REGIONAL COURSES IN INTERNATIONAL LAW

Bangkok, Thailand
12 – 30 November 2012

STUDY MATERIALS
PART VI

Codification Division of the United Nations Office of Legal Affairs

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STUDY MATERIALS
PART VI

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Bangkok, Thailand
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International Humanitarian Law

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INTERNATIONAL HUMANITARIAN LAW
MR. KEVIN RIORDAN

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COURSE OUTLINE - INTERNATIONAL HUMANITARIAN LAW

Course description

The course will examine the content and application of International Humanitarian Law (IHL), also known as the “law of armed conflict” or the “law of war”.

This course will provide a basic knowledge of IHL in the context of past and present wars and conflicts.

It will focus on the protection of people and objects in international and non-international armed conflicts.

Objectives

At the conclusion of the course, students should be able to:

- Display an understanding of the system of international humanitarian law, the interpretation of IHL treaties and the identification of customary IHL.
- Apply the principles of IHL to contemporary issues of concern to the international community.

Course content

The course will focus on:

1. Definition and elements of IHL
2. Sources and principles of IHL
3. Beginning and end of armed conflicts and their geographical limits
4. International and non-international armed conflicts
5. Principle of distinction: combatants and civilians, military objectives and civilian objects
6. Protection of persons: wounded and sick, POWs, civilians and children
7. Situations resulting in the loss of protection including direct participation in hostilities
8. The challenges of relating IHL to terrorism, targeted killings, and robotic and cyber warfare

Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 1868

Document printed from the ICRC web site on the 07.08.2012

Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868.

Full text

On the proposition of the Imperial Cabinet of Russia, an International Military Commission having assembled at St. Petersburg in order to examine the expediency of forbidding the use of certain projectiles in time of war between civilized nations, and that Commission having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity, the Undersigned are authorized by the orders of their Governments to declare as follows:

Considering:

That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity;

The Contracting Parties engage mutually to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances.

They will invite all the States which have not taken part in the deliberations of the International Military Commission assembled at St. Petersburg by sending Delegates thereto, to accede to the present engagement.

This engagement is compulsory only upon the Contracting or Acceding Parties thereto in case of war between two or more of themselves; it is not applicable to non-Contracting Parties, or Parties who shall not have acceded to it.

It will also cease to be compulsory from the moment when, in a war between Contracting or Acceding Parties, a non-Contracting Party or a non-Acceding Party shall join one of the belligerents.

The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity.

Done at St. Petersburg, 29 November (11 December) 1868.

(Here follow signatures)

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 1907

Document printed from the ICRC web site on the 08.08.2012

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

Full text

(List of Contracting Parties)

Seeing that while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert;
Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization;
Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible;
Have deemed it necessary to complete and explain in certain particulars the work of the First Peace Conference, which, following on the Brussels Conference of 1874, and inspired by the ideas dictated by a wise and generous forethought, adopted provisions intended to define and govern the usages of war on land.
According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.
It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice;
On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.
Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.
They declare that it is in this sense especially that Articles I and 2 of the Regulations adopted must be understood.
The High Contracting Parties, wishing to conclude a fresh Convention to this effect, have appointed the following as their Plenipotentiaries:

(Here follow the names of Plenipotentiaries)

Who, after having deposited their full powers, found in good and due form, have agreed upon the following:

Article 1. The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.

Art. 2. The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention.

Art. 3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Art. 4. The present Convention, duly ratified, shall as between the Contracting Powers, be substituted for the Convention of 29 July 1899, respecting the laws and customs of war on land.
The Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention.

Art. 5. The present Convention shall be ratified as soon as possible.
The ratifications shall be deposited at The Hague.
The first deposit of ratifications shall be recorded in a procès-verbal signed by the Representatives of the Powers which take part therein and by the Netherlands Minister for Foreign Affairs.
The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Netherlands Government and accompanied by the instrument of ratification.
A duly certified copy of the procès-verbal relative to the first deposit of ratifications, of the notifications mentioned in the preceding paragraph, as well as of the instruments of ratification, shall be immediately sent by the Netherlands Government, through the diplomatic channel, to the powers invited to the Second Peace Conference, as well as to the other Powers which have adhered to the Convention. In the cases contemplated in the preceding paragraph the said Government shall at the same time inform them of the date on which it received the notification.

Art. 6. Non-Signatory Powers may adhere to the present Convention.
The Power which desires to adhere notifies in writing its intention to the Netherlands Government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government.
This Government shall at once transmit to all the other Powers a duly certified copy of the notification as well as of the act of adhesion, mentioning the date on which it received the notification.

Art. 7. The present Convention shall come into force, in the case of the Powers which were a party to the first deposit of ratifications, sixty days after the date of the procès-verbal of this deposit, and, in the case of the Powers which ratify subsequently or which adhere, sixty days after the notification of their ratification or of their adhesion has been received by the Netherlands Government.

Art. 8. In the event of one of the Contracting Powers wishing to denounce the present Convention, the denunciation shall be notified in writing to the Netherlands Government, which shall at once communicate a duly certified copy of the notification to all the other Powers, informing them of the date on which it was received.
The denunciation shall only have effect in regard to the notifying Power, and one year after the notification has reached the Netherlands Government.

Art. 9. A register kept by the Netherlands Ministry for Foreign Affairs shall give the date of the deposit of ratifications made in virtue of Article 5, paragraphs 3 and 4, as well as the date on which the notifications of adhesion (Article 6, paragraph 2), or of denunciation (Article 8, paragraph 1) were received.
Each Contracting Power is entitled to have access to this register and to be supplied with duly certified extracts.
In faith whereof the Plenipotentiaries have appended their signatures to the present Convention.
Done at The Hague 18 October 1907, in a single copy, which shall remain deposited in the archives of the Netherlands Government, and duly certified copies of which shall be sent, through the diplomatic channel to the Powers which have been invited to the Second Peace Conference.

(Here follow signatures)

ANNEX TO THE CONVENTION

REGULATIONS RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND

SECTION I
ON BELLIGERENTS

CHAPTER I
The qualifications of belligerents

Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

Art. 2. The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

Art. 3. The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.

CHAPTER II
Prisoners of war

Art. 4. Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.
They must be humanely treated.
All their personal belongings, except arms, horses, and military papers, remain their property.

Art. 5. Prisoners of war may be interned in a town, fortress, camp, or other place, and bound not to go beyond certain fixed limits; but they cannot be confined except as in indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist.

Art. 6. The State may utilize the labour of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war.
Prisoners may be authorized to work for the public service, for private persons, or on their own account.
Work done for the State is paid for at the rates in force for work of a similar kind done by soldiers of the national army, or, if there are none in force, at a rate according to the work executed.
When the work is for other branches of the public service or for private persons the conditions are settled in agreement with the military authorities.
The wages of the prisoners shall go towards improving their position, and the balance shall be paid them on their release, after deducting the cost of their maintenance.

Art. 7. The Government into whose hands prisoners of war have fallen is charged with their maintenance.
In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them.

Art. 8. Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.
Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment.
Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight.

Art. 9. Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to have the advantages given to prisoners of his class curtailed.

Art. 10. Prisoners of war may be set at liberty on parole if the laws of their country allow, and, in such cases, they are bound, on their personal honour, scrupulously to fulfil, both towards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.
In such cases their own Government is bound neither to require of nor accept from them any service incompatible with the parole given.

Art. 11. A prisoner of war cannot be compelled to accept his liberty on parole; similarly the hostile Government is not obliged to accede to the request of the prisoner to be set at liberty on parole.

Art. 12. Prisoners of war liberated on parole and recaptured bearing arms against the Government to whom they had pledged their honour, or against the allies of that Government, forfeit their right to be treated as prisoners of war, and can be brought before the courts.

Art. 13. Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.

Art. 14. An inquiry office for prisoners of war is instituted on the commencement of hostilities in each of the belligerent States, and, when necessary, in neutral countries which have received belligerents in their territory. It is the function of this office to reply to all inquiries about the prisoners. It receives from the various services concerned full information respecting internments arid transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war. The office must state in this return the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding, and death, as well as any observations of a special character. The individual return shall be sent to the Government of the other belligerent after the conclusion of peace.
It is likewise the function of the inquiry office to receive and collect all objects of personal use, valuables, letters, etc., found on the field of battle or left by prisoners who have been released on parole, or exchanged, or who have escaped, or died in hospitals or ambulances, and to forward them to those concerned.

Art. 15. Relief societies for prisoners of war, which are properly constituted in accordance with the laws of their country and with the object of serving as the channel for charitable effort shall receive from the belligerents, for themselves and their duly accredited agents every facility for the efficient performance of their humane task within the bounds imposed by military necessities and administrative regulations. Agents of these societies may be admitted to the places of internment for the purpose of distributing relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an undertaking in writing to comply with all measures of order and police which the latter may issue.

Art. 16. Inquiry offices enjoy the privilege of free postage. Letters, money orders, and valuables, as well as parcels by post, intended for prisoners of war, or dispatched by them, shall be exempt from all postal duties in the countries of origin and destination, as well as in the countries they pass through.
Presents and relief in kind for prisoners of war shall be admitted free of all import or other duties, as well as of payments for carriage by the State railways.

Art. 17. Officers taken prisoners shall receive the same rate of pay as officers of corresponding rank in the country where they are detained, the amount to be ultimately refunded by their own Government.

Art. 18. Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities.

Art. 19. The wills of prisoners of war are received or drawn up in the same way as for soldiers of the national army.
The same rules shall be observed regarding death certificates as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

Art. 20. After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.

CHAPTER III
The sick and wounded

Art. 21. The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention.

SECTION II
HOSTILITIES

CHAPTER I
Means of injuring the enemy, sieges, and bombardments

Art. 22. The right of belligerents to adopt means of injuring the enemy is not unlimited.

Art. 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden
(a) To employ poison or poisoned weapons;
(b) To kill or wound treacherously individuals belonging to the hostile nation or army;
(c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
(d) To declare that no quarter will be given;
(e) To employ arms, projectiles, or material calculated to cause unnecessary suffering;
(f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;
(h) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party. A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

Art. 24. Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.

Art. 25. The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

Art. 26. The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

Art. 27. In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

Art. 28. The pillage of a town or place, even when taken by assault, is prohibited.

CHAPTER II
Spies

Art. 29. A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.
Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not
considered spies: Soldiers and civilians, carrying out their mission openly, entrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.

Art. 30. A spy taken in the act shall not be punished without previous trial.

Art. 31. A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

CHAPTER III
Flags of truce

Art. 32. A person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag. He has a right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and interpreter who may accompany him.

Art. 33. The commander to whom a parlementaire is sent is not in all cases obliged to receive him.
He may take all the necessary steps to prevent the parlementaire taking advantage of his mission to obtain information.
In case of abuse, he has the right to detain the parlementaire temporarily.

Art. 34. The parlementaire loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason.

CHAPTER IV
Capitulations

Art. 35. Capitulations agreed upon between the Contracting Parties must take into account the rules of military honour.
Once settled, they must be scrupulously observed by both parties.

CHAPTER V
Armistices

Art. 36. An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

Art. 37. An armistice may be general or local. The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius.

Art. 38. An armistice must be notified officially and in good time to the competent authorities and to the troops. Hostilities are suspended immediately after the notification, or on the date fixed.

Art. 39. It rests with the Contracting Parties to settle, in the terms of the armistice, what communications may be held in the theatre of war with the inhabitants and between the inhabitants of one belligerent State and those of the other.

Art. 40. Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

Art. 41. A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary, compensation for the losses sustained.

SECTION III
MILITARY AUTHORITY OVER THE TERRITORY OF THE HOSTILE STATE

Art. 42. Territory is considered occupied when it is actually placed under the authority of the hostile army.
The occupation extends only to the territory where such authority has been established and can be exercised.

Art. 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Art. 44. A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense.

Art. 45. It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.

Art. 46. Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.
Private property cannot be confiscated.

Art. 47. Pillage is formally forbidden.

Art. 48. If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.

Art. 49. If, in addition to the taxes mentioned in the above article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.

Art. 50. No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

Art. 51. No contribution shall be collected except under a written order, and on the responsibility of a commander-in-chief.
The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.
For every contribution a receipt shall be given to the contributors.

Art. 52. Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.
Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.
Contributions in kind shall as far is possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

Art. 53. An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.
All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

Art. 54. Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.

Art. 55. The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Art. 56. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.
All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 1925

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Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925.

Full text

The undersigned Plenipotentiaries, in the name of their respective Governments:

(Here follow the names of Plenipotentiaries)

Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices, has been justly condemned by the general opinion of the civilized world; and
Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and
To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

Declare:

That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration.
The High Contracting Parties will exert every effort to induce other States to accede to the present Protocol. Such accession will be notified to the Government of the French Republic, and by the latter to all Signatory and Acceding Powers, and will take effect on the date of the notification by the Government of the French Republic.
The present Protocol of which the French and English texts are both authentic, shall be ratified as soon as possible. It shall bear today's date.
The ratifications of the present Protocol shall be addressed to the Government of the French Republic, which will at once notify the deposit of such ratification to each of the Signatory and Acceding Powers.
The instruments of ratification and accession to the present Protocol will remain deposited in the archives of the Government of the French Republic.
The present Protocol will come into force for each Signatory Power as from the date of deposit of its ratification, and, from that moment, each Power will be bound as regards other Powers which have already deposited their ratifications.

In witness whereof the Plenipotentiaries have signed the present Protocol.

Done at Geneva in a single copy, the seventeenth day of June, One Thousand Nine Hundred and Twenty-Five.

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 1980

Protocol on Non-Detectable Fragments (Protocol I), 1980

Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 1980

Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 1980

Protocol on Blinding Laser Weapons (Protocol IV), 1995

Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II as amended on 3 May 1996)

Amendment to Article I of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 2001

Protocol on Explosive Remnants of War (Protocol V), 2003

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United Nations • Nations Unies
New York, 1992

No. 22495

MULTILATERAL

Convention on prohibitions or restrictions on the use of certain conventional weapons which may he deemed to he excessively injurious or to have indiscriminate effects (with protocols). Concluded at Geneva on 10 October 1980

Authentic texts: Arabic, Chinese, English, French, Russian and Spanish.
Registered ex officio *on 2 December 1983.*

MULTILATÉRAL

Convention sur l'interdiction ou la limitation de l'emploi de certaines armes classiques qui peuvent être considérées comme produisant des effets traumatiques excessifs ou comme frappant sans discrimination (avec protocoles). Conclue à Genève le 10 octohre 1980

Textes authentiques : arabe, chinois, anglais, français, russe et espagnol.
Enregistrée d'office le 2 décembre 1983.

CONVENTION[1] ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS

The High Contracting Parties,

Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Further recalling the general principle of the protection of the civilian population against the effects of hostilities,

Basing themselves on the principle of international law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, and on the principle that prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering,

Also recalling that it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment,

[1] The Convention, including the three Protocols, came into force on 2 December 1983 in respect of the following States, i.e., six months after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations, in accordance with article 5 (1) and (3):

State	Date of deposit of the instrument of ratification, acceptance (A) or accession (a) and of acceptance of Protocols I, II and III		State	Date of deposit of the instrument of ratification, acceptance (A) or accession (a) and of acceptance of Protocols I, II and III	
Austria	14 March	1983	Japan	9 June	1982 *A*
Bulgaria	15 October	1982	Lao People's Democratic Republic	3 January	1983 *a*
Byelorussian Soviet Socialist Republic	23 June	1982	Mexico	11 February	1982
China	7 April	1982	Mongolia	8 June	1982
Czechoslovakia	31 August	1982	Poland	2 June	1983
Denmark	7 July	1982	Sweden	7 July	1982
Ecuador	4 May	1982	Switzerland	20 August	1982
Finland	8 April	1982	Ukrainian Soviet Socialist Republic	23 June	1982
German Democratic Republic	20 July	1982	Union of Soviet Socialist Republics	10 June	1982
Hungary	14 June	1982	Yugoslavia	24 May	1983

Subsequently, the Convention came into force for the following State six months after the date on which it deposited its instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations, in accordance with article 5 (2):

State	Date of deposit of the instrument of ratification and of acceptance of Protocols I, II and III
Norway	7 June 1983
(With effect from 7 December 1983.)	

Confirming their determination that in cases not covered by this Convention and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience,

Desiring to contribute to international détente, the ending of the arms race and the building of confidence among States, and hence to the realization of the aspiration of all peoples to live in peace,

Recognizing the importance of pursuing every effort which may contribute to progress towards general and complete disarmament under strict and effective international control,

Reaffirming the need to continue the codification and progressive development of the rules of international law applicable in armed conflict,

Wishing to prohibit or restrict further the use of certain conventional weapons and believing that the positive results achieved in this area may facilitate the main talks on disarmament with a view to putting an end to the production, stockpiling and proliferation of such weapons,

Emphasizing the desirability that all States become parties to this Convention and its annexed Protocols, especially the militarily significant States,

Bearing in mind that the General Assembly of the United Nations and the United Nations Disarmament Commission may decide to examine the question of a possible broadening of the scope of the prohibitions and restrictions contained in this Convention and its annexed Protocols,

Further bearing in mind that the Committee on Disarmament may decide to consider the question of adopting further measures to prohibit or restrict the use of certain conventional weapons,

Have agreed as follows:

Article 1. SCOPE OF APPLICATION

This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims,[1] including any situation described in paragraph 4 of Article 1 of Additional Protocol I to these Conventions.[2]

Article 2. RELATIONS WITH OTHER INTERNATIONAL AGREEMENTS

Nothing in this Convention or its annexed Protocols shall be interpreted as detracting from other obligations imposed upon the High Contracting Parties by international humanitarian law applicable in armed conflict.

Article 3. SIGNATURE

This Convention shall be open for signature by all States at United Nations Headquarters in New York for a period of twelve months from 10 April 1981.

Article 4. RATIFICATION, ACCEPTANCE, APPROVAL OR ACCESSION

1. This Convention is subject to ratification, acceptance or approval by the Signatories. Any State which has not signed this Convention may accede to it.

2. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

[1] United Nations, *Treaty Series*, vol. 75, p. 2.
[2] *Ibid.*, vol. 1125, p. 3.

3. Expressions of consent to be bound by any of the Protocols annexed to this Convention shall be optional for each State, provided that at the time of the deposit of its instrument of ratification, acceptance or approval of this Convention or of accession thereto, that State shall notify the Depositary of its consent to be bound by any two or more of these Protocols.

4. At any time after the deposit of its instrument of ratification, acceptance or approval of this Convention or of accession thereto, a State may notify the Depositary of its consent to be bound by any annexed Protocol by which it is not already bound.

5. Any Protocol by which a High Contracting Party is bound shall for that Party form an integral part of this Convention.

Article 5. ENTRY INTO FORCE

1. This Convention shall enter into force six months after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.

2. For any State which deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force six months after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.

3. Each of the Protocols annexed to this Convention shall enter into force six months after the date by which twenty States have notified their consent to be bound by it in accordance with paragraph 3 or 4 of Article 4 of this Convention.

4. For any State which notifies its consent to be bound by a Protocol annexed to this Convention after the date by which twenty States have notified their consent to be bound by it, the Protocol shall enter into force six months after the date on which that State has notified its consent so to be bound.

Article 6. DISSEMINATION

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate this Convention and those of its annexed Protocols by which they are bound as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction, so that those instruments may become known to their armed forces.

Article 7. TREATY RELATIONS UPON ENTRY INTO FORCE OF THIS CONVENTION

1. When one of the parties to a conflict is not bound by an annexed Protocol, the parties bound by this Convention and that annexed Protocol shall remain bound by them in their mutual relations.

2. Any High Contracting Party shall be bound by this Convention and any Protocol annexed thereto which is in force for it, in any situation contemplated by Article 1, in relation to any State which is not a party to this Convention or bound by the relevant annexed Protocol, if the latter accepts and applies this Convention or the relevant Protocol, and so notifies the Depositary.

3. The Depositary shall immediately inform the High Contracting Parties concerned of any notification received under paragraph 2 of this Article.

4. This Convention, and the annexed Protocols by which a High Contracting Party is bound, shall apply with respect to an armed conflict against that High Contracting Party of the type referred to in Article 1, paragraph 4, of Additional Protocol I to the Geneva Convention of 12 August 1949 for the Protection of War Victims:

(*a*) Where the High Contracting Party is also a party to Additional Protocol I and an authority referred to in Article 96, paragraph 3, of that Protocol has undertaken to apply the Geneva Conventions and Additional Protocol I in accordance with Article 96, paragraph 3, of the said Protocol, and undertakes to apply this Convention and the relevant annexed Protocols in relation to that conflict; or

(*b*) Where the High Contracting Party is not a party to Additional Protocol I and an authority of the type referred to in subparagraph (*a*) above accepts and applies the obligations of the Geneva Conventions and of this Convention and the relevant annexed Protocols in relation to that conflict. Such an acceptance and application shall have in relation to that conflict the following effects:

(i) The Geneva Conventions and this Convention and its relevant annexed Protocols are brought into force for the parties to the conflict with immediate effect;

(ii) The said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Geneva Conventions, this Convention and its relevant annexed Protocols; and

(iii) The Geneva Conventions, this Convention and its relevant annexed Protocols are equally binding upon all parties to the conflict.

The High Contracting Party and the authority may also agree to accept and apply the obligations of Additional Protocol I to the Geneva Conventions on a reciprocal basis.

Article 8. REVIEW AND AMENDMENTS

1. (*a*) At any time after the entry into force of this Convention any High Contracting Party may propose amendments to this Convention or any annexed Protocol by which it is bound. Any proposal for an amendment shall be communicated to the Depositary, who shall notify it to all the High Contracting Parties and shall seek their views on whether a conference should be convened to consider the proposal. If a majority, that shall not be less than eighteen of the High Contracting Parties so agree, he shall promptly convene a conference to which all High Contracting Parties shall be invited. States not parties to this Convention shall be invited to the conference as observers.

(*b*) Such a conference may agree upon amendments which shall be adopted and shall enter into force in the same manner as this Convention and the annexed Protocols, provided that amendments to this Convention may be adopted only by the High Contracting Parties and that amendments to a specific annexed Protocol may be adopted only by the High Contracting Parties which are bound by that Protocol.

2. (*a*) At any time after the entry into force of this Convention any High Contracting Party may propose additional protocols relating to other categories of conventional weapons not covered by the existing annexed protocols. Any such proposal for an additional protocol shall be communicated to the Depositary, who shall notify it to all the High Contracting Parties in accordance with subparagraph 1 (*a*) of this Article. If a majority, that shall not be less than eighteen of the High Contracting Parties so agree, the Depositary shall promptly convene a conference to which all States shall be invited.

(*b*) Such a conference may agree, with the full participation of all States represented at the conference, upon additional protocols which shall be adopted in the same manner as this Convention, shall be annexed thereto and shall enter into force as provided in paragraphs 3 and 4 of Article 5 of this Convention.

3. (*a*) If, after a period of ten years following the entry into force of this Convention, no conference has been convened in accordance with subparagraph 1 (*a*) or 2 (*a*) of this Article, any High Contracting Party may request the Depositary to convene a conference to which all High Contracting Parties shall be invited to review the scope and operation of this Convention and the Protocols annexed thereto and to consider any proposal for ammendments of this Convention or of the existing Protocols. States not parties to this Convention shall be invited as observers to the conference. The conference may agree upon amendments which shall be adopted and enter into force in accordance with subparagraph 1 (*b*) above.

(*b*) At such conference consideration may also be given to any proposal for additional protocols relating to other categories of conventional weapons not covered by the existing annexed Protocols. All States represented at the conference may participate fully in such consideration. Any additional protocols shall be adopted in the same manner as this Convention, shall be annexed thereto and shall enter into force as provided in paragraphs 3 and 4 of Article 5 of this Convention.

(*c*) Such a conference may consider whether provision should be made for the convening of a further conference at the request of any High Contracting Party if, after a similar period to that referred to in subparagraph 3 (*a*) of this Article, no conference has been convened in accordance with subparagraph 1 (*a*) or 2 (*a*) of this Article.

Article 9. DENUNCIATION

1. Any High Contracting Party may denounce this Convention or any of its annexed Protocols by so notifying the Depositary.

2. Any such denunciation shall only take effect one year after receipt by the Depositary of the notification of denunciation. If, however, on the expiry of that year the denouncing High Contracting Party is engaged in one of the situations referred to in Article 1, the Party shall continue to be bound by the obligations of this Convention and of the relevant annexed Protocols until the end of the armed conflict or occupation and, in any case, until the termination of operations connected with the final release, repatriation or re-establishment of the persons protected by the rules of international law applicable in armed conflict, and in the case of any annexed Protocol containing provisions concerning situations in which peace-keeping, observation or similar functions are performed by United Nations forces or missions in the area concerned, until the termination of those functions.

3. Any denunciation of this Convention shall be considered as also applying to all annexed Protocols by which the denouncing High Contracting Party is bound.

4. Any denunciation shall have effect only in respect of the denouncing High Contracting Party.

5. Any denunciation shall not affect the obligations already incurred, by reason of an armed conflict, under this Convention and its annexed Protocols by such denouncing High Contracting Party in respect of any act committed before this denunciation becomes effective.

Article 10. DEPOSITARY

1. The Secretary-General of the United Nations shall be the Depositary of this Convention and of its annexed Protocols.

2. In addition to his usual functions, the Depositary shall inform all States of:

(*a*) Signatures affixed to this Convention under Article 3;

(*b*) Deposits of instruments of ratification, acceptance or approval of or accession to this Convention deposited under Article 4;

(*c*) Notifications of consent to be bound by annexed Protocols under Article 4;

(*d*) The dates of entry into force of this Convention and of each of its annexed Protocols under Article 5; and

(*e*) Notifications of denunciation received under Article 9 and their effective date.

Article 11. AUTHENTIC TEXTS

The original of this Convention with the annexed Protocols, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Depositary, who shall transmit certified true copies thereof to all States.

PROTOCOL ON NON-DETECTABLE FRAGMENTS

(PROTOCOL I)

It is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.

PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES

(PROTOCOL II)

Article 1. MATERIAL SCOPE OF APPLICATION

This Protocol relates to the use on land of the mines, booby-traps and other devices defined herein, including mines laid to interdict beaches, waterway crossings or river crossings, but does not apply to the use of anti-ship mines at sea or in inland waterways.

Article 2. DEFINITIONS

For the purpose of this Protocol:

1. "Mine" means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle, and "remotely delivered mine" means any mine so defined delivered by artillery, rocket, mortar or similar means or dropped from an aircraft.

2. "Booby-trap" means any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.

3. "Other devices" means manually-emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time.

4. "Military objective" means, so far as objects are concerned, any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

5. "Civilian objects" are all objects which are not military objectives as defined in paragraph 4.

6. "Recording" means a physical, administrative and technical operation designed to obtain, for the purpose of registration in the official records, all available information facilitating the location of minefields, mines and booby-traps.

Article 3. GENERAL RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES

1. This Article applies to:

(*a*) Mines;

(*b*) Booby-traps; and

(*c*) Other devices.

2. It is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians.

3. The indiscriminate use of weapons to which this Article applies is prohibited. Indiscriminate use is any placement of such weapons:

(*a*) Which is not on, or directed against, a military objective; or

(*b*) Which employs a method or means of delivery which cannot be directed at a specific military objective; or

(*c*) Which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

4. All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.

Article 4. RESTRICTIONS ON THE USE OF MINES OTHER THAN REMOTELY DELIVERED MINES, BOOBY-TRAPS AND OTHER DEVICES IN POPULATED AREAS

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1. This Article applies to:

(*a*) Mines other than remotely delivered mines;

(*b*) Booby-traps; and

(*c*) Other devices.

2. It is prohibited to use weapons to which this Article applies in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:

(*a*) They are placed on or in the close vicinity of a military objective belonging to or under the control of an adverse party; or

(*b*) Measures are taken to protect civilians from their effects, for example, the posting of warning signs, the posting of sentries, the issue of warnings or the provision of fences.

Article 5. RESTRICTIONS ON THE USE OF REMOTELY DELIVERED MINES

1. The use of remotely delivered mines is prohibited unless such mines are only used within an area which is itself a military objective or which contains military objectives, and unless:

(*a*) Their location can be accurately recorded in accordance with Article 7 (1) (*a*); or

(*b*) An effective neutralizing mechanism is used on each such mine, that is to say, a self-actuating mechanism which is designed to render a mine harmless or cause it to destroy itself when it is anticipated that the mine will no longer serve the military purpose for which it was placed in position, or a remotely-controlled mechanism which is designed to render harmless or destroy a mine when the mine no longer serves the military purpose for which it was placed in position.

2. Effective advance warning shall be given of any delivery or dropping of remotely delivered mines which may affect the civilian population, unless circumstances do not permit.

Article 6. PROHIBITION ON THE USE OF CERTAIN BOOBY-TRAPS

1. Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all circumstances to use:

(*a*) Any booby-trap in the form of an apparently harmless portable object which is specifically designed and constructed to contain explosive material and to detonate when it is disturbed or approached, or

(*b*) Booby-traps which are in any way attached to or associated with:

(i) Internationally recognized protective emblems, signs or signals;

(ii) Sick, wounded or dead persons;

(iii) Burial or cremation sites or graves;

(iv) Medical facilities, medical equipment, medical supplies or medical transportations;

(v) Children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;

(vi) Food or drink;

(vii) Kitchen utensils or appliances except in military establishments, military locations or military supply depots;

(viii) Objects clearly of a religious nature;

(ix) Historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;

(x) Animals or their carcasses.

2. It is prohibited in all circumstances to use any booby-trap which is designed to cause superfluous injury or unnecessary suffering.

Article 7. RECORDING AND PUBLICATION OF THE LOCATION OF MINEFIELDS, MINES AND BOOBY-TRAPS

1. The parties to a conflict shall record the location of:

(*a*) All pre-planned minefields laid by them; and

(*b*) All areas in which they have made large-scale and pre-planned use of booby-traps.

2. The parties shall endeavour to ensure the recording of the location of all other minefields, mines and booby-traps which they have laid or placed in position.

3. All such records shall be retained by the parties who shall:

(*a*) Immediately after the cessation of active hostilities:

(i) Take all necessary and appropriate measures, including the use of such records, to protect civilians from the effects of minefields, mines and booby-traps; and either

(ii) In cases where the forces of neither party are in the territory of the adverse party, make available to each other and to the Secretary-General of the United Nations all information in their possession concerning the location of minefields, mines and booby-traps in the territory of the adverse party; or

(iii) Once complete withdrawal of the forces of the parties from the territory of the adverse party has taken place, make available to the adverse party and to the Secretary-General of the United Nations all information in their possession concerning the location of minefields, mines and booby-traps in the territory of the adverse party;

(*b*) When a United Nations force or mission performs functions in any area, make available to the authority mentioned in Article 8 such information as is required by that Article;

(*c*) Whenever possible, by mutual agreement, provide for the release of information concerning the location of minefields, mines and booby-traps, particularly in agreements governing the cessation of hostilities.

Article 8. PROTECTION OF UNITED NATIONS FORCES AND MISSIONS FROM THE EFFECTS OF MINEFIELDS, MINES AND BOOBY-TRAPS

1. When a United Nations force or mission performs functions of peace-keeping, observation or similar functions in any area, each party to the conflict shall, if requested by the head of the United Nations force or mission in that area, as far as it is able:

(*a*) Remove or render harmless all mines or booby-traps in that area;

(*b*) Take such measures as may be necessary to protect the force or mission from the effects of minefields, mines and booby-traps while carrying out its duties; and

(*c*) Make available to the head of the United Nations force or mission in that area, all information in the party's possession concerning the location of minefields, mines and booby-traps in that area.

2. When a United Nations fact-finding mission performs functions in any area, any party to the conflict concerned shall provide protection to that mission except where, because of the size of such mission, it cannot adequately provide such protection. In that case it shall make available to the head of the mission the information in its possession concerning the location of minefields, mines and booby-traps in that area.

Article 9. INTERNATIONAL CO-OPERATION IN THE REMOVAL OF MINEFIELDS, MINES AND BOOBY-TRAPS

After the cessation of active hostilities, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of information and technieal and material assistance — including, in appropriate circumstances, joint operations — necessary to remove or otherwise render ineffective minefields, mines and booby-traps placed in position during the conflict.

TECHNICAL ANNEX TO THE PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES (PROTOCOL II)

Guidelines on Recording

Whenever an obligation for the recording of the location of minefields, mines and booby-traps arises under the Protocol, the following guidelines shall be taken into account.

1. With regard to pre-planned minefields and large-scale and pre-planned use of booby-traps:

(*a*) Maps, diagrams or other records should be made in such a way as to indicate the extent of the minefield or booby-trapped area; and

(*b*) The location of the minefield or booby-trapped area should be specified by relation to the co-ordinates of a single reference point and by the estimated dimensions of the area containing mines and booby-traps in relation to that single reference point.

2. With regard to other minefields, mines and booby-traps laid or placed in position:

In so far as possible, the relevant information specified in paragraph 1 above should be recorded so as to enable the areas containing minefields, mines and booby-traps to be identified.

PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF INCENDIARY WEAPONS

(*PROTOCOL III*)

Article 1. DEFINITIONS

For the purpose of this Protocol:

1. "Incendiary weapon" means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat,

or a combination thereof, produced by a chemical reaction of a substance delivered on the target.

(*a*) Incendiary weapons can take the form of, for example, flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances.

(*b*) Incendiary weapons do not include:

(i) Munitions which may have incidental ineendiary effects, such as illuminants, tracers, smoke or signalling systems;

(ii) Munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives, such as armoured vehieles, aircraft and installations or facilities.

2. "Concentration of civilians" means any concentration of civilians, be it permanent or temporary, such as in inhabited parts of cities, or inhabited towns or villages, or as in camps or columns of refugees or evacuees, or groups of nomads.

3. "Military objective" means, so far as objects are concerned, any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

4. "Civilian objects" are all objects which are not military objectives as defined in paragraph 3.

5. "Feasible precautions" are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.

Article 2. PROTECTION OF CIVILIANS AND CIVILIAN OBJECTS

1. It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons.

2. It is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.

3. It is further prohibited to make any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

4. It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.

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New York, 2001

No. 22495. Multilateral

CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS (WITH PROTOCOLS I, II AND III). GENEVA, 10 OCTOBER 1980[1]

ADDITIONAL PROTOCOL TO THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS (PROTOCOL IV, ENTITLED PROTOCOL ON BLINDING LASER WEAPONS). VIENNA, 13 OCTOBER 1995

Entry into force : 30 July 1998, in accordance with article 2 of the Additional Protocol

Authentic texts : Arabic, Chinese, English, French, Russian and Spanish *

Registration with the Secretariat of the United Nations : ex officio, 30 July 1998

No. 22495. Multilatéral

CONVENTION SUR L'INTERDICTION OU LA LIMITATION DE L'EMPLOI DE CERTAINES ARMES CLASSIQUES QUI PEUVENT ÊTRE CONSIDÉRÉES COMME PRODUISANT DES EFFETS TRAUMATIQUES EXCESSIFS OU COMME FRAPPANT SANS DISCRIMINATION (AVEC PROTOCOLES I, II ET III). GENÈVE, 10 OCTOBRE 1980[1]

PROTOCOLE ADDITIONNEL À LA CONVENTION SUR L'INTERDICTION OU LA LIMITATION DE L'EMPLOI DE CERTAINES ARMES CLASSIQUES QUI PEUVENT ÊTRE CONSIDÉRÉES COMME PRODUISANT DES EFFETS TRAUMATIQUES EXCESSIFS OU COMME FRAPPANT SANS DISCRIMINATION (PROTOCOLE IV INTITULÉ PROTOCOLE RELATIF AUX ARMES À LASER AVEUGLANTES). VIENNE, 13 OCTOBRE 1995

Entrée en vigueur : 30 juillet 1998, conformément à l'article 2 du Protocole additionnel

Textes authentiques : arabe, chinois, anglais, français, russe et espagnol

Enregistrement auprès du Secrétariat des Nations Unies : d'office, 30 juillet 1998

* For the Spanish text of the Protocol, *See* Corrigenda at the back of the volume

1. United Nations, *Treaty Series*, Vol. 1342, I-22495 — Nations Unies, *Recueil des Traités*, Vol. 1342, I-22495

[ENGLISH TEXT — TEXTE ANGLAIS]

ADDITIONAL PROTOCOL TO THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS

Article 1.

ADDITIONAL PROTOCOL

The following protocol shall be annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects ("the Convention") as Protocol IV:

"PROTOCOL ON BLINDING LASER WEAPONS

(PROTOCOL IV)

Article 1

It is prohibited to employ laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices. The High Contracting Parties shall not transfer such weapons to any State or non-State entity.

Article 2.

In the employment of laser systems, the High Contracting Parties shall take all feasible precautions to avoid the incidence of permanent blindness to unenhanced vision. Such precautions shall include training of their armed forces and other practical measures.

Article 3.

Blinding as an incidental or collateral effect of the legitimate military employment of laser systems, including laser systems used against optical equipment, is not covered by the prohibition of this Protocol.

Article 4.

For the purpose of this Protocol "permanent blindness" means irreversible and uncorrectable loss of vision which is seriously disabling with no prospect of recovery. Serious disability is equivalent to visual acuity of less than 20/200 Snellen measured using both eyes."

Article 2.

ENTRY INTO FORCE

This Protocol shall enter into force as provided in paragraphs 3 and 4 of Article 5 of the Convention.

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PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES AS AMENDED ON 3 MAY 1996 (PROTOCOL II AS AMENDED ON 3 MAY 1996) ANNEXED TO THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS. GENEVA, 3 MAY 1996

Entry into force : 3 December 1998, in accordance with article 2 of the Protocol

Anthentic texts : Arabic, Chinese, English, French, Russian and Spanish

Registration with the Secretariat of the United Nations : ex officio, 3 December 1998

PROTOCOLE SUR L'INTERDICTION OU LA LIMITATION DE L'EMPLOI DES MINES, PIÈGES ET AUTRES DISPOSITIFS, TEL QU'IL A ÉTÉ MODIFIÉ LE 3 MAI 1996 (PROTOCOLE II, TEL QU'IL A ÉTÉ MODIFIÉ LE 3 MAI 1996) ANNEXÉ À LA CONVENTION SUR L'INTERDICTION OU LA LIMITATION DE L'EMPLOI DE CERTAINES ARMES CLASSIQUES QUI PEUVENT ÊTRE CONSIDÉRÉES COMME PRODUISANT DES EFFETS TRAUMATIQUES EXCESSIFS OU COMME FRAPPANT SANS DISCRIMINATION. GENÈVE, 3 MAI 1996

Entrée en vigueur : 3 décembre 1998, conformément à l'article 2 du Protocole

Textes authentiques : arabe, chinois, anglais, français, russe et espagnol

Enregistrement anprès dn Secrétariat des Nations Unies : d'office, 3 décembre 1998

[ENGLISH TEXT — TEXTE ANGLAIS]

PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES AS AMENDED ON 3 MAY 1996 (PROTOCOL II AS AMENDED ON 3 MAY 1996) ANNEXED TO THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS

ARTICLE 1. AMENDED PROTOCOL

The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices (Protocol II), annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects ("the Convention") is hereby amended. The text of the Protocol as amended will read as follows:

"Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices as Amended on 3 May 1996

(Protocol II as amended on 3 May 1996)

Article 1. Scope of application

1. This Protocol relates to the use on land of the mines, booby-traps and other devices, defined herein, including mines laid to interdict beaches, waterway crossings or river crossings, but does not apply to the use of anti-ship mines at sea or in inland waterways.

2. This Protocol shall apply, in addition to situations referred to in Article 1 of this Convention, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Protocol.

4. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

5. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

6. The application of the provisions of this Protocol to parties to a conflict, which are not High Contracting Parties that have accepted this Protocol, shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.

Article 2. Definitions

For the purpose of this Protocol:

1. "Mine" means a munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a person or vehicle.

2. "Remotely-delivered mine" means a mine not directly emplaced but delivered by artillery, missile, rocket, mortar, or similar means, or dropped from an aircraft. Mines delivered from a land-based system from less than 500 metres are not considered to be "remotely delivered", provided that they are used in accordance with Article 5 and other relevant Articles of this Protocol.

3. "Anti-personnel mine" means a mine primarily designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons.

4. "Booby-trap" means any device or material which is designed, constructed, or adapted to kill or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.

5. "Other devices" means manually-emplaced munitions and devices including improvised explosive devices designed to kill, injure or damage and which are actuated manually, by remote control or automatically after a lapse of time.

6. "Military objective" means, so far as objects are concerned, any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

7. "Civilian objects" are all objects which are not military objectives as defined in paragraph 6 of this Article.

8. "Minefield" is a defined area in which mines have been emplaced and "mined area" is an area which is dangerous due to the presence of mines. "Phoney minefield" means an area free of mines that simulates a minefield. The term "minefield" includes phoney mine fields.

9. "Recording" means a physical, administrative and technical operation designed to obtain, for the purpose of registration in official records, all available information facilitating the location of minefields, mined areas, mines, booby-traps and other devices.

10. "Self-destruction mechanism" means an incorporated or externally attached automatically-functioning mechanism which secures the destruction of the munition into which it is incorporated or to which it is attached.

11. "Self-neutralization mechanism" means an incorporated automatically-functioning mechanism which renders inoperable the munition into which it is incorporated.

12. "Self-deactivating" means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component, for example, a battery, that is essential to the operation of the munition.

13. "Remote control" means control by commands from a distance.

14. "Anti-handling device" means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with the mine.

15. "Transfer" involves, in addition to the physical movement of mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced mines.

Article 3. General restrictions on the use of mines, booby-traps and other devices

1. This Article applies to:

(a) Mines;

(b) Booby-traps; and

(c) Other devices.

2. Each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all mines, booby-traps, and other devices employed by it and undertakes to clear, remove, destroy or maintain them as specified in Article 10 of this Protocol.

3. It is prohibited in all circumstances to use any mine, booby-trap or other device which is designed or of a nature to cause superfluous injury or unnecessary suffering.

4. Weapons to which this Article applies shall strictly comply with the standards and limitations specified in the Technical Annex with respect to each particular category.

5. It is prohibited to use mines, booby-traps or other devices which employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations.

6. It is prohibited to use a self-deactivating mine equipped with an anti-handling device that is designed in such a manner that the anti-handling device is capable of functioning after the mine has ceased to be capable of functioning.

7. It is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians or civilian objects.

8. The indiscriminate use of weapons to which this Article applies is prohibited. Indiscriminate use is any placement of such weapons:

(a) Which is not on, or directed against, a military objective. In case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used;

(b) Which employs a method or means of delivery which cannot be directed at a specific military objective; or

(c) Which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

9. Several clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are not to be treated as a single military objective.

10. All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations. These circumstances include, but are not limited to:

(a) The short- and long-term effect of mines upon the local civilian population, for the duration of the mine field;

(b) Possible measures to protect civilians (for example, fencing, signs, warning and monitoring);

(c) The availability and feasibility of using alternatives; and

(d) The short- and long-term military requirements for a minefield.

11. Effective advance warning shall be given of any emplacement of mines, booby-traps and other devices which may affect the civilian population, unless circumstances do not permit.

Article 4. Restrictions on the use of anti-personnel mines

It is prohibited to use anti-personnel mines which are not detectable, as specified in paragraph 2 of the Technical Annex.

