Rights of the Child, Article 38(3) (*ibid.*, § 381).

⁷⁴ Additional Protocol I, Article 77(2) (adopted by consensus) (*ibid.*, § 502); Additional Protocol II, Article 4(3)(c) (adopted by consensus) (*ibid.*, § 503).

⁷⁵ Convention on the Rights of the Child, Article 38(2) (*ibid.*, § 504); African Charter on the Rights and Welfare of the Child, Article 22(2) (*ibid.*, § 386).

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of the International Criminal Court, using children to "participate actively in hostilities" constitutes a war crime in both international and non-international armed conflicts.⁷⁶ It is also included as a war crime in the Statute of the Special Court for Sierra Leone.⁷⁷ In his report on the establishment of the Special Court for Sierra Leone, the UN Secretary-General stated that the provisions of Article 4 of Additional Protocol II have long been regarded as part of customary international law.⁷⁸

The participation of children in hostilities is prohibited in many military manuals,⁷⁹ including those which are applicable in non-international armed conflicts.⁸⁰ It is also prohibited under the legislation of numerous States.⁸¹

No official contrary practice was found. Alleged practices of using children to take part in hostilities have generally been condemned by States and international organisations, for example, with respect to conflicts in the Democratic Republic of the Congo, Liberia and Sudan.⁸² In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council strongly condemned the "use of children in armed conflict in violation of international law".⁸³ In a resolution adopted in 1996 on the plight of African children in situations of armed conflict, the OAU Council of Ministers reaffirmed that "the use of children in armed conflicts constitutes a violation of their rights and should be considered as war crimes".⁸⁴

The International Conferences of the Red Cross and Red Crescent in 1986 and 1995 adopted resolutions stressing the prohibition of the participation of children in hostilities.⁸⁵ The Plan of Action for the years 2000–2003, adopted by the 27th International Conference of the Red Cross and Red Crescent in 1999, requires that all parties to an armed conflict ensure that "all measures,

⁷⁶ ICC Statute, Article 8(2)(b)(XXVI) and (e)(VII) (*ibid.*, § 387).

⁷⁷ Statute of the Special Court for Sierra Leone, Article 4(c) (*ibid.*, § 515).

⁷⁸ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone (*ibid.*, § 341).

⁷⁹ See, e.g., the military manuals of Argentina (*ibid.*, § 520), Australia (*ibid.*, § 521), France (*ibid.*, § 524), Germany (*ibid.*, § 525), Netherlands (*ibid.*, § 526) and Nigeria (*ibid.*, § 528).

⁸⁰ See, e.g., the military manuals of Argentina (*ibid.*, § 520), Australia (*ibid.*, § 521), Canada (*ibid.*, § 522), Colombia (*ibid.*, § 523), France (*ibid.*, § 524), Germany (*ibid.*, § 525), New Zealand (*ibid.*, § 527) and Nigeria (*ibid.*, § 528).

⁸¹ See, e.g., the legislation of Australia (*ibid.*, § 529), Belarus (*ibid.*, §§ 530–531), Canada (*ibid.*, § 533), Colombia (*ibid.*, §§ 534–535), Congo (*ibid.*, § 536), Germany (*ibid.*, § 537), Georgia (*ibid.*, § 538), Ireland (*ibid.*, § 539), Jordan (*ibid.*, § 540), Malaysia (*ibid.*, § 541), Mali (*ibid.*, § 542), Netherlands (*ibid.*, § 543), New Zealand (*ibid.*, § 544), Norway (*ibid.*, § 545), Philippines (*ibid.*, § 546) and United Kingdom (*ibid.*, § 548); see also the draft legislation of Burundi (*ibid.*, § 532) and Trinidad and Tobago (*ibid.*, § 547).

⁸² See, e.g., the statements of Italy (*ibid.*, § 559) and United States (*ibid.*, § 569); UN Security Council, Res. 1071 (*ibid.*, § 572) and Res. 1083 (*ibid.*, § 572); UN Security Council, Statement by the President (*ibid.*, § 575); UN General Assembly, Res. 51/112 (*ibid.*, § 576).

⁸³ UN Security Council, Res. 1261 (*ibid.*, § 573).

⁸⁴ OAU, Council of Ministers, Res. 1659 (LXIV) (*ibid.*, § 584).

⁸⁵ 25th International Conference of the Red Cross, Res. IX (*ibid.*, § 585); 26th International Conference of the Red Cross and Red Crescent, Res. II (*ibid.*, § 586).

including penal measures, are taken to stop the participation of children... in armed hostilities".⁸⁶

In addition, the UN Security Council, UN General Assembly and UN Commission on Human Rights frequently require the rehabilitation and reintegration of children who have taken part in armed conflict.⁸⁷ The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict specifically requires governments to take measures to demobilise and rehabilitate former child soldiers and to reintegrate them into society.⁸⁸

Lastly, it should be noted that Additional Protocol I provides that children who do take a direct part in hostilities and fall into the power of an adverse party shall continue to benefit from the special protection to which they are entitled, whether they are prisoners of war or not.⁸⁹ None of the rules which identify such special protection, such as the prohibition of sexual violence (see Rule 93) and the obligation to separate children from adults in detention (see Rule 120) provide for an exception in the event that children have taken part in hostilities. In addition, none of the practice supporting the prohibition of the participation of children in hostilities provides that they should be deprived of their special protection if they do participate in hostilities.

Definition of participation in hostilities

In the framework of the war crime of "using children to participate actively in hostilities" contained in the Statute of the International Criminal Court, the words "using" and "participate" have been adopted in order to:

cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.⁹⁰

⁸⁶ 27th International Conference of the Red Cross and Red Crescent, Res. I (adopted by consensus) (*ibid.*, § 589).

⁸⁷ See, e.g., UN Security Council, Statement by the President (*ibid.*, § 574); UN General Assembly, Res. 55/116 (*ibid.*, § 459); UN Commission on Human Rights, Res. 1998/76 (*ibid.*, § 227).

⁸⁸ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Articles 6(3) and 7(1) (*ibid.*, § 389).

⁸⁹ Additional Protocol I, Article 77(3) (adopted by consensus).