Article 5. Restrictions on the use of anti-personnel mines other than remotely-delivered mines

1. This Article applies to anti-personnel mines other than remotely-delivered mines.

2. It is prohibited to use weapons to which this Article applies which are not in compliance with the provisions on self-destruction and self-deactivation in the Technical Annex, unless:

(a) Such weapons are placed within a perimeter-marked area which is monitored by military personnel and protected by fencing or other means, to ensure the effective exclusion of civilians from the area. The marking must be of a distinct and durable character and must at least be visible to a person who is about to enter the perimeter-marked area; and

(b) Such weapons are cleared before the area is abandoned, unless the area is turned over to the forces of another State which accept responsibility for the maintenance of the protections required by this Article and the subsequent clearance of those weapons.

3. A party to a conflict is relieved from further compliance with the provisions of sub-paragraphs 2 (a) and 2 (b) of this Article only if such compliance is not feasible due to forcible loss of control of the area as a result of enemy military action, including situations where direct enemy military action makes it impossible to comply. If that party regains control of the area, it shall resume compliance with the provisions of sub-paragraphs 2 (a) and 2 (b) of this Article.

4. If the forces of a party to a conflict gain control of an area in which weapons to which this Article applies have been laid, such forces shall, to the maximum extent feasible, maintain and, if necessary, establish the protections required by this Article until such weapons have been cleared.

5. All feasible measures shall be taken to prevent the unauthorized removal, defacement, destruction or concealment of any device, system or material used to establish the perimeter of a perimeter-marked area.

6. Weapons to which this Article applies which propel fragments in a horizontal arc of less than 90 degrees and which are placed on or above the ground may be used without the measures provided for in sub-paragraph 2 (a) of this Article for a maximum period of 72 hours, if:

(a) They are located in immediate proximity to the military unit that emplaced them; and

(b) The area is monitored by military personnel to ensure the effective exclusion of civilians.

Article 6. Restrictions on the use of remotely-delivered mines

1. It is prohibited to use remotely-delivered mines unless they are recorded in accordance with sub-paragraph I(b) of the Technical Annex.

2. It is prohibited to use remotely-delivered anti-personnel mines which are not in compliance with the provisions on self-destruction and self-deactivation in the Technical Annex.

3. It is prohibited to use remotely-delivered mines other than anti-personnel mines, unless, to the extent feasible, they are equipped with an effective self-destruction or self neutralization mechanism and have a back-up self-deactivation feature, which is designed so that the mine will no longer function as a mine when the mine no longer serves the military purpose for which it was placed in position.

4. Effective advance warning shall be given of any delivery or dropping of remotely delivered mines which may affect the civilian population, unless circumstances do not permit.

Article 7. Prohibitions on the use of booby-traps and other devices

1. Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all circumstances to use booby-traps and other devices which are in any way attached to or associated with:

(a) Internationally recognized protective emblems, signs or signals;

(b) Sick, wounded or dead persons;

(c) Burial or cremation sites or graves;

(d) Medical facilities, medical equipment, medical supplies or medical transportation;

(e) Children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;

(f) Food or drink;

(g) Kitchen utensils or appliances except in military establishments, military locations or military supply depots;

(h) Objects clearly of a religious nature;

(i) Historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or

(j) Animals or their carcasses.

2. It is prohibited to use booby-traps or other devices in the form of apparently harmless portable objects which are specifically designed and constructed to contain explosive material.

3. Without prejudice to the provisions of Article 3, it is prohibited to use weapons to which this Article applies in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:

(a) They are placed on or in the close vicinity of a military objective; or

(b) Measures are taken to protect civilians from their effects, for example, the posting of warning sentries, the issuing of warnings or the provision of fences.

Article 8. Transfers

1. In order to promote the purposes of this Protocol, each High Contracting Party:

(a) Undertakes not to transfer any mine the use of which is prohibited by this Protocol;

(b) Undertakes not to transfer any mine to any recipient other than a State or a State agency authorized to receive such transfers;

(c) Undertakes to exercise restraint in the transfer of any mine the use of which is restricted by this Protocol. In particular, each High Contracting Party undertakes not to transfer any anti-personnel mines to States which are not bound by this Protocol, unless the recipient State agrees to apply this Protocol; and

(d) Undertakes to ensure that any transfer in accordance with this Article takes place in full compliance, by both the transferring and the recipient State, with the relevant provisions of this Protocol and the applicable norms of international humanitarian law.

2. In the event that a High Contracting Party declares that it will defer compliance with specific provisions on the use of certain mines, as provided for in the Technical Annex, sub-paragraph 1 (a) of this Article shall however apply to such mines.

3. All High Contracting Parties, pending the entry into force of this Protocol, will refrain from any actions which would be inconsistent with sub-paragraph 1 (a) of this Article.

Article 9. Recording and use of information on minefields, mined areas, mines, booby-traps and other devices

1. All information concerning minefields, mined areas, mines, booby-traps and other devices shall be recorded in accordance with the provisions of the Technical Annex.

2. All such records shall be retained by the parties to a conflict, who shall, without delay after the cessation of active hostilities, take all necessary and appropriate measures, including the use of such information, to protect civilians from the effects of minefields, mined areas, mines, booby-traps and other devices in areas under their control.

At the same time, they shall also make available to the other party or parties to the conflict and to the Secretary-General of the United Nations all such information in their possession concerning minefields, mined areas, mines, booby-traps and other devices laid by them in areas no longer under their control; provided, however, subject to reciprocity, where the forces of a party to a conflict are in the territory of an adverse party, either party may withhold such information from the Secretary-General and the other party, to the extent that security interests require such withholding, until neither party is in the territory of the other. In the latter case, the information withheld shall be disclosed as soon as those security interests permit. Wherever possible, the parties to the conflict shall seek, by mutual agreement, to provide for the release of such information at the earliest possible time in a manner consistent with the security interests of each party.

3. This Article is without prejudice to the provisions of Articles 10 and 12 of this Protocol.

Article 10. Removal of mine fields, mined areas, mines, booby-traps and other devices and international cooperation

1. Without delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained in accordance with Article 3 and paragraph 2 of Article 5 of this Protocol.

2. High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines, booby-traps and other devices in areas under their control.

3. With respect to minefields, mined areas, mines, booby-traps and other devices laid by a party in areas over which it no longer exercises control, such party shall provide to the party in control of the area pursuant to paragraph 2 of this Article, to the extent permitted by such party, technical and material assistance necessary to fulfil such responsibility.

4. At all times necessary, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil such responsibilities.

Article 11. Technological cooperation and assistance

1 . Each High Contracting Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information concerning the implementation of this Protocol and means of mine clearance. In particular, High Contracting Parties shall not impose undue restrictions on the provision of mine clearance equipment and related technological information for humanitarian purposes.

2. Each High Contracting Party undertakes to provide information to the database on mine clearance established within the United Nations System, especially information concerning various means and technologies of mine clearance, and lists of experts, expert agencies or national points of contact on mine clearance.

3. Each High Contracting Party in a position to do so shall provide assistance for mine clearance through the United Nations System, other international bodies or on a bilateral basis, or contribute to the United Nations Voluntary Trust Fund for Assistance in Mine Clearance.

4. Requests by High Contracting Parties for assistance, substantiated by relevant information, may be submitted to the United Nations, to other appropriate bodies or to other States. These requests may be submitted to the Secretary-General of the United Nations, who shall transmit them to all High Contracting Parties and to relevant international organizations.

5. In the case of requests to the United Nations, the Secretary-General of the United Nations, within the resources available to the Secretary-General of the United Nations, may take appropriate steps to assess the situation and, in cooperation with the requesting High Contracting Party, determine the appropriate provision of assistance in mine clearance or implementation of the Protocol. The Secretary-General may also report to High Contracting Parties on any such assessment as well as on the type and scope of assistance required.

6. Without prejudice to their constitutional and other legal provisions, the High Contracting Parties undertake to cooperate and transfer technology to facilitate the implementation of the relevant prohibitions and restrictions set out in this Protocol.

7. Each High Contracting Party has the right to seek and receive technical assistance, where appropriate, from another High Contracting Party on specific relevant technology, other than weapons technology, as necessary and feasible, with a view to reducing any period of deferral for which provision is made in the Technical Annex.

Article 12. Protection from the effects of minefields, mined areas, mines, booby-traps and other devices

1. Application

(a) With the exception of the forces and missions referred to in sub-paragraph 2(a)(i) of this Article, this Article applies only to missions which are performing functions in an area with the consent of the High Contracting Party on whose territory the functions are performed.

(b) The application of the provisions of this Article to parties to a conflict which are not High Contracting Parties shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.

(c) The provisions of this Article are without prejudice to existing international humanitarian law, or other international instruments as applicable, or decisions by the Security Council of the United Nations, which provide for a higher level of protection to personnel functioning in accordance with this Article.

2. Peace-keeping and certain other forces and mission

(a) This paragraph applies to:

(i) Any United Nations force or mission performing peace-keeping, observation or similar functions in any area in accordance with the Charter of the United Nations; and

(ii) Any mission established pursuant to Chapter VIII of the Charter of the United Nations and performing its functions in the area of a conflict.

(b) Each High Contracting Party or party to a conflict, if so requested by the head of a force or mission to which this paragraph applies, shall:

(i) So far as it is able, take such measures as are necessary to protect the force or mission from the effects of mines, booby-traps and other devices in any area under its control;

(ii) If necessary in order effectively to protect such personnel, remove or render harmless, so far as it is able, all mines, booby-traps and other devices in that area; and

(iii) Inform the head of the force or mission of the location of all known minefields, mined areas, mines, booby-traps and other devices in the area in which the force or mission is performing its functions and, so far as is feasible, make available to the head of the force or mission all information in its possession concerning such minefields, mined areas, mines, booby-traps and other devices.

3. Humanitarian and fact-finding missions of the United Nations System

(a) This paragraph applies to any humanitarian or fact-finding mission of the United Nations System.

(b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall:

(i) Provide the personnel of the mission with the protections set out in sub-paragraph 2(b)(i) of this Article; and

(ii) If access to or through any place under its control is necessary for the performance of the mission's functions and in order to provide the personnel of the mission with safe passage to or through that place:

(aa) Unless on-going hostilities prevent, inform the head of the mission of a safe route to that place if such information is available; or

(bb) If information identifying a safe route is not provided in accordance with sub-paragraph (aa), so far as is necessary and feasible, clear a lane through minefields.

4. Missions of the International Committee of the Red Cross

(a) This paragraph applies to any mission of the International Committee of the Red Cross performing functions with the consent of the host State or States as provided for by

the Geneva Conventions of 12 August 1949 and, where applicable, their Additional Protocols.

(b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall:

i) Provide the personnel of the mission with the protections set out in sub-paragraph 2(b)(i) of this Article; and

(ii) Take the measures set out in sub-paragraph 3(b)(ii) of this Article.

5. Other humanitarian missions and missions of enquiry

(a) Insofar as paragraphs 2, 3 and 4 of this Article do not apply to them, this paragraph applies to the following missions when they are performing functions in the area of a conflict or to assist the victims of a conflict:

(i) Any humanitarian mission of a national Red Cross or Red Crescent society or of their International Federation;

(ii) Any mission of an impartial humanitarian organization, including any impartial humanitarian demining mission; and

(iii) Any mission of enquiry established pursuant to the provisions of the Geneva Conventions of 12 August 1949 and, where applicable, their Additional Protocols.

(b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall, so far as is feasible:

(i) Provide the personnel of the mission with the protections set out in sub-paragraph 2(b)(i) of this Article; and

(ii) Take the measures set out in sub-paragraph 3(b)(ii) of this Article.

6. Confidentiality

All information provided in confidence pursuant to this Article shall be treated by the recipient in strict confidence and shall not be released outside the force or mission concerned without the express authorization of the provider of the information.

7. Respect for laws and regulations

Without prejudice to such privileges and immunities as they may enjoy or to the requirements of their duties, personnel participating in the forces and missions referred to in this Article shall:

(a) Respect the laws and regulations of the host State; and

Article 13. Consultations of High Contracting Parties

(b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

1. The High Contracting Parties undertake to consult and cooperate with each other on all issues related to the operation of this Protocol. For this purpose, a conference of High Contracting Parties shall be held annually.

2. Participation in the annual conferences shall be determined by their agreed Rules of Procedure.

3. The work of the conference shall include:

(a) Review of the operation and status of this Protocol;

(b) Consideration of matters arising from reports by High Contracting Parties according to paragraph 4 of this Article;

(c) Preparation for review conferences; and

(d) Consideration of the development of technologies to protect civilians against indiscriminate effects of mines.

4. The High Contracting Parties shall provide annual reports to the Depositary, who shall circulate them to all High Contracting Parties in advance of the conference, on any of the following matters:

(a) Dissemination of information on this Protocol to their armed forces and to the civilian population;

(b) Mine clearance and rehabilitation programmes;

(c) Steps taken to meet technical requirements of this Protocol and any other relevant information pertaining thereto;

(d) Legislation related to this Protocol;

(e) Measures taken on international technical information exchange, on international cooperation on mine clearance, and on technical cooperation and assistance; and

(f) Other relevant matters.

5. The cost of the Conference of High Contracting Parties shall be borne by the High Contracting Parties and States not parties participating in the work of the conference, in accordance with the United Nations scale of assessment adjusted appropriately.

Article 14. Compliance

1. Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction or control.

2. The measures envisaged in paragraph 1 of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol, wilfully kill or cause serious injury to civilians and to bring such persons to justice.

3. Each High Contracting Party shall also require that its armed forces issue relevant military instructions and operating procedures and that armed forces personnel receive training commensurate with their duties and responsibilities to comply with the provisions of this Protocol.

4. The High Contracting Parties undertake to consult each other and to cooperate with each other bilaterally, through the Secretary-General of the United Nations or through other appropriate international procedures, to resolve any problems that may arise with regard to the interpretation and application of the provisions of this Protocol.

TECHNICAL ANNEX

1. Recording

(a) Recording of the location of mines other than remotely-delivered mines, minefields, mined areas, booby-traps and other devices shall be carried out in accordance with the following provisions:

(i) The location of the minefields, mined areas and areas of booby-traps and other devices shall be specified accurately by relation to the coordinates of at least two reference points and the estimated dimensions of the area containing these weapons in relation to those reference points;

(ii) Maps, diagrams or other records shall be made in such a way as to indicate the location of minefields, mined areas, booby-traps and other devices in relation to reference points, and these records shall also indicate their perimeters and extent; and

(iii) For purposes of detection and clearance of mines, booby-traps and other devices, maps, diagrams or other records shall contain complete information on the type, number, emplacing method, type of fuse and life time, date and time of laying, anti-handling devices (if any) and other relevant information on all these weapons laid. Whenever feasible the minefield record shall show the exact location of every mine, except in row minefields where the row location is sufficient. The precise location and operating mechanism of each booby-trap laid shall be individually recorded.

(b) The estimated location and area of remotely-delivered mines shall be specified by coordinates of reference points (normally corner points) and shall be ascertained and when feasible marked on the ground at the earliest opportunity. The total number and type of mines laid, the date and time of laying and the self-destruction time periods shall also be recorded.

(c) Copies of records shall be held at a level of command sufficient to guarantee their safety as far as possible.

(d) The use of mines produced after the entry into force of this Protocol is prohibited unless they are marked in English or in the respective national language or languages with the following information:

(i) Name of the country of origin;

(ii) Month and year of production; and

(iii) Serial number or lot number.

The marking should be visible, legible, durable and resistant to environmental effects, as far as possible.

2. Specifications on detectability

(a) With respect to anti-personnel mines produced after 1 January 1997, such mines shall incorporate in their construction a material or device that enables the mine to be detected by commonly-available technical mine detection equipment and provides a response signal equivalent to a signal from 8 grammes or more of iron in a single coherent mass.

(b) With respect to anti-personnel mines produced before 1 January 1997, such mines shall either incorporate in their construction, or have attached prior to their emplacement, in a manner not easily removable, a material or device that enables the mine to be detected by commonly-available technical mine detection equipment and provides a response signal equivalent to a signal from 8 grammes or more of iron in a single coherent mass.

(c) In the event that a High Contracting Party determines that it cannot immediately comply with sub-paragraph (b), it may declare at the time of its notification of consent to be bound by this Protocol that it will defer compliance with sub-paragraph (b) for a period not to exceed 9 years from the entry into force of this Protocol. In the meantime it shall, to the extent feasible, minimize the use of anti-personnel mines that do not so comply.

3. Specifications on self-destruction and self-deactivation

(a) All remotely-delivered anti-personnel mines shall be designed and constructed so that no more than 10% of activated mines will fail to self-destruct within 30 days after emplacement, and each mine shall have a back-up self-deactivation feature designed and constructed so that, in combination with the self-destruction mechanism, no more than one in one thousand activated mines will function as a mine 120 days after emplacement.

(b) All non-remotely delivered anti-personnel mines, used outside marked areas, as defined in Article 5 of this Protocol, shall comply with the requirements for self-destruction and self-deactivation stated in sub-paragraph (a).

(c) In the event that a High Contracting Party determines that it cannot immediately comply with sub-paragraphs (a) and/or (b), it may declare at the time of its notification of consent to be bound by this Protocol, that it will, with respect to mines produced prior to the entry into force of this Protocol, defer compliance with sub-paragraphs (a) and/or (b) for a period not to exceed 9 years from the entry into force of this Protocol.

During this period of deferral, the High Contracting Party shall:

(i) Undertake to minimize, to the extent feasible, the use of anti-personnel mines that do not so comply; and

(ii) With respect to remotely-delivered anti-personnel mines, comply with either the requirements for self-destruction or the requirements for self-deactivation and, with respect to other anti-personnel mines comply with at least the requirements for self-deactivation.

4. International signs for minefields and mined areas

Signs similar to the example attached and as specified below shall be utilized in the marking of minefields and mined areas to ensure their visibility and recognition by the civilian population:

(a) Size and shape: a triangle or square no smaller than 28 centimetres (11 inches) by 20 centimetres (7.9 inches) for a triangle, and 15 centimetres (6 inches) per side for a square;

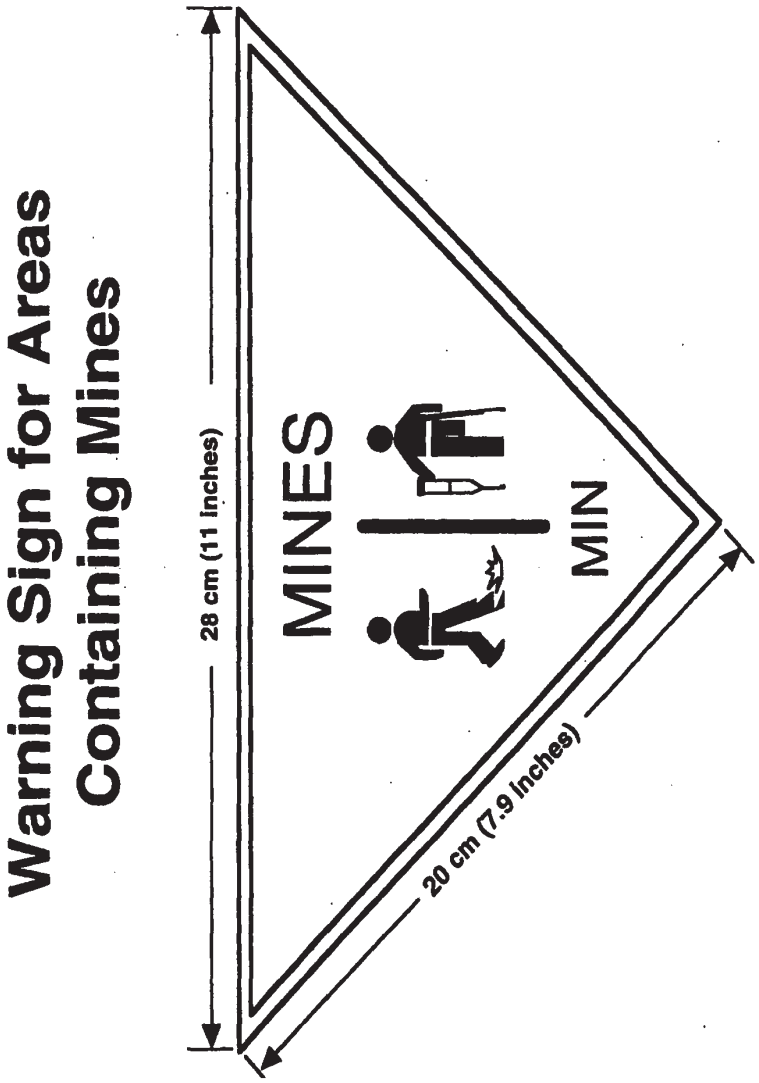
(b) Colour: red or orange with a yellow reflecting border;

(c) Symbol: the symbol illustrated in the Attachment, or an alternative readily recognizable in the area in which the sign is to be displayed as identifying a dangerous area;

(d) Language: the sign should contain the word "mines" in one of the six official languages of the Convention (Arabic, Chinese, English, French, Russian and Spanish) and the language or languages prevalent in that area; and

(e) Spacing: signs should be placed around the minefield or mined area at a distance sufficient to ensure their visibility at any point by a civilian approaching the area."

Attachment



ARTICLE 2. ENTRY INTO FORCE

This amended Protocol shall enter into force as provided for in paragraph 1 (b) of Article 8 of the Convention.

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New York, 2005

No. 22495. Multilateral

CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS (WITH PROTOCOLS I, II AND III). GENEVA, 10 OCTOBER 1980[1]

AMENDMENT TO THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS. GENEVA, 21 DECEMBER 2001

Entry into force : 18 May 2004 , in accordance with article 8, paragraph 1 (b) of the Convention which reads, in part, as follows: "amendments ... shall enter into force in the same manner as the Convention and the annexed Protocols (i.e. ... six months after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession." (see following page)

Authentic texts : Arabic, Chinese, English, French, Russian and Spanish

Registration with the Secretariat of the United Nations : ex officio, 18 May 2004

No. 22495. Multilatéral

CONVENTION SUR L'INTERDICTION OU LA LIMITATION DE L'EMPLOI DE CERTAINES ARMES CLASSIQUES QUI PEUVENT ÊTRE CONSIDÉRÉES COMME PRODUISANT DES EFFETS TRAUMATIQUES EXCESSIFS OU COMME FRAPPANT SANS DISCRIMINATION (AVEC PROTOCOLES I, II ET III). GENÈVE, 10 OCTOBRE 1980[1]

AMENDEMENT À LA CONVENTION SUR L'INTERDICTION OU LA LIMITATION DE L'EMPLOI DE CERTAINES ARMES CLASSIQUES QUI PEUVENT ÊTRE CONSIDÉRÉES COMME PRODUISANT DES EFFETS TRAUMATIQUES EXCESSIFS OU COMME FRAPPANT SANS DISCRIMINATION. GENÈVE, 21 DÉCEMBRE 2001

Entrée en vigueur : 18 mai 2004 , conformément à l'alinéa b) du paragraphe 1 de l'article 8 de la Convention qui se lit, en partie, comme suit : "les amendements .... entreront en vigueur de la même manière que la présente Convention et les Protocoles y annexés (soit .... six mois après la date dépôt du vingtième instrument de ratification, d'acceptation, d'approbation ou d'adhésion.)" (voir la page suivante)

Textes authentiques : arabe, chinois, anglais, français, russe et espagnol

Enregistrement auprès du Secrétariat des Nations Unies : d'officc, 18 mai 2004

1. United Nations, *Treaty Series*, vol. 1342, No. I-22495 — Nations Unies, *Recueil des Traités*, vol. 1342, no I-22495.

[ENGLISH TEXT — TEXTE ANGLAIS]

AMENDMENT TO ARTICLE I OF THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS (CCW)

The following decision to amend Article 1 of the Convention in order to expand the scope of its application to non-international armed conflicts was made by the States Parties at the Second Review Conference held from 11 to 21 December 2001. This decision appears in the Final Declaration of the Second Review Conference, as contained in document CCW/CONF.II/2.

"DECIDE to amend Article 1 of the Convention to read as follows:

"1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article 1 of Additional Protocol 1 to these Conventions.

2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.

3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.

4. Nothing in this Convention or its annexed Protocols shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

5. Nothing in this Convention or its annexed Protocols shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

6. The application of the provisions of this Convention and its annexed Protocols to parties to a conflict which are not High Contracting Parties that have aceepted this Convention or its annexed Protocols, shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.

7. The provisions of Paragraphs 2-6 of this Article shall not prejudice additional Protocols adopted after 1 January 2002, which may apply, exclude or modify the scope of their application in relation to this Article."

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New York, 2010

PROTOCOL ON EXPLOSIVE REMNANTS OF WAR TO THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS (PROTOCOL V). GENEVA, 28 NOVEMBER 2003

Entry into force : 12 November 2006, in accordance with article 5 (3) and (4) of the Convention

Authentic texts : Arabic, Chinese, English, French, Russian and Spanish

Registration with the Secretariat of the United Nations : ex officio, 12 November 2006

PROTOCOLE RELATIF AUX RESTES EXPLOSIFS DE GUERRE À LA CONVENTION SUR L'INTERDICTION OU LA LIMITATION DE L'EMPLOI DE CERTAINES ARMES CLASSIQUES QUI PEUVENT ÊTRE CONSIDÉRÉES COMME PRODUISANT DES EFFETS TRAUMATIQUES EXCESSIFS OU COMME FRAPPANT SANS DISCRIMINATION (PROTOCOLE V). GENÈVE, 28 NOVEMBRE 2003

Entrée en vigueur : 12 novembre 2006, conformément à l'article 5 3) et 4) de la Convention

Textes authentiques : arabe, chinois, anglais, français, russe et espagnol

Enregistrement auprès du Secrétariat des Nations Unies : d'office, 12 novembre 2006

[ENGLISH TEXT — TEXTE ANGLAIS]

PROTOCOL ON EXPLOSIVE REMNANTS OF WAR

The High Contracting Parties,

Recognising the serious post-conflict humanitarian problems caused by explosive remnants of war,

Conscious of the need to conclude a Protocol on post-conflict remedial measures of a generic nature in order to minimise the risks and effects of explosive remnants of war,

And willing to address generic preventive measures, through voluntary best practices specified in a Technical Annex for improving the reliability of munitions, and therefore minimising the occurrence of explosive remnants of war,

Have agreed as follows:

Article 1. General provision and scope of application

1. In conformity with the Charter of the United Nations and of the rules of the international law of armed conflict applicable to them, High Contracting Parties agree to comply with the obligations specified in this Protocol, both individually and in co-operation with other High Contracting Parties, to minimise the risks and effects of explosive remnants of war in post-conflict situations.

2. This Protocol shall apply to explosive remnants of war on the land territory including internal waters of High Contracting Parties.

3. This Protocol shall apply to situations resulting from conflicts referred to in Article 1, paragraphs 1 to 6, of the Convention, as amended on 21 December 2001.

4. Articles 3, 4, 5 and 8 of this Protocol apply to explosive remnants of war other than existing explosive remnants of war as defined in Article 2, paragraph 5 of this Protocol.

Article 2. Definitions

For the purpose of this Protocol,

1. Explosive ordnance means conventional munitions containing explosives, with the exception of mines, booby traps and other devices as defined in Protocol II of this Convention as amended on 3 May 1996.

2. Unexploded ordnance means explosive ordnance that has been primed, fused, armed, or otherwise prepared for use and used in an armed conflict. It may have been fired, dropped, launched or projected and should have exploded but failed to do so.

3. Abandoned explosive ordnance means explosive ordnance that has not been used during an armed conflict, that has been left behind or dumped by a party to an armed conflict, and which is no longer under control of the party that left it behind or dumped it. Abandoned explosive ordnance may or may not have been primed, fused, armed or otherwise prepared for use.

4. Explosive remnants of war means unexploded ordnance and abandoned explosive ordnance.

5. Existing explosive remnants of war means unexploded ordnance and abandoned explosive ordnance that existed prior to the entry into force of this Protocol for the High Contracting Party on whose territory it exists.

Article 3. Clearance, removal or destruction of explosive remnants of war

1. Each High Contracting Party and party to an armed conflict shall bear the responsibilities set out in this Article with respect to all explosive remnants of war in territory under its control. In cases where a user of explosive ordnance which has become explosive remnants of war, does not exercise control of the territory, the user shall, after the cessation of active hostilities, provide where feasible, inter alia technical, financial, material or human resources assistance, bilaterally or through a mutually agreed third party, including inter alia through the United Nations system or other relevant organisations, to facilitate the marking and clearance, removal or destruction of such explosive remnants of war.

2. After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control. Areas affected by explosive remnants of war which are assessed pursuant to paragraph 3 of this Article as posing a serious humanitarian risk shall be accorded priority status for clearance, removal or destruction.

3. After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall take the following measures in affected territories under its control, to reduce the risks posed by explosive remnants of war:

(a) survey and assess the threat posed by explosive remnants of war;

(b) assess and prioritise needs and practicability in terms of marking and clearance, removal or destruction;

(c) mark and clear, remove or destroy explosive remnants of war;

(d) take steps to mobilise resources to carry out these activities.

4. In conducting the above activities High Contracting Parties and parties to an armed conflict shall take into account international standards, including the International Mine Action Standards.

5. High Contracting Parties shall co-operate, where appropriate, both among themselves and with other states, relevant regional and international organisations and non-governmental organisations on the provision of inter alia technical, financial, material and human resources assistance including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil the provisions of this Article.

Article 4. Recording, retaining and transmission of information

1. High Contracting Parties and parties to an armed conflict shall to the maximum extent possible and as far as practicable record and retain information on the use of explo-

sive ordnance or abandonment of explosive ordnance, to facilitate the rapid marking and clearance, removal or destruction of explosive remnants of war, risk education and the provision of relevant information to the party in control of the territory and to civilian populations in that territory.

2. High Contracting Parties and parties to an armed conflict which have used or abandoned explosive ordnance which may have become explosive remnants of war shall, without delay after the cessation of active hostilities and as far as practicable, subject to these parties' legitimate security interests, make available such information to the party or parties in control of the affected area, bilaterally or through a mutually agreed third party including inter alia the United Nations or, upon request, to other relevant organisations which the party providing the information is satisfied are or will be undertaking risk education and the marking and clearance, removal or destruction of explosive remnants of war in the affected area.

3. In recording, retaining and transmitting such information, the High Contracting Parties should have regard to Part 1 of the Technical Annex.

Article 5. Other precautions for the protection of the civilian population, individual civilians and civilian objects from the risks and effects of explosive remnants of war

1. High Contracting Parties and parties to an armed conflict shall take all feasible precautions in the territory under their control affected by explosive remnants of war to protect the civilian population, individual civilians and civilian objects from the risks and effects of explosive remnants of war. Feasible precautions are those precautions which are practicable or practicably possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations. These precautions may include warnings, risk education to the civilian population, marking, fencing and monitoring of territory affected by explosive remnants of war, as set out in Part 2 of the Technical Annex.

Article 6. Provisions for the protection of humanitarian missions and organisations from the effects of explosive remnants of war

1. Each High Contracting Party and party to an armed conflict shall:

(a) Protect, as far as feasible, from the effects of explosive remnants of war, humanitarian missions and organisations that are or will be operating in the area under the control of the High Contracting Party or party to an armed conflict and with that party's consent.

(b) Upon request by such a humanitarian mission or organisation, provide, as far as feasible, information on the location of all explosive remnants of war that it is aware of in territory where the requesting humanitarian mission or organisation will operate or is operating.

2. The provisions of this Article are without prejudice to existing International Humanitarian Law or other international instruments as applicable or decisions by the Security Council of the United Nations which provide for a higher level of protection.

Article 7. Assistance with respect to existing explosive remnants of war

1. Each High Contracting Party has the right to seek and receive assistance, where appropriate, from other High Contracting Parties, from states non-party and relevant international organisations and institutions in dealing with the problems posed by existing explosive remnants of war.

2. Each High Contracting Party in a position to do so shall provide assistance in dealing with the problems posed by existing explosive remnants of war, as necessary and feasible. In so doing, High Contracting Parties shall also take into account the humanitarian objectives of this Protocol, as well as international standards including the International Mine Action Standards.

Article 8. Co-operation and assistance

1. Each High Contracting Party in a position to do so shall provide assistance for the marking and clearance, removal or destruction of explosive remnants of war, and for risk education to civilian populations and related activities inter alia through the United Nations system, other relevant international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organisations, or on a bilateral basis.

2. Each High Contracting Party in a position to do so shall provide assistance for the care and rehabilitation and social and economic reintegration of victims of explosive remnants of war. Such assistance may be provided inter alia through the United Nations system, relevant international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organisations, or on a bilateral basis.

3. Each High Contracting Party in a position to do so shall contribute to trust funds within the United Nations system, as well as other relevant trust funds, to facilitate the provision of assistance under this Protocol.

4. Each High Contracting Party shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information other than weapons related technology, necessary for the implementation of this Protocol. High Contracting Parties undertake to facilitate such exchanges in accordance with national legislation and shall not impose undue restrictions on the provision of clearance equipment and related technological information for humanitarian purposes.

5. Each High Contracting Party undertakes to provide information to the relevant databases on mine action established within the United Nations system, especially information concerning various means and technologies of clearance of explosive remnants of war, lists of experts, expert agencies or national points of contact on clearance of explosive remnants of war and, on a voluntary basis, technical information on relevant types of explosive ordnance.

6. High Contracting Parties may submit requests for assistance substantiated by relevant information to the United Nations, to other appropriate bodies or to other states. These requests may be submitted to the Secretary-General of the United Nations, who shall

transmit them to all High Contracting Parties and to relevant international organisations and non-governmental organisations.

7. In the case of requests to the United Nations, the Secretary-General of the United Nations, within the resources available to the Secretary-General of the United Nations, may take appropriate steps to assess the situation and in co-operation with the requesting High Contracting Party and other High Contracting Parties with responsibility as set out in Article 3 above, recommend the appropriate provision of assistance. The Secretary-General may also report to High Contracting Parties on any such assessment as well as on the type and scope of assistance required, including possible contributions from the trust funds established within the United Nations system.

Article 9. Generic preventive measures

1. Bearing in mind the different situations and capacities, each High Contracting Party is encouraged to take generic preventive measures aimed at minimising the occurrence of explosive remnants of war, including, but not limited to, those referred to in part 3 of the Technical Annex.

2. Each High Contracting Party may, on a voluntary basis, exchange information related to efforts to promote and establish best practices in respect of paragraph 1 of this Article.

Article 10. Consultations of High Contracting Parties

1. The High Contracting Parties undertake to consult and co-operate with each other on all issues related to the operation of this Protocol. For this purpose, a Conference of High Contracting Parties shall be held as agreed to by a majority, but no less than eighteen High Contracting Parties.

2. The work of the conferences of High Contracting Parties shall include:

(a) review of the status and operation of this Protocol;

(b) consideration of matters pertaining to national implementation of this Protocol, including national reporting or updating on an annual basis.

(c) preparation for review conferences.

3. The costs of the Conference of High Contracting Parties shall be borne by the High Contracting Parties and States not parties participating in the Conference, in accordance with the United Nations scale of assessment adjusted appropriately.

Article 11. Compliance

1. Each High Contracting Party shall require that its armed forces and relevant agencies or departments issue appropriate instructions and operating procedures and that its personnel receive training consistent with the relevant provisions of this Protocol.

2. The High Contracting Parties undertake to consult each other and to co-operate with each other bilaterally, through the Secretary-General of the United Nations or through

other appropriate international procedures, to resolve any problems that may arise with regard to the interpretation and application of the provisions of this Protocol.

TECHNICAL ANNEX

This Technical Annex contains suggested best practice for achieving the objectives contained in Articles 4, 5 and 9 of this Protocol. This Technical Annex will be implemented by High Contracting Parties on a voluntary basis.

1. Recording, storage and release of information for Unexploded Ordnance (UXO) and Abandoned Explosive Ordnance (AXO)

(a) Recording of information: Regarding explosive ordnance which may have become UXO a State should endeavour to record the following information as accurately as possible:

(i) the location of areas targeted using explosive ordnance;

(ii) the approximate number of explosive ordnance used in the areas under (i);

(iii) the type and nature of explosive ordnance used in areas under (i);

(iv) the general location of known and probable UXO;

Where a State has been obliged to abandon explosive ordnance in the course of operations, it should endeavour to leave AXO in a safe and secure manner and record information on this ordnance as follows:

(v) the location of AXO;

(vi) the approximate amount of AXO at each specific site;

(vii) the types of AXO at each specific site.

(b) Storage of information: Where a State has recorded information in accordance with paragraph (a), it should be stored in such a manner as to allow for its retrieval and subsequent release in accordance with paragraph (c).

(c) Release of information: Information recorded and stored by a State in accordance with paragraphs (a) and (b) should, taking into account the security interests and other obligations of the State providing the information, be released in accordance with the following provisions:

(i) Content:

On UXO the released information should contain details on:

(1) the general location of known and probable UXO;

(2) the types and approximate number of explosive ordnance used in the targeted areas;

(3) the method of identifying the explosive ordnance including colour, size and shape and other relevant markings;

(4) the method for safe disposal of the explosive ordnance.

On AXO the released information should contain details on:

(5) the location of the AXO;

(6) the approximate number of AXO at each specific site;

(7) the types of AXO at each specific site;

(8) the method of identifying the AXO, including colour, size and shape;

(9) information on type and methods of packing for AXO;

(10) state of readiness;

(11) the location and nature of any booby traps known to be present in the area of AXO.

(ii) Recipient: The information should be released to the party or parties in control of the affected territory and to those persons or institutions that the releasing State is satisfied are, or will be, involved in UXO or AXO clearance in the affected area, in the education of the civilian population on the risks of UXO or AXO.

(iii) Mechanism: A State should, where feasible, make use of those mechanisms established internationally or locally for the release of information, such as through UNMAS, IMSMA, and other expert agencies, as considered appropriate by the releasing State.

(iv) Timing: The information should be released as soon as possible, taking into account such matters as any ongoing military and humanitarian operations in the affected areas, the availability and reliability of information and relevant security issues.

2. Warnings, risk education, marking, fencing and monitoring

Key terms

(a) Warnings are the punctual provision of cautionary information to the civilian population, intended to minimise risks caused by explosive remnants of war in affected territories.

(b) Risk education to the civilian population should consist of risk education programmes to facilitate information exchange between affected communities, government authorities and humanitarian organisations so that affected communities are informed about the threat from explosive remnants of war. Risk education programmes are usually a long term activity.

Best practice elements of warnings and risk education

(c) All programmes of warnings and risk education should, where possible, take into account prevailing national and international standards, including the International Mine Action Standards.

(d) Warnings and risk education should be provided to the affected civilian population which comprises civilians living in or around areas containing explosive remnants of war and civilians who transit such areas.

(e) Warnings should be given, as soon as possible, depending on the context and the information available. A risk education programme should replace a warnings programme as soon as possible. Warnings and risk education always should be provided to the affected communities at the earliest possible time.

(f) Parties to a conflict should employ third parties such as international organisations and non-governmental organisations when they do not have the resources and skills to deliver efficient risk education.

(g) Parties to a conflict should, if possible, provide additional resources for warnings and risk education. Such items might include: provision of logistical support, production of risk education materials, financial support and general cartographic information.

Marking, fencing, and monitoring of an explosive remnants of war affected area

(h) When possible, at any time during the course of a conflict and thereafter, where explosive remnants of war exist the parties to a conflict should, at the earliest possible time and to the maximum extent possible, ensure that areas containing explosive remnants of war are marked, fenced and monitored so as to ensure the effective exclusion of civilians, in accordance with the following provisions.

(i) Warning signs based on methods of marking recognised by the affected community should be utilised in the marking of suspected hazardous areas. Signs and other hazardous area boundary markers should as far as possible be visible, legible, durable and resistant to environmental effects and should clearly identify which side of the marked boundary is considered to be within the explosive remnants of war affected area and which side is considered to be safe.

(j) An appropriate structure should be put in place with responsibility for the monitoring and maintenance of permanent and temporary marking systems, integrated with national and local risk education programmes.

3. Generic preventive measures

States producing or procuring explosive ordnance should to the extent possible and as appropriate endeavour to ensure that the following measures are implemented and respected during the life-cycle of explosive ordnance.

(a) Munitions manufacturing management

(i) Production processes should be designed to achieve the greatest reliability of munitions.

(ii) Production processes should be subject to certified quality control measures.

(iii) During the production of explosive ordnance, certified quality assurance standards that are internationally recognised should be applied.

(iv) Acceptance testing should be conducted through live-fire testing over a range of conditions or through other validated procedures.

(v) High reliability standards should be required in the course of explosive ordnance transactions and transfers.

(b) Munitions management

In order to ensure the best possible long-term reliability of explosive ordnance, States are encouraged to apply best practice norms and operating procedures with respect to its storage, transport, field storage, and handling in accordance with the following guidance.

(i) Explosive ordnance, where necessary, should be stored in secure facilities or appropriate containers that protect the explosive ordnance and its components in a controlled atmosphere, if necessary.

(ii) A State should transport explosive ordnance to and from production facilities, storage facilities and the field in a manner that minimises damage to the explosive ordnance.

(iii) Appropriate containers and controlled environments, where necessary, should be used by a State when stockpiling and transporting explosive ordnance.

(iv) The risk of explosions in stockpiles should be minimised by the use of appropriate stockpile arrangements.

(v) States should apply appropriate explosive ordnance logging, tracking and testing procedures, which should include information on the date of manufacture of each number, lot or batch of explosive ordnance, and information on where the explosive ordnance has been, under what conditions it has been stored, and to what environmental factors it has been exposed.

(vi) Periodically, stockpiled explosive ordnance should undergo, where appropriate, live-firing testing to ensure that munitions function as desired.

(vii) Sub-assemblies of stockpiled explosive ordnance should, where appropriate, undergo laboratory testing to ensure that munitions function as desired.

(viii) Where necessary, appropriate action, including adjustment to the expected shelf-life of ordnance, should be taken as a result of information acquired by logging, tracking and testing procedures, in order to maintain the reliability of stockpiled explosive ordnance.

(c) Training

The proper training of all personnel involved in the handling, transporting and use of explosive ordnance is an important factor in seeking to ensure its reliable operation as intended. States should therefore adopt and maintain suitable training programmes to ensure that personnel are properly trained with regard to the munitions with which they will be required to deal.

(d) Transfer

A State planning to transfer explosive ordnance to another State that did not previously possess that type of explosive ordnance should endeavour to ensure that the receiving State has the capability to store, maintain and use that explosive ordnance correctly.

(e) Future production

A State should examine ways and means of improving the reliability of explosive ordnance that it intends to produce or procure, with a view to achieving the highest possible reliability.

Convention on the Safety of United Nations and Associated Personnel, 1994

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Multilateral

Convention on the Safety of United Nations and Associated Personnel. New York, 9 December 1994

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Multilatéral

Convention sur la sécurité du personnel des Nations Unies et du personnel associé. New York, 9 décembre 1994

Entrée en vigueur : *15 janvier 1999, conformément au paragraphe 1 de l'article 27 (voir la page suivante)*

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Enregistrement auprès du Secrétariat des Nations Unies : *d'office, 15 janvier 1999*

[ENGLISH TEXT — TEXTE ANGLAIS]

CONVENTION ON THE SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL

The States Parties to this Convention,

Deeply concerned over the growing number of deaths and injuries resulting from deliberate attacks against United Nations and associated personnel,

Bearing in mind that attacks against, or other mistreatment of, personnel who act on behalf of the United Nations are unjustifiable and unacceptable, by whomsoever committed,

Recognizing that United Nations operations are conducted in the common interest of the international community and in accordance with the principles and purposes of the Charter of the United Nations,

Acknowledging the important contribution that United Nations and associated personnel make in respect of United Nations efforts in the fields of preventive diplomacy, peacemaking, peace-keeping, peace-building and humanitarian and other operations,

Conscious of the existing arrangements for ensuring the safety of United Nations and associated personnel, including the steps taken by the principal organs of the United Nations, in this regard,

Recognizing none the less that existing measures of protection for United Nations and associated personnel are inadequate,

Acknowledging that the effectiveness and safety of United Nations operations are enhanced where such operations are conducted with the consent and cooperation of the host State,

Appealing to all States in which United Nations and associated personnel are deployed and to all others on whom such personnel may rely, to provide comprehensive support aimed at facilitating the conduct and fulfilling the mandate of United Nations operations,

Convinced that there is an urgent need to adopt appropriate and effective measures for the prevention of attacks committed against United Nations and associated personnel and for the punishment of those who have committed such attacks,

Have agreed as follows:

Article 1. Definitions

For the purposes of this Convention:

(a) "United Nations personnel" means:

(i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation;

(ii) Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted;

(b) "Associated personnel" means:

(i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations;

(ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency;

(iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency,

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

(c) "United Nations operation" means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control:

(i) Where the operation is for the purpose of maintaining or restoring international peace and security; or

(ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation;

(d) "Host State" means a State in whose territory a United Nations operation is conducted;

(e) "Transit State" means a State, other than the host State, in whose territory United Nations and associated personnel or their equipment are in transit or temporarily present in connection with a United Nations operation.

Article 2. Scope of Application

1. This Convention applies in respect of United Nations and associated personnel and United Nations operations, as defined in article 1.

2. This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

Article 3. Identification

1. The military and police components of a United Nations operation and their vehicles, vessels and aircraft shall bear distinctive identification. Other personnel, vehicles, vessels and aircraft involved in the United Nations operation shall be appropriately identified unless otherwise decided by the Secretary-General of the United Nations.

2. All United Nations and associated personnel shall carry appropriate identification documents.

Article 4. Agreements on the Status of the Operation

The host State and the United Nations shall conclude as soon as possible an agreement on the status of the United Nations operation and all personnel engaged in the operation including, inter alia, provisions on privileges and immunities for military and police components of the operation.

Article 5. Transit

A transit State shall facilitate the unimpeded transit of United Nations and associated personnel and their equipment to and from the host State.

Article 6. Respect for Laws and Regulations

1. Without prejudice to such privileges and immunities as they may enjoy or to the requirements of their duties, United Nations and associated personnel shall:

(a) Respect the laws and regulations of the host State and the transit State; and

(b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

2. The Secretary-General of the United Nations shall take all appropriate measures to ensure the observance of these obligations.

Article 7. Duty to Ensure the Safety and Security of United Nations and Associated Personnel

1. United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate.

2. States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from the crimes set out in article 9.

3. States Parties shall cooperate with the United Nations and other States Parties, as appropriate, in the implementation of this Convention, particularly in any case where the host State is unable itself to take the required measures.

Article 8. Duty to Release or Return United Nations and Associated Personnel Captured or Detained

Except as otherwise provided in an applicable status-of-forces agreement, if United Nations or associated personnel are captured or detained in the course of the performance

of their duties and their identification has been established, they shall not be subjected to interrogation and they shall be promptly released and returned to United Nations or other appropriate authorities. Pending their release such personnel shall be treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949.

Article 9. Crimes against United Nations and Associated Personnel

1. The intentional commission of:

(a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;

(b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;

(c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act;

(d) An attempt to commit any such attack; and

(e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack,

shall be made by each State Party a crime under its national law.

2. Each State Party shall make the crimes set out in paragraph 1 punishable by appropriate penalties which shall take into account their grave nature.

Article 10. Establishment of Jurisdiction

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in the following cases:

(a) When the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State.

2. A State Party may also establish its jurisdiction over any such crime when it is committed:

(a) By a stateless person whose habitual residence is in that State; or

(b) With respect to a national of that State; or

(c) In an attempt to compel that State to do or to abstain from doing any act.

3. Any State Party which has established jurisdiction as mentioned in paragraph 2 shall notify the Secretary-General of the United Nations. If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General of the United Nations.

4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in cases where the alleged offender is present in its territory and it does not extradite such person pursuant to article 15 to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.

5. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 11. Prevention of Crimes against United Nations and Associated Personnel

States Parties shall cooperate in the prevention of the crimes set out in article 9, particularly by:

(a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories; and

(b) Exchanging information in accordance with their national law and coordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes.

Article 12. Communication of Information

1. Under the conditions provided for in its national law, the State Party in whose territory a crime set out in article 9 has been committed shall, if it has reason to believe that an alleged offender has fled from its territory, communicate to the Secretary-General of the United Nations and, directly or through the Secretary-General, to the State or States concerned all the pertinent facts regarding the crime committed and all available information regarding the identity of the alleged offender.

2. Whenever a crime set out in article 9 has been committed, any State Party which has information concerning the victim and circumstances of the crime shall endeavour to transmit such information, under the conditions provided for in its national law, fully and promptly to the Secretary-General of the United Nations and the State or States concerned.

Article 13. Measures to Ensure Prosecution or Extradition

1. Where the circumstances so warrant, the State Party in whose territory the alleged offender is present shall take the appropriate measures under its national law to ensure that person's presence for the purpose of prosecution or extradition.

2. Measures taken in accordance with paragraph 1 shall be notified, in conformity with national law and without delay, to the Secretary-General of the United Nations and, either directly or through the Secretary-General, to:

(a) The State where the crime was committed;

(b) The State or States of which the alleged offender is a national or, if such person is a stateless person, in whose territory that person has his or her habitual residence;

(c) The State or States of which the victim is a national; and

(d) Other interested States.

Article 14. Prosecution of Alleged Offenders

The State Party in whose territory the alleged offender is present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of an ordinary offence of a grave nature under the law of that State.

Article 15. Extradition of Alleged Offenders

1. To the extent that the crimes set out in article 9 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State.

4. Each of those crimes shall be treated, for the purposes of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of article 10.

Article 16. Mutual Assistance in Criminal Matters

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the crimes set out in article 9, including assistance in obtaining evidence at their disposal necessary for the proceedings. The law of the requested State shall apply in all cases.

2. The provisions of paragraph 1 shall not affect obligations concerning mutual assistance embodied in any other treaty.

Article 17. Fair Treatment

1. Any person regarding whom investigations or proceedings are being carried out in connection with any of the crimes set out in article 9 shall be guaranteed fair treatment, a fair trial and full protection of his or her rights at all stages of the investigations or proceedings.

2. Any alleged offender shall be entitled:

(a) To communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights; and

(b) To be visited by a representative of that State or those States.

Article 18. Notification of Outcome of Proceedings

The State Party where an alleged offender is prosecuted shall communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to other States Parties.

Article 19. Dissemination

The States Parties undertake to disseminate this Convention as widely as possible and, in particular, to include the study thereof, as well as relevant provisions of international humanitarian law, in their programmes of military instruction.

Article 20. Savings Clauses

Nothing in this Convention shall affect:

(a) The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards;

(b) The rights and obligations of States, consistent with the Charter of the United Nations, regarding the consent to entry of persons into their territories;

(c) The obligation of United Nations and associated personnel to act in accordance with the terms of the mandate of a United Nations operation;

(d) The right of States which voluntarily contribute personnel to a United Nations operation to withdraw their personnel from participation in such operation; or

(e) The entitlement to appropriate compensation payable in the event of death, disability, injury or illness attributable to peace-keeping service by persons voluntarily contributed by States to United Nations operations.

Article 21. Right of Self-Defence

Nothing in this Convention shall be construed so as to derogate from the right to act in self-defence.

Article 22. Dispute Settlement

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall, at the request of one

of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by application in conformity with the Statute of the Court.

2. Each State Party may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it does not consider itself bound by all or part of paragraph 1. The other States Parties shall not be bound by paragraph 1 or the relevant part thereof with respect to any State Party which has made such a reservation.

3. Any State Party which has made a reservation in accordance with paragraph 2 may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 23. Review Meetings

At the request of one or more States Parties, and if approved by a majority of States Parties, the Secretary-General of the United Nations shall convene a meeting of the States Parties to review the implementation of the Convention, and any problems encountered with regard to its application.

Article 24. Signature

This Convention shall be open for signature by all States, until 31 December 1995, at United Nations Headquarters in New York.

Article 25. Ratification, Acceptance or Approval

This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

Article 26. Accession

This Convention shall be open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 27. Entry into Force

1. This Convention shall enter into force thirty days after twenty-two instruments of ratification, acceptance, approval or accession have been deposited with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 28. Denunciation

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

Article 29. Authentic Texts

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

Done at New York this ninth day of December one thousand nine hundred and ninety-four.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997

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Convention on the Prohibition of the Use, Stockpiling, Prodnction and Transfer of Anti-Personnel Mines and on their Destrnction. Oslo, 18 September 1997

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Registration with the Secretariat of the United Nations: *ex officio, 1 March 1999*

Multilatéral

Convention sur l'interdiction de l'emploi, du stockage, de la production et du transfert des mines antipersonnel et sur leur destruction. Oslo, 18 septembre 1997

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Enregistrement auprès dn Secrétariat des Nations Unies : *d'office, 1er mars 1999*

[ENGLISH TEXT — TEXTE ANGLAIS]

CONVENTION ON THE PROHIBITION OF THE USE, STOCKPILING, PRODUCTION AND TRANSFER OF ANTI-PERSONNEL MINES AND ON THEIR DESTRUCTION

Preamble

The States Parties,

Determined to put an end to the suffering and casualties caused by anti-personnel mines, that kill or maim hundreds of people every week, mostly innocent and defenceless civilians and especially children, obstruct economic development and reconstruction, inhibit the repatriation of refugees and internally displaced persons, and have other severe consequences for years after emplacement,

Believing it necessary to do their utmost to contribute in an efficient and coordinated manner to face the challenge of removing anti-personnel mines placed throughout the world, and to assure their destruction,

Wishing to do their utmost in providing assistance for the care and rehabilitation, including the social and economic reintegration of mine victims,

Recognizing that a total ban of anti-personnel mines would also be an important confidence-building measure,

Welcoming the adoption of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional

Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, and calling for the early ratification of this Protocol by all States which have not yet done so,

Welcoming also United Nations General Assembly Resolution 51/45 S of 10 December 1996 urging all States to pursue vigorously an effective, legally-binding international agreement to ban the use, stockpiling, production and transfer of anti-personnel landmines,

Welcoming furthermore the measures taken over the past years, both unilaterally and multilaterally, aiming at prohibiting, restricting or suspending the use, stockpiling, production and transfer of anti-personnel mines,

Stressing the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines and recognizing the efforts to that end undertaken by the International Red Cross and Red Crescent Movement, the International Campaign to Ban Landmines and numerous other non-governmental organizations around the world,

Recalling the Ottawa Declaration of 5 October 1996 and the Brussels Declaration of 27 June 1997 urging the international community to negotiate an international and legally binding agreement prohibiting the use, stockpiling, production and transfer of anti-personnel mines,

Emphasizing the desirability of attracting the adherence of all States to this Convention, and determined to work strenuously towards the promotion of its universalization in all relevant fora including, inter alia, the United Nations, the Conference on Disarmament, regional organizations, and groupings, and review conferences of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects,

Basing themselves on the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, on the principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and on the principle that a distinction must be made between civilians and combatants,

Have agreed as follows:

Article 1. General Obligations

1. Each State Party undertakes never under any circumstances:

(a) To use anti-personnel mines;

(b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;

(c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

2. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of this Convention.

Article 2. Definitions

1. "Anti-personnel mine" means a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.

2. "Mine" means a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle.

3. "Anti-handling device" means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine.

4. "Transfer" involves, in addition to the physical movement of anti-personnel mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced anti-personnel mines.

5. "Mined area" means an area which is dangerous due to the presence or suspected presence of mines.

Article 3. Exceptions

1. Notwithstanding the general obligations under Article 1, the retention or transfer of a number of anti- personnel mines for the development of and training in mine detection, mine clearance, or mine destruction techniques is permitted. The amount of such mines shall not exceed the minimum number absolutely necessary for the above-mentioned purposes.

2. The transfer of anti-personnel mines for the purpose of destruction is permitted.

Article 4. Destruction of Stockpiled Anti-Personnel Mines

Except as provided for in Article 3, each State Party undertakes to destroy or ensure the destruction of all stockpiled anti-personnel mines it owns or possesses, or that are under its jurisdiction or control, as soon as possible but not later than four years after the entry into force of this Convention for that State Party.

Article 5. Destruction of Anti-Personnel Mines in Mined Areas

1. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control, as soon as possible but not later than ten years after the entry into force of this Convention for that State Party.

2. Each State Party shall make every effort to identify all areas under its jurisdiction or control in which anti-personnel mines are known or suspected to be emplaced and shall ensure as soon as possible that all anti-personnel mines in mined areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means, to ensure the effective exclusion of civilians, until all anti-personnel mines contained therein have been destroyed. The marking shall at least be to the standards set out in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.

3. If a State Party believes that it will be unable to destroy or ensure the destruction of all anti-personnel mines referred to in paragraph 1 within that time period, it may submit a request to a Meeting of the States Parties or a Review Conference for an extension of the deadline for completing the destruction of such anti-personnel mines, for a period of up to ten years.

4. Each request shall contain:

(a) The duration of the proposed extension;

(b) A detailed explanation of the reasons for the proposed extension, including:

(i) The preparation and status of work conducted under national demining programs;

(ii) The financial and technical means available to the State Party for the destruction of all the anti- personnel mines; and

(iii) Circumstances which impede the ability of the State Party to destroy all the anti-personnel mines in mined areas;

(c) The humanitarian, social, economic, and environmental implications of the extension; and

(d) Any other information relevant to the request for the proposed extension.

5. The Meeting of the States Parties or the Review Conference shall, taking into consideration the factors contained in paragraph 4, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension period.

6. Such an extension may be renewed upon the submission of a new request in accordance with paragraphs 3, 4 and 5 of this Article. In requesting a further extension period a State Party shall submit relevant additional information on what has been undertaken in the previous extension period pursuant to this Article.

Article 6. International Cooperation and Assistance

1. In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance, where feasible, from other States Parties to the extent possible.

2. Each State Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information concerning the implementation of this Convention. The States Parties shall not impose undue restrictions on the provision of mine clearance equipment and related technological information for humanitarian purposes.

3. Each State Party in a position to do so shall provide assistance for the care and rehabilitation, and social and economic reintegration, of mine victims and for mine awareness programmes. Such assistance may be provided, inter alia, through the United Nations system, international, regional or national organizations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organizations, or on a bilateral basis.

4. Each State Party in a position to do so shall provide assistance for mine clearance and related activities. Such assistance may be provided, inter alia, through the United Nations system, international or regional organizations or institutions, non-governmental organizations or institutions, or on a bilateral basis, or by contributing to the United Nations Voluntary Trust Fund for Assistance in Mine Clearance, or other regional funds that deal with demining.

5. Each State Party in a position to do so shall provide assistance for the destruction of stockpiled anti- personnel mines.

6. Each State Party undertakes to provide information to the database on mine clearance established within the United Nations system, especially information concerning various means and technologies of mine clearance, and lists of experts, expert agencies or national points of contact on mine clearance.

7. States Parties may request the United Nations, regional organizations, other States Parties or other competent intergovernmental or non-governmental fora to assist its authorities in the elaboration of a national demining program to determine, inter alia:

(a) The extent and scope of the anti-personnel mine problem;

(b) The financial, technological and human resources that are required for the implementation of the programme;

(c) The estimated number of years necessary to destroy all anti-personnel mines in mined areas under the jurisdiction or control of the concerned State Party;

(d) Mine awareness activities to reduce the incidence of mine-related injuries or deaths;

(e) Assistance to mine victims;

(f) The relationship between the Government of the concerned State Party and the relevant governmental, intergovernmental or non-governmental entities that will work in the implementation of the program.

8. Each State Party giving and receiving assistance under the provisions of this Article shall cooperate with a view to ensuring the full and prompt implementation of agreed assistance programs.

Article 7. Transparency Measures

1. Each State Party shall report to the Secretary-General of the United Nations as soon as practicable, and in any event not later than 180 days after the entry into force of this Convention for that State Party on:

(a) The national implementation measures referred to in Article 9;

(b) The total of all stockpiled anti-personnel mines owned or possessed by it, or under its jurisdiction or control, to include a breakdown of the type, quantity and, if possible, lot numbers of each type of anti- personnel mine stockpiled;

(c) To the extent possible, the location of all mined areas that contain, or are suspected to contain, anti- personnel mines under its jurisdiction or control, to include as much detail as possible regarding the type and quantity of each type of anti-personnel mine in each mined area and when they were emplaced;

(d) The types, quantities and, if possible, lot numbers of all anti-personnel mines retained or transferred for the development of and training in mine detection, mine clearance or mine destruction techniques, or transferred for the purpose of destruction, as well as the institutions authorized by a State Party to retain or transfer anti-personnel mines, in accordance with Article 3;

(e) The status of programmes for the conversion or de-commissioning of anti-personnel mine production facilities;

(f) The status of programmes for the destruction of anti-personnel mines in accordance with Articles 4 and 5, including details of the methods which will be used in destruction, the location of all destruction sites and the applicable safety and environmental standards to be observed;

(g) The types and quantities of all anti-personnel mines destroyed after the entry into force of this Convention for that State Party, to include a breakdown of the quantity of each type of anti-personnel mine destroyed, in accordance with Articles 4 and 5, respectively, along with, if possible, the lot numbers of each type of anti-personnel mine in the case of destruction in accordance with Article 4;

(h) The technical characteristics of each type of anti-personnel mine produced, to the extent known, and those currently owned or possessed by a State Party, giving, where reasonably possible, such categories of information as may facilitate identification and clearance of anti-personnel mines; at a minimum, this information shall include the dimensions, fusing, explosive content, metallic content, colour photographs and other information which may facilitate mine clearance; and

(i) The measures taken to provide an immediate and effective warning to the population in relation to all areas identified under paragraph 2 of Article 5.

2. The information provided in accordance with this Article shall be updated by the States Parties annually, covering the last calendar year, and reported to the Secretary-General of the United Nations not later than 30 April of each year.

3.The Secretary-General of the United Nations shall transmit all such reports received to the States Parties.

Article 8. Facilitation and Clarification of Compliance

1.The States Parties agree to consult and cooperate with each other regarding the implementation of the provisions of this Convention, and to work together in a spirit of cooperation to facilitate compliance by States Parties with their obligations under this Convention.

2. If one or more States Parties wish to clarify and seek to resolve questions relating to compliance with the provisions of this Convention by another State Party, it may submit, through the Secretary-General of the United Nations, a Request for Clarification of that matter to that State Party. Such a request shall be accompanied by all appropriate information. Each State Party shall refrain from unfounded Requests for Clarification, care being taken to avoid abuse. A State Party that receives a Request for Clarification shall provide, through the Secretary-General of the United Nations, within 28 days to the requesting State Party all information which would assist in clarifying this matter.

3. If the requesting State Party does not receive a response through the Secretary-General of the United Nations within that time period, or deems the response to the Request for Clarification to be unsatisfactory, it may submit the matter through the Secretary-General of the United Nations to the next Meeting of the States Parties. The Secretary-General of the United Nations shall transmit the submission, accompanied by all appropriate information pertaining to the Request for Clarification, to all States Parties. All such information shall be presented to the requested State Party which shall have the right to respond.

4. Pending the convening of any meeting of the States Parties, any of the States Parties concerned may request the Secretary-General of the United Nations to exercise his or her good offices to facilitate the clarification requested.

5. The requesting State Party may propose through the Secretary-General of the United Nations the convening of a Special Meeting of the States Parties to consider the matter. The Secretary-General of the United Nations shall thereupon communicate this proposal and all information submitted by the States Parties concerned, to all States Parties with a request that they indicate whether they favour a Special Meeting of the States Parties, for the purpose of considering the matter. In the event that within 14 days from the date of such communication, at least one-third of the States Parties favours such a Special Meeting, the Secretary-General of the United Nations shall convene this Special Meeting of the States Parties within a further 14 days. A quorum for this Meeting shall consist of a majority of States Parties.

6. The Meeting of the States Parties or the Special Meeting of the States Parties, as the case may be, shall first determine whether to consider the matter further, taking into account all information submitted by the States Parties concerned. The Meeting of the States Parties or the Special Meeting of the States Parties shall make every effort to reach a decision by consensus. If despite all efforts to that end no agreement has been reached, it shall take this decision by a majority of States Parties present and voting.

7. All States Parties shall cooperate fully with the Meeting of the States Parties or the Special Meeting of the States Parties in the fulfilment of its review of the matter, including any fact-finding missions that are authorized in accordance with paragraph 8.

8. If further clarification is required, the Meeting of the States Parties or the Special Meeting of the States Parties shall authorize a fact-finding mission and decide on its mandate by a majority of States Parties present and voting. At any time the requested State Party may invite a fact-finding mission to its territory. Such a mission shall take place without a decision by a Meeting of the States Parties or a Special Meeting of the States Parties to authorize such a mission. The mission, consisting of up to 9 experts, designated and approved in accordance with paragraphs 9 and 10, may collect additional information on the spot or in other places directly related to the alleged compliance issue under the jurisdiction or control of the requested State Party.

9. The Secretary-General of the United Nations shall prepare and update a list of the names, nationalities and other relevant data of qualified experts provided by States Parties and communicate it to all States Parties. Any expert included on this list shall be regarded as designated for all fact-finding missions unless a State Party declares its non-acceptance in writing. In the event of non-acceptance, the expert shall not participate in fact-finding missions on the territory or any other place under the jurisdiction or control of the objecting State Party, if the non-acceptance was declared prior to the appointment of the expert to such missions.

10. Upon receiving a request from the Meeting of the States Parties or a Special Meeting of the States Parties, the Secretary-General of the United Nations shall, after consultations with the requested State Party, appoint the members of the mission, including its leader. Nationals of States Parties requesting the fact-finding mission or directly affected by it shall not be appointed to the mission. The members of the fact-finding mission shall enjoy privileges and immunities under Article VI of the Convention on the Privileges and Immunities of the United Nations, adopted on 13 February 1946.

11. Upon at least 72 hours notice, the members of the fact-finding mission shall arrive in the territory of the requested State Party at the earliest opportunity. The requested State Party shall take the necessary administrative measures to receive, transport and accommodate the mission, and shall be responsible for ensuring the security of the mission to the maximum extent possible while they are on territory under its control.

12. Without prejudice to the sovereignty of the requested State Party, the fact-finding mission may bring into the territory of the requested State Party the necessary equipment which shall be used exclusively for gathering information on the alleged compliance issue. Prior to its arrival, the mission will advise the requested State Party of the equipment that it intends to utilize in the course of its fact-finding mission.

13. The requested State Party shall make all efforts to ensure that the fact-finding mission is given the opportunity to speak with all relevant persons who may be able to provide information related to the alleged compliance issue.

14. The requested State Party shall grant access for the fact-finding mission to all areas and installations under its control where facts relevant to the compliance issue could be expected to be collected. This shall be subject to any arrangements that the requested State Party considers necessary for:

(a) The protection of sensitive equipment, information and areas;

(b) The protection of any constitutional obligations the requested State Party may have with regard to proprietary rights, searches and seizures, or other constitutional rights; or

(c) The physical protection and safety of the members of the fact-finding mission.

In the event that the requested State Party makes such arrangements, it shall make every reasonable effort to demonstrate through alternative means its compliance with this Convention.

15. The fact-finding mission may remain in the territory of the State Party concerned for no more than 14 days, and at any particular site no more than 7 days, unless otherwise agreed.

16. All information provided in confidence and not related to the subject matter of the fact-finding mission shall be treated on a confidential basis.

17. The fact-finding mission shall report, through the Secretary-General of the United Nations, to the Meeting of the States Parties or the Special Meeting of the States Parties the results of its findings.

18. The Meeting of the States Parties or the Special Meeting of the States Parties shall consider all relevant information, including the report submitted by the fact-finding mission, and may request the requested State Party to take measures to address the compliance issue within a specified period of time. The requested State Party shall report on all measures taken in response to this request.

19. The Meeting of the States Parties or the Special Meeting of the States Parties may suggest to the States Parties concerned ways and means to further clarify or resolve the matter under consideration, including the initiation of appropriate procedures in conformity with international law. In circumstances where the issue at hand is determined to be due to circumstances beyond the control of the requested State Party, the Meeting of the States

Parties or the Special Meeting of the States Parties may recommend appropriate measures, including the use of cooperative measures referred to in Article 6.

20. The Meeting of the States Parties or the Special Meeting of the States Parties shall make every effort to reach its decisions referred to in paragraphs 18 and 19 by consensus, otherwise by a two-thirds majority of States Parties present and voting.

Article 9. National Implementation Measures

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

Article 10. Settlement of Disputes

1. The States Parties shall consult and cooperate with each other to settle any dispute that may arise with regard to the application or the interpretation of this Convention. Each State Party may bring any such dispute before the Meeting of the States Parties.

2. The Meeting of the States Parties may contribute to the settlement of the dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties to a dispute to start the settlement procedure of their choice and recommending a time-limit for any agreed procedure.

3. This Article is without prejudice to the provisions of this Convention on facilitation and clarification of compliance.

Article 11. Meetings of the States Parties

1. The States Parties shall meet regularly in order to consider any matter with regard to the application or implementation of this Convention, including:

(a) The operation and status of this Convention;

(b) Matters arising from the reports submitted under the provisions of this Convention;

(c) International cooperation and assistance in accordance with Article 6;

(d) The development of technologies to clear anti-personnel mines;

(e) Submissions of States Parties under Article 8; and

(f) Decisions relating to submissions of States Parties as provided for in Article 5.

2. The First Meeting of the States Parties shall be convened by the Secretary-General of the United Nations within one year after the entry into force of this Convention. The subsequent meetings shall be convened by the Secretary-General of the United Nations annually until the first Review Conference.

3. Under the conditions set out in Article 8, the Secretary-General of the United Nations shall convene a Special Meeting of the States Parties.

4. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend these meetings as observers in accordance with the agreed Rules of Procedure.

Article 12. Review Conferences

1. A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention. Further Review Conferences shall be convened by the Secretary- General of the United Nations if so requested by one or more States Parties, provided that the interval between Review Conferences shall in no case be less than five years. All States Parties to this Convention shall be invited to each Review Conference.

2. The purpose of the Review Conference shall be:

(a) To review the operation and status of this Convention;

(b) To consider the need for and the interval between further Meetings of the States Parties referred to in paragraph 2 of Article 11;

(c) To take decisions on submissions of States Parties as provided for in Article 5; and

(d) To adopt, if necessary, in its final report conclusions related to the implementation of this Convention.

3. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International

Committee of the Red Cross and relevant non-governmental organizations may be invited to attend each Review Conference as observers in accordance with the agreed Rules of Procedure.

Article 13. Amendments

1.At any time after the entry into force of this Convention any State Party may propose amendments to this Convention. Any proposal for an amendment shall be communicated to the Depositary, who shall circulate it to all States Parties and shall seek their views on whether an Amendment Conference should be convened to consider the proposal. If a majority of the States Parties notify the Depositary no later than 30 days after its circulation that they support further consideration of the proposal, the Depositary shall convene an Amendment Conference to which all States Parties shall be invited.

2. States not parties to this Convention, as well as the United Nations, other relevant international

organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend each Amendment Conference as observers in accordance with the agreed Rules of Procedure.

3. The Amendment Conference shall be held immediately following a Meeting of the States Parties or a Review Conference unless a majority of the States Parties request that it be held earlier.

4. Any amendment to this Convention shall be adopted by a majority of two-thirds of the States Parties present and voting at the Amendment Conference. The Depositary shall communicate any amendment so adopted to the States Parties.

5. An amendment to this Convention shall enter into force for all States Parties to this Convention which have accepted it, upon the deposit with the Depositary of instruments of acceptance by a majority of States Parties. Thereafter it shall enter into force for any remaining State Party on the date of deposit of its instrument of acceptance.

Article 14. Costs

1. The costs of the Meetings of the States Parties, the Special Meetings of the States Parties, the Review Conferences and the Amendment Conferences shall be borne by the States Parties and States not parties to this Convention participating therein, in accordance with the United Nations scale of assessment adjusted appropriately.

2. The costs incurred by the Secretary-General of the United Nations under Articles 7 and 8 and the costs of any fact-finding mission shall be borne by the States Parties in accordance with the United Nations scale of assessment adjusted appropriately.

Article 15. Signature

This Convention, done at Oslo, Norway, on 18 September 1997, shall be open for signature at Ottawa, Canada, by all States from 3 December 1997 until 4 December 1997, and at the United Nations Headquarters in New York from 5 December 1997 until its entry into force.

Article 16. Ratification, Acceptance, Approval or Accession

1. This Convention is subject to ratification, acceptance or approval of the Signatories.

2. It shall be open for accession by any State which has not signed the Convention.

3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

Article 17. Entry into Force

1. This Convention shall enter into force on the first day of the sixth month after the month in which the 40th instrument of ratification, acceptance, approval or accession has been deposited.

2. For any State which deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the 40th instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the first day of the sixth month after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.

Article 18. Provisional Application

Any State may at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally paragraph 1 of Article 1 of this Convention pending its entry into force.

Article 19. Reservations

The Articles of this Convention shall not be subject to reservations.

Article 20. Duration and Withdrawal

1. This Convention shall be of unlimited duration.

2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating this withdrawal.

3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six-month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.

4. The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law.

Article 21. Depositary

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention.

Article 22. Authentic Texts

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, S/1999/957, 8 September 1999

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REPORT OF THE SECRETARY-GENERAL TO THE SECURITY COUNCIL ON THE PROTECTION OF CIVILIANS IN ARMED CONFLICT

I. INTRODUCTION

1. On 12 February 1999 the Security Council held an open meeting on the matter of the protection of civilians in armed conflict. The Council noted with concern that civilians continued to be targeted in instances of armed conflict, in flagrant violation of international humanitarian and human rights law (S/PRST/1999/6). The Council requested that I submit a report with recommendations on how it could act to improve both the physical and legal protection of civilians in situations of armed conflict. I hereby submit the present report to the Security Council in response to that request.

2. Despite the adoption of the various conventions on international humanitarian and human rights law over the past 50 years, hardly a day goes by where we are not presented with evidence of the intimidation, brutalization, torture and killing of helpless civilians in situations of armed conflict. Whether it is mutilations in Sierra Leone, genocide in Rwanda, ethnic cleansing in the Balkans or disappearances in Latin America, the parties to conflicts have acted with deliberate indifference to those conventions. Rebel factions, opposition fighters and Government forces continue to target innocent civilians with alarming frequency.

3. International humanitarian and human rights law set out the rights of civilians and the obligations of combatants during time of conflict. Yet, belligerents throughout the world refuse to respect these statutes, relying instead on terror as a means of control over populations. Terrible hardships are borne by those who are targeted and tremendous stresses are placed on those who attempt to cope with each crisis.

4. On 12 August 1999, on the fiftieth anniversary of the signature of the Geneva Conventions, I signed, with others, a solemn appeal to all peoples, nations and Governments to reject the idea that war is inevitable and to work tirelessly to eradicate its underlying causes; to demand of all those involved in armed conflicts that they respect the essential humanitarian principles and the rules of international law; to spare civilians the agony of war; and to foster relations between individuals, peoples and nations on the basis of respect for human dignity, compassion and solidarity.

5. This report offers clear recommendations on what must be done to protect civilians, including measures that the Security Council can adopt within its sphere of responsibility. The report seeks to encourage decisive Council action to address this critical issue and to promote a "climate of compliance". How the Council responds to this challenge will be of crucial importance.

II. THREATS AND VIOLENCE AGAINST CIVILIANS IN ARMED CONFLICT

6. International humanitarian law sets standards for parties to an armed conflict on the treatment of civilians and other protected persons. Virtually all Member States have ratified the Geneva Conventions of 1949,[1] with a majority having signed or ratified the 1977 Protocols.[2] There are also legal norms in international human rights law from which there can be no derogation or suspension in time of public emergency.

7. However, the failure of parties to armed conflict to comply with the law on the one hand, and the lack of effective enforcement mechanisms on the other, have led to a situation in which civilians suffer disproportionately, and which the international community appears powerless to prevent.

A. Attacks against civilians

8. In many of today's armed conflicts, civilian casualties and the destruction of civilian infrastructure are not simply byproducts of war, but the consequence of the deliberate targeting of non-combatants. The violence is frequently perpetrated by non-state actors, including irregular forces and privately financed militias. In many conflicts, belligerents target civilians in order to expel or eradicate segments of the population, or for the purpose of hastening military surrender.

9. One feature of internal conflicts today is that the dividing line between civilians and combatants is frequently blurred. Combatants often live or seek shelter in villages, and sometimes use innocent civilians, even children, as human shields. In some cases, communities provide logistic support to armed groups, either voluntarily or under compulsion, and become targeted as a consequence.

10. In some cases, civilians have been systematically tortured and killed. During the 1994 genocide in Rwanda, entire families were executed in their homes

[1] To date, 188 countries have ratified the Geneva Conventions.

[2] Protocol I additional to the four Geneva Conventions of 1949 extends the definition of "international armed conflicts" to armed conflicts in which people are fighting against colonial domination, alien occupation and against racist regimes in the exercise of their right to self-determination. Protocol II additional to the Geneva Conventions develops and supplements article 3 common to the four Geneva Conventions concerning armed conflicts "not of an international character" occurring in the territory of one of the "High Contracting Parties".

and entire villages brutalized in an orchestrated campaign of mass extermination that claimed more than 500,000 lives. In Sierra Leone, since 1997, more than 5,000 civilians have suffered mutilations. In Burundi, over a quarter of a million people have been killed and hundreds of thousands repeatedly displaced.

B. Forced displacement

11. Today, there are over 30 million displaced people,[3] half of them children. Often exposed to systematic atrocities and without adequate physical protection, they are forced to flee, leaving behind their possessions, their homes and family members. Since this report was commissioned, large segments of the population of Kosovo in the Federal Republic of Yugoslavia were displaced, as well as hundreds of thousands of Angolans affected by the resumption of civil war there, to name just two places.

12. Forced displacement takes place both across and within national boundaries. People forced to leave their country of nationality or permanent residence should enjoy the protection of international refugee law, yet many do not. Internally displaced persons are in principle covered by the laws of their own country as well as by international humanitarian law applicable to victims of non-governmental conflicts and international human rights law.[4] Nevertheless, guarantees found in international human rights and humanitarian law are often disregarded by the country of origin or by the Government of the receiving State. Non-state actors are often unwilling or unable to meet the protection needs of displaced persons and refugees. This has led to many instances of containment and refoulement of refugees. In other cases, national authorities have been unwilling to acknowledge the existence of internally displaced persons and have obstructed international efforts to assist and protect them.

13. Furthermore, in many recent and current internal armed conflicts, combatants deliberately intimidate, attack and displace local populations to further their pursuit of economic control over natural resources. In such cases combatants rely on, and indeed profit from, civilian displacement.

C. Combatants and armed elements mixed with civilians in camps for refugees and internally displaced persons

14. Despite the promise of temporary refuge, camps do not always guarantee civilians protection. Failure to maintain the purely civilian and humanitarian character of camps means that civilians can find themselves living side by side

[3] The Office of the United Nations High Commissioner for Refugees estimates the number of refugees at 13.2 million (The State of the World's Refugees - 1997-1998). The Representative of the Secretary-General for internally displaced persons estimates their number at between 20 and 25 million (E/CN.4/1999/79).

[4] The rights of internally displaced persons have been outlined in the "Guiding Principles on Internal Displacement", presented to the Commission on Human Rights in 1998 by the Representative of the Secretary-General on internally displaced persons (E/CN.4/1998/53/Add.2, annex).

with combatants or other armed elements. In such circumstances, relief supplies may be diverted to members of warring factions who do not qualify for international protection or assistance. Moreover, warring factions frequently control the movement of refugees, impeding return or other sustainable solutions.

15. The presence of combatants in internally displaced person and refugee camps can destabilize the situation in an entire region. The most striking example was the infiltration of refugee camps in Zaire (now the Democratic Republic of the Congo) and Rwanda following the end of the civil war in 1994 by the Interahamwe and Impuzamugambi militia and remnants of the former Rwandan Army. Such elements also jeopardize the safety and protection of civilians, especially children, who may be forcibly recruited. Camps in States neighbouring the refugees' home country are often too close to the border and become militarized. They therefore become susceptible to cross-border attacks, military incursions and infiltration.

D. Specific problems faced by children

16. The United Nations Children's Fund estimates that two million children have been killed as a direct result of armed conflict in the course of the last decade. Three times that many have been seriously injured or permanently disabled. Even greater numbers die of malnutrition and disease and more than 300,000 children under 18 years of age have been ruthlessly exploited as soldiers in government armed forces or armed opposition groups in ongoing conflicts.[5] Inevitably, many of the children recruited into the military are deprived of their basic rights, including those to family unity and education. Countless numbers of children experience grave emotional wounds as a result of their experiences and the events they witness.

17. The Machel report on the impact of armed conflict on children (A/51/306 and Add.1) drew attention to aspects of children's protection in armed conflict that require new policy, programme and operational responses. It drew particular attention to the gross violations of children's rights when they, as soldiers, are made to participate in mutilation campaigns, rape, gender-based violence and sexual abuse.

E. Specific problems faced by women

18. Complex emergencies have a different impact on women and men. While men account for the largest numbers of combatants, women and children are disproportionately represented among civilians affected by conflict. This usually leads to dramatic increases in the number of children and women heads of households, leading to abrupt changes in their roles and increases in their workloads. The breakdown of the social fabric and the disintegration of families during times of armed conflict often leave women and girls especially vulnerable to gender-based violence and sexual exploitation, including rape and forced prostitution. Women also constitute the majority of refugees and

[5] See report of the Special Representative of the Secretary-General for Children and Armed Conflict of 12 October 1998 (A/53/482, paras. 18-22).

internally displaced persons: thus the burdens of displacement described above are disproportionately borne by them. Men on the other hand have been the major victims of summary mass executions in a number of recent wars.

F. Denial of humanitarian assistance and humanitarian access

19. Combatants target civilians in conflict by, among other things, attempting to restrict their access to food and/or other forms of life-saving assistance, or, indeed, deliberately starving them. In 1992 in Somalia, for instance, the parties to the conflict deliberately impeded the delivery of essential food and medical supplies, while during the siege of the enclaves in Bosnia and Herzegovina, civilians were systematically deprived of assistance necessary for their survival.

20. In this year alone, restrictions on the access of humanitarian organizations to those in need have put hundreds of thousands at risk in Angola, Kosovo (Federal Republic of Yugoslavia) and Sierra Leone. In the absence of any international presence, civilians affected by the conflicts in these areas are at the mercy of the warring parties and are dependent on them for the supplies they need.

G. Targeting of humanitarian and peacekeeping personnel

21. Humanitarian and peacekeeping personnel have increasingly become targets of organized violence. The protective emblem of the International Red Cross as well as the Red Crescent, and the United Nations flag, which represent the impartiality of relief workers, appear to offer less protection than ever. Threats against relief workers and peacekeeping personnel further restrict the ability of humanitarian organizations to ensure the delivery of assistance to vulnerable populations.

22. In recent years, United Nations staff and other humanitarian workers have lost their lives in Afghanistan, Angola, Bosnia and Herzegovina, Burundi, El Salvador, Ethiopia, Georgia, Haiti, Iraq, the Russian Federation (Chechnya), Rwanda, Sierra Leone, Somalia, the Sudan, Tajikistan and Uganda, while others have been abducted in Bosnia and Herzegovina, Georgia, Guatemala, Liberia, Peru, the Russian Federation (Chechnya), Somalia, the Sudan and Tajikistan. Death, injury or harassment of humanitarian personnel have become almost daily occurrences.

H. Widespread availability of small arms and continued use of anti-personnel landmines

23. The widespread use of small arms, light weapons and anti-personnel landmines has had a significant impact on the scope and level of the violence that affects civilian populations in armed conflict. The absence of effective controls on the transfer of small arms along with their low cost make them popular weapons in today's conflicts. These light and easy-to-use weapons have made it much easier to turn children into soldiers. Their easy availability to untrained combatants has also greatly increased the risks of delivering humanitarian assistance in affected areas.

24. Millions of unexploded low-cost anti-personnel landmines and other ordnance constitute the deadly legacy of more than two dozen wars. They kill and maim thousands of civilians every year. Landmines also deny the use of land for agriculture, impede the delivery of humanitarian assistance and development aid and disrupt and delay the resettlement and reintegration of returning internally displaced persons and refugees.

I. Humanitarian impact of sanctions

25. Recent experience has shown that sanctions can have a highly negative impact on civilian populations, especially children and women. Sanctions committees established by the Security Council to oversee the implementation of sanctions regimes have recently taken steps to streamline and expedite their procedures for processing humanitarian exemptions. Nonetheless, the collateral effects of such measures continue to give cause for concern in many cases.

26. Regional sanctions and embargoes are of special concern. Often hastily imposed by neighbouring countries without clear guidelines regarding the minimization of their humanitarian impact, regional sanctions have hampered the provision of emergency humanitarian assistance in recent years, particularly in Sierra Leone and Burundi. The impediments to the efficient processing of humanitarian exemptions by regional sanctions authorities have, on several occasions, prevented United Nations humanitarian operations from delivering urgently needed assistance.

III. MAINTAINING PEACE AND SECURITY - THE ROLE OF THE SECURITY COUNCIL IN THE PROTECTION OF CIVILIANS IN SITUATIONS OF ARMED CONFLICT

27. In its presidential statement of 12 February 1999 (S/PRST/1999/6), the Security Council noted that large-scale human suffering is a consequence and sometimes a contributing factor to instability and further conflict. Bearing in mind its primary responsibility for the maintenance of international peace and security, the Council affirmed the need for the international community to assist and protect civilian populations affected by armed conflict. The Council also expressed its willingness to respond, in accordance with the Charter of the United Nations, to situations in which civilians, as such, have been targeted or humanitarian assistance to civilians has been deliberately obstructed.

28. The above statement affirms the intimate connections between systematic and widespread violations of the rights of civilians and breakdowns in international peace and security.

29. It is now generally recognized that the maintenance of international peace and security requires action by the Security Council at all stages of a conflict or potential conflict. Whenever possible, action must be taken to address the root causes of conflict and to prevent disputes from escalating into violence. Where, for whatever reason, these preventive approaches cannot be effectively implemented or have failed, the main thrust of policy must be to minimize the consequences of the violence for civilian populations and to seek to bring hostilities to a close. In the aftermath of war, all efforts must be directed

at peacekeeping and peace-building, including reconciliation amongst groups pulled apart by the conflict, and the administration of justice to those who have violated international humanitarian or human rights law.

30. In a series of resolutions adopted since 1991, the Security Council has reaffirmed its "primary responsibility for the maintenance of international peace and security", as set out in Article 24 of the Charter. The Council also recognizes that massive and systematic breaches of human rights law and international humanitarian law constitute threats to international peace and security and therefore demand its attention and action.

31. In its resolution 688 (1991), of 5 April 1991, on Iraq, the Security Council recognized that the repression of the civilian population led to consequences that threatened peace and security in the region. In resolution 941 (1994), of 23 September 1994 on Bosnia and Herzegovina, the Council recognized that ethnic cleansing constituted a clear violation of international humanitarian law and posed a threat to the peace effort. In resolution 955 (1994), of 8 November 1994, on Rwanda, the Council indicated that genocide and other systematic widespread and flagrant violations of international humanitarian law constituted a threat to international peace and security. In resolution 1203 (1998), of 24 October 1998, on Kosovo, Federal Republic of Yugoslavia, the Security Council affirmed that the situation within the country's borders constituted a continuing threat to peace and security in the region. Finally, and most recently, resolution 1244 (1999), of 10 June 1999, on Kosovo, Federal Republic of Yugoslavia, reaffirmed respect for sovereignty and territorial integrity but also mandated a United Nations mission to restore and maintain security within the territory of the province.