⁹⁰ Draft Statute of the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Part One, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 2 (cited in Vol. II, Ch. 39, § 513).

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The Act on Child Protection of the Philippines provides that children shall not "take part in the fighting, or be used as guides, couriers or spies".⁹¹ Upon ratification of the Convention on the Rights of the Child, the Netherlands stated that "States should not be allowed to involve children directly or indirectly in hostilities".⁹²

Age-limit for participation in hostilities

Additional Protocols I and II, the Statute of the International Criminal Court and the Statute of the Special Court for Sierra Leone put the minimum age for participation in hostilities at 15, as does the Convention on the Rights of the Child.⁹³ Upon ratification of the Convention on the Rights of the Child, Austria and Germany stated that the age-limit of 15 years was incompatible with the best interests of the child.⁹⁴ Colombia, Spain and Uruguay also expressed disagreement with this age-limit.⁹⁵ At the 27th International Conference of the Red Cross and Red Crescent in 1999, Belgium, Canada, Denmark, Finland, Guinea, Iceland, Mexico, Mozambique, Norway, South Africa, Sweden, Switzerland and Uruguay pledged support to raise the age-limit for participation in hostilities to 18 years.⁹⁶ Under the African Charter on the Rights and Welfare of the Child, the age-limit for participation in hostilities is 18 years.⁹⁷ Under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, States must take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities, while armed groups that are distinct from the armed forces of a State may not, under any circumstances, use persons under the age of 18 in hostilities.⁹⁸

Although there is not, as yet, a uniform practice regarding the minimum age for participation in hostilities, there is agreement that it should not be below 15 years of age.

⁹¹ Philippines, *Act on Child Protection* (*ibid.*, § 546).

⁹² Netherlands, Reservations and declarations made upon ratification of the Convention on the Rights of the Child (*ibid.*, § 509).

⁹³ Additional Protocol I, Article 77(2) (adopted by consensus) (*ibid.*, § 379); Additional Protocol II, Article 4(3)(c) (adopted by consensus) (*ibid.*, § 380); ICC Statute, Article 8(2)(b)(XXVI) and (e)(VII) (*ibid.*, § 387); Statute of the Special Court for Sierra Leone, Article 4(c) (*ibid.*, § 515); Convention on the Rights of the Child, Article 38(2) (*ibid.*, § 504).

⁹⁴ Reservations and declarations made upon ratification of the Convention on the Rights of the Child by Austria (*ibid.*, § 506) and Germany (*ibid.*, § 508).

⁹⁵ Declarations made upon ratification of the Convention on the Rights of the Child by Colombia (*ibid.*, § 507), Spain (*ibid.*, § 510) and Uruguay (*ibid.*, § 511).

⁹⁶ Pledges made at the 27th International Conference of the Red Cross and Red Crescent by Belgium (*ibid.*, § 550), Canada (*ibid.*, § 551), Denmark (*ibid.*, § 553), Finland (*ibid.*, § 554), Guinea (*ibid.*, § 555), Iceland (*ibid.*, § 556), Mexico (*ibid.*, § 560), Mozambique (*ibid.*, § 561), Norway (*ibid.*, § 562), South Africa (*ibid.*, § 564), Sweden (*ibid.*, § 565), Switzerland (*ibid.*, § 566) and Uruguay (*ibid.*, § 571).

⁹⁷ African Charter on the Rights and Welfare of the Child, Article 2.

⁹⁸ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Articles 1 and 4 (cited in Vol. II, Ch. 39, § 514).

Rule 138. The elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection.

Practice

Volume II, Chapter 39, Section E.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

The elderly

The recognition of the special respect and protection due to the elderly is contained in various provisions of the Third and Fourth Geneva Conventions relating to their evacuation and the treatment of persons deprived of their liberty.⁹⁹ These provisions are set forth in numerous military manuals,¹⁰⁰ including those which apply to non-international armed conflicts.¹⁰¹ They are also included in the legislation of some States.¹⁰²

The Plan of Action for the years 2000–2003, adopted by the 27th International Conference of the Red Cross and Red Crescent in 1999, requires that all parties to an armed conflict take effective measures to ensure that in the conduct of hostilities, every effort is made to spare the lives of and protect and respect the civilian population, with particular protective measures for groups with special vulnerabilities such as the elderly.¹⁰³ The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993 called upon States and parties to armed conflicts strictly to observe international humanitarian law out of concern for the violations that affected the civilian population, in particular the elderly.¹⁰⁴

No official contrary practice was found with respect to either international or non-international armed conflicts.

⁹⁹ Third Geneva Convention, Articles 16, 44–45 and 49 (*ibid.*, § 604); Fourth Geneva Convention, Articles 17, 27, 85 and 119 (*ibid.*, §§ 603–604).

¹⁰⁰ See, e.g., the military manuals of Argentina (*ibid.*, § 606), Australia (*ibid.*, § 607), Canada (*ibid.*, § 608), Colombia (*ibid.*, § 609), El Salvador (*ibid.*, §§ 610–611), France (*ibid.*, §§ 612–613), Kenya (*ibid.*, § 614), Morocco (*ibid.*, § 615), New Zealand (*ibid.*, § 616), Philippines (*ibid.*, § 617), Spain (*ibid.*, § 618), Sweden (*ibid.*, § 619), Switzerland (*ibid.*, § 620), United Kingdom (*ibid.*, §§ 621–622) and United States (*ibid.*, §§ 623–624).

¹⁰¹ See, e.g., the military manuals of Australia (*ibid.*, § 607), Colombia (*ibid.*, § 609), El Salvador (*ibid.*, §§ 610–611), Kenya (*ibid.*, § 614) and Philippines (*ibid.*, § 617).

¹⁰² See, e.g., the legislation of Azerbaijan (*ibid.*, § 625), Bangladesh (*ibid.*, § 626), Ireland (*ibid.*, § 627), Norway (*ibid.*, § 628) and Venezuela (*ibid.*, § 629).

¹⁰³ 27th International Conference of the Red Cross and Red Crescent, Res. I (adopted by consensus) (*ibid.*, § 635).