32. The Security Council's increased concern for the plight of civilians in armed conflict has been reinforced by the frequent briefings it has received on the humanitarian situation in countries affected by conflict, and is further illustrated by the establishment by the Council of international ad hoc criminal tribunals for the former Yugoslavia and Rwanda.

33. Prevention, peace-making, peacekeeping and peace-building are mutually reinforcing and must sometimes take place concurrently if the Security Council is to adopt a comprehensive and integrated approach to protecting civilians in armed conflict. In its presidential statement of 12 February 1999 the Council called for a comprehensive and coordinated approach by Member States and international organizations and agencies to address the problem of civilians in situations of armed conflicts. Indeed it was in precisely this context that the Council requested the present report containing concrete recommendations on ways the Council, acting within its sphere of responsibility, could improve the physical and legal protection of civilians in situations of armed conflict.

34. In the section which follows, I have elaborated a number of specific recommendations for the Council to consider. These recommendations have emerged from broad consultations, including, as requested, with the Inter-Agency Standing Committee. They cover action at all stages of a conflict and include a wide range of activities relating to both legal and physical protection. They range from measures to promote adherence to international law, through political

and diplomatic initiatives intended to influence the behaviour of parties to conflicts, to measures of enforcement under Chapter VII of the Charter.

IV. RECOMMENDED MEASURES TO STRENGTHEN LEGAL PROTECTION

35. The protection of civilians in armed conflict would be largely assured if combatants respected the provisions of international humanitarian and human rights law. The recommendations in this section are therefore aimed at identifying ways in which the Security Council can promote full respect for international humanitarian, human rights and refugee law, by States and non-state actors, and particularly by parties to conflicts. The recommendations also include proposals for action by the Council to ensure that violations of these instruments are addressed through appropriate judicial processes.

A. Ratification and implementation of international instruments

36. International instruments are essential tools for the legal protection of civilians in armed conflict and should therefore be a major focus of the Security Council's efforts. These efforts should be focused initially on encouraging Member States to ratify the major instruments, to take steps to ensure their implementation in practice and to heighten awareness and acceptance of these fundamental international norms within national armed forces and police and among all sectors of society. In order to promote a "climate of compliance", Member States should take advantage of the technical services of United Nations bodies and other appropriate organizations, including the International Committee of the Red Cross, to support the incorporation of these international instruments into national law, to develop strong national institutions charged with the dissemination, monitoring and enforcement of these instruments and to establish systematic training programmes for armed forces and police in international humanitarian, human rights and refugee law, including child rights and gender related provisions. In this context, Member States could usefully exchange information about best practices with respect to the implementation of the major instruments of international humanitarian, human rights and refugee law.[6]

[6] The major instruments in international humanitarian law are the four Geneva Conventions (1949) and the two Additional Protocols (1977), of which the latter covers internal armed conflicts. The major human rights treaties are the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989), the International Convention on the Elimination of All Forms of Racial Discrimination (1965) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). The major instruments of refugee law are the Convention on the Status of Refugees (1951) and its Protocol (1967). Other relevant instruments are the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (1997), the Convention on the Safety of United Nations and Associated Personnel (1994), the Statute of the

I recommend that the Security Council:

1. Urge Member States to ratify the major instruments of international humanitarian law, human rights law and refugee law, to withdraw reservations and to take all appropriate legislative, judicial and administrative measures to implement these instruments, including dissemination among all sectors of society, and to report to the Council on action taken in this regard.

2. Call on Member States and non-state actors, as appropriate, to adhere to international humanitarian, human rights and refugee law, particularly the non-derogable rights enumerated in article 4 of the International Covenant on Civil and Political Rights.[7]

B. Accountability for war crimes

37. Widespread and systematic violations of international humanitarian and human rights law have too frequently not been prosecuted by domestic authorities. The Security Council's establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda constituted a major step forward in addressing this failing and in combating the culture of impunity. The adoption of the Statute of the International Criminal Court in 1998 provides for the establishment of a global enforcement mechanism to address impunity, which may also serve as a potential deterrent to future violators. The apprehension and trial of indicted war crimes suspects is an indispensable component in the enforcement of international law and justice.

38. In this context, I also recall the recommendation, which I made to the Security Council in my report on the causes of conflict and the promotion of durable peace and sustainable development in Africa (A/52/871), that combatants be held financially liable for their victims under international law where civilians are made the deliberate target of aggression, and that international legal machinery be developed to facilitate efforts to find, attach and seize the assets of transgressing parties and their leaders.

I recommend that the Security Council:

3. In cases of non-compliance, consider using the enforcement measures contained in the Charter of the United Nations under Chapter VII, to induce compliance with orders and requests of the two existing ad hoc tribunals for the

International Criminal Court (1998), the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and its Protocol (1999), and the Convention on Conventional Weapons (1980) and its four Additional Protocols.

[7] Article 4 of the International Covenant on Civil and Political Rights declares non-derogable the right against discrimination on grounds of race, colour, sex, language, religion or social origin under international humanitarian law in times of armed conflict. The most frequent violations of non-derogable rights are summary and arbitrary executions, torture, cruel and degrading treatments and slavery (forced labour).

former Yugoslavia and Rwanda, respectively, for the arrest and surrender of accused persons.

4. Urge Member States to ratify the Statute of the International Criminal Court as a concrete measure aimed at enforcing respect for international humanitarian law and human rights law.[8]

5. Pending the establishment of the International Criminal Court, encourage the development of judicial and investigative mechanisms with national and international components, which may be used when the prosecution of those responsible for genocide, crimes against humanity and war crimes in either national or international tribunals appears unlikely given the unwillingness or inability of the parties involved.

6. Urge Member States to adopt national legislation for the prosecution of individuals responsible for genocide, crimes against humanity and war crimes. Member States should initiate prosecution of persons under their authority or on their territory for grave breaches of international humanitarian law on the basis of the principle of universal jurisdiction and report thereon to the Security Council.

C. Gaps in existing international law

1. Internal displacement

39. In 1992, in response to a request by the Commission on Human Rights, the then Secretary-General appointed a Representative on Internally Displaced Persons, whose objective was to examine the protection of internally displaced persons. In the absence of an international legal framework spelling out the rights and the freedoms of internally displaced persons specifically, the Representative compiled the Guiding Principles on Internal Displacement, which are based on existing instruments in international humanitarian and human rights law, and which were presented to the Commission on Human Rights in 1998 (E/CN.4/1998/53/Add.2, annex).

I recommend that the Security Council:

7. In cases of massive internal displacement, encourage States to follow the legal guidance provided in the Guiding Principles on Internal Displacement.

[8] As of June 1999, only three of the 82 signatory States to the Statute of the International Criminal Court have presented their ratification instrument. An additional 57 ratifications are required for the Statute to enter into force.

2. Minimum age of recruitment in the armed forces and other armed groups

40. The internationally accepted minimum age for recruitment and participation in hostilities is currently 15 years.[9] The Statute of the International Criminal Court (1998) classifies the conscription, enlistment or use of children under the age of 15 as a war crime. The International Labour Organization Worst Forms of Child Labour Convention (1999) prohibits the forced or compulsory recruitment of children under 18 for use in armed conflict, but permits voluntary enlistment as well as recruitment for purposes other than combat. The African Charter on the Rights and Welfare of the Child (1990) prohibits the recruitment or use of children under age 18. None of these three Conventions are in force at present and the efforts of the Commission on Human Rights to introduce and adopt an optional protocol to the Convention on the Rights of the Child, aimed at raising the minimum age for recruitment and participation in hostilities to 18, have yet to succeed.

41. Though national legislation in most Member States codifies 18 as the age of obligatory military service, unfortunately this is seldom observed in time of armed conflict. An additional complication derives from the fact that most child soldiers participating in armed conflict do so within the ranks of non-state armed groups, where the line of command and responsibility is often unclear.

42. In October 1998, I announced a minimum age requirement for United Nations peacekeepers being made available to the United Nations by Member States and asked contributing Governments to send in their national contingent's troops preferably not younger than 21 years of age, and in no case less than 18. In addition, Member States were also requested not to send civilian police and military observers younger than 25 years of age to peacekeeping operations.[10] This decision was taken to ensure that the use of uniformed personnel by the United Nations is an example for police and military forces worldwide.

I recommend that the Security Council:

8. Urge Member States to support the proposal to raise the minimum age for recruitment and participation in hostilities to 18, and accelerate the drafting of an optional protocol on the situation of children in armed conflict to the Convention on the Rights of the Child for consideration by the General Assembly.

[9] It should be noted, however, that article 38.3 of the Convention on the Rights of the Child states that States Parties shall refrain from recruiting any person who has not attained the age of 15 years into their armed forces. In recruiting among those persons who have attained the age of 15 but who have not attained the age of 18 years, States Parties shall endeavour to give priority to those who are oldest.

[10] See the daily press briefing of the Office of the Spokesman of the Secretary-General of 29 October 1998.

9. Demand that non-state actors involved in conflict not use children below the age of 18 in hostilities, or face the imposition of targeted sanctions if they do not comply.

3. Safety of humanitarian personnel

43. The Convention on the Safety of United Nations and Associated Personnel of 1994, which entered into force on 15 January 1999, covers those United Nations and associated personnel engaged in operations specifically authorized by the Security Council or the General Assembly. I believe that there is an emerging consensus that the scope of the Convention of 1994 should be extended to cover other categories of United Nations and associated personnel not at present covered under the Convention, including locally recruited staff. States should also consider adopting appropriate national legislation on this matter.

I recommend that the Security Council:

10. Urge Member States which have not yet done so to ratify the 1994 Convention on the Safety of United Nations and Associated Personnel, and encourage States which have already ratified to implement it fully.

11. Invite the General Assembly to urgently pursue the development of a protocol to the 1994 Convention, which would extend the scope of legal protection to all United Nations and associated personnel.

V. RECOMMENDED MEASURES TO STRENGTHEN PHYSICAL PROTECTION

44. In addition to the application of legal measures, the Security Council can promote the protection of civilians in conflict both by political and diplomatic measures as well as by peacekeeping or enforcement measures under Chapters VI, VII or VIII of the Charter. The recommendations in this chapter therefore seek to identify ways in which the Council can strengthen the physical protection of civilians through a wide range of measures, which may be introduced at different stages of a conflict.

A. Conflict prevention

45. The primary purpose of the United Nations, as stated in Article 1.1 of the Charter, is "to maintain peace and security by the prevention and removal of threats to the peace". Given that the Security Council is the primary organ responsible for the maintenance of international peace and security, it is vital that it devote greater attention to conflict prevention and give effective leadership and strong backing to efforts in this field. In this context, my July 1997 report on United Nations reform stressed that greater emphasis should be placed on timely and adequate prevention. The United Nations of the twenty-first century must increasingly become a focus of preventive measures.

46. While the causes of conflict are complex and need to be addressed in a comprehensive manner, there are a number of steps which the Council could take, acting within its sphere of responsibility, to identify potential conflict situations much sooner than is now the case and to forestall the outbreak of

hostilities. For example, early warning mechanisms are widely regarded as serving an important role in conflict prevention. Timely and adequate response to early warning will enhance the chances of preventing outbreaks of armed conflict.

47. The United Nations preventive deployment force in the former Yugoslav Republic of Macedonia is a good example of effective early action for conflict prevention. The Council should consider the use of such deployment in other situations. Preventive deployments will be of particular value in situations where the legacy of past conflict has increased the risk of mass violations of human rights. It is also important to bear in mind that while mass killings and atrocities can break out with fearsome rapidity it is usually only after considerable planning and pre-deployment of militia and other forces.

I recommend that the Security Council:

12. Consider deployment in certain cases of a preventive peacekeeping operation, or of another preventive monitoring presence.

13. Increase its use of relevant provisions in the Charter, such as Articles 34 to 36, by investigating disputes at an early stage, inviting Member States to bring disputes to the Security Council's attention, and recommending appropriate procedures for dealing with disputes; and strengthen the relevance of Article 99 of the Charter by taking concrete action in response to threats against peace and security as these are identified by the Secretariat.

14. Establish Security Council working groups relating to certain specific volatile situations to improve the understanding of the causes and implications of conflict, as well to provide a consistent forum in which to consider options to prevent the outbreak of violence in each case.

15. Make use of the human rights information and analysis emanating from independent treaty body experts and mechanisms of the Commission on Human Rights, as well as other reliable sources, as indicators for potential preventive action by the United Nations.

B. Confidence-building

1. Media

48. The role of the mass media in armed conflict needs special attention. The genocide in Rwanda and the crimes against humanity in Bosnia and Herzegovina were triggered in part by nationalistic and ethnocentric hate campaigns propagated through the mass media. Efforts to address the problem of hate media are constrained by concerns relating to national sovereignty and freedom of the press. Yet the obligation to take all possible action to prevent the open incitement to violence against particular groups is self-evident. Accordingly, I shall instruct relevant departments at Headquarters, and my representatives and the resident coordinators in countries affected by this phenomenon, to encourage and support objective broadcasting or other media initiatives, including measures to dispel rumours, counter misinformation and promote the free exchange of information. I have also decided to launch an international

effort to explore appropriate responses to "hate media" that seek to incite violence against civilians.

I recommend that the Security Council:

16. In situations of ongoing conflict, ensure that, whenever required, appropriate measures are adopted to control or close down hate media assets.

17. Ensure that United Nations missions aimed at peace-making, peacekeeping and peace-building include a mass media component that can disseminate information about international humanitarian law and human rights law, including peace education and children's protection, while also giving objective information about the activities of the United Nations, and encourage authorized regional missions to include such a capacity.

2. Other mechanisms

49. In recent years a number of different types of confidence-building measures have been tried in the immediate post-conflict peace-building phase. These have included, inter alia, measures to encourage visits and exchanges between members of different groups previously at war; cultural and sporting events; adjustments to regulations relating to the issuance of official documents such as passports, identification cards and vehicle license plates and conferences and symposia of professional and technical personnel from different regions of the affected country. Some of these activities are also relevant in the early stages of hostilities before conflict becomes entrenched, or as a means of breaking through an impasse during conflict resolution negotiations. I have therefore decided to develop a field manual of good practice, giving details of successful confidence-building measures in peace-building operations, for use in future such operations.

50. In the field of confidence-building the Council may find value in collaboration with non-governmental organizations and other civil society actors, which offer expertise and added value in these fields.

C. Humanitarian access

51. It is the obligation of States to ensure that affected populations have access to the assistance they require for their survival. If a State is unable to fulfil its obligation, the international community has a responsibility to ensure that humanitarian aid is provided. The rapid deployment of humanitarian assistance operations is critical when responding to the needs of civilians affected by armed conflict. Effective and timely humanitarian action requires unhindered access to those in need. Thus, humanitarian organizations are involved on a daily basis in negotiations with the parties to conflicts to obtain and maintain safe access to civilians in need, as well as guarantees of security for humanitarian personnel. In order to fulfil this task, humanitarian actors must be able to maintain a dialogue with relevant non-state actors without thereby lending them any political legitimacy.

I recommend that the Security Council:

18. Underscore in its resolutions, at the onset of a conflict, the imperative for civilian populations to have unimpeded access to humanitarian assistance and for concerned parties, including non-state actors, to cooperate fully with the United Nations humanitarian coordinator in providing such access, as well as to guarantee the security of humanitarian organizations, in accordance with the principles of humanity, neutrality and impartiality, and insist that failure to comply will result in the imposition of targeted sanctions.

19. Urge neighbouring Member States to ensure access for humanitarian assistance and call on them to bring any issues that might threaten the right of civilians to assistance to the attention of the Security Council as a matter affecting peace and security.

D. Special measures for children and women

52. In the Council's comprehensive resolution of 25 August 1999 on the item children and armed conflict, the Council noted, inter alia, recent efforts to bring to an end the use of children as child soldiers, in particular International Labour Organization Convention No. 182, which prohibits forced or compulsory labour. The Council also noted the Rome Statute of the International Criminal Court, in which conscripting or enlisting children under the age of 15 or using them to participate actively in hostilities is characterized as a war crime. The Council strongly condemned the targeting of children in situations of armed conflict and called upon all parties to comply strictly with their obligations under the United Nations Convention on the Rights of the Child, and stressed the responsibility of all States to bring an end to impunity. The Council's recognition of the importance of child protection has created a favourable environment for the consideration of new concrete measures in this field.

53. The particular vulnerability of women in modern armed conflict has already been described. Measures to address this vulnerability need to be taken at all stages of the conflict. I would ask the agencies concerned to establish monitoring and reporting systems that include the documentation of violations against women and children in conflict situations.

I recommend that the Security Council:

20. Ensure, as appropriate, that the special protection and assistance requirements of children and women are fully addressed in all peacekeeping and peace-building operations.

21. Systematically require parties to conflicts to make special arrangements to meet the protection and assistance requirements of children and women. These could include the promotion of "days of immunization" or similar initiatives.

E. Targeted sanctions

54. The continued efforts by Member States to develop more targeted sanctions regimes are welcome. The concept of targeted sanctions,[11] including financial sanctions, such as freezing of overseas assets, trade embargoes on arms and luxury goods and travel bans constitutes a potentially valuable means for pressuring targeted elites, while minimizing the negative humanitarian impact on vulnerable civilian populations that has been a characteristic of comprehensive economic sanctions.[12] In collaboration with a number of Member States and civil society organizations, I am committed to continuing a number of ongoing efforts to improve the efficacy of targeted sanctions.

I recommend that the Security Council:

22. Make greater use of targeted sanctions to deter and contain those who commit egregious violations of international humanitarian and human rights law, as well as those parties to conflicts which continually defy the resolutions of the Security Council, thereby flouting its authority.

23. Establish a permanent technical review mechanism of United Nations and regional sanctions regimes which can use information provided by Council members, relevant financial institutions, the Secretariat, agencies and other humanitarian actors to ascertain the probable impact of sanctions on civilians.[13]

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[11] Targeted sanctions, also referred to as smart sanctions, include: the freezing of financial assets of regime members or elites who support them; suspension of credits and grant aid; denial and limitation of access to overseas financial markets; trade embargoes on arms and luxury goods; flight bans; political sanctions such as diplomatic isolation and withdrawal of accreditation; denial of overseas travel, visas and educational opportunities to regime members and their families. Targeted sanctions are a less blunt instrument than comprehensive sanctions, thereby minimizing humanitarian costs, the disruption of non-military trade, the likelihood of a black market emerging, additional humanitarian aid requirements and a negative impact on social infrastructures.

[12] I am encouraged that recent resolutions of the Security Council establishing or modifying existing sanctions regimes (e.g. the Sudan, Angola, Sierra Leone), and, most recently, the arms embargo in the case of the Federal Republic of Yugoslavia, have been designed to include measures with little or no humanitarian impact. I also welcome recent efforts of the Council to address the humanitarian aspect of sanctions in Iraq pursuant to Council resolution 986 (1995). Moreover, the members of the Security Council recently agreed on a series of practical proposals to improve the work of the Sanctions Committee in this area, reported in the note by the President of the Security Council of 29 January 1999 (S/1999/92). I look forward to further progress on this matter.

[13] The most vulnerable groups are defined as children, pregnant or nursing mothers, the elderly and the sick and infirm.

24. Further develop standards and rules to minimize the humanitarian impact of sanctions on the basis of proposals made by the President of the Council to the sanctions committees, and ensure especially that sanctions are not imposed without provision for obligatory, immediate and enforceable humanitarian exemptions.

25. Request regional organizations or groups of countries to submit complete information regarding the establishment of proper humanitarian exemption mechanisms and clearance procedures prior to authorizing the imposition of regional sanctions. The Council may also wish to monitor the ability of regional sanctions authorities to implement the exemptions and clear shipments of humanitarian goods and to establish procedures for exercising its authority to address inadequacies.

F. Small arms and anti-personnel landmines

55. The proliferation and abuse of light weapons and small arms fuel conflicts, exacerbate the suffering of civilian victims and contribute to the breakdown of societies. A number of international and regional initiatives are seeking to address this difficult problem. I fully endorse these initiatives. Controlling the availability of arms is an essential prerequisite for a successful peace-building process. It requires a multi-dimensional approach involving demobilization, rehabilitation of combatants, law enforcement, measures to stop illegal trafficking and regulations for the legal registration and use of arms.

56. Landmines continue to maim and kill thousands of civilians each year. Unexploded ordnance, particularly cluster bombs, also kill and maim civilians long after they are used. Although a large number of States have ratified the Ottawa Convention on landmines, many States have not and some require assistance from the United Nations to meet their treaty obligations.

I recommend that the Security Council:

26. Impose arms embargoes in situations where civilians and protected persons are targeted by the parties to the conflict, or where the parties are known to commit systematic and widespread violations of international humanitarian and human rights law, including the recruitment of child soldiers; and urge Member States to enforce these embargoes in their own national jurisdictions.

27. Encourage Member States to give political and financial support and assistance to other States to facilitate compliance with the Ottawa Convention.

G. Peacekeeping

57. In the past, United Nations peacekeeping operations have performed a wide range of tasks related to the protection of civilians, including: discouraging abuses of civilian populations; providing stability and fostering a political process of reconciliation; supporting institution-building efforts, including in such areas as human rights and law enforcement; protecting humanitarian workers and delivering humanitarian assistance; maintaining the security and neutrality of refugee camps, including separation of combatants and non-combatants;

maintaining "safe zones" for the protection of civilian populations; deterring and addressing abuses including through the arrest of war criminals.

58. In the past, difficulties have arisen where it has been foreseen that elements of a peacekeeping mandate would be combined with a coercive or enforcement role, where mandates were insufficiently clear or inadequate resources were assigned to the task. It is therefore important to make a clear distinction between those tasks which can be accomplished with a modest presence, those which require a credible deterrent capacity, and those which require enforcement action.

59. The Security Council's increasing emphasis on the integration of human rights and humanitarian concerns in its actions to promote peace and resolve conflicts is a recognition of the need for a comprehensive approach to peacekeeping, which also helps to strengthen the protection of civilians. In its most recent report, the Special Committee on Peacekeeping Operations noted that the scope of peacekeeping has to be multi-disciplinary in nature, not solely restricted to military tasks, but also include civilian police activities, humanitarian assistance, disarmament and demobilization measures, actions against the proliferation of small arms and light weapons and human rights monitoring.

1. Provision of resources and support

60. As a general rule, the effectiveness of any operation bears a strong relation to its capacity to deploy swiftly the resources necessary to fulfil a given mandate. If an operation arrives in the field without the necessary capacity, this not only limits its practical effectiveness, but also undermines its political viability. A mission that is perceived as strong from the beginning of its deployment is far less likely to be tested than one which is perceived as initially vulnerable or ineffective.

I recommend that the Security Council:

28. Take steps to strengthen the Organization's capacity to plan and deploy rapidly. This includes enhancing the participation in the United Nations Stand-by Arrangements System, including by increasing the numbers of civilian police and specialized civil administration and humanitarian personnel. Rapidly deployable units of military and police are also required. Also essential is the capacity to quickly deploy a Mission headquarters.

29. Ensure that these units are trained in human rights and international humanitarian law, including child and gender related provisions, civilian-military coordination and communications and negotiation skills.

2. Compliance with international standards in United Nations operations

61. The presence and activities of United Nations peacekeepers in volatile areas throughout the world have contributed significantly to the protection of civilians in armed conflict. Countless young men and women have done so selflessly, some having given their lives. In order to protect civilians in armed conflict, as well as to protect the legitimacy and respect of peacekeeping

operations and their personnel, we need to address those cases in which peacekeepers are involved in unacceptable behaviour, including abuses of the civilian population. I have made available to troop-contributors a number of texts on human rights obligations and codes of conduct. It is important that national training programmes give appropriate emphasis to these obligations. I have also recently promulgated a Secretary-General's bulletin on the observance of international humanitarian law by members of United Nations forces, instructing them on the basic principles and rules governing means and methods of warfare and the protection of civilians and other protected persons. I shall count on the Security Council to lend appropriate support to my future requests to include ombudspersons and, where appropriate, investigatory capacities in United Nations peacekeeping operations.

I recommend that the Security Council:

30. Underscore the importance of compliance with international humanitarian and human rights law in the conduct of all peacekeeping operations by urging that Member States disseminate instructions among their personnel serving in United Nations peacekeeping operations and among those participating in authorized operations conducted under national or regional command and control.

31. Support a public "ombudsman" with all peacekeeping operations to deal with complaints from the general public about the behaviour of United Nations peacekeepers and establish an ad hoc fact-finding commission, as necessary, to examine reports on alleged breaches of international humanitarian and human rights law committed by members of United Nations forces.

32. Request the deploying Member States to report to the United Nations Secretariat on measures taken to prosecute members of their armed forces who have violated international humanitarian and human rights law while in service of the United Nations.

33. Where appropriate, establish a peacekeeping presence early in the movement of refugees and displaced persons, in order to ensure that they are able to settle in camps free from the threat of harassment or infiltration by armed elements.

3. Cooperation with other actors

62. The United Nations welcomes the possibility of collaboration with regional and sub-regional efforts whenever this will assist in conflict prevention, management or resolution. At the same time, certain limitations and concerns are evident. In many cases, regional organizations will face planning, structural or financial limitations that are graver than those facing the United Nations. This could lead to unequal response to conflict in different places. There is also concern that, where action is authorized without United Nations oversight, inappropriate actions could be taken in the name of the Organization.

63. In the context of its follow-up to the report on the causes of conflict and the promotion of durable peace and sustainable development in Africa, the Security Council recognized the potential for regional organizations to contribute and called for renewed efforts to enhance their capacity. At the

same time, the Security Council identified a number of measures which could help address some of the concerns noted above (S/PRST/1998/35). The Security Council stressed the need for regional operations to ensure that their personnel respect and observe international law, including humanitarian, human rights and refugee law. In this context, the Security Council underlined its support for the inclusion of civilian elements, for instance in dealing with political and human rights issues; and recognized the importance of the contribution that can be made by co-deployment of a United Nations peacekeeping force.

I recommend that the Security Council:

34. Confirm that regional organizations have the capacity to carry out an operation according to international norms and standards before authorizing their deployment, and put in place mechanisms whereby the Council can effectively monitor such operations.

H. Separation of combatants and armed elements from civilians in camps

64. When the national law enforcement system of a host-State is unable to separate combatants or armed elements from civilians in camps designated for internally displaced persons or refugees, it is essential that international efforts are made to restore the humanitarian nature of such camps. This issue was considered by the Council during its debate of the Secretary-General's report on the protection of humanitarian assistance for refugees and others in conflict situations (S/1998/883). As a result of these consultations, a number of possible options have been proposed to the Council, depending on the specific circumstances in each situation. The modalities for the implementation of the following recommendations will require further consultations between the Department of Peacekeeping Operations, the Office of the United Nations High Commissioner for Refugees and troop-contributing countries.

I recommend that the Security Council:

35. Deploy international military observers to monitor the situation in camps for internally displaced persons and refugees when the presence of arms, combatants and armed elements is suspected. If such elements are found and national forces are unable or unwilling to intervene, consider the range of options I have outlined in S/1998/883. This could involve deploying regional or international military forces that are prepared to take effective measures to protect civilians. Such measures could include compelling disarmament of the combatants or armed elements.

36. Mobilize international support for national security forces, from logistical and operational assistance to technical advice, training and supervision where necessary.

37. Mobilize international support for the relocation of camps too close to the border with refugees' countries of origin, to a safe distance away from the border.

I. Disarmament and demobilization

65. The abundance of armaments available to conflicting parties, especially small arms and light weapons, is a major contributing factor to the number and intensity of armed conflicts around the globe, as well as to violations of signed peace settlements. The disarming and demobilizing of combatants must be a top priority in any United Nations peacekeeping/peace-building operation. I refer to the Security Council presidential statement of 8 July 1999 for valuable guidelines (S/PRST/1998/21).

I recommend that the Security Council:

38. Ensure that peace agreements and the mandates of all United Nations peacekeeping missions include, where appropriate, specific measures for disarmament, demobilization and destruction of unnecessary arms and ammunition, and that early and adequate resources are made available. In this regard, particular attention should be given to demobilization and reintegration of child soldiers.

J. Humanitarian zones, security zones and safe corridors

66. Humanitarian zones, security zones and safe corridors address the issue of protection through the designation of specific areas or routes, which are either neutralized by an arrangement involving consent between the parties (humanitarian zones) or secured by force (security zones). Recent experiences, particularly in Bosnia and Herzegovina, demonstrate the need for greater understanding of the humanitarian, security and political implications of the establishment of zones aimed at protecting civilians.

I recommend that the Security Council:

39. Establish, as a measure of last resort, temporary security zones and safe corridors for the protection of civilians and the delivery of assistance in situations characterized by the threat of genocide, crimes against humanity and war crimes against the civilian population, subject to a clear understanding that such arrangements require the availability, prior to their establishment, of sufficient and credible force to guarantee the safety of civilian populations making use of them, and ensure the demilitarization of these zones and the availability of a safe-exit option.

K. Intervention in cases of systematic and widespread violations of international law

67. Protection mechanisms rely first and foremost on the willingness of State and non-state actors to comply with applicable international law. In situations where the parties to the conflict commit systematic and widespread breaches of international humanitarian and human rights law, causing threats of genocide, crimes against humanity and war crimes, the Security Council should be prepared to intervene under Chapter VII of the Charter. The use of coercive action should be seen as a mechanism of last resort to protect the civilian population from immediate threats to their lives and to ensure the safe passage of humanitarian convoys.

I recommend that the Security Council:

40. In the face of massive and ongoing abuses, consider the imposition of appropriate enforcement action. Before acting in such cases, either with a United Nations, regional or multinational arrangement, and in order to reinforce political support for such efforts, enhance confidence in their legitimacy and deter perceptions of selectivity or bias toward one region or another, the Council should consider the following factors:

(a) The scope of the breaches of human rights and international humanitarian law including the numbers of people affected and the nature of the violations;

(b) The inability of local authorities to uphold legal order, or identification of a pattern of complicity by local authorities;

(c) The exhaustion of peaceful or consent-based efforts to address the situation;

(d) The ability of the Security Council to monitor actions that are undertaken;

(e) The limited and proportionate use of force, with attention to repercussions upon civilian populations and the environment.

VI. OBSERVATIONS

68. In the present report I have painted a stark picture of the realities faced by civilians in armed conflict and the challenges these situations present to the international community. I have recommended clear action on the part of the Security Council to compel parties to conflict to respect the rights guaranteed to civilians by international law and convention. The plight of civilians is no longer something which can be neglected, or made secondary because it complicates political negotiations or interests. It is fundamental to the central mandate of the Organization. The responsibility for the protection of civilians cannot be transferred to others. The United Nations is the only international organization with the reach and authority to end these practices. I urge the Security Council to commit itself to this task.

69. I have been pleased to observe that the process of United Nations reform over the past two years has led to general recognition of the need for a comprehensive and integrated approach to handling crises, bringing together political, humanitarian, development and human rights actors within an agreed framework for action. In these efforts, it is clearly the Security Council which must play the leading role. We look to the Council to chart the overall approach to the resolution of crises and encourage the closest cooperation and coordination between all components of the United Nations system, regional forces, bilateral actors, Governments and non-state actors in the affected countries, as well as civil society, including international non-governmental organizations and the private sector. I welcome the increased interest of the

Council in humanitarian aspects of conflicts and look forward to even closer cooperation in the future.

70. In this report I have provided concrete recommendations to the Council covering a very wide range of initiatives. It is my belief that each of them can contribute to the protection of civilians in some or all situations. However, I wish to draw particular attention to nine proposals which I believe to be of particular importance. First are two recommendations intended to permanently strengthen the capacity of the Council and the Organization to protect civilians in armed conflict. These are:

1. Take steps to strengthen the Organization's capacity to plan and deploy rapidly. This includes enhancing the participation in the United Nations Stand-by Arrangements System, including by increasing the numbers of civilian police and specialized civil administration and humanitarian personnel. Rapidly deployable units of military and police are also required. Also essential is the capacity to quickly deploy a Mission headquarters. (Recommendation 28)

2. Establish a permanent technical review mechanism of United Nations and regional sanctions which can use information provided by Council members, relevant financial institutions, the Secretariat, agencies and other humanitarian actors to ascertain the probable impact of sanctions on civilians. (Recommendation 23)

71. Second are four recommendations which could be employed by the Council upon receipt of information indicating that the outbreak of violence aimed at civilians may be imminent. These are:

3. Impose arms embargoes in situations where civilians and protected persons are targeted by the parties to the conflict, or where the parties are known to commit systematic and widespread violations of international humanitarian and human rights law, including the recruitment of child soldiers; and urge Member States to enforce these embargoes in their own national jurisdictions. (Recommendation 26)

4. Consider deployment in certain cases of a preventive peacekeeping operation, or of another preventive monitoring presence. (Recommendation 12)

5. Make greater use of targeted sanctions to deter and contain those who commit egregious violations of international humanitarian and human rights law, as well as those parties to conflicts which continually defy the resolutions of the Council, thereby flouting its authority. (Recommendation 22)

6. Deploy international military observers to monitor the situation in camps for internally displaced persons and refugees when the presence of arms, combatants and armed elements is suspected; and if such elements are found and national forces are unable or unwilling to intervene, deploy regional or international military forces that are prepared to take effective measures to compel disarmament of the combatants or armed elements. (Recommendation 35)

72. Finally, I put forward three recommendations intended to alleviate the suffering of civilians in situations where conflict has already broken out and where civilians are being targeted. These are:

7. Underscore in its resolutions, at the onset of a conflict, the imperative for civilian populations to have unimpeded access to humanitarian assistance and for concerned parties including non-state actors, to cooperate fully with the United Nations humanitarian coordinator in providing such access, as well as to guarantee the security of humanitarian organizations, in accordance with the principles of humanity, neutrality and impartiality, and insist that failure to comply will result in the imposition of targeted sanctions. (Recommendation 18)

8. Ensure that, whenever required, peacekeeping and peace enforcement operations are authorized and equipped to control or close down hate media assets. (Recommendation 16)

9. In the face of massive and ongoing abuses, consider the imposition of appropriate enforcement action. Before acting in such cases, either with a United Nations, regional or multinational arrangement, and in order to reinforce political support for such efforts, enhance confidence in their legitimacy and deter perceptions of selectivity or bias toward one region or another, the Council should consider the following factors:

(a) The scope of the breaches of human rights and international humanitarian law, including the numbers of people affected and the nature of the violations;

(b) The inability of local authorities to uphold legal order, or identification of a pattern of complicity by local authorities;

(c) The exhaustion of peaceful or consent-based efforts to address the situation;

(d) The ability of the Security Council to monitor actions that are undertaken;

(e) The limited and proportionate use of force, with attention to repercussions upon civilian populations and the environment. (Recommendation 40)

73. Despite the precedence of law, norms and principles, physical security often needs to be assured before legal protection. The Council must act rapidly to make this principle a reality. I welcome the Council's call for this report. I sincerely hope that the Council will give its full attention to consideration of all the recommendations in it. It will be important to establish an agreed mechanism and timetable for follow-up and review. I stand ready to report regularly to the Council on progress achieved.

Secretary-General's Bulletin, Observance by United Nations forces of international humanitarian law, ST/SGB/1999/13, 6 August 1999

United Nations ST/SGB/1999/13

Secretariat

6 August 1999

Secretary-General's Bulletin

Observance by United Nations forces of international humanitarian law

The Secretary-General, for the purpose of setting out fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control, promulgates the following:

Section 1
Field of application

1.1 The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.

1.2 The promulgation of this bulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict.

Section 2
Application of national law

The present provisions do not constitute an exhaustive list of principles and rules of international humanitarian law binding upon military personnel, and do not prejudice the application thereof, nor do they replace the national laws by which military personnel remain bound throughout the operation.

Section 3
Status-of-forces agreement

In the status-of-forces agreement concluded between the United Nations and a State in whose territory a United Nations force is deployed, the United Nations undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel. The United Nations also undertakes to ensure that members of the military personnel of the force are fully acquainted with the principles and rules of those international instruments. The obligation to respect the said principles and rules is applicable to United Nations forces even in the absence of a status-of-forces agreement.

Section 4
Violations of international humanitarian law

In case of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts.

Section 5
Protection of the civilian population

5.1 The United Nations force shall make a clear distinction at all times between civilians and combatants and between civilian objects and military objectives. Military operations shall be directed only against combatants and military objectives. Attacks on civilians or civilian objects are prohibited.

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5.2 Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

5.3 The United Nations force shall take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians or damage to civilian property.

5.4 In its area of operation, the United Nations force shall avoid, to the extent feasible, locating military objectives within or near densely populated areas, and take all necessary precautions to protect the civilian population, individual civilians and civilian objects against the dangers resulting from military operations. Military installations and equipment of peacekeeping operations, as such, shall not be considered military objectives.

5.5 The United Nations force is prohibited from launching operations of a nature likely to strike military objectives and civilians in an indiscriminate manner, as well as operations that may be expected to cause incidental loss of life among the civilian population or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated.

5.6 The United Nations force shall not engage in reprisals against civilians or civilian objects.

Section 6
Means and methods of combat

6.1 The right of the United Nations force to choose methods and means of combat is not unlimited.

6.2 The United Nations force shall respect the rules prohibiting or restricting the use of certain weapons and methods of combat under the relevant instruments of international humanitarian law. These include, in particular, the prohibition on the use of asphyxiating, poisonous or other gases and biological methods of warfare; bullets which explode, expand or flatten easily in the human body; and certain explosive projectiles. The use of certain conventional weapons, such as non-detectable fragments, anti-personnel mines, booby traps and incendiary weapons, is prohibited.

6.3 The United Nations force is prohibited from employing methods of warfare which may cause superfluous injury or unnecessary suffering, or which are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment.

6.4 The United Nations force is prohibited from using weapons or methods of combat of a nature to cause unnecessary suffering.

6.5 It is forbidden to order that there shall be no survivors.

6.6 The United Nations force is prohibited from attacking monuments of art, architecture or history, archaeological sites, works of art, places of worship and museums and libraries which constitute the cultural or spiritual heritage of peoples. In its area of operation, the United Nations force shall not use such cultural property or their immediate surroundings for purposes which might expose them to destruction or damage. Theft, pillage, misappropriation and any act of vandalism directed against cultural property is strictly prohibited.

6.7 The United Nations force is prohibited from attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population, such as foodstuff, crops, livestock and drinking-water installations and supplies.

6.8 The United Nations force shall not make installations containing dangerous forces, namely dams, dikes and nuclear electrical generating stations, the object of military operations if such operations may cause the release of dangerous forces and consequent severe losses among the civilian population.

6.9 The United Nations force shall not engage in reprisals against objects and installations protected under this section.

Section 7
Treatment of civilians and persons *hors de combat*

7.1 Persons not, or no longer, taking part in military operations, including civilians, members of armed forces who have laid down their weapons and persons placed *hors de combat* by reason of sickness, wounds or detention, shall, in all circumstances, be treated humanely and without any adverse distinction based on race, sex, religious convictions or any other ground. They shall be accorded full respect for their person, honour and religious and other convictions.

7.2 The following acts against any of the persons mentioned in section 7.1 are prohibited at any time and in any place: violence to life or physical integrity; murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; collective punishment; reprisals; the taking of hostages; rape; enforced prostitution; any form of sexual assault and humiliation and degrading treatment; enslavement; and pillage.

7.3 Women shall be especially protected against any attack, in particular against rape, enforced prostitution or any other form of indecent assault.

7.4 Children shall be the object of special respect and shall be protected against any form of indecent assault.

Section 8
Treatment of detained persons

The United Nations force shall treat with humanity and respect for their dignity detained members of the armed forces and other persons who no longer take part in military operations by reason of detention. Without prejudice to their legal status, they shall be treated in accordance with the relevant provisions of the Third Geneva Convention of 1949, as may be applicable to them *mutatis mutandis*. In particular:

(a) Their capture and detention shall be notified without delay to the party on which they depend and to the Central Tracing Agency of the International Committee of the Red Cross (ICRC), in particular in order to inform their families;

(b) They shall be held in secure and safe premises which provide all possible safeguards of hygiene and health, and shall not be detained in areas exposed to the dangers of the combat zone;

(c) They shall be entitled to receive food and clothing, hygiene and medical attention;

(d) They shall under no circumstances be subjected to any form of torture or ill-treatment;

(e) Women whose liberty has been restricted shall be held in quarters separated from men's quarters, and shall be under the immediate supervision of women;

(f) In cases where children who have not attained the age of sixteen years take a direct part in hostilities and are arrested, detained or interned by the United Nations force, they shall continue to benefit from special protection. In particular, they shall be held in quarters separate from the quarters of adults, except when accommodated with their families;

(g) ICRC's right to visit prisoners and detained persons shall be respected and guaranteed.

Section 9
Protection of the wounded, the sick, and medical and relief personnel

9.1 Members of the armed forces and other persons in the power of the United Nations force who are wounded or sick shall be respected and protected in all circumstances. They shall be treated humanely and receive the medical care and attention required by their condition, without adverse distinction. Only urgent medical reasons will authorize priority in the order of treatment to be administered.

9.2 Whenever circumstances permit, a suspension of fire shall be arranged, or other local arrangements made, to permit the search for and identification of the wounded, the sick and the dead left on the battlefield and allow for their collection, removal, exchange and transport.

9.3 The United Nations force shall not attack medical establishments or mobile medical units. These shall at all times be respected and protected, unless they are used, outside their humanitarian functions, to attack or otherwise commit harmful acts against the United Nations force.

9.4 The United Nations force shall in all circumstances respect and protect medical personnel exclusively engaged in the search for, transport or treatment of the wounded or sick, as well as religious personnel.

9.5 The United Nations force shall respect and protect transports of wounded and sick or medical equipment in the same way as mobile medical units.

9.6 The United Nations force shall not engage in reprisals against the wounded, the sick or the personnel, establishments and equipment protected under this section.

9.7 The United Nations force shall in all circumstances respect the Red Cross and Red Crescent emblems. These emblems may not be employed except to indicate or to protect medical units and medical establishments, personnel and material. Any misuse of the Red Cross or Red Crescent emblems is prohibited.

9.8 The United Nations force shall respect the right of the families to know about the fate of their sick, wounded and deceased relatives. To this end, the force shall facilitate the work of the ICRC Central Tracing Agency.

9.9 The United Nations force shall facilitate the work of relief operations which are humanitarian and impartial in character and conducted without any adverse distinction, and shall respect personnel, vehicles and premises involved in such operations.

Section 10
Entry into force

The present bulletin shall enter into force on 12 August 1999.

(*Signed*) Kofi A. **Annan**
Secretary-General

Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, S/2001/331, 30 March 2001

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Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict

I. Towards a culture of protection

1. The Security Council, by its resolution 1296 (2000) of 19 April 2000, requested me to submit, by 30 March 2001, this second report on the protection of civilians in armed conflict, with a view to requesting additional such reports in the future. In my first report on the protection of civilians in armed conflict (S/1999/957), submitted to the Security Council on 8 September 1999, I painted a stark picture of the realities faced by millions of civilians around the world in situations of armed conflict, people caught in the midst of war and in dire need of aid and protection. Consequently, I recommended a clear course of action for the Security Council to compel parties to a conflict to better protect civilian populations and to respect the rights guaranteed to civilians by international law.

2. Unfortunately, the realities of distressed populations have not changed, and the majority of the important recommendations in that first report have yet to be put into practice. Recruitment and use of child soldiers, the proliferation of small arms, the indiscriminate use of landmines, large-scale forced displacement and ethnic cleansing, the targeting of women and children, the denial of even the most basic human rights, and widespread impunity for atrocities are still all too familiar features of war. The growing number of threats to the lives of local and international staff members of international organizations and other aid groups has added one more shameful characteristic to the reality of today's conflicts.

3. The context is therefore clear: as internal armed conflicts proliferate, civilians have become the principal victims. It is now conventional to say that, in recent decades, the proportion of war victims who are civilians has leaped dramatically, to an estimated 75 per cent, and in some cases even more. I say "conventional" because the truth is that no one really knows. Relief agencies rightly devote their resources to helping the living rather than counting the dead. Whereas armies count their losses, there is no agency mandated to keep a tally of civilians killed. The victims of today's atrocious conflicts are not merely anonymous, but literally countless. To some extent, this can be explained by changes in the nature of conflict. The decline of inter-State warfare waged by regular armies has been matched by a rise in intra-State warfare waged by irregular forces. Furthermore, and particularly in conflicts with an element of ethnic or religious hatred, the affected civilians tend not to be the incidental victims of these new irregular forces; they are their principal object.

4. In September 2000, all the States Members of the Organization pledged, in the United Nations Millennium Declaration (General Assembly resolution 55/2), to expand and strengthen the protection of civilians in complex emergencies, in conformity with international humanitarian law. Yet just as Member States have too often failed to address the calamitous impact of modern warfare on civilians, so, too, has the United Nations often been unable to respond adequately to their need for protection and assistance. My hope now is to move beyond an analysis of our past failures and to identify ways in which the international system can be strengthened to help meet the growing needs of civilians in war. The report of the Panel on United Nations Peace Operations (A/55/305-S/2000/809) has identified steps which the United Nations could take to improve its performance. In the present report, I wish to focus on additional steps which Member States must take to strengthen their own capacity to protect the civilian victims of war more effectively, and on initiatives that the Security Council and other organs of the United Nations can take to complement these efforts.

5. I believe that Member States, supported by the United Nations and other actors, must work towards creating a culture of protection. In such a culture, Governments would live up to their responsibilities, armed groups would respect the recognized rules of international humanitarian law, the private sector would be conscious of the impact of its engagement in crisis areas, and Member States and international organizations would display the necessary commitment to ensuring decisive and rapid action in the face of crisis. The establishment of this culture will depend on the willingness of Member States not only to adopt some of the measures detailed below, but also to deal with the reality of armed groups and other non-State actors in conflicts, and the role of civil society in moving from vulnerability to security and from war to peace.

II. Parameters of protection

6. "Protection" is a complex and multi-layered process, involving a diversity of entities and approaches. It depends on the circumstances and stages of a particular conflict. Many countries are caught in a grey zone between war and peace: armed conflict may erupt sporadically in parts of the country, and may tend to intensify or to subside. In such situations, it often is the diversity of entities providing protection and their mandates that helps to cover a wide range of needs. Relevant activities may include the delivery of humanitarian assistance; the monitoring and recording of violations of international humanitarian and human rights law, and reporting these violations to those responsible and other decision makers; institution-building, governance and development programmes; and, ultimately, the deployment of peacekeeping troops. In each case, these activities will have to be adapted to the specific requirements of each conflict situation, and be adapted to the needs, structure and sensitivities of the affected population.

7. The primary responsibility for the protection of civilians rests with Governments, as set out in the guiding principles on humanitarian assistance adopted by the General Assembly in its resolution 46/182 of 19 December 1991. At the same time, armed groups have a direct responsibility, according to Article 3 common to the four Geneva Conventions of 1949 and to customary international humanitarian law, to protect civilian populations in armed conflict. International instruments require not only Governments but also armed groups to behave responsibly in conflict situations, and to take measures to ensure the basic needs and protection of civilian populations. Where Governments do not have resources and capacities to do this unaided, it is incumbent on them to invoke the support of the international system. Protection efforts must be focused on the individual rather than the security interests of the State, whose primary function is precisely to ensure the security of its civilian population.

8. In focusing on the humanitarian aspects of protection, it should be stressed that protection cannot be a substitute for political processes. Protecting civilians is most effectively achieved by preventing violent conflict — through the "culture of prevention" called for by the Security Council in November 1999 (S/PRST/1999/34). Or it can be achieved by ending a conflict and building sustainable peace, as stressed by the Council in February 2001 (S/PRST/2001/5). Protection must be enhanced, but it is not a solution in its own right, and should not be seen as such.

III. Measures to enhance protection

A. Prosecution of violations of international criminal law

9. Internationally recognized standards of protection will be effectively upheld only when they are given the force of law, and when violations are regularly and reliably sanctioned. The establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda, and the adoption of the Rome Statute to establish a permanent International Criminal Court are important steps in this direction. Safe havens for mass murderers and torturers are disappearing. These developments are complemented by significant advances in international criminal law through the jurisprudence of the two ad hoc tribunals and by the rapidly growing number of ratifications of the Rome Statute. This emerging paradigm of international criminal justice confronts

perpetrators of grave violations with the real possibility of prosecution for past, present and future crimes.

1. Denial of amnesty for serious crimes

10. The recent arrest, indictment and eventual sentencing of former or current heads of State or Government has allowed prosecutors to further penetrate the shield of immunity. Courts are increasingly willing to send the message that nobody is above the law. Let me therefore be clear: the granting of amnesties to those who committed serious violations of international humanitarian and criminal law is not acceptable. The experience of Sierra Leone has confirmed that such amnesties do not bring about lasting peace and reconciliation.

2. Impact of criminal justice

11. The fair prosecution and trial of individual suspects can help significantly to build confidence and facilitate reconciliation in post-conflict societies, by removing collective attributions of guilt. Well-publicized prosecutions can deter crimes in current and future conflicts. Deterrence and prevention of crime, however, need the full commitment of the international community to supporting the quest for justice and accountability by providing the necessary financial and operational means to judicial arrangements, whether established under the auspices of the United Nations or by national Governments. Establishing courts without secure and sustained funding, and without follow-up efforts to rebuild national criminal justice systems, can do a disservice to victims of large-scale violence and undermine their confidence in justice. The proposed court for Sierra Leone and the serious crimes panel in East Timor deserve particular attention in this respect.

3. Importance of national jurisdictions

12. Despite the important role that international prosecution plays in encouraging compliance with international law, consistent enforcement depends primarily on the commitment and cooperation of national jurisdictions. The prosecution of individuals is, first and foremost, a responsibility of the State concerned. International justice can only complement those efforts when States are genuinely unable or unwilling to investigate and prosecute. In particular, a growing number of States have started to apply the principle of universal jurisdiction. The most publicized examples were the arrest by the United Kingdom of Great Britain and Northern Ireland of the former President of Chile, Augusto Pinochet, on charges of torture, at the request of Spanish authorities, and the arrest of the former President of Chad, Hissein Habré, by Senegal on similar charges. The application of this principle can be an essential stimulus for justice and reconciliation in the country of origin of the perpetrator. Its successful exercise requires closer cooperation between States, however, notably on issues of evidence and extradition. States therefore need to adapt their national legislation to the recognized standards of international humanitarian and criminal law and to ensure that they have a fair and credible judiciary.

4. Truth and reconciliation efforts

13. The experiences of Rwanda and other places have shown, however, that neither international nor national judicial systems command the necessary resources to prosecute the suspected perpetrators of conflict-related crimes, who may number in the thousands. Truth and reconciliation efforts, considered exceptional only a few years ago, have become an accepted method of overcoming a violent past. Truth commissions have recently been established in Nigeria, Panama and Sierra Leone and planned in East Timor; their creation is being discussed in several other post-conflict contexts. Truth and reconciliation, however, should not become a substitute for individual prosecution. The objective of such efforts should be to combine the search for truth, accounting for past abuses, promotion of national reconciliation and the bolstering of an emerging democratic order. The prescription for overcoming impunity must be adapted to the specific circumstances of the conflict and the area involved.

Recommendations

1. I urge the Security Council and the General Assembly to provide, from the outset, reliable, sufficient and sustained funding for international efforts, whether existing or future international tribunals, arrangements established in the context of United Nations peace operations, or initiatives undertaken in concert with individual Member States, to bring to justice perpetrators of grave violations of international humanitarian and human rights law.

2. I recommend that the Security Council consider the establishment of arrangements addressing impunity and, as appropriate, for truth and reconciliation, during the crafting of peacekeeping mandates, in particular where this response has been triggered by widespread and systematic violations of international humanitarian and human rights law.

3. I encourage Member States to introduce or strengthen domestic legislation and arrangements providing for the investigation, prosecution and trial of those responsible for systematic and widespread violations of international criminal law. To this end, I endorse efforts aimed at supporting Member States in building capable and credible judicial institutions that are equipped to provide fair proceedings.

B. Access to vulnerable populations

14. In many conflicts, safe and unhindered access to vulnerable civilian populations is granted only sporadically, and is often subject to conditions, delayed, or even bluntly denied. The consequences for those populations are often devastating: entire communities are deprived of even basic assistance and protection. The agony of civilians in such isolated circumstances is further exacerbated as, in modern warfare, particularly internal conflicts, civilians are often targeted as part of a political strategy. The mutilations of civilians in Sierra Leone and the deliberate starvation of the civilian population in Somalia are only two examples. In these situations, access is the prerequisite for any form of protection of individuals and communities affected by war.

15. Because of the internal nature of most conflicts, United Nations agencies, the International Committee of the Red Cross and non-governmental organizations have increasingly had to negotiate to ensure access to those in need. Suffering populations cannot afford to wait for the outcome of an often-prolonged peace process. Access negotiations during a conflict must be understood as a humanitarian necessity. Given the highly complex context in which such negotiations have to be conducted, involving a diversity of warring parties and international actors, the need for common standards, complementary negotiation strategies and skilled negotiators is evident. In practice, the negotiator's ability often determines the scope of humanitarian assistance and protection provided to distressed populations. Common ground rules would help to make access negotiations more predictable and effective, and reduce the risk of mistakes or of agencies being played off against each other by warring parties.

1. Obtaining meaningful access

16. As a general rule, access negotiations should always have a clear objective, namely, humanitarian space providing unimpeded, timely, safe and sustained access to people in need. Access must be obtained, managed and maintained throughout a conflict by keeping the parties continuously engaged. The inability of aid agencies operating in Sierra Leone to make even initial contacts with the Revolutionary United Front throughout 1998 illustrates the difficulty of engaging rebel groups in a structured dialogue. Establishing a regular rapport and having freedom of movement in the conflict area can contribute to normalization and build confidence among war-affected populations. The sustained presence of humanitarian agencies can provide some measure of security to populations who would otherwise be wholly at the mercy of the parties or compelled to leave their homes. The terms of engagement of the aid agencies in a particular conflict must therefore clearly set out conditions for humanitarian operations, allowing for assessments that are based on actual needs, regular delivery of assistance and programme monitoring.

2. Complexities on the ground

17. Despite the Security Council's repeated reaffirmation of the importance of safe and unimpeded access (see, for example, resolutions 706 (1991) on Iraq and 1333 (2000) on Afghanistan), gaining safe and regular access is a daily struggle marked by a plethora of practical concerns, including demands of conditionality — warring parties requesting their share of aid before granting access to vulnerable populations; the deliberate starving of civilians to attract food aid in order to feed combatants; or the delivery of dual-purpose items that could also serve the war effort. Under international law, displaced persons and other victims of conflict are entitled to international protection and assistance where this is not available from national authorities. However, negotiations on the ground often revolve around the practical implications: for example, the failure of warring parties to admit the delivery of certain food items because they are perceived as jeopardizing the objectives of their war effort.

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18. The approach to these challenges often defines the credibility and effectiveness of the humanitarian effort. Strengthening access negotiations thus requires the development of common policies and common criteria for engagement among aid agencies. These criteria should address clearance procedures, monitoring of delivery to minimize diffusion of goods to combatants, and efficient coordination.

3. Engaging the parties to a conflict

19. In a multi-faction conflict, such as that in the Democratic Republic of the Congo, experience has shown that, in order to gain meaningful and regular access to vulnerable populations within different combat zones, where front lines are shifting from day to day, the consent of many parties has to be obtained at the local, regional, national and international levels. They may include a range of armed groups and other non-State actors with often diverse or obscure political, economic and strategic goals. Sometimes these actors will be operating across international borders, yet deliberately standing outside the established international normative framework. In most intra-State conflicts, armed groups exercise de facto control of parts of a country and the civilian population living there. Negotiating and obtaining access to those populations therefore requires the engagement of those groups.

20. Whereas Governments are sometimes concerned that such engagements might legitimize armed groups, these concerns must be balanced against the urgent need for humanitarian action. It is the obligation to preserve the physical integrity of each and every civilian within their jurisdiction, regardless of gender, ethnicity, religion or political conviction, that should guide Governments in exercising their sovereign responsibility. Where Governments are prevented from reaching civilians because they are under the control of armed groups, they must allow impartial actors to carry out their humanitarian task. Such a loss of control does not release Governments from their responsibility for all civilians within their jurisdiction.

21. Engaging armed groups in a constructive dialogue is also of vital importance for guaranteeing the security of humanitarian operations in a conflict area. Often, combatants perceive the provision of humanitarian assistance and protection to vulnerable populations as being not a neutral but rather a politically motivated act. In intra-State conflicts, where the political and strategic objectives of parties often include the expulsion or extermination of an ethnic, religious or political group, even the accommodation of the most basic needs of the populations may be perceived as direct interference with the war effort. As a result, humanitarian agencies, although pursuing neutral objectives enshrined in international law, are frequently perceived as partisan, and therefore become targets themselves. The drastically accelerated toll of casualties among United Nations civilian personnel, local and international, serving in conflict areas over the past two and a half years is a sad testament to this development. Between 1 January 1992 and 31 August 1998, 153 staff members lost their lives and 43 were taken hostage or kidnapped (see S/1998/883); since August 1998, the numbers have risen to 198 and 240, respectively (as of 20 March 2001).

4. Internally displaced persons

22. Meaningful access is particularly important when reaching out to the estimated 20 to 25 million people who are displaced within the borders of their country. The plight of this exceptionally vulnerable group has gained urgency in the 1990s as their number has dramatically increased in the wake of the numerous internal armed conflicts of that decade. Forced to leave their homes, they regularly suffer from severe deprivation, lack of shelter, insecurity and discrimination. Their protection is, first and foremost, a responsibility of the relevant national authorities.

23. In many cases, however, national authorities fail to provide the necessary protection and assistance to such people or to provide safe and meaningful access for international organizations. As a result, and because there is no established system of international protection and assistance for internally displaced persons, the response to their needs has often been inconsistent and ineffective.

24. In this respect, the Guiding Principles on Internal Displacement, developed by my Representative on Internally Displaced Persons, have come more and more to be regarded as a tool for addressing the basic needs of such people. For example, in Armenia, Azerbaijan and Georgia efforts are under way to review national legislation in terms of the Guiding Principles. In other countries, such as Angola and Colombia, Governments have integrated the Guiding Principles into national policy and legislation. In addition, the Inter-Agency Standing Committee has established an

Inter-Agency Network, comprising senior focal points in all concerned organizations, to carry out reviews of selected countries with internally displaced populations, and to make proposals for an improved international response to their basic needs. A United Nations Special Coordinator on Internal Displacement has been nominated by the Emergency Relief Coordinator to head this review process.

5. Coordinated approach

25. Developing a coordinated approach to access negotiations can therefore be a matter of life and death, both for vulnerable populations and for humanitarian workers. Often, the large number of domestic and international aid agencies in a conflict area poses a challenge in itself. Driven by differing mandates and interests, international agencies often negotiate access independently, thereby diminishing the effectiveness of their own and other agencies' response. Duplication of effort, and the manipulative behaviour of warring parties, can jeopardize fragile access agreements. It is therefore essential to develop more coordinated and creative approaches to access negotiations, for example, by pooling agency interests consistent with their mandates, and agreeing on mutually complementary sectoral negotiations. A coordinated approach must give weight to strategic planning and adequate preparation even in a crisis. The immunization campaign led by the World Health Organization and the United Nations Children's Fund in the Democratic Republic of the Congo in 2000 is an example of a successfully coordinated effort.

26. Clarity of objectives and a sound understanding of the local context and the root causes of conflict should be indispensable prerequisites for any access negotiations. I have therefore requested the Inter-Agency Standing Committee to develop a manual for access negotiations and strategies, including benchmarks for the engagement and disengagement of aid agencies, demands of conditionality, clearance procedures, needs assessments, and other principles outlined in the present report. The manual should guide negotiators in being consistent, transparent, accountable and credible during negotiations, and in seeking to obtain safe, sustained, timely and unimpeded access.

27. I have, further, asked the Emergency Relief Coordinator to develop, in cooperation with the Inter-Agency Standing Committee, models for better coordination of access negotiations on the ground. Working towards complementary negotiating strategies can help to prevent warring parties from playing aid agencies off against each other, as has happened in a number of recent conflicts.

Recommendations

4. Recalling the Security Council's recognition, in its resolution 1265 (1999), of the importance of gaining safe and unimpeded access of humanitarian personnel to civilian populations in need, I urge the Council to actively engage the parties to each conflict in a dialogue aimed at sustaining safe access for humanitarian operations, and to demonstrate its willingness to act where such access is denied.

5. I encourage the Security Council to conduct more frequent fact-finding missions to conflict areas with a view to identifying the specific requirements for humanitarian assistance, and in particular obtaining safe and meaningful access to vulnerable populations.

C. Separation of civilians and armed elements

28. In my report of 1998 on the causes of conflict and the promotion of durable peace and sustainable development in Africa (A/52/871-S/1998/318), I recognized that the safety of refugees had increasingly become a matter of international concern, as had the security of States hosting large refugee populations or having such populations near their borders. This assessment has not changed. On the contrary, massive movements of displaced populations across international borders, most frequently prompted by civil wars in the region, have altered delicate ethnic balances in neighbouring States and thereby destabilized the recipient societies. Furthermore, there is a grave risk that the movement of people — sometimes in their hundreds of thousands — alongside armed elements will undermine the security of entire subregions or regions, and thereby internationalize an initially local conflict.

29. The examples of Zambia, the Republic of the Congo and West Timor (Indonesia) all bear ample witness to this danger. The escalation of fighting in the Parrot's Beak area, located on the borders of Guinea,

Liberia and Sierra Leone, is the most recent case in point. This small Guinean enclave has become a haven for an estimated 180,000 refugees from Liberia and Sierra Leone. The spillover of fighting between armed elements from Liberia and Sierra Leone into Guinea has given these already displaced persons cause to flee again, creating one of the worst refugee crises in the world. In addition, 70,000 Guinean citizens are being placed at severe risk. It is therefore a matter of utmost urgency to preserve, at the earliest stage possible, the civilian character of camps and settlements for displaced persons — both refugees and internally displaced — by separating civilians from armed elements that move alongside them. Such separation can prevent further aggravation of conflict, and ensure that persons fleeing persecution or war get the protection and assistance they require.

1. Impact of the mixing of displaced populations and armed elements

30. Failure to separate armed elements from civilians has led to devastating situations in and around camps and settlements. As the example of West Timor (Indonesia) shows, not separating combatants from civilians allows armed groups to take control of a camp and its population, politicizing their situation and gradually establishing a military culture within the camp. The impact on the safety and security of both the refugees and the neighbouring local population is severe. Entire camp populations can be held hostage by militias that operate freely in the camps, spread terror, press-gang civilians, including children, into serving their forces, sexually assault and exploit women, and deliberately prevent displaced people from returning home. In addition, humanitarian aid and supplies are often diverted to these armed elements, depriving the intended civilian beneficiaries. Finally, blurred lines between the civilian and military character of camps expose civilians inside to the risk of attack by opposing forces, where camps are perceived to serve as launching pads for renewed fighting.

2. Constraints of response

31. And yet, for practical and political reasons, the response to this phenomenon has been inadequate. Host countries, which have the primary responsibility for ensuring the security of refugees on their territory, feel increasingly overburdened by the logistical, and material challenge of accommodating large influxes of population. They have to preserve the civilian and humanitarian character of settlements for displaced populations, identify distinct camp locations, and separate combatants from civilians, including through disarmament, demobilization and internment measures. In fact, in order to avoid such strain, and in fear of being drawn into the conflict, potential host countries increasingly deny asylum by closing their borders, thereby further exacerbating the situation of displaced civilians within the conflict area. While recognizing the genuine interest of host States in preserving their neutrality in the conflict, we must be clear that it is the responsibility of States to grant asylum to distressed and persecuted populations and to ensure their protection and the provision of relief and assistance to them.

32. Humanitarian agencies, often the first and only presence on the ground in these situations, cannot identify, intern, disarm and demobilize armed elements present in refugee camps. They have neither the mandate nor the means to do so. Already, the identification of armed elements leads to enormous problems. Legally, international humanitarian law does not define fighters in internal conflicts, because Member States are reluctant to confer a formal status on those whom they consider insurgents or rebels. Practically, militia and armed elements, often attempting to hide among fleeing civilian populations, do not necessarily wear military uniforms or otherwise identify themselves. Moreover, internal armed conflicts go through different phases of ceasefires or combat pauses and renewed fighting, and consequent cycles of demobilization and remobilization. The existence of part-time combatants — farmer by day, fighter by night — and the provision by civilians of basic help and shelter to combatants further obscure the issue. As a result, humanitarian operations are increasingly threatened by the lack of security in refugee camps. The murders of aid workers in West Timor (Indonesia) and Guinea are distressing illustrations. As a result, operations have had to withdraw from camps, and often an entire area, further aggravating the distress of the civilian camp population.

33. Member States are nevertheless still reluctant to support the work of humanitarian agencies in these circumstances, because of the perceived security risk to their military personnel and the risk of further exacerbating the conflict by direct confrontations with armed elements. Ensuring security in camps requires

the involvement of police and military forces, not least in disarming and demobilizing militias and transferring them to different sites.

3. Development of a toolkit

34. The potential for large population flows, mixed with armed elements, to destabilize entire regions and, eventually, to ignite an international conflict has been sadly demonstrated by events in West Africa and the Great Lakes region. I therefore believe that it is within the purview of the Security Council to deter threats to international peace and security deriving from such population movements by supporting host States in taking appropriate and timely measures to separate civilians and armed elements. In my previous report on the protection of civilians, I recommended a set of tools aimed at improving the safety of refugee populations, including the deployment of regional or international military forces. Some Member States have started to develop concepts and practical methods for putting those recommendations into practice, including support and training for national police forces through the involvement of international police. Moreover, the need to preserve the civilian character of asylum features prominently on the agenda of the Global Consultations on International Protection, sponsored by the United Nations High Commissioner for Refugees.

35. The seriousness and urgency of the matter dictate that we move quickly to advance the practical implementation of those recommendations, to test concepts and to add new measures to the toolkit. The agreement between the Department of Peacekeeping Operations of the Secretariat and the Office of the United Nations High Commissioner for Refugees, of June 2000, ensuring close cooperation on all aspects of this complex matter, is a first step in this direction. Both bodies have agreed, as appropriate, to deploy, with the consent of the host State, multidisciplinary assessment teams to an emerging crisis area in order to clarify the situation on the ground, evaluate security threats for refugee populations, and consider appropriate practical responses. Where feasible, these findings would be incorporated into a comprehensive plan with recommendations for further action, including action by the Security Council. Such action could include logistical and material support for early measures by the host State to disarm combatants at the point of entry into the country. Once separated and disarmed, fighters could be transferred to, and if necessary interned at, a safe location away from the border.

36. In addition, Member States should support the efforts of host States by providing bilateral assistance to their law and order authorities in establishing adequate security arrangements in camps, so as to deter infiltration by armed elements. As a first step, assistance in locating refugee camps and settlements at a significant distance from the border would help to prevent militarization. Assistance could also include training and capacity-building efforts, equipment and logistics, as well as the deployment of national police contingents for patrolling and monitoring in camps. Further, relevant experiences and practices in refugee environments should be included in police training curricula.

37. Finally, as I indicated in my statement to the Security Council on the peace process in the Democratic Republic of the Congo, on 21 February 2001, the movement of large populations, and the failure to separate armed elements from those populations, has potentially negative effects on neighbouring countries not involved in the conflict. Where such problems threaten to affect a region as a whole, a wider regional approach may be required from the outset of any international involvement. This may entail the establishment of a forum for dialogue among all the affected countries of the region, non-governmental organizations, United Nations agencies, donors and others. Their aims may include solving the root causes of displacement, restoring peace, promoting the integration of displaced persons in host countries, seeking resettlement in third countries, or bringing all of the displaced back to their homeland. With the end of the cold war and its rigid division of the world, it is time to make better use of regional approaches. The International Conference on Central American Refugees, held in May 1989, which helped to bring hundreds of thousands of refugees home to countries where peace had been restored, is an example of the progress that such approaches can produce. Pursuant to the Security Council's invitation in paragraph 14 of resolution 1296 (2000), I will continue to bring to the attention of the Council situations that may require a regional approach as displaced populations and other civilians are put at risk by the infiltration of armed elements, in particular where this may constitute a threat to international peace and security.

Recommendation

6. I encourage the Security Council to further develop the concept of regional approaches to regional and subregional crises, in particular when formulating mandates.

7. I further encourage the Security Council to support the development of clear criteria and procedures for the identification and separation of armed elements in situations of massive population displacement.

D. Media and information in conflict situations

38. The misuse of information can have deadly consequences in armed conflicts, just as information correctly employed can be life-saving. The "hate media" that were used to incite genocide in Rwanda are an extreme example of the way information can be manipulated to foment conflict and incite mass violence. Hate speech, misinformation and hostile propaganda continue to be used as blunt instruments against civilians, triggering ethnic violence and forcing displacement. Preventing such activities and ensuring that accurate information is disseminated, is thus an essential part of the work of protecting civilians in armed conflict. Impartial information on conflicts, zones of combat, the location of minefields and the availability of humanitarian assistance, can be as vital a requirement for distressed populations caught in areas of violent upheaval as shelter, food, water and medical services.

1. Countering hate media used to incite violence

39. If the first casualty of war is the truth, the next victims are those who are unable to draw attention to their need for protection. They are all too often rendered speechless and faceless by war, reduced to crude statistics in the news. Giving these victims a voice can be vital for mobilizing the support necessary to protect human life. Informed public opinion can act as a brake on human rights abuses, by countering the culture of impunity and urging respect for international law. Yet in the Great Lakes region of Africa, "hate" radio continues to spur violence and atrocities against civilians on a large scale. The international community has an obligation to counteract such misuse of information and the media collectively and creatively. While the prosecution by the International Criminal Tribunal for Rwanda of the principals involved in the promotion of genocide by Radio-Télévision Mille Collines is a significant step, preventing such incitement in the future remains an urgent task.

40. The best antidote to hate speech and incitement to violence is the development of free and independent media serving the needs of all parts of society. A range of activities should be undertaken by the international community to support such development: countering misinformation, providing essential information; support for accurate local news coverage; assistance in creating programmes aimed at promoting inter-ethnic understanding and tolerance; technical assistance to improve local broadcast capacity; training for local journalists in accurate reporting; and media monitoring mechanisms. In addition, the distribution of radio receivers and broadcasting equipment is often a vital and practical necessity.

41. Combating hostile propaganda, however, may also require a more immediate and intense effort by the international community, based on a coordinated approach involving numerous actors. The number of actors, both non-governmental and intergovernmental, operating programmes aimed at preventing violence and preparing for national reconciliation has grown in recent years — initiatives in Angola, Bosnia and Herzegovina, Burundi, Liberia, Sierra Leone and South Africa are examples. These initiatives, however, often remain inconsistent and essentially ad hoc. Consequently, costly operations such as that in Bosnia and Herzegovina have yielded only mixed results. A more coordinated response could be fostered by establishing media monitoring mechanisms within peace operations and, as appropriate, other agency operations. Such mechanisms could ensure regular monitoring, reporting and documenting of misuse of information, and strengthen independent local media capacities. They also could serve informed decision-making, contribute to legal accountability and, as appropriate, recommend specific action to be taken by relevant actors, including the Security Council. They should reach out to relevant actors on the ground, including international experts, donors and local media professionals.

2. Use of media and information in support of humanitarian operations

42. In the global information age, giving victims a voice is essential for mobilizing the support necessary to preserve and improve the quality of human life. While recognizing that at times massive media campaigns can distort policy priorities, reliable media accounts and adequate information management are an essential basis for decisions by Governments, donors, international organizations and non-governmental organizations.

43. The awareness of even distant events allows informed assessments and helps, in particular, humanitarian agencies to shape an appropriate response before going into a conflict area. Concrete and verified information about massive displacements of people, security conditions, and violations of international humanitarian and human rights law can be vital for distressed populations and international aid workers alike. Where communications are disrupted, using the media to inform distressed populations about the activities of relief agencies, and about the location of shelter, food, water and medical services, can be critical for alleviating human suffering. The Afghan Education Projects Unit of the BBC World Service, which covers issues such as landmine awareness, hygiene, sanitation, reducing violence against women and agricultural productivity, is one commendable example.

44. As emphasized in the report of the Panel on United Nations Peace Operations, the new information technologies — the Internet, in particular — play an increasingly important role in reaching and supporting local counterparts. We must continue to invest in this area and explore partnerships. The United Nations-operated Integrated Regional Information Network (IRIN), in conjunction with ReliefWeb, has brought great benefits to United Nations and other operations by providing accurate information from and to crisis areas. I recommend further strengthening such valuable regional information initiatives.

3. Protection of journalists

45. Many initiatives rely on the courage and commitment of journalists in conflict areas. Their protection from harassment, intimidation and threats must therefore be of concern to all. It is estimated that 449 journalists have been killed worldwide since 1990. In many cases, they were the victims of deliberate efforts by parties in conflict to escape adverse consequences of their violent attacks on civilians by preventing accurate reporting of their activities and, consequently, informed decision-making. In this respect, initiatives like that in Colombia establishing special protection programmes for journalists as part of the Prosecutor General's Office are important. The establishment of hotlines for threatened journalists in conflict areas, as was done in Bosnia and Herzegovina, could further help to reduce their risks.

Recommendation

8. I recommend that the Security Council make provision for the regular integration in mission mandates of media monitoring mechanisms that would ensure the effective monitoring, reporting and documenting of the incidence and origins of "hate media". Such mechanisms would involve relevant information stakeholders from within the United Nations and other relevant international organizations, expert non-governmental organizations, and representatives of independent local media.

IV. Entities providing protection

46. Recent experiences in dealing with such problems as described above in conflicts in West Africa, the Great Lakes region, East Timor and elsewhere have shown that the challenge of protecting civilian populations can only be met by reaching across traditional lines and creating synergies among many actors. While traditional responsibilities remain unchanged, the number of actors involved in rendering assistance and protection has significantly expanded: new actors have entered the stage and previously overlooked actors have gained greater importance. Although often profoundly differing in their resources, mandates, philosophies and interests, they can enhance our capacity to respond to violent conflict by providing additional resources, new approaches and comparative advantages. Faced with the increasingly opaque web of local and global politics, economic interests and criminal activity that characterizes many of today's conflicts, we must make the best use of organizations' limited resources by engaging all relevant actors in our work to improve the protection of civilians.

A. Entities bearing primary responsibility

1. Governments

47. International efforts to protect civilians can only complement the efforts of Governments. I therefore

extend to a wider audience the call made to the parties in the Democratic Republic of the Congo: the United Nations and its Member States, as well as other relevant agencies, can assist only where those most responsible are themselves reliably committed. In particular, every Government must show the necessary commitment to fulfilling its international obligations to protect civilians. This entails the initiation, organization, coordination and implementation of humanitarian assistance within its territory. Where a Government is prevented from protecting its civilians, for lack of either resources or de facto control over part of its territory, it may need to seek the support of the international system, which has been established for precisely this purpose. Regrettably, in times of conflict, many Governments are unwilling to live up to this responsibility; in fact, they often constitute the major impediment to any meaningful humanitarian assistance and protection. This interface between national responsibility and international support continues to pose a major challenge to the international community.

2. Armed groups

48. The recent prevalence of civil wars has drawn increasing attention to the potential role of armed groups that are parties to the conflict in protecting civilian populations. In most intra-State conflicts armed groups have gained control over part of a country's territory and the population living there. Again and again, however, we see them misuse their power by attacking defenceless civilians, in blatant disregard of international humanitarian law. I would therefore like to recall the prohibition against targeting civilians and conducting indiscriminate attacks on civilians, enshrined in customary international humanitarian law, which is binding not only on States and their Governments but equally and directly so on armed groups that are parties to the conflict, as stated in article 3 common to the Geneva Conventions of 1949. The practice of the two ad hoc tribunals and the statute of the International Criminal Court have underlined the principle of direct responsibility of armed groups for violations of international humanitarian law.

49. Experience has shown, however, that many armed groups deliberately operate outside the recognized normative and ethical framework in furtherance of their objectives. In order to promote respect for international humanitarian and human rights law in these situations and to facilitate the necessary provision of humanitarian assistance and protection to vulnerable populations, it is indispensable to engage these groups in a structured dialogue. In this respect, I welcome the growing tendency of the Security Council to address all parties to armed conflicts (see resolution 1261 (1999)). It is important that aid agencies reaffirm the fundamental principles of international humanitarian and human rights law in their codes of conduct and in any agreements they conclude with actors on the ground. Contacts with armed groups should be neutral and should not affect their legitimacy or the legitimacy of their claims.

50. In this respect, I intend to ask the Inter-Agency Standing Committee to develop a manual of best practices for engagement with armed groups. The manual should provide a clearer and common understanding of the structure and mode of operation of those groups, and their specific demands and constraints, and give guidance on how to promote a better understanding of the principles and operational requirements of humanitarian activities in such circumstances.

Recommendations

9. In its resolutions the Security Council should emphasize the direct responsibility of armed groups under international humanitarian law. Given the nature of contemporary armed conflict, protecting civilians requires the engagement of armed groups in a dialogue aimed at facilitating the provision of humanitarian assistance and protection.

10. Many armed groups have neither developed a military doctrine nor otherwise incorporated the recognized principles of international humanitarian law in their mode of operation. I therefore urge Member States and donors to support efforts to disseminate information on international humanitarian and human rights law to armed groups and initiatives to enhance their practical understanding of the implications of those rules.

B. Complementarity of other entities

51. While the primary responsibility for the protection of civilians rests with Governments, in places where the Government is unable or unwilling to fulfil its obligations the international community is coming to accept its own responsibilities. The United Nations, including in particular the Security Council, needs to strengthen its role in this regard by more actively engaging a range of relevant actors. Effective coordination, better flow of information, and the building of new partnerships will be crucial to the future success of the international response to conflict. It will also be important to involve domestic partners, so that any international response to a crisis begins with a nuanced understanding of the local context.

52. In recent years, the Security Council has shown growing sensitivity to protection issues. Resolutions 1261 (1999), 1265 (1999), 1296 (2000), 1314 (2000) and 1325 (2000) all represent positive steps. The inclusion of provisions for mine action in mandates is a further sign of progress. Yet the capacity of the Council to address protection issues could be enhanced in a number of ways, including through better informed decision-making, and through the drafting of resolutions and mandates that more fully reflect the needs of civilians. To help bring this about, briefings on the humanitarian implications of proposed resolutions would be useful, as would the holding of debates on issues which embrace both peace and security and humanitarian concerns. Further, as the experience of the Council's recent visits to the Democratic Republic of the Congo, Sierra Leone or East Timor shows, field missions can be useful as fact-finding tools, exercises in advocacy and instruments of persuasion. Such missions might usefully be dispatched to other crisis zones in which the international response has been poorly informed or poorly supported. The Council would also benefit from being regularly informed by actors outside the United Nations system.

Recommendation

11. I recommend that the Security Council develop a regular exchange with the General Assembly and other organs of the United Nations on issues pertaining to the protection of civilians in armed conflict. I suggest that the President of the General Assembly use the monthly meeting with the President of the Security Council to alert the Council to situations in which action might be required.

1. Civil society

(a) Non-governmental organizations

53. Recent years have seen a considerable growth in the number and influence of national and transnational non-governmental organizations. Thanks to the global reach of the media and the possibilities of information technology, above all the Internet, non-governmental organizations are now better placed to form coalitions, organize and mobilize cohesive support on a global scale. In particular, non-governmental organizations have proved that they can make a significant impact on public policy and international law. In many conflicts non-governmental organizations are among the first to bear witness to violations of international humanitarian and human rights law, to conduct rigorous assessments of the humanitarian situation on the ground, and to solicit a coherent international response. By doing so, they often succeed in raising public awareness of a conflict, and thereby make political leaders act decisively in the face of crisis.

54. On the ground, non-governmental organizations are the daily and indispensable partners of the United Nations in providing humanitarian relief and assistance to vulnerable people. Their presence among the local population often imparts a measure of protection, not least in areas where minorities are living. Just like United Nations personnel, however, their national and international staff have more and more become the target of attack. The Inter-Agency Standing Committee has therefore formed a working group to strengthen cooperation on issues of staff security between the United Nations and non-governmental organizations at the field level. Finally, non-governmental organizations play an important and active role in negotiating humanitarian corridors and access to distressed populations, and, in some cases, in bringing warring parties to the negotiation table.

55. It is essential that Member States, the United Nations and other international organizations and non-governmental organizations, better understand each other's comparative advantages as a first step towards working more effectively together. Non-governmental organizations already work in close concert with the United Nations on the ground and through the Inter-Agency Standing Committee. I would like to review and further strengthen the work of the Inter-Agency Standing Committee, with a view to identifying ways in which the work of the United Nations and the work

of the non-governmental organizations may become more complementary in the near future. Presenting the views of an emerging civil society on issues of global concern, non-governmental organizations should be given a more regular forum to inform the decision-making debate and to advocate policies.

56. The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, of 1997, and the Rome Statute establishing an International Criminal Court a year later are examples of the power of international civil society to work with Governments to achieve a legislative goal which can help to protect civilians in armed conflict.

(b) Domestic civil society

57. Domestic civil society represents the basic source of protection, especially when all other layers of protection fail. Civil society in this context refers not only to local non-governmental organizations and human rights groups, but also to religious congregations, charities, universities, trade unions, legal associations, independent activists and human rights defenders, families, clans and more. We must continue to reach out and build partnerships with these actors, and employ their knowledge of the local context, their skill at operating in conflict zones, and their sensitivity to the needs of local populations and to local cultural norms. The funding and training of these actors is therefore an important investment. In particular, partnerships between international and domestic civil society must be strengthened in negotiating access, monitoring abuse, especially where international monitoring is not possible, and facilitating dialogue with political actors on the ground. Finally, domestic civil society actors are often best equipped to promote awareness of and respect for international law within the conflict zone.

58. International actors must make sure that displaced communities are given a say in decisions that affect them. Displaced communities are not passive. They create their own strategies for addressing their needs by exchanging limited resources, services, information and shelter. Their involvement in identifying needs, in other decisions that affect their lives, and in implementing aid programmes is therefore essential. Moreover, they can help to salvage what remains of society by encouraging the restoration of communal links or supporting the reintegration of permanently displaced persons into new communities. They hold the knowledge and ability to reunify families and create support structures for unaccompanied children and elderly people.

(c) Women, children and youth

59. Tragically, women and children are the principal victims of armed conflict. Women are vulnerable to sexual violence, trafficking and mutilation, whether at home, in flight or in camps for displaced populations. Yet women also play a prominent role in rebuilding war-torn societies. Women's roles as mediators and as a primary force of economic activity during armed conflict are still underexamined and underutilized. In Cambodia, Colombia, East Timor, Guatemala, Liberia, Mozambique, Somalia and many other places women have set examples of peace-building across clans, political affiliations and ethnicity. The study requested by the Security Council in its resolution 1325 (2000) concerning women and peace and security will further inform such efforts and promote understanding of the impact of armed conflict on women and the role they do and can play in peace-building.

60. Children too, besides being victimized as child soldiers and in many other ways during armed conflict, have a role to play in building a more stable future for war-torn countries. In its resolution 1314 (2000) concerning children in armed conflict, the Security Council called on Member States to encourage the involvement of young persons in programmes for peace consolidation and peace-building. Both UNICEF and my Special Representative for Children and Armed Conflict have spoken repeatedly of the need to ensure the participation of adolescents in humanitarian responses and peace-building activities. Consequently, I reiterate the call made in my report on children and armed conflict (A/55/163-S/2000/712), for the participation of children and young people to be encouraged and promoted in all programmes and policies aimed at protecting their rights and the rights of other civilian populations, before, during and after armed conflicts, as a means to improve those programmes and policies.

(d) Private sector

61. With almost 96 per cent of the private sector engaged in the manufacturing of civilian goods and services, the private sector has a vested interest in peace-building and economic stability, and in

complementing rather than obstructing humanitarian efforts. Not all businesses, however, seek to be helpful or socially responsible. The negative role of foreign businesses in the diamond industry in Angola and Sierra Leone demonstrates this fact. The impact of the pursuit of economic interests in conflict areas has come under increasingly critical scrutiny. Corporations have been accused of complicity with human rights abuses, and corporate royalties have continued to fuel wars. It has become common knowledge that by selling diamonds and other valuable minerals, belligerents can supply themselves with small arms and light weapons, thereby prolonging and intensifying the fighting and the suffering of civilians. It is therefore of critical importance that the United Nations continues to promote the exercise of responsible investment in crisis areas, by building upon and expanding its partnership with the private sector.

Recommendations

12. I encourage the Security Council to continue investigating the linkages between illicit trade in natural resources and the conduct of war and to urge Member States and regional organizations to take appropriate measures against corporate actors, individuals and entities involved in illicit trafficking in natural resources and small arms that may further fuel conflicts.

13. I urge Member States to adopt and enforce executive and legislative measures to prevent private sector actors within their jurisdiction from engaging in commercial activities with parties to armed conflict that might result in or contribute to systematic violations of international humanitarian and human rights law.

2. Regional organizations

62. In recent years, the United Nations has increasingly been engaged in building partnerships, on issues pertaining to the protection of civilians, with regional and intergovernmental organizations, including the Council of Europe, the Organization for Security and Cooperation in Europe, the Organization of African Unity, the Economic Community of West African States, the Southern African Development Community, the Association of Southeast Asian Nations, the League of Arab States, the Organization of the Islamic Conference, and the Inter-American Commission on Human Rights. Often, regional organizations alone cannot sufficiently address the needs of civilians in war. The list of cooperative efforts to resolve crisis, promote respect for international law or build national institutions is therefore growing and features such prominent examples as Kosovo (Federal Republic of Yugoslavia), Sierra Leone, Ethiopia/Eritrea, Myanmar and the Occupied Palestinian Territory.

63. There remains, however, a need for greater coordination with such organizations, notably in arriving at a common analysis and understanding of the local context and its requirements and sensitivities. At their fourth high-level meeting, in February 2001, the United Nations and regional organizations adopted a framework for cooperation in peace-building (see S/2001/138) and agreed on guiding principles for cooperation in this field, as well as on possible cooperative activities such as establishing peace-building units, sending joint assessment missions to the field, developing repertories of best practices and lessons learned, and the joint holding of pledging conferences. It was agreed that a follow-up meeting at the working level should be convened before the end of 2001 to seek practical means of implementing the framework for cooperation in peace-building as well as furthering the 13 modalities for conflict prevention identified in 1998.