¹⁰⁴ World Conference on Human Rights, Vienna Declaration and Programme of Action (*ibid.*, § 634).

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(vii) *Using human shields.* Using human shields is prohibited under customary international law (see Rule 97) but has also been recognised as a war crime by the International Criminal Tribunal for the Former Yugoslavia, either as inhuman or cruel treatment,⁷⁷ or as an outrage upon personal dignity.⁷⁸ Its inclusion in the Statute of the International Criminal Court was uncontroversial.⁷⁹ Using human shields constitutes a criminal offence under the legislation of many States.⁸⁰ References to more practice can be found in the commentary to Rule 97.

(viii) *Conscripting or enlisting children under the age of 15 into armed forces, or using them to participate actively in hostilities.* The prohibition of enlisting children under 15 years of age into the armed forces, or using them to participate actively in hostilities, was introduced in Additional Protocol I.⁸¹ Although this is a relatively recent prohibition, the inclusion of such acts as war crimes in the Statute of the International Criminal Court was uncontroversial. The recruitment of children is prohibited under the legislation of many States.⁸² Using children to participate actively in hostilities is also prohibited under the legislation of many States.⁸³ References to more practice can be found in the commentary to Rules 136–137.

(ix) *Committing sexual violence, in particular rape, sexual slavery, enforced prostitution and enforced pregnancy.* The explicit listing in the Statute of the International Criminal Court of various forms of sexual violence as war crimes

⁷⁷ See, e.g., ICTY, *Blaškić case*, Case No. IT-95-14-T, Judgement, Trial Chamber I, 3 March 2000, § 716; *Kordić and Čerkez case*, Case No. IT-95-14/2-T, Judgement, Trial Chamber III, 26 February 2001, § 256; see also *Karadžić and Mladić case*, Review of the Indictments (cited in Vol. II, Ch. 32, § 2366).

⁷⁸ See, e.g., ICTY, *Aleksovski case*, Case No. IT-95-14/1-T, Judgement, Trial Chamber I, 25 June 1999, § 229.

⁷⁹ ICC Statute, Article 8(2)(b)(xxiii).

⁸⁰ See, e.g., the legislation of Australia (cited in Vol. II, Ch. 32, § 2287), Azerbaijan (*ibid.*, §§ 2288–2289), Bangladesh (*ibid.*, § 2290), Belarus (*ibid.*, § 2291), Canada (*ibid.*, § 2293), Democratic Republic of the Congo (*ibid.*, § 2294), Congo (*ibid.*, § 2295), Germany (*ibid.*, § 2296), Georgia (*ibid.*, § 2297), Ireland (*ibid.*, § 2298), Lithuania (*ibid.*, § 2299), Mali (*ibid.*, § 2300), Netherlands (*ibid.*, § 2301), New Zealand (*ibid.*, § 2302), Norway (*ibid.*, § 2303), Peru (*ibid.*, § 2304), Poland (*ibid.*, § 2305), Tajikistan (*ibid.*, § 2306), United Kingdom (*ibid.*, § 2308) and Yemen (*ibid.*, § 2309); see also the draft legislation of Burundi (*ibid.*, § 2292) and Trinidad and Tobago (*ibid.*, § 2307).

⁸¹ Additional Protocol I, Article 77(2).

⁸² See, e.g., the legislation of Australia (cited in Vol. II, Ch. 39, § 407), Azerbaijan (*ibid.*, § 408), Bangladesh (*ibid.*, § 409), Belarus (*ibid.*, §§ 410–411), Canada (*ibid.*, § 413), Colombia (*ibid.*, §§ 414–415), Congo (*ibid.*, § 416), Georgia (*ibid.*, § 418), Germany (*ibid.*, § 419), Ireland (*ibid.*, § 420), Jordan (*ibid.*, § 421), Malawi (*ibid.*, § 422), Malaysia (*ibid.*, § 423), Netherlands (*ibid.*, § 425), New Zealand (*ibid.*, § 426), Norway (*ibid.*, § 427), Philippines (*ibid.*, § 428), Spain (*ibid.*, § 429), Ukraine (*ibid.*, § 431) and United Kingdom (*ibid.*, § 432); see also the draft legislation of Argentina (*ibid.*, § 406), Burundi (*ibid.*, § 412) and Trinidad and Tobago (*ibid.*, § 430).

⁸³ See, e.g., the legislation of Australia (cited in Vol. II, Ch. 39, § 529), Belarus (*ibid.*, §§ 530–531), Canada (*ibid.*, § 533), Colombia (*ibid.*, §§ 534–535), Congo (*ibid.*, § 536), Germany (*ibid.*, § 537), Georgia (*ibid.*, § 538), Ireland (*ibid.*, § 539), Jordan (*ibid.*, § 540), Malaysia (*ibid.*, § 541), Mali (*ibid.*, § 542), Netherlands (*ibid.*, § 543), New Zealand (*ibid.*, § 544), Norway (*ibid.*, § 545), Philippines (*ibid.*, § 546) and United Kingdom (*ibid.*, § 548); see also the draft legislation of Burundi (*ibid.*, § 532) and Trinidad and Tobago (*ibid.*, § 547).

reflects changes in society in recent decades, in particular the demand for greater respect for and recognition of women. Although rape was prohibited by the Geneva Conventions, it was not explicitly listed as a grave breach either in the Conventions or in Additional Protocol I but would have to be considered a grave breach on the basis that it amounts to inhuman treatment or wilfully causing great suffering or serious injury to body or health. It was not the subject of war crimes trials after the Second World War, even though the practice of sexual violence was widespread. However, since then, not only has there been recognition of the criminal nature of rape or sexual assault in armed conflict in the legislation of many States,⁸⁴ but there have also been a number of prosecutions and convictions on this basis by the International Criminal Tribunals for the Former Yugoslavia and for Rwanda.⁸⁵