Recommendation

14. I encourage the Security Council to establish a more regular cooperation with regional organizations and arrangements to ensure informed decision-making, the integration of additional resources, and the use of their comparative advantages. Such cooperation should include the establishment of a regular regional reporting mechanism, and briefings, for the Security Council. Future high-level consultations between the United Nations and regional organizations will provide a welcome opportunity to further develop cooperation on strengthening the protection of civilians in armed conflict.

V. Final observations

64. The instruments, political and legal, now available for the protection of civilians in armed conflict are in urgent need of updating. They were developed in a world where State actors were overwhelmingly dominant, and they reflect that fact.

Similarly, the practice of the United Nations was, at its inception, almost exclusively focused on the interaction of Member States.

65. New mechanisms and strategies are required to deal with changed circumstances. The forms of conflict most prevalent in the world today are internal — communal violence, ethnic cleansing, terrorism, private wars financed by the international trade in diamonds or oil — and involve a proliferation of armed groups. These circumstances reflect, to varying degrees, the erosion of the central role of the State in world affairs. While civilians have been the principal victims of these changes, it is wrong to say that the new order is entirely hostile to the protection of civilians. There are opportunities which can be seized, such as the global reach of the media and of new information technologies; the growing influence of civil society organizations and non-governmental organizations; the interdependence of the global economy; and the reach of international commerce.

66. Whether we are able to establish the culture of protection to which I referred at the beginning of this report will largely depend on the extent to which the United Nations, and the international community at large, are able to engage with the changed world. Is there enough will to strengthen the criminal justice system — both internationally and within national jurisdictions? Is there willingness to engage with armed groups, as the majority of armed conflicts occur within the borders of States? Will we be able to harness the potential of the media and the Internet? Will we build effective partnerships with civil society, non-governmental and regional organizations, and the private sector? These are not abstract questions; they are questions which emerge daily in the struggle to reduce the suffering of civilians in conflict and which, if they are to be answered in the affirmative, will at a minimum require Member States to take the specific steps enumerated in this and my previous report.

67. To this end, I would like to draw the Council's attention to a matter of particular concern. The present report is the second in a series. Some 18 months have passed since I submitted my first report on the protection of civilians in armed conflict. I regret to note that only a few of its 40 recommendations are so far being implemented. Nevertheless, the present report adds a further set of 14 recommendations whose implementation I consider essential if a real improvement in protection is to be achieved. Reports and recommendations are no substitute for effective action. The primary responsibility for the protection of civilians falls on Governments and armed groups involved in conflict situations. Where they do not honour these responsibilities, it is up to the Security Council to take action. Progress in protecting civilians threatened by armed conflict is measured in lives and livelihoods, and freedom from fear, rather than in statements of intent or expressions of concern. For this reason, I urge the members of the Security Council to review progress in implementing the recommendations made in this and the previous report. Further reports can have meaning when there is clear evidence that their recommendations are effecting real progress towards their goal. By shifting the focus to implementation of recommendations already agreed upon, it should be possible to ensure that future efforts will be more effective in bringing genuine relief and protection to civilians in armed conflict.

Annex I

Recommendations and generic policy directions

A. Prosecution of violations of international criminal law

Addressing impunity requires an ongoing and consistent commitment by international actors and Governments to ensure that international conventions are ratified and implemented, that sustained and adequate funding is provided for international tribunals, that national prosecutions in accordance with international standards are encouraged where States are genuinely able and willing, and that amnesties are rejected for those who commit genocide, crimes against humanity and war crimes (see paras. 9-13).

1. I urge the Security Council and the General Assembly to provide, from the outset, reliable, sufficient and sustained funding for international efforts, whether existing or future international tribunals, arrangements established in the context of United Nations peace operations or initiatives undertaken in concert with individual Member States, to bring to justice perpetrators of grave violations of international humanitarian and human rights law.

2. I recommend that the Security Council consider the establishment of arrangements addressing impunity and, as appropriate, for truth and reconciliation, during the crafting of peacekeeping mandates, in particular where this response has been triggered by widespread and systematic violations of international humanitarian and human rights law.

3. I encourage Member States to introduce or strengthen domestic legislation and arrangements providing for the investigation, prosecution and trial of those responsible for systematic and widespread violations of international criminal law. To this end, I endorse efforts aimed at supporting Member States in building capable and credible judicial institutions that are equipped to provide fair proceedings.

B. Standards for access negotiations

Obtaining meaningful access to those in need requires skilful negotiators and clear practical standards, including benchmarks for engagement and disengagement (see paras. 14-27).

4. Recalling the Security Council's recognition, in its resolution 1265 (1999), of the importance of gaining safe and unimpeded access of humanitarian personnel to civilian populations in need, I urge the Council to actively engage the parties to each conflict in a dialogue aimed at sustaining safe access for humanitarian operations, and to demonstrate its willingness to act where such access is denied.

5. I encourage the Security Council to conduct more frequent fact-finding missions to conflict areas with a view to identifying the specific requirements for humanitarian assistance, in particular obtaining safe and meaningful access to vulnerable populations.

C. Engagement of armed groups

In view of the prevalence of civil wars among today's conflicts, a structured dialogue with armed groups is indispensable for reaching and protecting vulnerable populations in times of war (see paras. 30-32 and 48-50).

9. In its resolutions the Security Council should emphasize the direct responsibility of armed groups under international humanitarian law. Given the nature of contemporary armed conflict, protecting civilians requires the engagement of armed groups in a dialogue aimed at facilitating the provision of humanitarian assistance and protection.

10. Many armed groups have neither developed a military doctrine nor otherwise incorporated the recognized principles of international humanitarian law in their mode of operation. I therefore urge Member States and donors to support efforts to disseminate information on international humanitarian and human rights law to armed groups, and initiatives to enhance their practical understanding of the implications of those rules.

D. Separation of civilians and armed elements

The early separation of armed elements from civilian populations preserves the civilian and humanitarian character of camps and settlements for displaced persons and helps to reduce potential threats to international peace and security (see paras. 28-37).

7. I further encourage the Security Council to support the development of clear criteria and procedures for the identification and separation of armed elements in situations of massive population displacement.

E. Regional focus on conflict situations

Responding adequately to conflict situations often requires a regional focus rather than a solely country-specific approach of political decision makers. Such situations carry the potential of destabilizing entire regions or subregions and thus can jeopardize international peace and security (see paras. 28-29, 37 and 62-63).

6. I encourage the Security Council to further develop the concept of regional approaches to regional and subregional crises, in particular when formulating mandates.

14. I encourage the Security Council to establish a more regular cooperation with regional organizations and arrangements to ensure informed decision-making, the integration of additional resources, and the use of their comparative advantages. Such cooperation should include the establishment of a regular regional reporting mechanism, and briefings, for the Security Council. In this respect, future high-level consultations between the United Nations and regional organizations will provide a welcome opportunity to further develop cooperation on strengthening the protection of civilians in armed conflict.

F. Enhancing informed decision-making

In order to enhance informed decision-making of the Security Council and its members, it is necessary to use the comparative advantages of other relevant actors within and outside the United Nations system (see paras. 51-63).

11. I recommend that the Security Council develop a regular exchange with the General Assembly and other organs of the United Nations on issues pertaining to the protection of civilians in armed conflict. I suggest that the President of the General Assembly use the monthly meeting with the President of the Security Council to alert the Council to situations in which action might be required.

G. Media and information in conflict situations

Developing stronger and more coordinated media and information mechanisms in conflict areas can play a vital role in facilitating informed decision-making, guiding and maximizing the impact of humanitarian response, and building a stronger civil society based on access to free and independent media sources (see paras. 38-45).

8. I recommend that the Security Council make provision for the regular integration in mission mandates of media monitoring mechanisms that would ensure the effective monitoring, reporting and documenting of the incidence and origins of "hate media". Such mechanisms would involve relevant information stakeholders from within the United Nations and other relevant international organizations, expert non-governmental organizations, and representatives of independent local media.

H. Engaging the private sector

The United Nations and other international organizations must engage the private sector in a constructive dialogue by building creative partnerships, ensuring that corporate operations are placed within the framework of international norms and standards that provide the infrastructure on which global commerce increasingly depends (see para. 61).

12. I encourage the Security Council to continue investigating the linkages between illicit trade in natural resources and the conduct of war and to urge Member States and regional organizations to take appropriate measures against corporate actors, individuals and entities involved in illicit trafficking in natural resources and small arms that may further fuel conflicts.

13. I urge Member States to adopt and enforce executive and legislative measures to prevent private sector actors within their jurisdiction from engaging in commercial activities with parties to armed conflict that might result in or contribute to systematic violations of international humanitarian and human rights law.

Annex II

Implementation of the recommendations contained in the report of the Secretary-General of 8 September 1999

In my report on the protection of civilians in armed conflict of 8 September 1999 (S/1999/957), I made 40 concrete recommendations to the Security Council covering a wide range of initiatives. In my observations, I drew particular attention to the nine recommendations listed below, which I deemed to be of particular importance. The matrix is intended to illustrate some of the initiatives and processes undertaken since to implement the recommendations.

Recommendations	*Action taken since September 1999*
1. Take steps to strengthen the Organization's capacity to plan and deploy rapidly. This includes enhancing the participation in the United Nations Standby Arrangement System, including by increasing the numbers of civilian police and specialized civil administration and humanitarian personnel. Rapidly deployable units of military and police are also required. Also essential is the capacity to deploy quickly a Mission headquarters. (Recommendation 28)	**The report of the Panel on United Nations Peace Operations** (A/55/305-S/2000/809) was presented to the Secretary-General on 17 August 2000 and submitted by him to the Security Council on 21 August 2000. In its report, the Panel recommends reforms in the Organization's capacity to rapidly deploy peace operations (see paras. 86-91 and 102-169). It concludes, inter alia, that traditional United Nations peacekeeping operations should be fully deployed within 30 days and more complex peacekeeping operations, such as those for intra-State conflicts, within 90 days. The Panel calls upon Member States to work together to ensure coherent, multinational, brigade-sized forces, ready for effective deployment within these timelines. The United Nations Secretariat should establish an on-call list of about 100 military and 100 police officers and experts from national armies and police forces, who would be available for immediate deployment within seven days. Conditions of service for civilian specialists should be revised to enable the United Nations to attract more qualified personnel, and reward good performances with better career prospects. During **the Millennium Summit of the United Nations**, held in September 2000, the Security Council met at the level of heads of State and Government to discuss the need to ensure an effective role for the Security Council in the maintenance of international peace and security, particularly in Africa. The Council in its resolution 1318 (2000), underlined the importance of enhancing the United Nations capacity for rapid deployment of peacekeeping operations and urged Member States to provide sufficient and timely resources. The report of the Panel on United Nations Peace Operations was endorsed by the Security Council in resolution 1327 (2000), in which it recognized the importance of rapid deployment of troops, police and civilian personnel in mission areas and urged the Secretary-General to consult with troop-contributing countries on how best to achieve this important objective. **The General Assembly** at its fifty-fifth session endorsed some of the recommendations contained in the report and appropriated an additional amount of $363,000 under political affairs, and $37,200 under management and central support services. The General Assembly also approved expenditures of $9,190,200 gross for peacekeeping operations for the period from 1 July 2000 to 30 June 2001. **The United Nations Standby Arrangement System**. The Panel on United Nations Peace Operations also drew attention to the importance of promoting a precise understanding of Member States armed forces and their capacities in regard to peacekeeping. To date, 88 countries have officially expressed their willingness to participate. The High Readiness Brigade was created in response to the Secretary-General's call for a rapid deployment force. It currently comprises units from Argentina, Canada, Denmark, the Netherlands, Norway, Poland and Sweden, units trained to the same standards, for deployment in operations under Chapter VI of the Charter of the United Nations.
2. Establish a permanent technical review mechanism of United Nations and regional sanctions which can use information provided by Council members, relevant financial institutions, the Secretariat, agencies and other humanitarian actors to ascertain the probable impact of sanctions on civilians. (Recommendation 23)	No permanent technical review mechanism of the United Nations and regional sanctions has been established yet. A first step, however, has been taken by the Security Council in resolution 1333 (2000), by which it imposed sanctions on the Taliban. For the first time, the Council decided to include a "sunset" clause, according to which the Secretary-General was requested to review the humanitarian implications of the measures imposed and

Recommendations	*Action taken since September 1999*
	report to the Council within 90 days of the adoption of resolution 1333 (2000). The Secretary-General, in consultation with the sanctions Committee, would also continue to report at regular intervals thereafter on any humanitarian implications and submit a comprehensive report no later than 30 days prior to the expiration of these measures.
3. Impose arms embargoes in situations where civilians and protected persons are targeted by the parties to the conflict, or where the parties are known to commit systematic and widespread violations of international humanitarian and human rights law, including the recruitment of child soldiers; and urge Member States to enforce these embargoes in their own national jurisdictions. (Recommendation 26)	The two most recent examples of weapon embargoes imposed by the Security Council apply to Afghanistan (resolution 1333 (2000)) and Ethiopia/Eritrea (resolution 1298 (2000)). With regard to the latter, the Council noted with concern that the fighting between Ethiopia and Eritrea had serious humanitarian implications for the civilian population of the two States and demanded the earliest possible reconvening of substantive peace talks under the auspices of the Organization of African Unity. Member States were asked to prevent the sale or supply to Eritrea and Ethiopia of weapons, ammunition, military vehicles, equipment and spare parts, as well as any provision to the two countries of technical aid or training related to the manufacture or use of arms. In the case of Afghanistan, States were to prevent the direct supply, sale or transfer of arms to the territory controlled by the Taliban.
4. Consider deployment in certain cases of a preventive operation, or of another preventive monitoring presence. (Recommendations 12)	Since the deployment of the United Nations Preventive Deployment Force in the former Yugoslav Republic of Macedonia and the United Nations Mission in the Central African Republic, no peacekeeping operation has been established within the strict framework of conflict prevention.
5. Make greater use of targeted sanctions to deter and contain those who commit egregious violations of international humanitarian and human rights law, as well as those parties to the conflict which continually defy the resolutions of the Council, thereby flouting its authority. (Recommendation 22)	Despite the recommendations of the **Interlaken process**, sanctions regimes targeting specific groups of individuals have not been established yet. The Interlaken process on targeted financial sanctions was finalized in 1999 and aimed at improving the effectiveness of financial sanctions regimes and limiting the humanitarian impact of comprehensive economic embargoes. Experts concluded that, although targeted financial sanctions appeared to be technically workable, serious difficulties

Recommendations	*Action taken since September 1999*
	remained in the tracking of financial transactions and localizaiton of financial assets. Furthermore, it was noted that international cooperation among Member States would need to be formalized to ensure the proper implementation of sanctions and that more consistent United Nations sanctions resolutions with the appropriate technical guidelines should be adopted. The **Bonn-Berlin process** followed the model of the Interlaken process in investigating how to make United Nations sanctions better targeted, but with the primary focus on arms embargoes and travel and aviation sanctions. It was suggested that an extensive monitoring mechanism for arms embargoes should be established and that consideration could be given to the imposition of secondary measures in cases of proved violations.
6. Deploy international military observers to monitor the situation in camps for internally displaced persons and refugees when the presence of arms, combatants and armed elements is suspected; and if such elements are found and national forces are unable to or unwilling to intervene, deploy regional or international military forces that are prepared to take effective measures to compel disarmament of the combatants or armed elements. (Recommendation 35)	No international military observers have been deployed for the purpose of monitoring the situation in camps for internally displaced persons and refugees. However, military observers have sometimes carried out this task as part of their regular activities. Being increasingly faced with dangerous situations in camps and settlements for refugees and internally displaced persons, UNHCR has made various attempts to improve security in such camps and to preserve their civilian nature. In the camps established for Rwandan refugees in eastern Zaire (now the Democratic Republic of the Congo), UNHCR paid and equipped a special Zairian contingent, recruited from Zairian presidential guard, to monitor security conditions. In addition, UNHCR has supported Tanzanian police officers in carrying out their task of enhancing security in camps of Burundian refugees in the United Republic of Tanzania and in ensuring the civilian and humanitarian character of those camps. In camps established for Kosovo Albanian refugees in the former Yugoslav Republic of Macedonia, UNHCR arranged for the deployment of an international police adviser.

Recommendations	*Action taken since September 1999*
7. Underscore in its resolutions, at the onset of a conflict, the imperative for civilian populations to have unimpeded access to humanitarian assistance, and for concerned parties, including non-State actors, to cooperate fully with the United Nations humanitarian coordinator in providing such access, as well as to guarantee the security of humanitarian organizations, in accordance with the principles of humanity, neutrality and impartiality, and insist that failure to comply will result in the imposition of targeted sanctions. (Recommendation 18)	In many of its recent resolutions, including resolutions on the situations in the Democratic Republic of the Congo, East Timor, Ethiopia/Eritrea and Sierra Leone, the Security Council underscored the importance of civilian populations having unimpeded access to humanitarian assistance. When establishing the United Nations Mission in Sierra Leone by resolution 1289 (2000), the Council authorized the Mission to take necessary action to afford protection to civilians under imminent threat of physical violence, and reiterated this mandate in resolution 1313 (2000). The following resolutions have included similar provisions on the need for unimpeded access to humanitarian assistance: resolution 1272 (1999) on the establishment of the United Nations Transitional Administration in East Timor; resolution 1291 (2000) on the situation concerning the Democratic Republic of the Congo; and resolutions 1312 (2000) and 1320 (2000) on the situation between Eritrea and Ethiopia.
8. Ensure that, whenever required, peacekeeping and peace enforcement operations are authorized and equipped to control or close down hate media assets. (Recommendation 16)	No peacekeeping or peace enforcement operation has yet been authorized to close down the assets of hate media.
9. In the face of massive and ongoing abuses, consider the imposition of appropriate enforcement action. Before acting in such cases, either with a United Nations, regional or multinational arrangement, and in order to reinforce political support for such efforts, enhance confidence in their legitimacy and deter perceptions of selectivity or bias towards one region or another, the Council should consider the following factors: (a) The scope of the breaches of human rights and international humanitarian law, including the numbers of people affected and the nature of the violations;	There is an ongoing global debate among Member States on the relationship between military intervention to halt or prevent cases of widespread and systematic violations of international humanitarian and human rights law and State sovereignty. One such initiative is the International Commission on Intervention and State Sovereignty, which was established in September 2000 and is seeking to reconcile the concepts of interventions and State sovereignty. The Commission is an independent international body designed to help bridge the two concepts. Its aim is to build a broader understanding of these issues and to foster a global political consensus on how to move towards action within the United Nations system. The Commission intends to finalize its report by the autumn of 2001.

Recommendations	*Action taken since September 1999*
(b) The inability of local authorities to uphold legal order, or identification of a pattern of complicity by local authorities; (c) The exhaustion of peaceful or consent-based efforts to address the situation; (d) The ability of the Security Council to monitor actions that are undertaken; (e) The limited and proportionate use of force, with attention to repercussions upon civilian populations and the environment. (Recommendation 40)	

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Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict

Introduction

1. The present report, the third report on the protection of civilians in armed conflict, is submitted in accordance with the request of the President of the Council, contained in his letter dated 21 June 2001 (S/2001/614).

2. The first report, dated 8 September 1999 (S/1999/957), presented the facts about the reality confronted by millions of civilians around the world in situations of armed conflict and recommended that the Security Council act to encourage parties to a conflict to better protect civilian populations. The second report, dated 30 March 2001 (S/2001/331), focused on some additional steps Member States could take to strengthen their own capacity to protect civilians in armed conflict.

3. In the 18 months since those reports were tabled, the Office for the Coordination of Humanitarian Affairs of the Secretariat has worked to ensure a more consistent and systematic presentation of these issues to the various organs of the United Nations, particularly the Security Council and the Economic and Social Council. Much interest has been demonstrated through the increased number of briefings to the Security Council during the past 18 months, highlighting issues of humanitarian concern in matters of peace and security, including the protection of civilians. The one-day workshop on the Mano River region convened by the Council on 18 July 2002, at which the Department of Political Affairs, the Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs made presentations, provided a practical stocktaking of the effectiveness and adequacy of the mandate of the United Nations Mission in Sierra Leone (UNAMSIL). It also ensured a comprehensive review of the protection needs of civilians alongside peace-building and political objectives. It would be useful to conduct further regular reviews of Security Council mandates from the point of view of the impact on civilians and in the context of a joint political, security and humanitarian analysis.

4. Much work has also been done to strengthen and enhance the policy agenda outlined in the first two reports. At the request of the Security Council, the Office for the Coordination of Humanitarian Affairs developed an aide-memoire, which was adopted by the Council in the statement by its President of 15 March 2002 (S/PRST/2002/6). The aide-memoire is a practical tool that provides a basis for improved analysis and diagnosis of key civilian protection issues that arise out of

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conflict. It was based on the deliberations of a series of round tables held with Member States, the United Nations system, the International Committee of the Red Cross (ICRC), non-governmental organizations and academic experts, with all contributing to its formulation. Since its adoption, the aide-memoire has served as a common framework and a point of reference for supporting the protection of civilians.

5. Closer cooperation and coordination between the Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs has facilitated much of the work that has been conducted since the previous report. Collaboration between these two departments of the Secretariat was particularly useful for the design and launch of the aide-memoire. Discussions are presently under way to deepen the cooperation between the Department and the Office and to facilitate joint planning through the implementation of standard operating procedures. Like the aide-memoire, these standard operating procedures will aim to mainstream issues pertaining to the protection of civilians into work dealing with the establishment, closure and change of peacekeeping missions and mandates.

6. The round tables also contributed to the design of a "roadmap", requested by the Security Council in resolutions 1265 (1999) of 17 September 1999 and 1296 (2000) of 19 April 2000. A provisional version of the roadmap is set out in the annex to the present report for consideration by members of the Security Council. This version has reorganized the recommendations along action-oriented themes identified in the round tables and echoed in the aide-memoire. In early 2003, the Office for the Coordination of Humanitarian Affairs will work with other parts of the Secretariat and the United Nations system to develop further the roadmap concept by outlining specific activities to support implementation by States, and by organizing these activities into a coherent plan of action, with time frames for completion and identification of institutional responsibilities.

7. The primary focus now will be towards implementation, as called for by the Security Council and the Economic and Social Council. In its resolution 2002/32 of 26 July 2002, the Council specifically invites Member States to participate actively in workshops on the protection of civilians in order to share knowledge and experience and to improve practice. The Office for the Coordination of Humanitarian Affairs is coordinating a series of six regional workshops that bring together relevant representatives from the United Nations, non-governmental organizations, and academic institutions with leaders from key government ministries, in particular the ministries of foreign affairs, defence and internal affairs. The workshops introduce and outline fundamental concepts concerning the protection of civilians, provide participants with experience in using diagnostic tools such as the aide-memoire and provide a regional perspective on the threats to the security and protection of civilians.

8. With the assistance of the Government of South Africa, the first of these workshops was recently held at Pretoria, with strong participation from eight countries in the southern African region. Their observations and conclusions about the protection of civilians reflected the experience of a region in which countries had either undergone and emerged from conflict or had been affected by regional conflicts and their consequences, such as sizeable refugee flows.

9. The southern Africa workshop highlighted the importance of regional actions and of the need to engage regional institutions in the protection of civilians. The

establishment of the African Union (AU) and the New Partnership for Africa's Development provide an important new platform for securing greater commitment to an improved framework for the protection of civilians. The Government of South Africa proposes to introduce this issue within AU. The workshop also emphasized that effective control of small arms and demining programmes requires common regional policies and regional enforcement structures for control and destruction. This region's experience with integration of combatants into the armed forces serves to underline the importance of establishing codes of conduct defining the relationship between individual members of military forces and the civilian populations and the need to reinforce such codes through proper systems of accountability. The separation of armed elements from refugee populations is one of the highest priorities for the region. Participants noted an increasing trend in the militarization of the refugee and the local host populations where refugee camps were located in border areas and in close proximity to areas of conflict. There has been large-scale involvement of armed non-State actors in conflicts in the region, and the workshop underscored the importance of engaging them in conflict negotiations and in securing acknowledgement of their own responsibility and obligations for the protection of civilians.

10. The second workshop, held in Japan, involved officials and civil society representatives from 11 countries of East Asia and the Pacific. It noted that the region does not have strongly developed regional structures, and that the context of conflict differs from other regions and is usually communal or ethnic in nature. Regional concerns, therefore, focus on the potential problems caused by the spill-over of refugees and the absence of regional capacity to respond. The region is also characterized by a strong interest and support for peacekeeping, although there is little sharing of experience in this area. The workshop demonstrated the need to promote the protection of civilians as a key element in conflict prevention. This extends to training in peacekeeping because peacekeepers may not be fully aware of the challenges and responsibilities involved in the protection of civilians and a common approach is required. The recent bomb attacks in Bali, Indonesia, underscored the concerns of all countries in the region about terrorism and its relationship to the protection of civilians. Countries in the region are involved in drafting new legislation to address this challenge to security. This is also an area where Governments may welcome guidance and support to ensure that new measures provide a focus for the protection of civilian victims of terrorism and remain compatible with overall responsibilities for the protection of civilians. The regional workshops have initiated the important process of developing understanding and support for a culture of protection called for in the first report and have provided an opportunity for engaging regional entities in this task.

11. It is also important to look at changing trends and the new contexts they provide for the protection of civilians in armed conflict. Since the previous report, some of the world's most protracted and violent conflicts are reaching resolution or coming to an end. Angola is now on the road to peace after three decades of civil war that left thousands dead and millions displaced. In Sierra Leone, where the most egregious acts of violence were committed against civilians, there are clear signs of an end to armed conflict. Afghanistan is yet another remarkable example of a seemingly intractable conflict coming to an end. All three cases, however, confirmed the critical nature of the protection of civilian populations, including their right to humanitarian access, even in conflicts approaching resolution and through the

transitional phase when peace is consolidated. An important aspect of the implementation of the protection of civilians is the observation, monitoring and verification of human rights throughout. This requires close cooperation between the Department of Political Affairs, the Office for the Coordination of Humanitarian Affairs, the Office of the United Nations High Commissioner for Human Rights (OHCHR) and relevant United Nations protection-mandated agencies to ensure that negotiated peace agreements are comprehensive, with humanitarian and human rights principles and priorities well integrated into the political framework.

12. As is now well known, civilians, rather than combatants, are the main casualties of conflicts today, with women and children constituting an unprecedented number of the victims. More than 2.5 million people have died directly as the result of conflict in the last decade, and over 10 times this number (31 million people) have been displaced and uprooted by conflict. This represents human suffering on an immense scale. With the upsurge of global terrorism, a new kind of threat to civilians has emerged, one that may significantly increase the scale of suffering in the future and severely impact on the efforts of the international community to protect civilians, particularly the need to separate civilians from combatants. This new challenge is examined in depth in the conclusion of the present report.

13. Since the previous report, an increasing number of States, United Nations organizations and regional and non-governmental organizations are making use of the Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2, annex) to strengthen legal frameworks on the protection of internally displaced persons. Angola and Uganda have incorporated, or are in the process of incorporating, aspects of the Guiding Principles into legal and regulatory frameworks for resettlement and return. In the Sudan, both the Government and the Sudan People's Liberation Movement Army (SPLMA) participated in separate workshops held by the inter-agency internally displaced persons unit housed in the Office for the Coordination of Humanitarian Affairs to contribute to the formation of policy frameworks. In Belgrade, officials at the federal (Federal Republic of Yugoslavia) and republic (Serbia) levels have expressed an interest in developing a legal framework for response. In Afghanistan, the Guiding Principles have been used as a reference for the drafting — still under way — of a decree for the safe return of internally displaced persons. Moreover, agencies are using them as the basis for discussion with local authorities and for dissemination as well as guidance in projects and programmes implementation. In Indonesia, the authorities have begun a process of public education using the Guiding Principles to promote actively their better understanding.

14. The adoption of agreed standards for the humane treatment of internally displaced persons must, of course, be followed by careful implementation when internally displaced persons are able to return to their homes. In Angola and Burundi, for example, efforts are under way to ensure the necessary preconditions for safe and sustainable return, thereby integrating the protection needs of returning internally displaced persons and refugees.

15. In the emerging context of the transition from conflict, practical actions to ensure the protection of civilians will be required in three key areas, both as setting the stage for an effective transition to peace and remaining essential throughout the process: secure humanitarian access, the clear separation of civilians and

combatants, and the swift re-establishment of the rule of law, justice and reconciliation during transition. The present report examines several new challenges — sexual exploitation, commercial exploitation and terrorism — and their impact on the protection of civilians.

16. The present report does not address in detail the issues relating to women and children in armed conflict, as those issues are dealt with in the report on women, peace and security (S/2002/1154) and the report on children and armed conflict (S/2002/1299).

Access to vulnerable populations

17. Carefully negotiated humanitarian access does much to improve the protection of civilian populations in the short term and to improve prospects for a successful transition to reconciliation. The presence of humanitarian actors reinforces the idea of neutrality — a concept fundamental to the protection of civilians. Unimpeded access for humanitarian agencies to all populations in need, regardless of group or status, also removes a basis for grievance and does much to confirm that issues of difference, disagreement or grievance can be resolved. Access is also likely to remind populations affected by conflict of the longer-term benefits that can be gained from peace. By de-escalating the conflict, lowering its intensity and foreshadowing the benefits of peace, access both affords civilians immediate short-term protection benefits and sets the stage for an effective and sustainable transition to peace.

18. The positive impact of unimpeded humanitarian access on the transition to peace was demonstrated most recently in the Sudan during October 2002 where unimpeded access was a cornerstone for a memorandum of understanding between the Sudanese authorities and SPLMA, the first in 19 years, marking the cessation of hostilities. A subsequent technical agreement for implementation signed two weeks later extended the cessation of hostilities and the removal of access restrictions until the end of 2002, with the possibility of a further extension.

19. In most conflict situations, however, securing humanitarian access continues to be a challenge. In many conflicts, protection and assistance for millions of vulnerable civilians continues to be manipulated, delayed and even denied, with devastating consequences. A number of obstacles undermine efforts to secure access, including the physical insecurity of aid workers, denial of access by authorities and a lack of structured engagement with non-State actors.

20. The impact of insecurity and the consequent lack of access for humanitarian agencies is clearly evident in the Democratic Republic of the Congo, where limited humanitarian access resulted in massive loss of life, with reports of over 2 million deaths, of which an estimated 350,000 were the direct result of violence. In the Ituri region of the eastern part of the Democratic Republic of the Congo, six ICRC staff members were brutally killed in April 2001, leading to the reduction and withdrawal of humanitarian staff. There is now grave concern over the situation in Ituri, where there is the potential for a return to the widespread ethnic killings of early 2001. In Liberia, where the humanitarian situation has deteriorated considerably as the result of continued fighting, only 120,000 people are receiving humanitarian assistance and a much larger group of vulnerable and displaced persons remain inaccessible. In Afghanistan, security remains a major concern. Some areas are still characterized by

sporadic factional fighting, causing interruption in access and hence assistance and monitoring programmes.

21. Despite institutional efforts by the United Nations to strengthen staff training and capacity to meet security needs, humanitarian workers as well as civilians continue to be targeted as a way of denying humanitarian access. In addition to countless civilian deaths, four United Nations staff members have been killed and two abducted in 2002. International organizations such as ICRC have also suffered fatalities and abductions. Other humanitarian workers have been attacked in Burundi, the Sudan, Chechnya and the Occupied Palestinian Territories.

22. Such acts do not simply destroy individual lives. They are an attack on the emblem of the United Nations and ICRC and other humanitarian organizations, an attempt to drive them out and to deny their role as protectors of civilians in conflict. When committed in the context of armed conflict, such acts should be recognized as war crimes and dealt with accordingly by the relevant national judicial authorities or the International Criminal Court.

23. Humanitarian access is sometimes restricted because the access itself is perceived as a potential threat to other populations. The grave humanitarian situation in the Occupied Palestinian Territories is an example. The humanitarian crisis is inextricably linked to measures adopted by Israel in response to suicide bombings and other attacks against Israeli military and civilian targets. Access remains entirely at the discretion of the Israeli Defence Forces and is often denied to the United Nations and other humanitarian personnel.

24. Ms. Catherine Bertini, the Secretary-General's Personal Humanitarian Envoy to the Occupied Territories, reported in August on the mounting humanitarian crisis, describing it as a crisis of access and mobility. She highlighted the impact on civilian populations of loss of access to basic needs and services, including medical treatment and education, because of curfews and closures, while other services, such as food supplies and water, are blocked from reaching communities.

25. A further constraint on securing humanitarian access is a lack of structured contact with non-State actors. There are two levels to the problem. First, States may be unwilling or unable to engage non-State actors in dialogue, either on the peace process or on their obligations to civilian populations under the Geneva Conventions. Consequently, very few non-State actors recognize their responsibilities regarding humanitarian access as a component of international humanitarian law, and this leads to access being restricted, unpredictable or denied altogether. This lack of awareness and observance is exacerbated by the plethora of warring parties in many civil conflicts — ranging from de facto authorities and warlords, to military entities active in combat, to formal political entities — which may eventually become a party to the peace accord.

26. Second, it is critically important that humanitarian actors are able freely to make contact with non-State actors to negotiate fundamental issues like humanitarian access, regardless of the relationships between the State and the rebel groups. In conflicts with no clearly delineated front line, however, such contact is often made under pressure by a number of humanitarian bodies, including United Nations agencies, ICRC and non-governmental organizations. The risks of fragmented, piecemeal or parallel negotiations on humanitarian access are high.

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Rebel groups may play one organization against another, thus increasing the risks to security and further endangering access.

27. In order to be effective, negotiations should be conducted in a structured, coordinated manner based on agreed standards and mechanisms. Comprehensive framework agreements provide a stronger and more transparent basis for humanitarian access. The aide-memoire can be a useful guide to the issues that need to be addressed. United Nations agencies are also preparing a manual on terms of engagement with armed groups, to better assist coordination and to facilitate more effective negotiations.

28. If skilfully crafted in a principled manner, negotiations for unimpeded humanitarian access may also become the basis for a future transition to peace and recovery, in no small measure by simply being one of the few, if not the only, forums where the parties to the conflict are talking to one another. National immunization days and "days of tranquillity", to provide targeted services, particularly for children, have proved to be a good starting point in several conflicts, including Liberia and Sierra Leone. Two models of effective comprehensive frameworks include Operation Lifeline Sudan (OLS) and the Somalia Aid Coordination Body (SACB). OLS provides an operational framework for United Nations agencies and non-governmental organizations in the Sudan to secure access to civilians regardless of their location, and serves as a bridge to securing commitment to the principles underlying the protection of civilians in the current peace talks at Machakos, Kenya. SACB integrates the efforts of the United Nations system with a consortium of international non-governmental organizations. It has served in the same sustained manner as a vehicle for providing essential assistance during an ongoing and devastating conflict. Although civilians in both the Sudan and Somalia have continued to be attacked, these frameworks provide a platform for continuing negotiations on humanitarian access.

29. As a creative means of securing humanitarian access — a fundamental basis for protection during a crisis and a foundation for the transition to peace — States are urged to support greater use of inclusive framework mechanisms, particularly in circumstances where there are no peace operations or other agreements that provide a basis for access. In many cases this can only happen with significant bilateral pressure on the warring parties. In this, the support and influence of the Security Council and Member States is vital.

30. To summarize, the following practical measures can improve access to civilians in armed conflicts and can support the development and consolidation of transitional processes:

- All parties to a conflict, including non-State actors, must understand their obligations and responsibilities to civilians;
- There should be clearly defined conditions for humanitarian access in any terms of engagement;
- Contact should be undertaken on a coordinated basis by humanitarian and United Nations agencies based on agreed conditions;
- The aide-memoire should be used as a tool for structuring and guiding response to access negotiations;

- Contact between warring parties on humanitarian access issues should be structured. Framework agreements are the best option when no peacekeeping mission is present;
- Governments should not subordinate the basic rights of civilians in response to perceived security threats.

Separation of civilians and armed elements

31. Conflict often leads to mixed movements of populations, comprising not only refugees, internally displaced persons and other civilians, but also armed elements seeking sanctuary in neighbouring countries. The continued presence of combatants undermines the transition towards peace. Moreover, the presence of armed elements in refugee camps and internally displaced person settlements has very specific and serious humanitarian consequences. Women and children are particularly vulnerable to serious human rights violations, such as trafficking, forced recruitment, rape and other forms of physical and sexual abuse.

32. Over the past year, there have been successful relocation exercises separating civilians and combatants. In the northern part of the Democratic Republic of the Congo, the authorities, working collaboratively with the Office of the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), successfully separated armed elements from a civilian community which had given shelter to 26,000 refugees from the Central African Republic and relocated them. In Sierra Leone, the authorities, assisted by UNHCR, were able to persuade refugees to move away from the borders, and, in a more secure environment, were able to screen and separate combatants from refugees and establish a separate regime for the internment of combatants.

33. There are two distinct issues of concern: one relates to the intermingling of combatants and civilians in a range of situations and the other concerns, specifically, the movement of combatants into refugee and internally displaced person camps and settlements.

34. When combatants are intermingled with civilians, Governments sometimes resort to extraordinary measures to address the problem, some of which may seem disproportionate or to be punitive to the civilian population. Examples of such responses, which have themselves resulted in further threats to civilian security and rights to protection, include regroupement camps, forced relocation, protected villages and, in the Middle East, punitive measures directed at civilians. Such actions violate international humanitarian and human rights law and should be condemned.

35. Where refugees are involved, experience has demonstrated that it is essential to separate civilians from armed elements in refugee camps and elsewhere immediately. The longer the camps remain militarized, the more difficult the problem will be to redress. This situation also creates major difficulties in the post-conflict transition, impeding refugee returns and reintegration. The establishment of refugee camps at a reasonable distance from the border is essential to preserving the civilian and humanitarian character of these camps.

36. Removing refugee camps from border areas is often complex and difficult to achieve. Sometimes Governments, fearing instability, prefer to contain the problem at the border. The authorities may also wish to leave refugees at the border for strategic political or military reasons. Refugees themselves may be reluctant to leave the border area, wishing to return home periodically or to be in a position to take flight again if necessary. This problem challenges the hospitality of host communities and receiving States, which find that conflict not only draws in local populations, but inevitably spills over, beyond the local host communities, affecting security in border areas. Civilian populations on both sides of a border can be coerced into courier activities and children are at risk of being militarized. When these mass movements also include armed elements, regional security is at stake and conflicts risk becoming internationalized. The Democratic Republic of the Congo, Zambia and West Africa are clear examples of this danger. It is in this difficult and fluid context that the international community must pursue its goal of maintaining the humanitarian and civilian nature of camps for refugees and internally displaced persons.

37. Agenda for Protection,[1] recently released by UNHCR, contains an array of measures designed to preserve the humanitarian character of asylum. A concrete outcome of the Agenda is the conclusion on the civilian and humanitarian character of asylum,[2] recently adopted by the Executive Committee of UNHCR, which sets out important understandings for Member States to ensure the physical safety of refugees, particularly in refugee camps. The conclusion emphasizes the primary responsibility of host States to ensure the civilian and humanitarian character of asylum, calls for the disarmament of armed elements and covers the identification, separation and internment of combatants.

38. UNHCR, working with Member States, other United Nations agencies and ICRC, will develop specific measures for the disarmament of armed elements and for the identification, separation and internment of combatants. These measures will serve to clarify standards and procedures agreed by all responsible parties. States will be asked specifically to support the deployment of security officers into insecure refugee situations. In this context, the United Nations will deploy, with the consent of host States, multidisciplinary assessment teams to areas of emerging crisis to assess the situation on the ground, evaluate threats to refugee populations and make practical recommendations.

39. Some States argue that a major constraint in their efforts physically to separate armed elements from civilians is a lack of resources and capacity. If this task is beyond the capacities of local authorities, their genuine concerns must be recognized and wherever possible addressed. Assistance from international civilian police and military forces is vital, particularly in disarming and demobilizing militias and in transferring them elsewhere. One practical solution would be to establish a roster of experts who could be seconded by their Governments for a limited period of time in order to assess the situation, design the strategy, assist the local authorities and, if feasible, pilot the exercise together with local authorities. Member States with such capacity are urged to provide the necessary practical support. It must be understood, however, that it remains the responsibility of States to grant asylum to victims of violence to ensure that they receive protection, relief and assistance.

40. To summarize, in order to facilitate the effective separation of civilians from armed elements, the following practical actions or requirements are needed:

(a) Commitment by Governments to remove refugee camps and internally displaced person settlements from border areas and to the separation and internment of combatants;

(b) Rapid deployment of United Nations multidisciplinary assessment teams to assist and support the separation of combatants and civilians;

(c) Provision of support to States hosting refugees in order to strengthen the capacity of law enforcement authorities through an appropriate security package, notably to strengthen police units in insecure refugee situations;

(d) Promotion of the use of the aide-memoire and the Agenda for Protection by Governments in situations where combatants and civilians are intermingled, as a means of ensuring that their responses to perceived security threats meet international legal standards.

Rule of law, justice and reconciliation

41. Restoration of the rule of law is fundamental to a country's capacity to emerge from a period of conflict into a sustainable peace, based on the assured protection of civilians and the return of order. The institutions for security, law and order and justice are frequently the first to weaken or collapse in contemporary civil conflicts, thus creating a vacuum for human rights protection. This vacuum is sometimes filled on an interim basis by multidimensional peacekeeping operations — such as those deployed in Kosovo and Timor-Leste — where international civilian police are deployed to deal with law enforcement and international military forces provide an environment of security.

42. There can be no long-term solution to security problems on this scale unless and until a well-trained, well-equipped and regularly paid national army and national police, within the context of a fully functioning criminal justice system, are in place. Recent efforts to achieve this have been crucial, as in Timor-Leste, where the relatively speedy and internationally supported transformation of the Armed Forces of National Liberation of East Timor (FALINTIL) into the core of a national defence force was critical in the smooth transition to independence.

43. The international community is now striving to achieve this transition in Afghanistan, where the most serious challenge to the fragile peace remains a lack of security in much of the country. In the absence of a stable security environment, the human rights situation in Afghanistan remains worrying in many respects, principally owing to the weakness of the central government, warlordism, factional conflicts and a very rudimentary and dysfunctional justice system. The situation of women continues to be a matter of concern in many parts of the country. It is vital that donors support, with the necessary resources, the efforts of the Government and people of Afghanistan to ensure security in their country.

44. For a secure environment to be sustained and the rule of law to take hold in any transitional situation, one of the first priorities must be a comprehensive disarmament, demobilization and reintegration programme. In Sierra Leone, an official disarmament, demobilization and reintegration programme was a central tenet of the Lomé Peace Accord. This accord was also the first such agreement to recognize the special needs of children in the disarmament, demobilization and reintegration process, with almost 7,000 child soldiers successfully demobilized and

disarmed. This process, completed in January 2002, and the ongoing reintegration efforts are essential components of the improved security conditions so vital for a lasting peace.

45. The United Nations Development Programme (UNDP) has been promoting national ownership of the disarmament, demobilization and reintegration processes, supporting national capacity to reabsorb combatants and providing technical advice on policy frameworks in such countries as Afghanistan, Sierra Leone, Angola, the Democratic Republic of the Congo and Somalia. Similarly, the United Nations Children's Fund (UNICEF) and its partners have been engaged in the prevention of recruitment, demobilization and social reintegration of child soldiers in these and other countries. The key to successful reintegration and prevention of re-recruitment of child soldiers is long-term investment in education, vocational training and family and community support programmes, taking into account the special needs of girls.