The inclusion of crimes of sexual violence in the Statute of the International Criminal Court was not of itself controversial. There was, however, some controversy concerning two of the crimes of sexual violence, namely, “forced pregnancy” and “any other form of sexual violence”. “Forced pregnancy” was introduced as a crime in the Statute of the International Criminal Court following the suggestion of Bosnia and Herzegovina and others because of the incidence of such acts during its armed conflict.⁸⁶ Some delegations, however, feared that this crime might be interpreted as imposing on States a duty to provide forcibly impregnated women access to abortion.⁸⁷ Given that the crime involves two other war crimes, namely, rape and unlawful confinement, the customary nature of the criminality of this behaviour is not in doubt. Characterising “any other form of sexual violence” as a war crime caused some difficulty for some delegations as they felt it to be somewhat vague. It was solved by introducing the words “also constituting a grave breach of the Geneva Conventions”. Although the intention of some of the groups that pressed for the inclusion of this crime was to stress that any form of sexual violence should be considered to be a grave breach, this phrase has been interpreted by States in the Elements of Crimes for the International Criminal Court as requiring that

⁸⁴ See, e.g., the legislation of Armenia (cited in Vol. II, Ch. 32, § 1620), Australia (*ibid.*, §§ 1621–1623), Azerbaijan (*ibid.*, §§ 1624–1625), Bangladesh (*ibid.*, § 1626), Belgium (*ibid.*, § 1627), Bosnia and Herzegovina (*ibid.*, § 1628), Canada (*ibid.*, § 1630), China (*ibid.*, § 1631), Colombia (*ibid.*, § 1632), Congo (*ibid.*, § 1633), Croatia (*ibid.*, § 1634), Estonia (*ibid.*, § 1636), Ethiopia (*ibid.*, § 1637), Georgia (*ibid.*, § 1638), Germany (*ibid.*, § 1639), South Korea (*ibid.*, § 1643), Lithuania (*ibid.*, § 1644), Mali (*ibid.*, § 1645), Mozambique (*ibid.*, § 1646), Netherlands (*ibid.*, §§ 1648–1649), New Zealand (*ibid.*, § 1650), Paraguay (*ibid.*, § 1653), Slovenia (*ibid.*, § 1654), Spain (*ibid.*, § 1656), United Kingdom (*ibid.*, § 1658) and Yugoslavia (*ibid.*, §§ 1659–1660); see also the draft legislation of Argentina (*ibid.*, § 1619), Burundi (*ibid.*, § 1629) and Trinidad and Tobago (*ibid.*, § 1657).

⁸⁵ See, e.g., ICTY, *Nikolić case*, Review of the Indictment (cited in Vol. II, Ch. 32, § 1731), *Delalić case*, Judgement (*ibid.*, § 1733), *Furundžija case*, Judgement and Judgment on Appeal, (*ibid.*, §§ 1734–1735) and *Kunarac case*, Judgement (*ibid.*, § 1736).

⁸⁶ ICC Statute, Article 8(2)(b)(xxii).

⁸⁷ See Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, pp. 329–330.

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Knut Doermann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2002.

national legislation provide that booty must be handed over to the authorities.¹⁰

In an attempt to clarify the term 'pillage' by examining historical examples, linguistic usage and military regulations, a commentator elaborated the following definition:

(a) in a narrow sense, the unauthorized appropriation or obtaining by force of property . . . in order to confer possession of it on oneself or a third party;

(b) in a wider sense, the unauthorized imposition of measures for contributions or sequestrations, or an abuse of the permissible levy of requisitions (e.g. for private purposes), each done either through taking advantage of the circumstances of war or through abuse of military strength. In the traditional sense, pillage implied an element of violence. The notion of appropriation or obtaining against the owner's will (presumed or expressed), with the intention of unjustified gain, is inherent in the idea of pillage so that it is also perceived as a form of theft through exploitation of the circumstances and fortunes of war.¹¹

The following cases from post-Second World War trials specifically refer to the above-cited rules of the 1907 Hague Regulations for the description of the material elements of plunder, pillage, spoliation and exploitation. Although the elements of Art. 28 of the Hague Regulations are not specifically elaborated, the findings of the Tribunals may have an indicative value. With respect to terminology, the Tribunal in the *IG Farben* case found that:

the Hague Regulations do not specifically employ the term 'spoliation', but we do not consider this matter to be one of any legal significance. As employed in the indictment, the term is used interchangeably with the words 'plunder' and 'exploitation' . . . [T]he term 'spoliation' . . . applies

¹⁰ For example, Australia's Defence Force manual provides that seized property belongs to the capturing State, Australian Defence Force, *Law of Armed Conflict-Commander's Guide*, Operations Series, ADFP 37 Supplement-Interim edn, 7 March 1994, p. 12-4, para. 1224. New Zealand's military manual states that all enemy public movable property captured or found on the battlefield is known as booty and becomes the property of the capturing State, New Zealand Defence Force, Headquarters, Directorate of Legal Services, *Interim Law of Armed Conflict Manual*, DM 112 (Wellington, November 1992), p. 5-35. According to Arts. 15, 38 and 45 of the Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, seized property and war booty can only be used to benefit the army or the country and cannot be taken for personal gain.

¹¹ A. Steinkamm, 'Pillage' in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (North Holland, Amsterdam, Lausanne, New York, Oxford, Shannon, Singapore and Tokyo, 1997), vol. III, p. 1029. See also, for example, the Canadian military manual, Office of the Judge Advocate, *The Law of Armed Conflict at the Operational and Tactical Level*, in <http://www.dnd.ca/jag/operational.pubs.e.html#top>, p. 6-5.

to the widespread and systematized acts of dispossession and acquisition of property in violation of the rights of the owners, which took place in territories under the belligerent occupation or control of Nazi Germany during World War II. We consider that 'spoliation' is synonymous with the word 'plunder' as employed in Control Council Law 10, and that it embraces offences against property in violation of the laws and customs of war.¹²

Hence, it appears that the terms 'plunder', 'pillage', 'spoliation' and 'exploitation' were used interchangeably with the term 'appropriation'.¹³

Therefore, the case law cited under section 'Art. 8(2)(a)(iv)', subsection 'Legal basis of the war crime' describing the term 'appropriation' may be a further indication of what constitutes pillage.

The following post-Second World War trials deal explicitly with pillage without giving further clarification:

In the *F. Holstein and Twenty-three Others* case¹⁴ the accused were found guilty under Art. 221 of the French Code of Military Justice ('pillage committed in gangs by military personnel with arms or open force').

In the *P. Rust* case,¹⁵ the accused was found guilty of abusive and illegal requisitioning of French property, a case of pillage in time of war, under Art. 221 of the French Code of Military Justice and Art. 2(8) of the Ordinance of 1944 for the prosecution of war criminals. These provisions give effect to Art. 52 of the Hague Regulations of 1907.

In the *H. Szabados* case, the accused was found guilty of pillage (i.e. the looting of personal belongings and other property of the civilians evicted from their homes prior to the destruction of the latter) under Art. 440 of the French Code.¹⁶

Art. 28 of the 1907 Hague Regulations was quoted for the *actus reus* in the *T. Sakai* case.¹⁷

Pillage is defined more precisely in the following military manuals:

Australia's Defence Force manual defines pillage as 'the violent acquisition of property for private purposes' or 'the seizure or destruction of enemy private or public property or money by representatives of a belligerent, usually armed forces, for private purposes'.¹⁸ Canada's military

¹² *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. VIII, p. 1133; 15 AD 668 at 673.

¹³ See also 'Digest of Laws and Cases', in UNWCC, *LRTWC*, vol. XIV, p. 126; P. Verri, *Dictionary of the International Law of Armed Conflict* (ICRC, Geneva, 1988), p. 85.

¹⁴ In UNWCC, *LRTWC*, vol. VIII, p. 31; 13 AD 261.

¹⁵ In UNWCC, *LRTWC*, vol. IX, pp. 71 ff.; 15 AD 684.

¹⁶ In UNWCC, *LRTWC*, vol. IX, pp. 60 ff.; 13 AD 261. ¶1

¹⁷ In UNWCC, *LRTWC*, vol. XIV, p. 7; 13 AD 222.

¹⁸ Australian Defence Force, *Law of Armed Conflicts-Commander's Guide*, paras. 743 and 1224.

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manual defines pillage as 'the seizure or destruction of enemy private or public property or money by representatives of a belligerent, usually soldiers, for private purposes'.¹⁹ In the 'Military Handbook' and 'Military Manual' of the Netherlands pillage is defined as 'stealing goods (or property) belonging to civilians'.²⁰ The military manual of the Socialist Federal Republic of Yugoslavia considered the appropriation of private property, *inter alia*, as pillage.²¹ New Zealand's military manual states that 'pillage, the violent acquisition of property for private purposes, is prohibited'.²²

Remarks concerning the mental element

The ICTY Prosecution in the *Delalic* case considered that the following constituted the mental elements of the offence 'plunder of public or private property' under Art. 3(e) of the ICTY Statute:

- The destruction, taking, or obtaining by the accused of such property was committed with the intent to deprive the owner or any other person of the use or benefit of the property, or to appropriate the property for the use of any person other than the owner.

Later on in the *Kordic and Cerkez* case,²³ the ICTY Prosecution defined the mental element in a different manner:

- The property was acquired wilfully.²⁴

In the *H. A. Rauter* case,²⁵ the accused was found guilty of 'intentionally' taking the necessary measures to carry out the systematic pillage of the Netherlands population.

¹⁹ Office of the Judge Advocate, *The Law of Armed Conflict at the Operational and Tactical Level*, p. 12-8.

²⁰ *Toepassing Humanitair Oorlogsrecht*, Voorschrift No. 27-412/1, Koninklijke Landmacht, Ministerie van Defensie (1993), p. IV-5; *Handboek Militair* (Ministerie van Defensie, 1995), p. 7-43.

²¹ *Propisi o Primeri Pravila Medjunarodnog Ratnog Prava u Oruzanim Snagama SFRJ*, Savezni Sekretarijat za Narodnu Odbranu (Pravna Uprava, 1988), Point 92.

²² New Zealand Defence Force, *Interim Law of Armed Conflict Manual*, p. 5-35.

²³ ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 50.

²⁴ In the *Simic and Others* case the ICTY Prosecution defined the notion of 'wilful' as 'a form of intent which includes recklessness but excludes ordinary negligence. "Wilful" means a positive intent to do something, which can be inferred if the consequences were foreseeable, while "recklessness" means wilful neglect that reaches the level of gross criminal negligence.' ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor v. Milan Simic and Others*, IT-95-9-PT, p. 35.

²⁵ In UNWCC, *LRTWC*, vol. XIV, pp. 89 ff.; 16 AD 526.

Art. 8(2)(b)(xvii) – Employing poison or poisoned weapons

Text adopted by the PrepCom

War crime of employing poison or poisoned weapons

1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.
2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Commentary

Travaux préparatoires/Understandings of the PrepCom

Due to the very brief wording of the Rome Statute for the war crime of 'employing poison or poisoned weapons' (Art. 8(2)(b)(xvii)), it was necessary for the EOC to explain the requirements under this crime in more detail. However, in order to avoid the difficult task of negotiating a definition of poison, the text adopted includes a specific threshold with regard to the effects of the substance: 'The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.' These effects must be the consequence of the toxic features of the substance. A number of delegations opposed the threshold 'serious' in the elements requiring 'serious damage to health', but eventually joined the consensus.

Legal basis of the war crime

The phrase 'employing poison or poisoned weapons' is directly derived from Art. 23(a) of the Hague Regulations.

The prohibition of poison is probably the most ancient prohibition of a means of combat in international law. Since the late Middle Ages the use of poison has always been strictly prohibited.¹ An early reference to this

¹ Y. Sandoz, *Des armes interdites en droit de la guerre* (Imprimerie Grounauer, Geneva, 1975), pp. 11 ff.; S. Oeter, 'Methods and Means of Combat' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press, Oxford, 1995), p. 138.

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Element 2 largely reflects the findings of the ICTR in the *Akayesu* case, taking into account the effect of special circumstances of an armed conflict on the victims' will:

[C]oercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence.¹

Footnote 51 gives additional guidance to the notion of 'genuine consent' as contained in that element.