46. The entry into force on 1 July 2002 of the Rome Statute of the International Criminal Court (A/CONF.183/9) marks an important deterrence against war crimes, crimes against humanity and genocide. The culture of impunity is being challenged. Over the past few years, the United Nations has placed considerable emphasis on issues of transitional justice in the former Yugoslavia, Rwanda, Sierra Leone and Timor-Leste. In these situations, re-establishing the rule of law and reactivating basic criminal justice systems has been critical to holding together fragile peace agreements and protecting civilians during the transition to peace. It has led to the establishment of ad hoc international tribunals in the case of Rwanda and the former Yugoslavia and, most recently, the creation of a Special Court for Sierra Leone. At the recommendation of the Department of Peacekeeping Operations, the Executive Committee on Peace and Security established in April 2002 an interdepartmental/agency task force for the development of comprehensive rule of law strategies for peace operations, and fully endorsed its final report and recommendations at the end of September.

47. The issue of accountability for past atrocities and human rights abuses — who should be held accountable and how — has been increasingly recognized by the international community as fundamental from the beginning. An inability to address these issues of justice in Kosovo led to widespread retribution by former victims, including new killings and a renewed cycle of refugee outflows, which even the over 40,000 North Atlantic Treaty Organization (NATO)-led troops were unable to prevent. Justice systems need to address past abuses quickly if the rebuilding process after violent upheaval is to have a solid basis. While it is argued, however, that amnesties for members of armed forces are needed for a cessation in hostilities to take effect, they remain unacceptable to and unrecognized by the United Nations unless they exclude genocide, crimes against humanity and war crimes from their provisions.

48. The rebuilding of essential rule of law institutions should have the most immediate priority in situations of transition from conflict to peace if the protection of civilians is to be ensured. This is not a role that can be performed by military forces alone. It requires civilian justice experts backed by civilian police. In the absence of adequate local capacity, rapid deployment of international civilian law enforcement and criminal justice experts is vital. UNDP is building capacity and supporting reforms to justice and security institutions, for example in Afghanistan,

Kosovo, El Salvador, Rwanda, Guatemala and Haiti. In areas where the United Nations has the mandate to provide an interim administration, such as Kosovo and Timor-Leste, it has been able to provide such international support to the local judiciary and other structures of government. In Afghanistan, for instance, OHCHR has been supporting the United Nations Assistance Mission in Afghanistan (UNAMA) in building the capacity of the independent Afghan national human rights commission, which focuses on monitoring and investigation, human rights education, women's rights and transitional justice.

49. It is important to draw a distinction between punitive and restorative justice. The work of the various international tribunals, as well as national courts, falls into the former category. Restorative justice, which can be seen as including the return of refugees and displaced persons to their former places of residence in safety and dignity, coupled with the full restoration of national protection, is equally important to the transition to peace and recovery. The right to return, applicable to all citizens and former habitual residents, as well as the restitution of property, housing and land, are of key importance. Indeed, the resolution of property and housing issues before and subsequent to return is often vital to political stability, economic security, the protection of human rights and the establishment and strengthening of the rule of law.

50. The demand for justice and accountability must be balanced with the political pressures to move forward, away from the conflict, based on new alliances and agreements. Reconciliation between former combatants, whether internal or external, can be as important as justice for longer-term stability. This has been the experience of Timor-Leste.

51. There are, however, no reconciliation templates. Each situation has unique requirements. Timing is also critical. Kosovars found it impossible to discuss reconciliation in the period following the departure of the Serbs, and in Timor-Leste its leaders spoke of reconciliation soon after Indonesia's withdrawal. In Timor-Leste there was also a significant effort made to strike an appropriate balance between prosecuting some perpetrators of serious abuse while reintegrating lesser offenders. The Commission for Reception, Truth and Reconciliation is a complementary measure, with the objective of truth-telling and community based reconciliation, possibly with compensation, by lesser offenders. With assistance from OHCHR, Sierra Leone has also established a similar structure with its Special Court and the Truth and Reconciliation Commission. These complementary mechanisms serve a valuable function, by beginning the process of reviewing the past truthfully, thus combining the imperatives of justice and reconciliation. Moreover, by recognizing and involving women and children in their work, these particular bodies have been able to put in place special procedures, thereby facilitating the successful reintegration of women and children. Justice and truth-seeking mechanisms also offer opportunities to combine internationally-mandated prosecution processes with more traditional mechanisms of confession, reparation and acceptance by the community. At the same time, further comparative analysis of such functions by the international community is needed.

52. Justice and reconciliation must work together to address the underlying causes of conflict and to prevent possibly violent retribution. Local actors should be involved from the outset in the process of reconciliation and in reforming and restoring the justice system. Reconciliation efforts may begin even in the midst of

conflict and need to be undertaken in a culturally sensitive way. Education in conflict and post-conflict situations can provide a window of opportunity for building tolerance and social justice in communities.

53. To summarize, the practical recommendations that address the needs of rule of law, justice and reconciliation and thereby provide better protection for civilians in conflict, it is necessary:

(a) To provide the resources for and to reform national institutions for security, law and order and justice for better enforcement of the rule of law and human rights standards as soon as possible when conflict ends;

(b) To ensure that the necessary disarmament, demobilization and reintegration of combatants is conducted as early as possible with full recognition of the elements required for reconciliation at the community level;

(c) To ensure that laws and regulations inconsistent with international legal standards, in particular the right to return, restitution of property rights and the right to adequate housing, are repealed and that effective and impartial mechanisms are put in place to allow for the return and restoration of property;

(d) To ensure that reliable, sufficient and sustained funding is provided to existing international tribunals and the International Criminal Court, as well as other initiatives to bring to justice perpetrators of grave violations of international humanitarian and human rights law.

Observations

54. In the 18 months since the previous report to the Security Council, three global issues have emerged that will seriously challenge the capacity of Member States to protect civilians. The first relates to an increased focus on gender-based violence in humanitarian crisis and conflict situations, a grave and continuing problem that has been heightened by reports of sexual exploitation and abuse and trafficking of women and girls perpetrated by humanitarian workers and peacekeepers.

55. Acknowledging that this serious problem went beyond the United Nations system, it was agreed that the Inter-Agency Standing Committee — representing not only United Nations agencies but also the Red Cross movement and non-governmental organizations — was the appropriate forum to address the problem on a global basis. The Standing Committee immediately set up a Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises, co-chaired by the Office for the Coordination of Humanitarian Affairs and UNICEF. The Task Force was explicitly charged with assessing weaknesses or gaps in existing procedures and standards of behaviour, and proposing specific measures for their remedy. In carrying out its assessment, the Task Force consulted widely with humanitarian partners, Member States and other interested stakeholders, including the Department of Peacekeeping Operations.

56. The causes of abuse, including trafficking and gender-based violence, stem from the unequal power relationships that are endemic in situations of mass displacement, conflict or civil strife. The United Nations, together with a range of partners in the humanitarian community, is implementing a number of preventive and remedial measures aimed at strengthening and enhancing the protection and care

of vulnerable persons in situations of humanitarian crisis and conflict. These include the adoption of core principles that represent the minimum standards of conduct for all United Nations civilian personnel and the establishment of clear reporting procedures. The core principles are: (a) sexual exploitation constitutes gross misconduct and is grounds for dismissal; (b) sexual activity with persons under 18 years of age is prohibited; (c) the exchange of money, employment, goods or services for sex is prohibited; (d) sexual relationships between humanitarian workers and beneficiaries are strongly discouraged; (e) there is an obligation to report concerns about possible abuses by co-workers; and (f) an environment that prevents sexual exploitation must be created, and managers have particular responsibilities to support and develop systems, which maintain this environment.

57. In addition, the United Nations is working to ensure that the design of peacekeeping and relief operations incorporates protection measures for groups vulnerable to abuse and exploitation. It is unfortunately the case, however, that other parties associated with the United Nations, including civilian police and military forces working under United Nations auspices and humanitarian non-governmental organizations, also perpetrate such violations. As the Secretary-General stated recently: “Men, women and children displaced by conflict or other disasters are among the most vulnerable people on earth. They look to the United Nations and its humanitarian partners for shelter and protection. Anyone employed by or affiliated with the United Nations who breaks that sacred trust must be held accountable and, when the circumstances so warrant, prosecuted” (A/57/465, para. 3). To this end, there are a number of measures which if taken by Member States would further strengthen the culture of protection in humanitarian crises:

(a) Respect for the “Ten Rules: Code of Personal Conduct for Blue Helmets” by all uniformed personnel contributed for service with the United Nations;

(b) The Security Council should consider the inclusion of a standard paragraph in relevant resolutions that require the reporting of follow-up actions and prosecutions undertaken in response to allegations of sexual abuse and exploitation;

(c) Member States should be encouraged to use the core principles in their standards and codes of conduct for national armed forces and police forces, thereby ensuring due attention is placed on protection from sexual abuse and exploitation;

(d) Donor countries should insist that all their implementing partners include the core principles in their codes of conduct prior to release of donor funding.

58. The second issue that has increasing impact on the protection of civilians relates to the commercial exploitation of conflict. The illicit and illegal exploitation of natural resources is a growing problem that serves to fuel conflict and increasingly involves and harms the security of the civilian population. This has been a hallmark of the conflict in the Democratic Republic of the Congo, but is common to many conflict situations. Individuals and companies take advantage of, maintain and have even initiated armed conflicts in order to plunder destabilized countries to enrich themselves, with devastating consequences for civilian populations.

59. The two recent reports, by the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (S/2002/1146, annex) and the Panel of Experts on Liberia (S/2002/1115, annex) have dramatically documented this impact. The panellists called upon

Member States to mobilize sustained efforts to deter and combat such illegal activities. In parallel, coercive measures directed at companies and individuals involved in plundering of resources in conflict situations should be considered by the Security Council. These should include:

(a) Travel bans on identified individuals;

(b) The freezing of personal assets of individuals involved in illegal exploitation;

(c) The barring of selected companies and individuals from accessing banking facilities and other financial institutions and from receiving funding or establishing a partnership or other commercial relations with international financial institutions.

60. Often the parties involved in the illegal exploitation have no incentive to alter their behaviour. It is necessary, therefore, to identify measures to target their fears of losing revenue and, at the same time, encourage the legal use of resources. It is essential that the socio-economic aspects of a transition are adequately addressed and that there exist a fair system of distribution of wealth in a fractured society. Regional economic integration and legitimate and transparent commercial development need to be promoted and supported. Economic activities need to be stimulated, including the creation of employment opportunities, while supporting simultaneous political processes in which these initiatives will be embedded.

61. Finally, the rise of terrorism and the involvement of terrorist organizations in armed conflicts adds a new and difficult set of challenges to our work on the protection of civilians. Terrorism must be condemned without reservation and energies must be focused on effectively combating this grave threat to international peace and security. The responses of States to acts of terrorism must remain cognizant of the need to protect civilian life and property and be undertaken with full respect to international humanitarian and human rights law. Every effort to strengthen the international protection of civilians in armed conflict is a victory against terrorism which, by its very nature, seeks to undermine civilian status and weaken the legal and institutional frameworks through which civilian men, women and children are shielded from the violence of war.

62. To pursue security at the expense of human rights will ultimately be self-defeating. In places where human rights and democratic values are lacking, disaffected groups are more likely to opt for a path of violence, or to sympathize with those who do. Greater respect for human rights, along with democracy and social justice, will, in the long term, prove the only effective safeguard against terror. The targeting of civilians and the disproportionate use of force beyond legitimate military objectives are violations of international humanitarian law and must be strongly condemned.

63. Past statements to the Security Council have discussed terrorism and the role of the United Nations in the fight against terrorism. It is important to note in the context of the present report the special problems that arise when terrorist organizations become involved in armed conflicts. The efforts of the United Nations to ensure access to vulnerable populations and to structure appropriate contact with armed actors for this purpose will be vastly more complicated if those armed actors are engaged in terrorist activities or are seen as being so involved. Efforts to begin the processes of reconciliation and to strengthen transitions from war to peace will

be made immeasurably more difficult if terrorist attacks have killed or continue to kill indiscriminately and without warning. The United Nations will need to formulate clear guidelines for its future work on the protection of civilians in armed conflicts where terrorist organizations are active.

64. The present report has highlighted the changing environment for the protection of civilians. It has noted the development of transitional processes towards peace in a number of countries that were previously the scene of long-standing conflicts. The effective protection of civilians is a critical element in laying the foundations for the peace process. The durability of peace is dependent on a commitment to the protection of civilians from its very inception. In the current environment, the report outlines a number of practical measures in three key areas where implementation will have an immediate and positive effect on transitional peace processes. The first, and underlying all others, is the awareness and understanding of Member States of their obligations and responsibilities for the protection of civilians in conflict situations. Second is a commitment to structured and inclusive negotiations on issues of humanitarian access, to the separation of armed elements from civilians, particularly in refugee situations, and a determination to ensure the physical safety of humanitarian personnel and the civilians they are working to assist. Thirdly, there is a need to appreciate better the interdependence between humanitarian assistance, peace and development. Finally, collective will is required to address the profound challenges to civilian protection posed by the commercial exploitation of conflicts, the sexual exploitation of civilians in conflict and the global threat of terrorism.

65. The report concludes with a number of practical initiatives that will serve to heighten awareness of the need for the protection of civilians in the daily work of the United Nations. The regional workshops of the Office for the Coordination of Humanitarian Affairs will provide an opportunity for those Member States that are best placed to do so to identify threats to regional peace and security and ways in which to address them collectively, through existing regional bodies and mechanisms. The report encourages the adoption and use of the aide-memoire to develop frameworks and more structured approaches to the protection of civilians by United Nations country teams in areas of conflict. Since its adoption, the aide-memoire has provided a useful framework for analysis and action. Its further application is encouraged to provide a consistent basis for training of security and peacekeeping personnel in meeting the challenges and responsibilities they face in the protection of civilians in conflict. In addition, it is important to continue the process of review initiated by the Security Council with its workshop on 18 July 2002 on the Mano River region. Consideration should be given to further reviews of key mandates and resolutions where the protection of civilians remains an important concern. This requires further strengthening of joint cooperation between the Office for the Coordination of Humanitarian Affairs, the Department of Political Affairs, the Department of Peacekeeping Operations, OHCHR, UNDP and other relevant United Nations entities on the integration of the protection of civilians into planning frameworks for peace missions and peace processes.

Notes

[1] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 12 A* (A/57/12/Add.1), annex IV.

[2] Ibid., *Supplement No. 12 A* (A/57/12/Add.1), chap. III, sect. C.

Annex

Roadmap for the protection of civilians

Document symbol	*Recommendation*		*Theme*
Enhancing the architecture of protection			
S/1999/957	1	Urge Member States to ratify and implement the major instruments of international humanitarian law, human rights law and refugee law and to report to the Council on action taken	Extending the legal framework
S/1999/957	2	Call upon Member States and non-State actors to adhere to international humanitarian, human rights and refugee law	Ensuring compliance
S/1999/957	6	Urge Member States to adopt national legislation for the prosecution of individuals responsible for genocide, crimes against humanity and war crimes and to prosecute, on the basis of universal jurisdiction, persons under their authority or on their territory responsible for grave breaches of international humanitarian law and to report thereon to the Council	Extending the legal framework
S/2001/331	3	Encourage Member States to introduce or strengthen legislation and arrangements providing for the investigation, prosecution and trial of those responsible for systematic and widespread violations of international criminal law, and support Member States in building credible judicial institutions equipped to provide fair proceedings	Establishing mechanisms to implement justice
S/1999/957	8	Urge Member States to support the proposal to raise the minimum age for recruitment and participation in hostilities to 18, and to accelerate the drafting of an optional protocol to the Convention on the Rights of the Child on the situation of children in armed conflict	Extending the legal framework
S/1999/957	10	Urge Member States to ratify and fully implement the 1994 Convention on the Safety of United Nations and Associated Personnel	Extending the legal framework
S/1999/957	11	Invite the General Assembly to develop urgently a protocol to the 1994 Convention, which would extend the scope of legal protection to all United Nations and associated personnel	Extending the legal framework
S/2001/331	13	Urge Member States to adopt and enforce measures to prevent private-sector actors from engaging in commercial activities with parties to armed conflict that might contribute to violations of international humanitarian and human rights law	Extending the legal framework

Document symbol	*Recommendation*		*Theme*
S/2001/331	12	Continue investigating linkages between illicit trade in natural resources and the conduct of war and urge Member States and regional organizations to take appropriate measures against corporate actors, individuals and entities involved in illicit trafficking in natural resources and small arms	Ensuring compliance
S/1999/957	4	Urge Member States to ratify the Rome Statute of the International Criminal Court	Establishing mechanisms to implement justice
S/1999/957	5	Encourage the development of judicial and investigative mechanisms to be used when the prosecution of those responsible for genocide, crimes against humanity and war crimes appears unlikely due to the unwillingness or inability of the parties involved, pending the establishment of the International Criminal Court	Establishing mechanisms to implement justice
S/2001/331	11	Develop a regular exchange between the Security Council and the General Assembly and other United Nations organs on issues pertaining to the protection of civilians in armed conflict	Increasing organizational capacities
S/2001/331	14	Establish a more regular cooperation between the Security Council and regional organizations to ensure informed decision-making, the integration of additional resources and the use of their comparative advantages, including through the establishment of a regular regional reporting mechanism and briefings to the Security Council and high-level consultations to further develop cooperation on strengthening the protection of civilians in armed conflict	Increasing organizational capacities
S/1999/957	28	Take steps to strengthen the Organization's capacity to plan and deploy rapidly, including by enhancing participation in the United Nations Stand-by Arrangements System and providing rapidly deployable units of military and police and the capacity to quickly deploy a mission headquarters	Increasing organizational capacities
S/1999/957	29	Ensure that these units are trained in human rights and international humanitarian law, including child and gender-related provisions, civilian-military coordination and communications and negotiation skills	Increasing organizational capacities
S/1999/957	30	Urge Member States to disseminate instructions on international humanitarian and human rights law among their personnel serving in United Nations peacekeeping operations and in authorized operations conducted under national or regional command and control	Training and preparedness

Document symbol	*Recommendation*		*Theme*
S/1999/957	27	Encourage Member States to give political and financial support to other States in order to facilitate compliance with the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and Their Destruction (the "Ottawa Convention")	Mitigating potential impact
S/1999/957	23	Establish a permanent technical review mechanism of United Nations and regional sanctions regimes to ascertain the probable impact of sanctions on civilians	Mitigating potential impact
S/1999/957	24	Further develop standards and rules to minimize the humanitarian impact of sanctions and ensure especially that sanctions are not imposed without provision for humanitarian exemptions	Mitigating potential impact
Protection through conflict prevention			
S/1999/957	14	Establish Security Council working groups relating to specific volatile situations to improve the understanding of the causes and implications of conflict, as well as to provide a consistent forum in which to consider options to prevent the outbreak of violence	Preparedness
S/1999/957	15	Make use of the human rights information and analysis emanating from independent treaty body experts, mechanisms of the Commission on Human Rights and other reliable resources as indicators for potential preventive action by the United Nations	Preparedness
S/1999/957	13	Increase Security Council use of relevant provisions in the Charter of the United Nations, such as Articles 34 to 36, by investigating disputes at an early stage, inviting Member States to bring disputes to the Security Council's attention and recommending appropriate procedures for dealing with disputes; and strengthen the relevance of Article 99 by taking concrete action in response to threats against peace and security identified by the Secretariat	Prevention
S/1999/957	12	Consider deployment in certain cases of a preventive peacekeeping operation or of another preventive monitoring presence	Prevention
Protection during conflict			
S/1999/957	18	Underscore in Security Council resolutions the imperative for civilian populations to have unimpeded access to humanitarian assistance and for concerned parties, including non-State actors, to cooperate fully with the United Nations humanitarian coordinator in providing such access and in guaranteeing the security of humanitarian organizations with non-compliance resulting in targeted sanctions	Obligate parties to the conflict

Document symbol	*Recommendation*		*Theme*
S/2001/331	9	Emphasize in Security Council resolutions the direct responsibility of armed groups under international humanitarian law	Obligate parties to the conflict
S/2001/331	10	Urge Member States and donors to support efforts to disseminate to armed groups information on international humanitarian and human rights law and initiatives to enhance their practical understanding	Obligate parties to the conflict
S/1999/957	9	Demand that non-State actors involved in conflict not use children below the age of 18 in hostilities, with non-compliance resulting in targeted sanctions	Obligate parties to the conflict
S/1999/957	20	Ensure that the special protection and assistance requirements of children and women are fully addressed in all peacekeeping and peace-building operations	Mission mandate and design (as necessary)
S/1999/957	21	Systematically require parties to conflicts to make special arrangements to meet the protection and assistance requirements of children and women	Obligate parties to the conflict
S/1999/957	7	Encourage States to follow the legal guidance provided in the Guiding Principles on Internal Displacement, in cases of massive internal displacement	Obligate parties to the conflict
S/1999/957	19	Urge neighbouring Member States to ensure access for humanitarian assistance and call upon them to bring to the attention of the Security Council any issues that might threaten the right of civilians to assistance, as a matter affecting peace and security	Obligate parties to the conflict
S/2001/331	5	Conduct more frequent fact-finding missions to conflict areas, with a view to identifying the specific requirements for humanitarian assistance, in particular obtaining safe and meaningful access to vulnerable populations	Secure access to vulnerable populations
S/2001/331	4	Actively engage the parties to each conflict in a dialogue aimed at sustaining safe access for humanitarian operations and demonstrate the Council's willingness to act where such access is denied	Secure access to vulnerable populations
S/2001/331	7	Develop clear criteria and procedures for the identification and separation of armed elements in situations of massive population displacement	Secure access to vulnerable populations
S/1999/957	39	Establish, as a measure of last resort, temporary security zones and safe corridors for the protection of civilians and the delivery of assistance in situations characterized by the threat of genocide, crimes against humanity and war crimes against the civilian population and ensure the demilitarization of these zones and the availability of a safe-exit option	Secure access to vulnerable populations

Document symbol	Recommendation		Theme
S/1999/957	33	Establish a peacekeeping presence early in the movement of refugees and displaced persons, where appropriate, in order to ensure that they are able to settle in camps free from the threat of harassment or infiltration by armed elements	Separate civilians and armed elements
S/1999/957	35	Deploy international military observers to monitor the situation in camps for internally displaced persons and refugees when the presence of arms, combatants and armed elements is suspected and to take appropriate measures in response	Separate civilians and armed elements
S/1999/957	37	Mobilize international support for the relocation of camps to a safe distance away from the border with refugees' countries of origin	Separate civilians and armed elements
S/1999/957	16	Ensure that appropriate measures are adopted to control or close down hate media assets in situations of ongoing conflict	Control hate media
S/1999/957	26	Impose arms embargoes in situations where civilians and protected persons are targeted by the parties to the conflict, or where the parties are known to commit systematic and widespread violations of international humanitarian and human rights law, including the recruitment of child soldiers; and urge Member States to enforce these embargoes in their own national jurisdictions	Sanctions
S/1999/957	22	Make greater use of targeted sanctions to deter and contain those who commit egregious violations of international humanitarian and human rights law, as well as those parties to conflicts which continually defy the resolutions of the Security Council	Sanctions
S/1999/957	25	Request regional organizations or groups of countries to submit complete information regarding humanitarian exemption mechanisms and clearance procedures prior to authorizing the imposition of regional sanctions; monitor the ability of regional sanctions authorities to implement the exemptions and clearance procedures and establish procedures for exercising Security Council authority to address inadequacies	Sanctions
S/2001/331	6	Develop the concept of regional approaches to regional and subregional crises, in particular when formulating mandates	Mission mandate and design (as necessary)
S/1999/957	34	Confirm that regional organizations have the capacity to carry out an operation according to international norms and standards before authorizing their deployment, and put in place mechanisms whereby the Council can effectively monitor such operations	Mission mandate and design (as necessary)

Document symbol	Recommendation		Theme
S/1999/957	17	Ensure that United Nations missions aimed at peace-making, peacekeeping and peace-building include a mass media component that can disseminate information about international humanitarian law and human rights law, including peace education and children's protection, and about the activities of the United Nations, and encourage authorized regional missions to include such a capacity	Mission mandate and design (as necessary)
S/2001/331	8	Make provision for the regular integration in mission mandates of media monitoring mechanisms to ensure the effective monitoring, reporting and documenting of hate media	Mission mandate and design (as necessary)
S/1999/957	38	Ensure that peace agreements and the mandates of all United Nations peacekeeping missions include, where appropriate, specific measures for disarmament, demobilization and the destruction of unnecessary arms and ammunition, with particular attention given to demobilization and reintegration of child soldiers, and that early and adequate resources are made available	Mission mandate and design (as necessary)
S/2001/331	2	Establish, during the crafting of peacekeeping mandates, arrangements addressing impunity and/or truth and reconciliation, in particular in situations of widespread and systematic violations of international humanitarian and human rights law	Mission mandate and design (as necessary)
S/1999/957	31	Support a public "ombudsman" with all peacekeeping operations to deal with complaints from the general public about the behaviour of United Nations peacekeepers and establish an ad hoc fact-finding commission, as necessary, to examine reports on alleged breaches of international humanitarian and human rights law	Mission mandate and design (as necessary)
S/1999/957	32	Request the deploying Member States to report to the United Nations Secretariat on measures taken to prosecute members of their armed forces who have violated international humanitarian and human rights law while in the service of the United Nations	Mission mandate and design (as necessary)
S/1999/957	40	Consider the imposition of appropriate enforcement action in response to massive and ongoing abuses on the basis of certain fundamental considerations such as the scope of the violations of human rights and international humanitarian law and the exhaustion of peaceful or consent-based efforts to address the situation	Enforcement
S/2001/331	1	Provide, from the outset, reliable, sufficient and sustained funding for international efforts to bring to justice perpetrators of grave violations of international humanitarian and human rights law	Justice and reconciliation

Document symbol	*Recommendation*		*Theme*
Protection after conflict			
S/1999/957	36	Mobilize international support for national security forces, including logistical and operational assistance, technical advice and supervision where necessary	Justice and reconciliation
S/1999/957	3	Consider using enforcement measures contained in Chapter VII of the Charter to induce, where necessary, compliance with orders and requests of the two existing ad hoc tribunals for the former Yugoslavia and Rwanda, respectively, for the arrest and surrender of accused persons	Justice and reconciliation

Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, S/2004/431, 28 May 2004

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Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict

I. Introduction

1. The present report, my fourth on the protection of civilians in armed conflict, is submitted pursuant to the request of the President of the Security Council contained in his statement of 20 December 2002 (S/PRST/2002/41).

2. It has now been 5 years since I first initiated the agenda on the protection of civilians in armed conflict and 10 years since the world's silent witnessing of genocide in Rwanda. These important milestones compel us to assess the collective achievements that have been made to better protect vulnerable civilian populations in the height of crises and in their immediate aftermath. They also, however, warrant honest reflection on those areas where action still falls short of needs.

3. Stark and disturbing evidence that civilians continue to bear the brunt of armed conflicts has emanated from four very different types of conflict that have received increased attention over the past 18 months: the conflict in the Darfur region of the Sudan has left more than 1 million civilians, mostly women and children, displaced and struggling to survive in harsh conditions, many others killed or subjected to extreme human rights violations, including rape and sexual violence, and entire villages destroyed; in Côte d'Ivoire more than 500,000 people have been displaced by conflict, civilians have suffered serious and widespread human rights violations, including killings, sexual violence and torture, and specific communities and ethnic groups have been forcibly displaced as a result of violence and harassment; in Iraq the increasingly serious threats to security and continued fighting have resulted in disproportionate and avoidable civilian deaths and injuries, and detainees have been subjected to torture and other serious violations of human rights and international humanitarian law; and in Nepal an upsurge in violence has been accompanied by reports of civilians being killed, tortured, raped, abducted and forcibly recruited. Several other countries, including Afghanistan, the Democratic Republic of the Congo and Liberia, have emerged from long-standing armed conflicts into delicate situations of transition, where many protection challenges increase rather than diminish and the continued engagement of the international community is vital in order to ensure that civilians are not denied the dividends of peace. Compliance by all parties to conflict with international humanitarian, human rights, refugee and criminal law is critical in all of these situations, whether they are situations of armed conflict, occupation or transition.

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4. In too many instances, civilians are subjected to extreme violence and are denied life-saving humanitarian assistance. Forced population displacement continues to be either a by-product or a deliberate strategy of warfare. In continued long-term conflicts, the erosion of social support structures has led to the spread of violence and new forms of warfare. Sexual violence as a means of warfare, particularly against women and girls, has increased and become even more horrifying, especially when rape is used as a weapon or as a means to spread HIV/AIDS to the enemy. A prevailing culture of impunity has continued to spur cycles of violence and criminality. Indiscriminate terrorist attacks and counter-terrorism measures that do not always comply with international human rights norms complicate the protection environment. Finally, humanitarian actors are operating in a less secure environment where they are deliberately attacked and are no longer protected by the emblems of the United Nations and the International Federation of Red Cross and Red Crescent Societies.

5. The environment created by long-term conflicts is one in which cross-border and regional factors have assumed increasing importance. It has required additional United Nations peacekeeping operations with more robust mandates and resources, new levels of interaction between civilian and military actors and greater support for institution-building initiatives necessary for peace to hold. It has also galvanized the international community's sense of responsibility towards protecting civilians under threat and its resolve to eliminate impunity. These developments reflect the way forward on an agenda that demands universal implementation and should never be allowed to be turned back.

6. In December 2003, my Under-Secretary-General for Humanitarian Affairs presented to the Security Council the elements of a ten-point platform on the protection of civilians in armed conflict. The ten-point platform embodies many of the key issues set out in the broader protection framework provided by the aide-memoire on the protection of civilians, an updated version of which the Security Council adopted on 15 December 2003 (S/PRST/2003/27, annex). The present report examines the issues outlined in the ten-point platform and identifies specific ways in which performance could be improved.

II. Review of performance on protection

A. Progress made since the previous report

7. The protection concerns I have outlined have demanded a more focused and coherent response over the past 18 months, both at Headquarters and in the field. Security Council resolutions and peacekeeping mandates have regularly identified key protection issues, including the deliberate targeting of civilians, sexual and other forms of violence, the recruitment and use of child soldiers and ensuring humanitarian access to facilitate the delivery of assistance and the safety of United Nations and associated personnel. I welcome the focus on protection concerns in the Security Council missions to the Great Lakes region and West Africa in June 2003 and to Afghanistan in November 2003 and hope that future missions will be used to further the implementation of the Council's resolutions on the protection of civilians in armed conflict, children and armed conflict, and women, peace and security.

8. In line with Security Council resolution 1296 (2000) of 19 April 2000, mandates of peacekeeping operations have been broadened to allow troops to physically protect civilians under imminent threat of violence, as seen in the mandates of the United Nations Mission in Sierra Leone (UNAMSIL) (resolution 1270 (1999)), the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) (resolution 1417 (2002)), the United Nations Mission in Liberia (UNMIL) (resolution 1509 (2003)), the United Nations Operation in Côte d'Ivoire (UNOCI) (resolution 1528 (2004)) and the United Nations Operation in Burundi (ONUB) (resolution 1545 (2004)). The inclusion in peacekeeping mandates of programmes for the disarmament, demobilization, reintegration and rehabilitation of combatants (UNAMSIL, the United Nations Assistance Mission in Afghanistan (resolution 1401 (2002)), MONUC, UNMIL, UNOCI and ONUB) and of measures to protect refugees and returnees (UNOCI and ONUB) is also key to meeting protection needs. By using its resolutions to stress to all parties to armed conflicts, including non-State armed groups, that human rights violations and denial of humanitarian access are unacceptable, the Security Council reinforces a message that humanitarian and other actors on the ground can use. The Council should continue to systematically emphasize these concerns.

9. The stronger protection focus in peacekeeping mandates has been complemented by swifter deployments of peacekeeping troops when needed to avert an immediate crisis of protection and to restore order. The speed and quality of response has improved through the involvement of new peacekeeping contributions. In Ituri, in the Democratic of the Congo, where ethnic conflicts were escalating dangerously, the situation was stabilized in May 2003 by the rapid deployment of forces by the European Union, authorized by the Security Council. Today, United Nations peacekeeping forces are holding local militias in check and maintaining the peace in a precarious situation. Similarly, the initiative of the Economic Community of West African States (ECOWAS) to rapidly deploy the ECOWAS Mission in Liberia (ECOMIL) in August 2003 made a significant contribution to the protection of civilians, particularly the early interventions in and around Monrovia, to provide security for civilians displaced by the conflict.

10. The humanitarian operational response on the ground has been extensive. In Sierra Leone, the establishment of an internment facility in Mapeh to accommodate armed elements, for example, was an innovative measure to ensure the civilian and humanitarian character of asylum, carried out by the Government of Sierra Leone with the assistance of the Office of the United Nations High Commissioner for Refugees (UNHCR) and UNAMSIL. The International Committee of the Red Cross (ICRC) also assisted. An inter-agency internment task force subsequently assisted the authorities with management, counselling and advocacy and supervised the implementation of an accelerated reintegration procedure for child soldiers by the United Nations Children's Fund (UNICEF), UNHCR and implementing partner non-governmental organizations. UNICEF has launched a back-to-school campaign in Liberia, modelled on the success of a similar programme in Afghanistan, which has already trained some 72,000 teachers, provided school supplies and seen the return of 334,000 boys and girls to the classroom. United Nations mine action programmes are under way in 36 countries where the threat of landmines and unexploded ordnance continues to hamper the delivery of humanitarian and reconstruction assistance and impede the safe return of refugees and internally displaced people.

These are but three examples of humanitarian work that is being carried out in various parts of the world to protect civilians when they need it most.

11. Since my last report (S/2002/1300), the regional dimension of civilian protection is being more consistently addressed by the Security Council, together with regional and subregional organizations. The Council, through its resolutions and its missions to areas of conflict, has increasingly adopted a regional approach to issues such as disarmament, demobilization, reintegration and rehabilitation and the cross-border movement of refugees, combatants and small arms. I am particularly pleased to see regional organizations taking up the protection of civilians agenda — as demonstrated, for example, by the decision of the African Union to appoint a special representative for the protection of civilians in armed conflict, measures taken by ECOWAS and the Organization for Security and Cooperation in Europe and, as already mentioned, the timely deployment by the European Union of rapid-reaction forces to Ituri and the deployment of ECOMIL in Liberia.

12. Such initiatives have been supported by collective mechanisms within the United Nations Secretariat, such as the regional humanitarian meeting for West Africa held in July 2003, at which the basic elements of a regional protection strategy were agreed on, and regional protection workshops in West Africa, the South Pacific, South Asia and Latin America organized by the Office for the Coordination of Humanitarian Affairs. Those workshops have strengthened the engagement of Member States at the regional level and have provided a stronger framework for addressing protection issues more coherently.

13. Efforts to deter war crimes, crimes against humanity and genocide and to break the prevailing culture of impunity in situations of armed conflict have been boosted by the establishment of the International Criminal Court and the jurisprudence of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as the Special Court for Sierra Leone. The formal referrals to the International Criminal Court of the situation in northern Uganda in December 2003 and in the Democratic Republic of the Congo in April 2004 by the respective Presidents of those countries provide civilians with hope that the unconscionable crimes committed against them will not go unpunished. The Security Council's request that the United Nations High Commissioner for Human Rights carry out a special investigation into civilian massacres in the Democratic Republic of the Congo represents a further mechanism for enhancing the protection of civilians.

14. The deeply disturbing issue of sexual exploitation and abuse of women and children in armed conflict by United Nations personnel — both civilian staff and uniformed peacekeeping personnel — has been the focus of considerable attention since my last report. In October 2003 a Secretary-General's bulletin on special measures for protection from sexual exploitation and sexual abuse (ST/SGB/2003/13) was promulgated. The bulletin sets out minimum standards of behaviour expected of all United Nations personnel, as well as measures necessary to maintain an environment that prevents sexual exploitation and abuse. Since its issuance, all parts of the United Nations system with a field presence have been working to establish a coherent system for implementation of the bulletin at the field level. Human trafficking, which is a related issue of increasing concern, is being addressed by the Department of Peacekeeping Operations as a policy priority.

15. The importance of maintaining a clear and common understanding of protection, based on my call for a system-wide approach, has been reflected in continued work to strengthen the policy framework and inter-agency coordination within the United Nations system. Key departments and agencies have jointly developed protection tools through the Executive Committee on Humanitarian Affairs Implementation Group for the Protection of Civilians in Armed Conflict, established in January 2003, including the "road map" and the updated aide-memoire on the protection of civilians. Closer coordination has also been evident in the increased use of multidisciplinary assessment missions, such as the joint regional humanitarian field review mission to West Africa (June and July 2003) and the joint Office for the Coordination of Humanitarian Affairs/Department of Peacekeeping Operations mission to the Democratic Republic of the Congo, which has been given the task of evaluating the execution of the humanitarian mandate within a peacekeeping environment and is scheduled for June 2004. I am also encouraged that recent arrangements between the Department of Peacekeeping Operations and UNHCR have included specific measures to secure expertise in assessing the security environment of refugees and returnees.

B. Continuing shortfalls

16. The Security Council has made a number of important commitments to the protection of civilians in armed conflict, in its resolutions 1265 (1999) and 1296 (2000). The following section of the report examines areas already identified by the Security Council as priorities and on which further action is required. These issues, which form the basis of the ten-point platform and most of which feature in resolutions 1265 (1999) and 1296 (2000), are (a) improving humanitarian access to civilians in need; (b) improving the safety and security of humanitarian personnel; (c) improving measures to respond to the security needs of refugees and internally displaced persons; (d) ensuring that the special protection and assistance requirements of children in armed conflict are fully addressed; (e) ensuring that the special protection and assistance requirements of women in armed conflict are fully addressed; (f) addressing shortcomings in our approach to disarmament, demobilization, reintegration and rehabilitation; (g) addressing the impact of small arms and light weapons on civilians; (h) combating impunity; (i) developing further measures to promote the responsibility of armed groups and non-State actors; and (j) ensuring the provision of the necessary resources to address the needs of vulnerable populations in "forgotten emergencies".

1. Humanitarian access

17. In 20 conflicts around the world, humanitarian access is either denied or obstructed for over 10 million people in need of food, water, shelter and medical care. Despite ongoing problems, important strides have been made over the past 18 months in accessing civilian populations in the eastern part of the Democratic Republic of the Congo, with the emerging peace process and a strengthened peacekeeping force. Elsewhere, however, the scene is much bleaker.

18. Since fighting broke out in early 2003 in the Darfur region of the Sudan, most of the people in need of assistance and protection have been beyond the humanitarian community's reach. Restrictions on access continue to deny life-saving assistance to 500,000 civilians in Liberia, 2.2 million in the Central African Republic and 1.5 million in Côte d'Ivoire. A similar situation exists in Afghanistan, where access to 1 million people in rural areas in the southern and eastern parts of the country is very limited and insecure. Access to 1.2 million people in the northern Caucasus district of the Russian Federation, including displaced populations and returnees, continues to be of concern. In northern Uganda, the number of people completely dependent on humanitarian assistance has increased dramatically — from 1 million to 1.6 million in the past 12 months alone — and humanitarian access is largely dependent on the uncertain provision of military escorts by the Government of Uganda. In the occupied Palestinian territory, security constraints on humanitarian assistance for 3.5 million civilians have worsened following the construction of a barrier through the West Bank, which is having a profound humanitarian impact on civilians by separating Palestinian communities from their land, jobs and markets and severely limiting their access to food, water and power supplies and essential social services, including schools and hospitals.

19. Efforts to secure more consistent humanitarian access need to be made on the basis of structured and coordinated negotiations. The strategic support of Member States, particularly neighbouring States, and regional organizations is critical, and I urge the Security Council to engage regional organizations as soon as an access crisis is brought to its attention. Security Council missions to conflict areas can assist by highlighting the need for humanitarian access in discussions with Governments. I also call for the further development of a coordinated system for Member States to provide material and financial support and standby teams of technical experts for rapid deployment to situations where insecurity (e.g., landmines) and the collapse of critical infrastructure (e.g., bridges) can create risks and delays in the distribution of humanitarian assistance. The United Nations operational framework for rapid response to mine and unexploded ordnance problems in emergencies is an example of an existing mechanism that enables rapid deployment of appropriate assets to assist in the delivery of humanitarian support.

2. Security of humanitarian personnel

20. The direct attacks on United Nations staff and other humanitarian personnel in Iraq, particularly the bombings of the United Nations and ICRC headquarters in Baghdad on 19 August and 27 October 2003 respectively, are tragic reminders of the new and dangerous environment in which humanitarian workers currently operate. Since my previous report, 27 United Nations staff members have been killed, while more than 426 others have been assaulted, held hostage or otherwise harassed in a range of situations, including in Afghanistan, Côte d'Ivoire, the Democratic Republic of the Congo, Liberia, Iraq, the Russian Federation (northern Caucasus) and the occupied Palestinian territory. In Burundi and Somalia, personal threats against members of international organizations restrict their ability to assess and monitor humanitarian needs and response. These events mark a disturbing trend of disregard for humanitarian principles and deliberate targeting of humanitarian workers for political or tactical purposes.

21. A sustained humanitarian presence to provide protection and assistance wherever needs exist is fundamental to the humanitarian mandate. In many cases, the deliberate targeting of humanitarian workers, including the taking of hostages, is intended to disrupt or stop international and humanitarian efforts to provide assistance and to deprive civilians of the protection an international presence affords. Attacks on humanitarian workers lead to restrictions on relief programmes,

the forced withdrawal of staff and concomitant difficulties in resuming humanitarian action. New threats mean that the active support and acceptance of local communities that has traditionally underpinned the security of humanitarian actors is no longer a sufficient guarantee. For humanitarian agencies to continue to be effective in this changed environment, collective approaches to protection and security coordination efforts will need to be reinforced. Supplementary legal measures to expand the scope of the 1994 Convention on the Safety of United Nations and Associated Personnel are also needed. I urge the Security Council to systematically condemn all attacks on United Nations personnel and other humanitarian workers and call upon Member States on whose territory such attacks occur to arrest and prosecute or, as appropriate, extradite those responsible. The perpetrators of such attacks must be held accountable, as affirmed in Council resolution 1502 (2003) of 26 August 2003.

3. Refugees and internally displaced persons

22. There are currently 50 million people who have been displaced from their homes by conflict. In the Sudan alone, an estimated 4 million people are internally displaced, together with more than 3 million people in the Democratic Republic of the Congo and 1.6 million in Uganda. Some 2 million people are internally displaced in Colombia, with many more actively prevented from leaving their homes. Safety for refugees and the internally displaced within camps and in host communities continues to be a matter of international concern, as is the security of States hosting large refugee populations or with such populations near their borders. Armed elements infiltrate camps in order to recruit or abduct men, women and children for military and other purposes and to appropriate food and other goods, endangering not only the inhabitants of the camps but also the hosting communities. The presence of armed elements and combatants in refugee and internally displaced settings blurs the civilian character of camps and exposes civilian populations to the increased likelihood of attack by opposing forces, especially where camps are perceived to serve as launching pads for cross-border attacks, as has been the case in Côte d'Ivoire. Moreover, the presence of combatants or armed elements in camps for refugees and internally displaced persons can destabilize an entire subregion or region and must be addressed through the identification, disarmament and internment of the combatants. To this end, I encourage Member States to support the outcomes of the UNHCR-convened meeting of experts on maintaining the civilian and humanitarian character of asylum, to be held in June 2004.

23. There has been progress at the regional level, particularly in West Africa, where the humanitarian community and Governments of the region have recognized the importance of developing common protection policies and frameworks to address cross-border flows of refugees between Guinea, Liberia and Sierra Leone. Member States, UNHCR and other humanitarian partners need to develop measures to protect refugees and internally displaced persons from forced military recruitment and to raise awareness, in particular targeting children through educational and public information campaigns. I am pleased to see such protection efforts being initiated on a regional basis.