(2) Sexual slavery

Element 1 was largely influenced by the definition of slavery as contained in the 1926 Slavery Convention. The PrepCom, however, concluded quickly that this definition would be too narrow and outdated, and in particular that there was no requirement to treat the victim as a chattel. The extent of the necessary adaptation remained nevertheless controversial. The discussion was influenced considerably by the definition adopted in the Statute of the crime against humanity of enslavement (Art. 7(2)(c)):

'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

Eventually the PrepCom agreed that the definition of slavery in the context of sexual slavery and of enslavement should be identical. Several delegations emphasised the need to clarify the notion of 'powers attaching to the right of ownership'. Therefore, the non-exhaustive list was added in Element 1. The formulation of 'similar deprivation of liberty' again was considered to be too narrow because the word 'similar' would have a limiting effect in so far as the deprivation of liberty must be comparable to 'purchasing, selling, lending or bartering', i.e. requiring some sort of commercial or pecuniary exchange. This would have possibly excluded conduct aimed at reducing someone to a servile status and cases of forced labour. Almost until the end of the final session of the PrepCom the broader approach was contested by several delegations. Eventually footnote 53 was accepted in order to reach consensus. Its second sentence was acceptable

¹ ICTR, Judgment, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, para. 688.

because it merely repeated statutory language stemming from the definition of enslavement. The first sentence was agreed upon because of its reference to developments reflected in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956, to which a considerable number of States have adhered. This would help to describe the limits of an acceptable interpretation of the term 'servile status', which was considered by several delegations as being too broad without further clarification.

As clarified by footnote 52, the crime may well be committed by several persons, e.g., the deprivation of liberty could be committed by one person and the sexual acts by another person. Attempts to spell these variations out in the elements were rejected. It was argued that this result would be achieved by applying Art. 25(3) ICC Statute, which includes the commission of a crime jointly with or through another person as well as several forms of participation in the commission of a crime. The footnote is a reminder of this because the existence of multiple perpetrators is most likely to be the case in this crime, although it could also be the case with others.

(3) Enforced prostitution

The PrepCom recognised that this crime can be committed by the use of force or coercion. The different forms of coercion included in Element 1 are inspired by Element 2 of the war crime of rape and defined accordingly.

A major point of controversy was how to distinguish enforced prostitution from sexual slavery, on the one hand, and other forms of sexual violence, on the other. In particular, it was ardently debated whether the fact that 'the perpetrator or another person obtained or expected to obtain pecuniary advantage in exchange for or in connection with the acts of a sexual nature' was an element of enforced prostitution or not. After long debates the PrepCom eventually answered in the affirmative. It added, however, the words 'or other advantage'. This was made in order to achieve a compromise between the group of delegations that objected to the requirement of pecuniary advantage and the group that insisted on it.² Findings from the *Awochi* case after the Second World War influenced the compromise.³

(4) Forced pregnancy, as defined in Art. 7(2)(f)

The one specific element of this crime essentially reproduces the definition contained in Art. 7(2)(f) ICC Statute. Several delegations wanted to clarify

² They argued that obtaining a pecuniary benefit would be inherent in the definition of prostitution.

³ *W. Awochi Case*, in UNWCC, *LRTWC*, vol. XIII, p. 125; 13 AD 254.

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Considerable debates took place with regard to the war crime of sexual violence, owing to the formulation found in the Statute '... also constituting a grave breach of the Geneva Conventions'. While some delegations argued that this formulation was intended only to indicate that gender crimes could already be prosecuted as grave breaches,⁶ others thought that the conduct must constitute one of the crimes defined in Art. 8(2)(a) – the specifically named grave breaches of the GC – and in addition involve violent acts of a sexual nature. The majority of delegations, in an attempt to reconcile the wording of the Statute with its aim, considered the statutory formulation as an element of the crime introducing a specific threshold as to the seriousness of the crime,⁷ and not as a factor requiring it also to be a grave breach listed in Art. 8(2)(a). Therefore, Element 2 was accepted.

Element 3 reflects a compromise between two opposing sides. While some delegations argued that Art. 30 ICC Statute should fully apply to the components of Element 2, other delegations took the view that no mental element would be required. In order to avoid a mistake of law defence, the PrepCom decided that 'awareness of the factual circumstances' would be the most appropriate standard.

Legal basis of the war crime

There is no single treaty reference containing all the different acts described in this war crime. The constituent parts of the crime may be found in a number of legal instruments. As the ICTY pointed out in the *Delalic* case:

There can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law. The terms of article 27 of the Fourth Geneva Convention specifically prohibit rape, any form of indecent assault and the enforced prostitution of women. A prohibition on rape, enforced prostitution and any form of indecent assault is further found in article 4(2) of Additional Protocol II, concerning internal armed conflicts. This Protocol also implicitly prohibits rape and sexual assault in article 4(1) which states that all persons are entitled to respect for their person and honour. Moreover, article 76(1) of Additional Protocol I expressly requires that women be protected from rape, forced prostitution and any other form of indecent assault. An implicit prohibition on rape and sexual assault can also be found in article 46 of the 1907 Hague Convention (IV) that provides for the protection of family honour and rights. Finally, rape is prohibited as a crime against

⁶ For this view, see *ibid.*, p. 364.

⁷ See *Ibid.*, n. 27, where the author indicates that the 'grave breach' reference was also intended to indicate that only serious crimes of sexual violence should fall within the definition.

humanity under article 6(c) of the Nürnberg Charter and expressed as such in Article 5 of the Statute.

There is on the basis of these provisions alone, a clear prohibition on rape and sexual assault under international humanitarian law. However the relevant provisions do not define rape.⁸

The most relevant provisions of the GC and AP read as follows:

• Art. 27(2) GC IV:

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

• Art. 75(2)(b) AP I:⁹

The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
... outrages upon personal dignity, in particular ... enforced prostitution ...

• Art. 76(1) AP I:¹⁰

Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.

(1) Rape

Remarks concerning the material elements

The Trial Chamber of the ICTR defined rape in the *Akayesu* case as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.¹¹

⁸ ICTY, Judgment, *The Prosecutor v. Zejnil Delalic and Others*, IT-96-21-T, paras. 476 ff. See also ICTY, Judgment, *The Prosecutor v. Anto Furundzija*, IT-95-17/1-T, paras. 165 ff.; 121 ILR 218 at 266.

⁹ Describing the personal field of application, the ICRC Commentary points out that this provision 'applies to everybody covered by the article, regardless of sex', C. Pilloud and J. S. Pictet, 'Art. 75' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 3049.

¹⁰ Describing the personal field of application, the ICRC Commentary states: 'The rule applies quite generally and therefore covers all women who are in the territory of Parties involved in the conflict, following the example of Part II of the Fourth Convention. In fact, the provision is not subject to any further specification, unlike most of the rules contained in Section III. Thus it applies both to women affected by the armed conflict, and to others; to women protected by the Fourth Convention and to those who are not', in *ibid.*, Art. 76, no. 3151.

¹¹ ICTR, Judgment, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, para. 688.

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In addition to the text adopted, several delegations wanted to include a clarification about the meaning of the term 'using them to participate actively in hostilities'. Other delegations, however, pointed out that at the Preparatory Committee that preceded the Diplomatic Conference in Rome, a footnote had been inserted in the text providing guidance for the interpretation of the concepts of 'use' and 'participation'. This footnote read as follows:

The words 'using' and 'participate' have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included in the terminology.¹

It was argued that whilst the footnote, as with all other interpretative footnotes contained in the Committee's Report, was not included in the text of the Statute, it is part of the *travaux préparatoires* and therefore eligible to give the necessary guidance for identifying the understanding of the drafters of the Rome Statute. On the basis of these arguments the proponents of clarification in the elements did not pursue their original aim further at the PrepCom.

Legal basis of the war crime

This offence is derived from Art. 7(2) AP I, which reads as follows:

The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.

Similar wording is found in Art. 38(2) and (3) of the 1989 UN Convention on the Rights of the Child:

¹ See Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Part One, A/CONF.183/2/Add.1 (14 April 1998), p. 21; H. von Hebel and D. Robinson, 'Crimes within the Jurisdiction of the Court' in R. S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer Law International, The Hague, London and Boston, 1999), p. 118.

States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.

Remarks concerning the material elements

Conscripting or enlisting

While Art. 7(2) AP I contains the word 'recruiting', Art. 8(2)(b)(xxvi) of the ICC Statute uses the terms 'conscripting or enlisting'. The terms are not further defined. The plain and ordinary meaning of the words suggests the following:

According to the *Oxford English Dictionary*, 'to recruit' means 'to enlist new soldiers; to get or seek for fresh supplies of men for the army';² 'to enlist' is defined as 'to enrol on the "list" of a military body; to engage a soldier';³ and 'to conscript' means 'to compel to military service by conscription; to enlist compulsorily'; the term 'conscription' is defined as 'enrolment or enlistment (of soldiers)'.⁴

Based on these explanations of the ordinary meaning of the terms, one may conclude that the notion of 'to enlist' comprises both the act of recruiting and the act of conscripting. The terms used seem to encompass every act – formal or *de facto* – of including persons in the armed forces. As pointed out in the ICRC Commentary on the corresponding provision for non-international armed conflicts,

[t]he principle of non-recruitment also prohibits accepting voluntary enlistment.⁵

² The *Oxford English Dictionary* (Oxford, first published 1933, reprint 1978), vol. VIII, p. 277. According to the *Cambridge International Dictionary of English* (Cambridge University Press, Cambridge, 1995), the word means 'to persuade someone to become a new member of an organization, esp. the army', p. 1188; and according to the *Concise Oxford Dictionary* (1994), it means 'enlist (a person) as a recruit', p. 1004.

³ The *Oxford English Dictionary*, vol. III, p. 191. According to the *Cambridge International Dictionary of English*, the word means 'to (cause to) join something, esp. the armed forces', p. 459, and according to the *Concise Oxford Dictionary*, it means 'enrol (=enter one's name on a list, esp. as a commitment to membership) in the armed services', p. 389.

⁴ The *Oxford English Dictionary*, vol. II, p. 848. According to the *Cambridge International Dictionary of English*, the term means 'to force someone by law to serve in one of the armed forces', p. 289, and according to the *Concise Oxford Dictionary*, it means 'enlist by conscription', while 'conscription' means 'compulsory enlistment for State service, esp. military service', p. 243.

⁵ S. Junod, 'Art. 4' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 4557.

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National armed forces

In the GC the term 'armed forces' is not specifically defined. However, as the ICRC Commentary points out, the expression 'members of the armed forces' refers to all military personnel, whether they belong to the land, sea or air forces.⁶

In Art. 43 AP I, armed forces are defined in the following terms:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Participate actively in hostilities

In contrast to the wording in Art. 77(2) AP I, 'direct part in hostilities', Art. 8(2)(b)(xxvi) ICC Statute uses the terms 'participate actively in hostilities'. In the context of common Art. 3 GC and the respective provisions of AP II, the ICTR found that *the term 'direct part in hostilities' has evolved from the phrase 'active part in the hostilities' of common Art. 3. The Tribunal concluded in this respect:*

*These phrases are so similar that, for the Chamber's purposes, they may be treated as synonymous.*⁷

In the ICRC Commentary the *travaux préparatoires* of Art. 77(2) AP I are described as follows:

The text refers to taking a 'direct' part in hostilities. The ICRC proposal did not include this word. Can this lead to the conclusion that indirect

⁶ J. S. Pictet (ed.), *Commentary III Geneva Convention Relative to the Treatment of Prisoners of War* (ICRC, Geneva, 1960), Art. 4, p. 51.

⁷ ICTR, Judgment, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, para. 629 (emphasis added).

acts of participation are not covered? Examples would include, in particular, gathering and transmission of military information, transportation of arms and munitions, provision of supplies etc. The intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, and consequently they should not be required to perform such services; if it does happen that children under fifteen spontaneously or on request perform such acts, precautions should at least be taken; for example, in the case of capture by the enemy, they should not be considered as spies, saboteurs or illegal combatants and treated as such.⁸

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date. Therefore, the mental element may be defined in accordance with Art. 30 of the ICC Statute.

With respect to the age of fifteen, a specific problem arises. It must be determined what level of knowledge the accused must have with regard to the age of the child. Must he/she know that the child is under fifteen years old? Could he/she remain unpunished if he/she does not enquire the age?

In the case *Regina v. Finta*, the Court held in general that

for war crimes, the Crown would have to establish that the accused knew or was aware of the facts or circumstances that brought his or her actions within the definition of a war crime. That is to say the accused would have to be aware that the facts or circumstances of his or her actions were such that, viewed objectively, they would shock the conscience of all right thinking people.

Alternatively, the *mens rea* requirement of... war crimes would be met if it were established that the accused was wilfully blind to the facts or circumstances that would bring his or her actions within the provisions of these offences.⁹

NB: Although relating to a different context, a further indication may be derived from national case law on indecent assault on children or similar offences where the *actus reus* encompasses a certain age limit.

- UK: In *Regina v. Prince*,¹⁰ the jury found that the accused believed the victim's statement that she was eighteen and his belief was reasonable, for she looked very much older than sixteen. In fact, she was under

⁸ C. Pilloud and J. S. Pictet, 'Art. 75' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 3187.

⁹ 104 ILR 284 at 363. ¹⁰ Law Reports 2 Crown Cases Reserved 154 (1875).

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sixteen and the accused therefore brought about the *actus reus* of the crime. He was not even negligent, let alone reckless or intentional as to the girl's age. In spite of his blameless inadvertence as to this important circumstance in the *actus reus*, the accused was convicted. Therefore, the reasonable belief that the victim is over a certain age limit is not a defence if he or she is in fact under it.¹¹

- Switzerland: With respect to offences requiring *dolus directus* or *dolus eventualis* the reasonable belief that the victim is over a certain age limit excludes the mental element;¹² with regard to Art. 187(4) of the 'Code pénal' which explicitly criminalises negligent conduct: 'L'auteur doit faire preuve d'une prudence accrue lorsque la victime présente un âge apparent proche de l'âge limite de protection: ce n'est que si des faits précis lui ont fait admettre que la personne avait plus de 16 ans qu'il ne sera pas punissable.'¹³
- France: With respect to an error of the actual age of the victim the accused must be acquitted if he proves the error and the error appears to be 'suffisamment plausible'.¹⁴
- US: Loewy points out: 'Statutory rape is generally a strict liability offence ... Thus, even an honest and reasonable mistake as to age (or mental capacity) will not serve to exculpate the defendant. E.g. *S v. Superior Court of Pima County*, 104 Ariz. 440, 454 P2d 982 (1969). There is, however, some authority to the contrary.'¹⁵

With respect to the crime of statutory rape, in LaFave and Scott¹⁶ it is stated that the majority of states 'impose[s] strict liability for sexual acts with underage complainants' (*Garnett v. State*, 332 Maryland 571, 632 A.2d 797 (1993)). Under such a provision, a conviction may be obtained 'even when the defendant's judgement as to the age of the complainant is warranted by her appearance, her sexual sophistication, her verbal misrepresentations, and the defendant's careful attempts to ascertain her true age' (*Garnett v. State, ibid.*).

- Germany: At least *dolus eventualis* is required. The accused is criminally responsible if he/she did not know the age, but did not care about

¹¹ See J. C. Smith and B. Hogan, *Criminal Law* (7th edn, Butterworths, London, Dublin and Edinburgh, 1995), pp. 72, 471.

¹² G. Stratenwerth, *Schweizerisches Strafrecht*, BT I (4th edn, Stämpfli, Berne, 1993), p. 144.

¹³ C. Favre, M. Pellet and P. Stoudmann, *Code pénal annoté* (Ed. Bis et Ter, Lausanne, 1997), p. 383; Stratenwerth, *Schweizerisches Strafrecht*, p. 144.

¹⁴ J. Pradel and M. Danti-Juan, *Droit pénal spécial* (Ed. Cujas, Paris, 1995), p. 472. See also R. Merle and A. Vitu, *Traité de droit criminel, Droit pénal spécial* (Ed. Cujas, Paris, 1982), p. 1514; M. L. Rassat, *Droit pénal spécial* (4th edn, Dalloz, Paris, 1977), p. 474.

¹⁵ A. H. Loewy, *Criminal Law* (2nd edn, West Publishing Co., St. Paul, MN, 1987), pp. 63 ff.

¹⁶ W. R. LaFave and A. W. Scott, Jr, *Criminal Law* (Hornbook, Pocket Part, 1995), p. 29.

it. However, he/she must not have excluded the possibility that the victim was under the age limit. If he did not think at all about the age of the victim, there is no *dolus eventualis*. He/she must be acquitted.¹⁷

In sum, the picture painted by these examples is not uniform. Some countries accept a strict liability. Others require that the accused at least realised the possibility that the victim was under the age limit. However, the latter may be seen as the bottom line.

¹⁷ A. Schönke and H. Schröder, *Strafgesetzbuch* (25th edn, Verlag C. H. Beck, Munich, 1997), para. 176, p. 1290.

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Art. 8(2)(e)(v) – Pillaging a town or place, even when taken by assault

Text adopted by the PrepCom

War crime of pillaging

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.^[61]
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

^[61] As indicated by the use of the term 'private or personal use', appropriations justified by military necessity cannot constitute the crime of pillaging.

Commentary

Travaux préparatoires/Understandings of the PrepCom

The PrepCom concluded that the elements of this war crime are identical to the elements of the corresponding war crime in an international armed conflict (Art. 8(2)(b)(xvi) ICC Statute).

Legal basis of the war crime

The instruments of international humanitarian law applicable to non-international armed conflicts explicitly prohibit only the pillaging of 'persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted' (Art. 4(2) (g) AP II).

Remarks concerning the elements

The conclusions stated under the section dealing with the offence of 'pillaging a town or place, even when taken by assault' (Art. 8(2)(b)(xvi) ICC Statute) in the context of international armed conflicts also apply to a large extent to this offence when committed in the context of a non-international armed conflict. Since both offences are formulated in exactly the same manner, there are no indications in the ICC Statute that this offence has different special constituent elements in an international or

non-international armed conflict. However, it must be emphasised that there are no specific rules of international humanitarian law allowing requisitions, contributions, seizure or taking of war booty in a non-international armed conflict.

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