24. New displacement within borders continues to prolong conflicts and to endanger peace processes, as has occurred most recently in Côte d'Ivoire. Governments bear the primary responsibility to protect, assist and respect the rights of internally displaced persons. Use of the Guiding Principles on Internal

Displacement, which bring together existing provisions under international humanitarian law, human rights law and refugee law by analogy, has been encouraged by the General Assembly and the Commission on Human Rights, as well as by regional and subregional organizations. National authorities should respond by developing and implementing national legislation and policies based on the Guiding Principles. When Governments are unwilling or unable to address the humanitarian needs of the internally displaced, the international community must respond. Through the Inter-Agency Internal Displacement Division of the Office for the Coordination of Humanitarian Affairs, greater collaboration now exists among humanitarian agencies involved in protection of the internally displaced, but further efforts are required to ensure that this response is consistent and comprehensive in all situations of internal displacement.

25. The safe and voluntary return and successful reintegration of refugees and displaced persons in post-conflict scenarios require a wide range of measures, including assistance and physical protection during transit as well as after return, landmine clearance and mine-risk education and measures to ensure respect for human rights, to promote reconciliation and to restore legal and other rights essential to reinsertion, such as property rights, access to personal documentation, access to employment and compensation for loss of property. To avoid the recurrence of displacement, greater coordination is needed with development partners in post-conflict scenarios to address the root causes of displacement, including poverty and the politics of exclusion.

4. Specific issues related to women and children

26. Women and children, especially girls, have suffered disproportionately in situations of armed conflict over the past 18 months. Conflicts continue to displace hundreds of thousands of women and children from their homes, to cause dramatic increases in female- and child-headed households and to undermine the important role of women as economic producers and providers of protection. The recruitment and use of children as soldiers in conflicts in Burundi, Colombia, the Democratic Republic of the Congo, the Sudan, northern Uganda and West Africa persists. Other thematic reports submitted to the Security Council on women, peace and security (S/2002/1154) and children and armed conflict (A/58/546-S/2003/1053 and Corr.1 and 2) address those issues in greater depth. The particular gravity of the suffering inflicted on women and children in armed conflict and the persistent violation of their human rights and fundamental freedoms demand, however, that some key issues be addressed in the present report.

27. The prevalence of sexual violence and other particularly abhorrent human rights abuses against women and children in situations of armed conflict, including in Côte d'Ivoire, the Democratic Republic of the Congo, Haiti, Liberia, western Sudan and northern Uganda, where humanitarian reports indicate an acute problem, has demanded the increased attention of Member States, the Security Council and the United Nations Secretariat. Strategies aimed at preventing and responding to sexual and gender-based violence in the field have included practical policies and guidelines prepared by United Nations departments and agencies, improvements in the design of peacekeeping and assessment missions to include gender advisers and child protection advisers and improved health services focused on sexual and reproductive health and the prevention of HIV/AIDS.

28. Despite those efforts, however, we are failing in our collective responsibility to protect women and children from the increasing horrors of sexual and gender-based violence. Extraordinary protection measures are needed. According to recent reports, in numerous villages and displacement camps in Darfur, women and children are being systematically raped. In the Democratic Republic of the Congo, tens of thousands of women and children, ranging in age from babies to women in their eighties, have been subjected to unspeakable forms of sexual violence. Such actions are all the worse for their long-term impact on society and reconciliation processes. Many of the women and children who miraculously survived the genocide in Rwanda are now dying of HIV/AIDS, a horrific legacy of the sexual violence to which they were subjected 10 years ago. Their plight today remains largely unacknowledged and they are receiving inadequate assistance.

29. In the planning and implementation of all peace support operations, the need to respond to sexual and gender-based violence, including through more effective physical protection and monitoring and reporting must be factored in and ways must be sought to enhance the overall participation of women in all aspects of the mission's mandate. Personnel-contributing countries should ensure that all mission personnel are trained prior to deployment on the rights and specific protection needs of women and children, particularly victims of sexual and gender-based violence. Increased donor support for programmes focused on the rights of women and girls, particularly those related to sexual violence and to HIV/AIDS and other sexually transmitted diseases, is critical. It is essential that the international response link closely with and support the capacity of national and community-based initiatives and women's groups, thus ensuring that actions are contextually relevant and effective.

30. In such violent and distressing circumstances, peacekeepers and United Nations staff must demonstrate exemplary personal conduct and behaviour. As a follow-up to the Secretary-General's bulletin on sexual exploitation and abuse, transparent monitoring and accountability structures will be established to ensure a gender-sensitive response to allegations of sexual exploitation and abuse, as well as complaint, reporting and follow-up procedures. The bulletin should also inspire the inclusion of gender considerations as a priority in peacekeeping and humanitarian missions. The bulletin is not binding on uniformed personnel, however, as they fall under the jurisdiction of their own Governments. In order to be truly effective, therefore, the efforts within the United Nations system need to be reinforced by demonstrated action on the part of national Governments whose military and police personnel serve in peacekeeping operations, including punitive measures against offending personnel. I encourage the Security Council to urge personnel-contributing countries to cooperate fully in this effort. Minimum standards of behaviour required of peacekeepers, based on the Secretary-General's bulletin, should be incorporated into the standards and codes of conduct for national armed forces and police forces, and information should be provided on any legal action taken against those charged with violations, an area in which the Department of Peacekeeping Operations has received woefully inadequate information.

31. The ready availability of small arms and the declines in educational and job opportunities that accompany long-term cycles of violence serve to increase the vulnerability of youth to engagement in armed groups. As a consequence, there is an emerging subculture of youth violence. In West Africa youth violence undermines the security of the subregion, and comprehensive regional protection solutions are

needed not only to address the particular needs of young people brutalized by war, but also as an important element of conflict prevention in neighbouring States. I encourage ECOWAS to develop strategies to combat youth violence and call upon donor countries to provide increased assistance to ECOWAS, as recommended by the Security Council mission to West Africa, to promote and support such strategies. Sustained, well-designed and well-resourced disarmament, demobilization, reintegration and rehabilitation programmes are fundamental. Education and skills training are also intrinsically linked to stemming a culture of youth violence, with many young people citing lack of access to formal or informal education as one of the primary factors motivating them to join armed groups. Similarly, greater emphasis is needed on public campaigns and programmes that promote positive and non-violent messages challenging the cult of the gun. It is critical that programmes to address youth violence not create resentment and division by seeming to favour wrongdoers, and that such programmes focus on the vital role that young people themselves have to play in promoting a culture of peace.

5. Disarmament, demobilization, reintegration and rehabilitation

32. Despite increased recognition that failed disarmament, demobilization, reintegration and rehabilitation initiatives carry with them the risk of a return to violence, such programmes remain chronically under-resourced, particularly in the rehabilitation and reintegration phases. Effective disarmament, demobilization, reintegration and rehabilitation programmes require sustainable reintegration of combatants into their home communities, which necessarily involves economic and social support to local communities shouldering the burden of reintegration. It is therefore imperative that the relevant legislative bodies of the United Nations work to ensure that secure and adequate funding is available (including from the regular budget and peacekeeping assessed budget) from the outset.

33. The planning and coordination of disarmament, demobilization, reintegration and rehabilitation remain particularly problematic. Integrated Headquarters and field planning structures and processes, including comprehensive policies, guidelines and standard operating procedures, are needed in order to improve the design and implementation of such programmes, as well as to engender more effective coordination and cooperation, both across the United Nations system and with implementing partners, such as national bodies and non-governmental organizations. In the light of the complex and overlapping roles played by a range of actors involved in the various elements of disarmament, demobilization, reintegration and rehabilitation, a more consistent and effective allocation of tasks is needed. The development of a coherent and integrated approach that effectively connects disarmament and demobilization with the reintegration phase remains an important priority.

34. Other fundamental barriers to effective disarmament, demobilization, reintegration and rehabilitation include the failure to address the relevant issues on a regional basis and inadequate recognition of the role of local civil society, especially women's groups and grass-roots community organizations, for example, the pivotal role of the Women in Peace-building Network in Liberia. Ultimately, ex-combatants must reintegrate themselves and communities must be willing to accept them. It is therefore crucial to seek a balance between managing the often very high expectations of ex-combatants and addressing the resentment of "favouritism" among the rest of the population. The participation of local civil society and grass-

roots community organizations needs to be encouraged accordingly and supported to the maximum extent possible. Greater engagement with and participation by regional organizations and arrangements and their Governments, particularly those of neighbouring States, is also critical.

35. The specific needs of child soldiers, women combatants and their dependants and others associated with fighting forces — including those who have been displaced — are not being adequately addressed. Disarmament, demobilization, reintegration and rehabilitation programmes are increasingly incorporating gender perspectives and child- and female-specific components that are planned, executed and evaluated within the framework of the central disarmament, demobilization, reintegration and rehabilitation committees and monitoring bodies (e.g., provision for children to enter programmes without being required to produce weapons or perform weapon tests and the establishment of interim care centres, staffed by female caregivers, to assess and address health issues specific to women and girls). In order to enable child soldiers to be transferred to civilian care as soon as possible, their demobilization should not be delayed pending formal disarmament, demobilization, reintegration and rehabilitation processes. I encourage the Security Council to continue to support measures aimed at ensuring that women and children affected by armed conflict are involved in and benefit equitably from all such processes. All relevant resolutions including disarmament, demobilization, reintegration and rehabilitation measures should address the specific roles, needs and capacities of women and girls. Greater emphasis also needs to be placed on girl soldiers as a priority group, the reinsertion of female combatants and dependants and the specific stigmatization that women often face.

6. Small arms and light weapons

36. Conflicts are often prolonged because of the unchecked proliferation of small arms and light weapons, specifically the rearming of militias and local defence forces. With unregulated cross-border flows of weapons, escalated conflicts can become regional, killing hundreds of thousands of people each year and destroying the lives of thousands more. The issue is one of both supply and demand and involves private companies, security services and certain Governments engaging in arms sales. The effects are clear in Colombia, the Democratic Republic of the Congo, Haiti, Iraq and the Middle East, the Sudan and West Africa, among other conflict areas.

37. Greater vigilance is needed from Member States to ensure that legal exports are not diverted into illicit arms flows or used to commit human rights abuses or to violate international law. Embargoes should be extended to cover not only arms but also the provision of military services in order to prevent private sector actors and Governments from engaging in commercial activities with parties to armed conflict that might result in or contribute to violations of international law. I would further encourage the Security Council to establish monitoring mechanisms for arms embargoes to oversee their enforcement and to impose coercive measures against Member States that deliberately violate them. The engagement of neighbouring States, regional organizations and, where appropriate, peacekeeping missions is fundamental in this process. In West Africa, for example, UNAMSIL, UNMIL and UNOCI have taken up the issue of small arms proliferation within the region, together with ECOWAS. The lasting resolution of conflict remains in many cases dependent on the comprehensive collection and disposal of weapons. The use by

Mozambique of ex-combatants to identify arms caches provides an example of best practice.

38. The United Nations response to small arms and light weapons issues is being led by the Coordinating Action on Small Arms (CASA), an inter-agency mechanism that, through its participating offices and agencies, provides assistance to States in a wide range of areas, such as policy advice, institution-building, legislation development, weapon collection and destruction, stockpile management and disarmament, demobilization, reintegration and rehabilitation. I encourage Member States to make use of the assistance that CASA can provide, as well as to develop an international instrument to identify and trace illicit small arms and light weapons and to establish the measures necessary to control their export and transit.

7. Impunity and compliance

39. The tenth anniversary of the Rwanda genocide should compel us to work harder to ensure that the Geneva Conventions and other instruments of international humanitarian and human rights law are adhered to and reinforced in all situations of armed conflict and that large-scale or systematic international crimes do not go unchallenged and are prevented or stopped as early as possible. My decision to appoint a Special Adviser on the Prevention of Genocide is intended to provide early warning of situations of concern and a better basis for action by the United Nations. The States on whose territory such crimes are being committed bear the foremost responsibility, but in the absence of timely and appropriate action by a State, the responsibility to respond falls to the international community. A series of gradated measures to be carried out by the Security Council, the broader United Nations system and the international community as a whole are required to respond to evidence of widespread crimes against civilians. Measures that the Council could consider include better monitoring and evaluating crisis situations (e.g., by requesting ad hoc missions by the High Commissioner for Human Rights), forceful demands that the parties cease their attacks on civilians and comply with their obligations under international law, the threat and imposition of sanctions when obligations continue to be breached, referrals to the Prosecutor of the International Criminal Court for investigation under article 13 (b) of the Rome Statute (where the national jurisdiction is unwilling or unable to act) and the rapid deployment of an appropriate force with an explicit mandate and adequate means to protect civilian lives. I urge those Member States that have not yet done so to ratify or accede to the statute of the International Criminal Court, as well as to the treaties concerning international humanitarian, human rights and refugee law, and to take all appropriate legislative, judicial and administrative measures to fully implement those treaties within national systems. This year's United Nations treaty event ("Focus 2004"), the theme of which is the protection of civilians, provides a timely opportunity for such treaty action.

40. The tragic legacy of Rwanda also underlines the need to ensure that justice is delivered efficiently and expeditiously. Post-conflict situations require processes of both reconciliation and justice, and more effective mechanisms need to be developed to better link those processes, drawing on the lessons of Sierra Leone and Timor-Leste. The case of Sierra Leone highlights the dangers of an imbalance between resources, efforts and outcomes. Accountability mechanisms must address crimes committed against those most affected by the conflict, for example, minorities, women, children and people who have been displaced, and provide special measures

for their full participation and protection in proceedings. By investing long-term political, technical and financial support in re-establishing judicial mechanisms and the rule of law in war-torn societies and helping them to mature, the international community will help to build the foundations necessary for sustainable peace and democracy. Issues of transitional justice will be examined at greater length in my forthcoming report on justice and the rule of law.

8. Responsibility of non-State armed groups

41. Violent attacks on civilians and denial of humanitarian access by non-State armed groups are common characteristics of today's armed conflicts. Promoting respect for international humanitarian law and human rights norms and providing humanitarian assistance to populations in areas under the control of armed groups require dialogue with those groups, whether they are highly organized with strong ideological/political motivations or gangs of bandits. The designation of certain non-State armed groups as terrorist organizations has had an adverse impact on opportunities for humanitarian negotiations. The prohibition on dialogue with armed groups in Colombia, for example, has resulted in severe restrictions on access to populations in need. A coherent approach to engagement with non-State armed groups by the international/humanitarian community is crucial in order to avoid manipulation by the armed group concerned, as is recognition of the neutral and impartial nature of United Nations humanitarian operations. Political pressure and bilateral diplomacy is vital to supporting dialogue between humanitarian agencies and non-State actors over issues of protection and access. Regional organizations and neighbouring countries play a particularly important role, and I therefore recommend the establishment of a framework within which the United Nations could engage with regional organizations more systematically on humanitarian issues related to protection and access and better address those issues at the regional intergovernmental level.

42. In order to determine the legitimacy of armed groups' involvement in new State/government structures, measures of compliance in respect of their treatment of civilians and provision of humanitarian access need to be developed in order to exclude those involved in gross human rights violations. Last year the Security Council established an important precedent for such an approach in its resolution on the Democratic Republic of the Congo (1468 (2003)), in which it called upon the Congolese parties to take into account the commitment and record of individuals with regard to respect for international humanitarian law and human rights when selecting individuals for key posts in the transitional government. Nonetheless, it remains to be seen whether this aspect of the resolution is being respected in letter and in spirit. More serious consideration also needs to be given to the imposition of travel restrictions and targeted sanctions (particularly in respect of small arms and military assistance) against armed groups that blatantly violate international humanitarian law and human rights standards and prevent humanitarian access to populations in need.

9. Forgotten emergencies

43. The flows of humanitarian funding for complex emergencies remain skewed. In many conflict situations where the protection needs are greatest — in the Central African Republic and the Democratic Republic of the Congo, for example — funding is at its weakest. In 2003, 18 out of 21 United Nations humanitarian appeals

were underfunded. Humanitarian appeals in 2003 for 13 African crises sought $2.2 billion, and less than half of that amount was received. Meanwhile, the $1 billion sought by the United Nations appeal for Iraq was fully met by donors. This reflects the harsh reality that political interests, strategic priorities and the media spotlight create enormously disproportionate responses, with very high levels of funding and resources channelled to high-profile conflicts, as in the former Yugoslavia in the 1990s and more recently in Afghanistan and Iraq, in stark contrast to other crises perceived to be less strategically important.

44. The result is a large number of emergencies that appear to be forgotten or ignored unless the violence escalates to such a level as to warrant a discussion by the Security Council. In the case of northern Uganda, I am grateful to the Council for its new level of engagement in and serious response to a horrific and neglected humanitarian crisis following the mission to Uganda by my Emergency Relief Coordinator and the subsequent briefings to Council members.

45. On a more systemic level, I urge the Security Council to consider carefully the links between the maintenance of international peace and security and the timing and lack of balance of funding in certain crises. Protection functions and well-designed and well-resourced disarmament, demobilization, reintegration and rehabilitation programmes are examples of the potential support for certain essential humanitarian costs that could be integrated as core costs into the mission plans and mandates of peacekeeping operations, including those in Burundi, Côte d'Ivoire, and the Sudan, as well as all future peacekeeping missions. This more comprehensive and multidimensional approach is vital if peace and a return of social stability are to take hold.

III. Way forward

46. An even clearer agenda is needed to ensure that the implementation of agreed priorities for civilian protection is sustained in an increasingly complex and unpredictable global political context. For its part, the United Nations system will continue to provide well-coordinated humanitarian protection and assistance and to strengthen it wherever possible with more precise monitoring, reporting and systematic data-gathering. Areas in which the impact of conflict could be more systematically measured, documented and used for effective humanitarian diplomacy, operational planning and appeals for funding include the number of civilians killed, tortured or displaced, the number of civilians totally or partially denied access to humanitarian assistance and protection, the number affected by sexual violence, security issues of refugees and the internally displaced, whether in camps or in host communities, the number who benefit from successful disarmament, demobilization, reintegration and rehabilitation programmes and the progress made by States in adopting measures to strengthen the protection of civilians.

47. The Under-Secretary-General for Humanitarian Affairs will provide an outline for this enhanced monitoring and reporting framework in his next update to the Security Council, in December 2004. This will provide a more empirical basis on which to review emerging challenges to humanitarian action and the impact on the protection of civilians and to ensure that the collective commitment to protection

properly reflects those shifts. Two key themes that need to be addressed are regional approaches to protection and the interface between protection and peace processes.

A. Regional approaches to protection

48. The most protracted conflicts of today have developed regional dimensions and created new dynamics that extend well beyond the border of a single country, increasingly inhibiting resolution of the conflict. Serious cross-border issues include the flight of civilians forced to flee their homes and seek shelter across borders, the risk that armed elements will infiltrate camps intended for refugees and internally displaced persons and will use them also as places in which to regroup and to recruit new fighters (typically children and adolescents) and the disarmament and demobilization of combatants. Such protection issues worsen when they cross borders, and require clearer recognition by neighbouring States of their responsibilities in addressing them.

49. Other protection issues, such as human trafficking, the illicit flow of arms and the illegal exploitation of natural resources, are not confined to the control of States and require regional mechanisms and commitments if they are to be properly addressed. The regional and international communities, in turn, have a responsibility to provide targeted long-term assistance to weak States to strengthen their institutions, to respond at an earlier stage in humanitarian crises and to maintain a robust presence in post-conflict countries to promote respect for human rights, the consolidation of good governance and peace-building processes. This will be easier in those parts of the world that already view themselves as a regional grouping and operate at that level in some capacity.

50. Regional partnering to address cross-border issues and their root causes has already begun in West Africa, where I established the Office of the Special Representative of the Secretary-General for West Africa to harmonize United Nations efforts, including with ECOWAS and the Mano River Union. Operation Blue Vigilance of UNAMSIL is an example of collaboration on joint security patrols and common border management in sensitive areas, including human rights monitoring. Such collaboration serves as an important capacity-building and confidence-building exercise for the police, armed forces and customs services at regional levels.

51. Effective monitoring and reporting mechanisms to gather timely and accurate data on cross-border problems, to be shared with regional security and other relevant actors, are also essential. I therefore urge the Security Council to commission a study on how to improve modalities for monitoring and reporting on cross-border issues in crisis and post-conflict situations, including reporting on the perpetration of core international crimes and compliance with existing regional agreements (for example, the moratorium on weapons in West Africa).

B. Protection and peace processes

52. Unless peace processes properly address concerns about the protection of civilians, they can be easily compromised and difficult to sustain. Guarantees for the protection of civilians constitute a critical measure of the level of commitment to a peace process, and therefore the focus cannot be on security and political

developments alone. Societies in conflict expect and deserve the fruits of peace, not merely an end to fighting. Often the urgent need to restore peace is so great, however, that a less-than-perfect peace process is the necessary compromise. Nonetheless, at a minimum ceasefire and peace agreements must include a commitment by parties to conflict to immediately cease all attacks on civilians, to facilitate humanitarian access, to create conditions conducive to the safe and sustainable return of refugee and internally displaced persons, to ensure the safety of humanitarian personnel and to disarm and demobilize combatants. Peace agreements must also provide for the development and strengthening of national human rights protection systems. While amnesties may constitute an important measure for dealing with lesser crimes, they must never be granted for serious violations of international humanitarian and human rights law. Finally, in recognition of the importance of physical obstructions to peace, peace agreements should also include commitments to undertake mine clearance as early as possible, based on the United Nations Mine Action Guidelines for Ceasefire and Peace Agreements, and incorporate measures to reduce the ready availability of weapons.

53. In countries recovering from conflict, sustainable peace ultimately depends on changes in attitude and behaviour within society, yet far too often peace processes are seen as the automatic prerogative of combatant forces. The legitimacy of a faction's engagement in peace processes should not be automatic, but should instead be based on its commitment to unhindered humanitarian access, to protecting civilians in areas under its control and to respecting human rights norms. All sectors and elements of society — not just fighting forces — need to be represented in peace processes so as to ensure a social climate conducive to sustainable peace. The critical contribution of women in facilitation, mediation and reconciliation efforts needs to be recognized by ensuring their full and equal participation, and the integration of gender perspectives, in all peace processes.

54. The restoration of property, land and housing rights is key not only to the voluntary return of refugees and internally displaced persons, but also to the overall sustainability of peace processes. The current situation in Burundi, with 1.6 million refugees and internally displaced persons out of a total population of 10 million, serves to emphasize the critical importance of adequately addressing issues of return and reintegration.

55. Special attention also needs to be devoted to assisting the survivors of sexual violence, and their communities. Sexual violence is one of the most complex issues confronting the international community and the time has come to address it comprehensively. Beyond the devastating physical, psychological, emotional and social trauma suffered by the women and children who are brutally attacked, these abhorrent crimes undermine cultural values and community relationships and can destroy the very ties that bind society together. Peace processes must offer sustained health, psychosocial and economic support to the survivors, as well as concerted efforts to address the culpability of the perpetrators. Processes of justice and reconciliation are critical responses to these and other grave violations of international humanitarian and human rights law and, ultimately, to sustainable peace. The need for reconciliation in post-conflict situations must be tempered with a clear commitment to ending impunity for serious violations of international humanitarian and human rights law. It has been argued that focusing on punishment for past atrocities can destabilize post-conflict situations and undermine national reconciliation. Impunity, however, can be an even more dangerous recipe for sliding

back into conflict. Thus, where sustainable peace is the goal, the question is not whether to focus on accountability and justice, but rather when and how.

56. Since the issuance of my last report, the United Nations has launched a concerted effort to improve the support provided to countries making the transition from conflict to peace. A successful transition requires the ability to respond rapidly to time-bound activities, such as disarmament, demobilization, reintegration and rehabilitation, as well as to longer-term processes, such as the establishment of structures for justice and security. For this reason, each peace process should be underpinned by a coherent strategy for all United Nations actors, complemented by appropriate strategies on the part of donors and the international community. The main goal is the consolidation of peace, and the protection of civilians is at the heart of this goal.

IV. Concluding observations

57. In the five years since the framework to strengthen the protection of civilians in armed conflict was initiated, the system of public international order has been under unprecedented strain. This is a very critical juncture in a year when larger and more complex United Nations peacekeeping missions are called for. At the same time, multilateral approaches to peace and security have been challenged. Greater public and international awareness of the Geneva Conventions on the conduct of war and the Additional Protocols thereto has not been translated into action. In the 18 months since the issuance of my last report, the very fundamentals of international humanitarian law and human rights have been under great pressure, and there are concerns that counter-terrorism measures have not always complied with human rights obligations. The promotion and protection of human rights must be central to an effective strategy to counter terrorism.

58. The present report has examined a number of issues that are key to developing the ten-point platform, which is designed to strengthen the protection of civilians in conflicts. It is a set of issues that the Security Council has already agreed in the past is of the highest priority, and it is now a matter of urgency that we deliver on these commitments. To fail will put long-agreed standards of international humanitarian law and human rights law, which are the foundations of humane and appropriate conduct in war, at grave risk. These fundamental human rights are the basis of international moral order that nations must respect, especially in times of war and fear.

59. I urge the Security Council to engage fully with these issues in order to be prepared to address important new challenges to the environment for protecting civilians. Formal military capacities, supporting multilateral peacekeeping operations and coalitions of the willing, are stretched as never before. The nature of warfare continues to change, and there are now many more actors and parties involved in conflicts. These include armed groups and militias, mercenaries, private military contractors and borderless terrorist networks. This evolving environment and the diversity of new actors creates circumstances where certain groups may evade responsibility entirely. This requires better regulation and standards of accountability for armed forces, as well as for private sector groups actively engaged with or working in support of militaries.

60. Humanitarian actors in conflicts have also multiplied. In addition to local authorities, United Nations personnel, the Red Cross and Red Crescent movement and the international relief and human rights bodies, new players include commercial subcontractors and for-profit organizations. Here, too, accountability and responsibility have become diffuse. Humanitarian protection relies on a form of social contract with the community, where the humanitarians are accepted and their work facilitated. This acceptance and the implicit support of the civilian community allow the conditions needed for the provision of humanitarian assistance. If the social contract is damaged, if there is a failure to understand it or if it is actively violated, effective humanitarian action and protection are threatened.

61. The international community must now recommit itself to the principles of international law based on justice, peaceful settlement of disputes and respect for human dignity. These principles impose necessary limits on violence and on permissible behaviour in conflicts and set minimum standards for treatment to which people are entitled as human beings. It is from these agreed standards that the United Nations framework for the protection of civilians in armed conflict has arisen and evolved. It can achieve moral authority and credibility only through principled, consistent and effective practice.

List of Customary Rules of International Humanitarian Law, International Committee of the Red Cross, 2005

Annex. List of Customary Rules of International Humanitarian Law

This list is based on the conclusions set out in Volume I of the study on customary international humanitarian law. As the study did not seek to determine the customary nature of each treaty rule of international humanitarian law, it does not necessarily follow the structure of existing treaties. The scope of application of the rules is indicated in square brackets. The abbreviation IAC refers to customary rules applicable in international armed conflicts and the abbreviation NIAC to customary rules applicable in non-international armed conflicts. In the latter case, some rules are indicated as being "arguably" applicable because practice generally pointed in that direction but was less extensive.

The Principle of Distinction

Distinction between Civilians and Combatants

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians. [IAC/NIAC]
Rule 2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. [IAC/NIAC]
Rule 3. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel. [IAC]
Rule 4. The armed forces of a party to the 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. [IAC]
Rule 5. Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians. [IAC/NIAC]
Rule 6. Civilians are protected against attack, unless and for such time as they take a direct part in hostilities. [IAC/NIAC]

Distinction between Civilian Objects and Military Objectives

Rule 7. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects. [IAC/NIAC]
Rule 8. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. [IAC/NIAC]
Rule 9. Civilian objects are all objects that are not military objectives. [IAC/NIAC]
Rule 10. Civilian objects are protected against attack, unless and for such time as they are military objectives. [IAC/NIAC]

Indiscriminate Attacks

Rule 11. Indiscriminate attacks are prohibited. [IAC/NIAC]
Rule 12. Indiscriminate attacks are those:
(a) which are not directed at a specific military objective;
(b) which employ a method or means of combat which cannot be directed at a specific military objective; or
(c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law;
and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction. [IAC/NIAC]
Rule 13. Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited. [IAC/NIAC]

Proportionality in Attack

Rule 14. Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited. [IAC/NIAC]

Precautions in Attack

Rule 15. In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]
Rule 16. Each party to the conflict must do everything feasible to verify that targets are military objectives. [IAC/NIAC]
Rule 17. Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]
Rule 18. Each party to the conflict must do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [IAC/NIAC]
Rule 19. Each party to the conflict must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [IAC/NIAC]

Rule 20. Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit. [IAC/NIAC]
Rule 21. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects. [IAC/arguably NIAC]

Precautions against the Effects of Attacks

Rule 22. The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks. [IAC/NIAC]
Rule 23. Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas. [IAC/arguably NIAC]
Rule 24. Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives. [IAC/arguably NIAC]

Specifically Protected Persons and Objects

Medical and Religious Personnel and Objects

Rule 25. Medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy. [IAC/NIAC]
Rule 26. Punishing a person for performing medical duties compatible with medical ethics or compelling a person engaged in medical activities to perform acts contrary to medical ethics is prohibited. [IAC/NIAC]
Rule 27. Religious personnel exclusively assigned to religious duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy. [IAC/NIAC]
Rule 28. Medical units exclusively assigned to medical purposes must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy. [IAC/NIAC]
Rule 29. Medical transports assigned exclusively to medical transportation must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy. [IAC/NIAC]
Rule 30. Attacks directed against medical and religious personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law are prohibited. [IAC/NIAC]

Humanitarian Relief Personnel and Objects

Rule 31. Humanitarian relief personnel must be respected and protected. [IAC/NIAC]
Rule 32. Objects used for humanitarian relief operations must be respected and protected. [IAC/NIAC]

Personnel and Objects Involved in a Peacekeeping Mission

Rule 33. Directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is prohibited. [IAC/NIAC]

Journalists

Rule 34. Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities. [IAC/NIAC]

Protected Zones

Rule 35. Directing an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities is prohibited. [IAC/NIAC]
Rule 36. Directing an attack against a demilitarized zone agreed upon between the parties to the conflict is prohibited. [IAC/NIAC]
Rule 37. Directing an attack against a non-defended locality is prohibited. [IAC/NIAC]

Cultural Property

Rule 38. Each party to the conflict must respect cultural property:

A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.
B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.

[IAC/NIAC]
Rule 39. The use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity. [IAC/NIAC]

Rule 40. Each party to the conflict must protect cultural property:

A. All seizure of or destruction or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited.

B. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.

[IAC/NIAC]

Rule 41. The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory. [IAC]

Works and Installations Containing Dangerous Forces

Rule 42. Particular care must be taken if works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, and other installations located at or in their vicinity are attacked, in order to avoid the release of dangerous forces and consequent severe losses among the civilian population. [IAC/NIAC]

The Natural Environment

Rule 43. The general principles on the conduct of hostilities apply to the natural environment:

A. No part of the natural environment may be attacked, unless it is a military objective.

B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.

C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.

[IAC/NIAC]

Rule 44. Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions. [IAC/arguably NIAC]

Rule 45. The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon. [IAC/arguably NIAC]

Specific Methods of Warfare

Denial of Quarter

Rule 46. Ordering that no quarter will be given, threatening an adversary therewith or conducting hostilities on this basis is prohibited. [IAC/NIAC]

Rule 47. Attacking persons who are recognized as *hors de combat* is prohibited. A person *hors de combat* is:

(a) anyone who is in the power of an adverse party;

(b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or

(c) anyone who clearly expresses an intention to surrender;

provided he or she abstains from any hostile act and does not attempt to escape. [IAC/NIAC]

Rule 48. Making persons parachuting from an aircraft in distress the object of attack during their descent is prohibited. [IAC/NIAC]

Destruction and Seizure of Property

Rule 49. The parties to the conflict may seize military equipment belonging to an adverse party as war booty. [IAC]

Rule 50. The destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity. [IAC/NIAC]

Rule 51. In occupied territory:

(a) movable public property that can be used for military operations may be confiscated;

(b) immovable public property must be administered according to the rule of usufruct; and

(c) private property must be respected and may not be confiscated;

except where destruction or seizure of such property is required by imperative military necessity. [IAC]

Rule 52. Pillage is prohibited. [IAC/NIAC]

Starvation and Access to Humanitarian Relief

Rule 53. The use of starvation of the civilian population as a method of warfare is prohibited. [IAC/NIAC]

Rule 54. Attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is prohibited. [IAC/NIAC]

Rule 55. The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control. [IAC/NIAC]

Rule 56. The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their

functions. Only in case of imperative military necessity may their movements be temporarily restricted. [IAC/NIAC]

Deception

Rule 57. Ruses of war are not prohibited as long as they do not infringe a rule of international humanitarian law. [IAC/NIAC]
Rule 58. The improper use of the white flag of truce is prohibited. [IAC/NIAC]
Rule 59. The improper use of the distinctive emblems of the Geneva Conventions is prohibited. [IAC/NIAC]
Rule 60. The use of the United Nations emblem and uniform is prohibited, except as authorized by the organization. [IAC/NIAC]
Rule 61. The improper use of other internationally recognized emblems is prohibited. [IAC/NIAC]
Rule 62. Improper use of the flags or military emblems, insignia or uniforms of the adversary is prohibited. [IAC/arguably NIAC]
Rule 63. Use of the flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict is prohibited. [IAC/arguably NIAC]
Rule 64. Concluding an agreement to suspend combat with the intention of attacking by surprise the enemy relying on that agreement is prohibited. [IAC/NIAC]
Rule 65. Killing, injuring or capturing an adversary by resort to perfidy is prohibited. [IAC/NIAC]

Communication with the Enemy

Rule 66. Commanders may enter into non-hostile contact through any means of communication. Such contact must be based on good faith. [IAC/NIAC]
Rule 67. *Parlementaires* are inviolable. [IAC/NIAC]
Rule 68. Commanders may take the necessary precautions to prevent the presence of a *parlementaire* from being prejudicial. [IAC/NIAC]
Rule 69. *Parlementaires* taking advantage of their privileged position to commit an act contrary to international law and detrimental to the adversary lose their inviolability. [IAC/NIAC]

Weapons

General Principles on the Use of Weapons

Rule 70. The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited. [IAC/NIAC]
Rule 71. The use of weapons which are by nature indiscriminate is prohibited. [IAC/NIAC]

Poison

Rule 72. The use of poison or poisoned weapons is prohibited. [IAC/NIAC]

Biological Weapons

Rule 73. The use of biological weapons is prohibited. [IAC/NIAC]

Chemical Weapons

Rule 74. The use of chemical weapons is prohibited. [IAC/NIAC]
Rule 75. The use of riot-control agents as a method of warfare is prohibited. [IAC/NIAC]
Rule 76. The use of herbicides as a method of warfare is prohibited if they:

(a) are of a nature to be prohibited chemical weapons;
(b) are of a nature to be prohibited biological weapons;
(c) are aimed at vegetation that is not a military objective;
(d) would cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which may be expected to be excessive in relation to the concrete and direct military advantage anticipated; or
(e) would cause widespread, long-term and severe damage to the natural environment.

[IAC/NIAC]

Expanding Bullets

Rule 77. The use of bullets which expand or flatten easily in the human body is prohibited. [IAC/NIAC]

Exploding Bullets

Rule 78. The anti-personnel use of bullets which explode within the human body is prohibited. [IAC/NIAC]

Weapons Primarily Injuring by Non-detectable Fragments

Rule 79. The use of weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body is prohibited. [IAC/NIAC]

Booby-traps

Rule 80. The use of booby-traps which are in any way attached to or associated with objects or persons entitled to special protection under international humanitarian law or with objects that are likely to attract civilians is prohibited. [IAC/NIAC]

Landmines

Rule 81. When landmines are used, particular care must be taken to minimize their indiscriminate effects. [IAC/NIAC]
Rule 82. A party to the conflict using landmines must record their placement, as far as possible. [IAC/arguably NIAC]
Rule 83. At the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal. [IAC/NIAC]

Incendiary Weapons

Rule 84. If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]
Rule 85. The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person *hors de combat*. [IAC/NIAC]

Blinding Laser Weapons

Rule 86. The use of laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited. [IAC/NIAC]

Treatment of Civilians and Persons Hors de Combat

Fundamental Guarantees

Rule 87. Civilians and persons *hors de combat* must be treated humanely. [IAC/NIAC]
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. [IAC/NIAC]
Rule 89. Murder is prohibited. [IAC/NIAC]
Rule 90. Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited. [IAC/NIAC]
Rule 91. Corporal punishment is prohibited. [IAC/NIAC]
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. [IAC/NIAC]
Rule 93. Rape and other forms of sexual violence are prohibited. [IAC/NIAC]
Rule 94. Slavery and the slave trade in all their forms are prohibited. [IAC/NIAC]
Rule 95. Uncompensated or abusive forced labour is prohibited. [IAC/NIAC]
Rule 96. The taking of hostages is prohibited. [IAC/NIAC]
Rule 97. The use of human shields is prohibited. [IAC/NIAC]
Rule 98. Enforced disappearance is prohibited. [IAC/NIAC]
Rule 99. Arbitrary deprivation of liberty is prohibited. [IAC/NIAC]
Rule 100. No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees. [IAC/NIAC]
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. [IAC/NIAC]
Rule 102. No one may be convicted of an offence except on the basis of individual criminal responsibility. [IAC/NIAC]
Rule 103. Collective punishments are prohibited. [IAC/NIAC]
Rule 104. The convictions and religious practices of civilians and persons *hors de combat* must be respected. [IAC/NIAC]
Rule 105. Family life must be respected as far as possible. [IAC/NIAC]

Combatants and Prisoner-of-War Status

Rule 106. Combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. If they fail to do so, they do not have the right to prisoner-of-war status. [IAC]
Rule 107. Combatants who are captured while engaged in espionage do not have the right to prisoner-of-war status. They may not be convicted or sentenced without previous trial. [IAC]
Rule 108. Mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status. They may not be convicted or sentenced without previous trial. [IAC]

The Wounded, Sick and Shipwrecked

Rule 109. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction. [IAC/NIAC]
Rule 110. The wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones. [IAC/NIAC]
Rule 111. Each party to the conflict must take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment and against pillage of their personal property. [IAC/NIAC]

The Dead

Rule 112. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction. [IAC/NIAC]
Rule 113. Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited. [IAC/NIAC]
Rule 114. Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them. [IAC]
Rule 115. The dead must be disposed of in a respectful manner and their graves respected and properly maintained. [IAC/NIAC]
Rule 116. With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves. [IAC/NIAC]

Missing Persons

Rule 117. Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate. [IAC/NIAC]

Persons Deprived of Their Liberty

Rule 118. Persons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention. [IAC/NIAC]
Rule 119. Women who are deprived of their liberty must be held in quarters separate from those of men, except where families are accommodated as family units, and must be under the immediate supervision of women. [IAC/NIAC]
Rule 120. Children who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units. [IAC/NIAC]
Rule 121. Persons deprived of their liberty must be held in premises which are removed from the combat zone and which safeguard their health and hygiene. [IAC/NIAC]
Rule 122. Pillage of the personal belongings of persons deprived of their liberty is prohibited. [IAC/NIAC]
Rule 123. The personal details of persons deprived of their liberty must be recorded. [IAC/NIAC]
Rule 124.

A. In international armed conflicts, the ICRC must be granted regular access to all persons deprived of their liberty in order to verify the conditions of their detention and to restore contacts between those persons and their families. [IAC]
B. In non-international armed conflicts, the ICRC may offer its services to the parties to the conflict with a view to visiting all persons deprived of their liberty for reasons related to the conflict in order to verify the conditions of their detention and to restore contacts between those persons and their families. [NIAC]

Rule 125. Persons deprived of their liberty must be allowed to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities. [IAC/NIAC]
Rule 126. Civilian internees and persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable. [IAC/NIAC]
Rule 127. The personal convictions and religious practices of persons deprived of their liberty must be respected. [IAC/NIAC]
Rule 128.

A. Prisoners of war must be released and repatriated without delay after the cessation of active hostilities. [IAC]
B. Civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities. [IAC]
C. Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist. [NIAC]

The persons referred to may continue to be deprived of their liberty if penal proceedings are pending against them or if they are serving a sentence lawfully imposed.

Displacement and Displaced Persons

Rule 129.

A. Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand. [IAC]
B. Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand. [NIAC]

Rule 130. States may not deport or transfer parts of their own civilian population into a territory they occupy. [IAC]
Rule 131. In case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated. [IAC/NIAC]

Rule 132. Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist. [IAC/NIAC]
Rule 133. The property rights of displaced persons must be respected. [IAC/NIAC]

Other Persons Afforded Specific Protection

Rule 134. The specific protection, health and assistance needs of women affected by armed conflict must be respected. [IAC/NIAC]
Rule 135. Children affected by armed conflict are entitled to special respect and protection. [IAC/NIAC]
Rule 136. Children must not be recruited into armed forces or armed groups. [IAC/NIAC]
Rule 137. Children must not be allowed to take part in hostilities. [IAC/NIAC]
Rule 138. The elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection. [IAC/NIAC]

Implementation

Compliance with International Humanitarian Law

Rule 139. Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control. [IAC/NIAC]
Rule 140. The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity. [IAC/NIAC]
Rule 141. Each State must make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law. [IAC/NIAC]
Rule 142. States and parties to the conflict must provide instruction in international humanitarian law to their armed forces. [IAC/NIAC]
Rule 143. States must encourage the teaching of international humanitarian law to the civilian population. [IAC/NIAC]

Enforcement of International Humanitarian Law

Rule 144. States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law. [IAC/NIAC]
Rule 145. Where not prohibited by international law, belligerent reprisals are subject to stringent conditions. [IAC]
Rule 146. Belligerent reprisals against persons protected by the Geneva Conventions are prohibited. [IAC]
Rule 147. Reprisals against objects protected under the Geneva Conventions and Hague Convention for the Protection of Cultural Property are prohibited. [IAC]
Rule 148. Parties to non-international armed conflicts do not have the right to resort to belligerent reprisals. Other countermeasures against persons who do not or who have ceased to take a direct part in hostilities are prohibited. [NIAC]

Responsibility and Reparation

Rule 149. A State is responsible for violations of international humanitarian law attributable to it, including:
(a) violations committed by its organs, including its armed forces;
(b) violations committed by persons or entities it empowered to exercise elements of governmental authority;
(c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and
(d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct.
[IAC/NIAC]
Rule 150. A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused. [IAC/NIAC]

Individual Responsibility

Rule 151. Individuals are criminally responsible for war crimes they commit. [IAC/NIAC]
Rule 152. Commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders. [IAC/NIAC]
Rule 153. Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible. [IAC/NIAC]
Rule 154. Every combatant has a duty to disobey a manifestly unlawful order. [IAC/NIAC]
Rule 155. Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered. [IAC/NIAC]

War Crimes

Rule 156. Serious violations of international humanitarian law constitute war crimes. [IAC/NIAC]

Rule 157. States have the right to vest universal jurisdiction in their national courts over war crimes. [IAC/NIAC]
Rule 158. States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects. [IAC/NIAC]
Rule 159. At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes. [NIAC]
Rule 160. Statutes of limitation may not apply to war crimes. [IAC/NIAC]
Rule 161. States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects. [IAC/NIAC]

Report of the Secretary-General on the protection of civilians in armed conflict, S/2005/740, 28 November 2005

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Report of the Secretary-General on the protection of civilians in armed conflict

I. Introduction

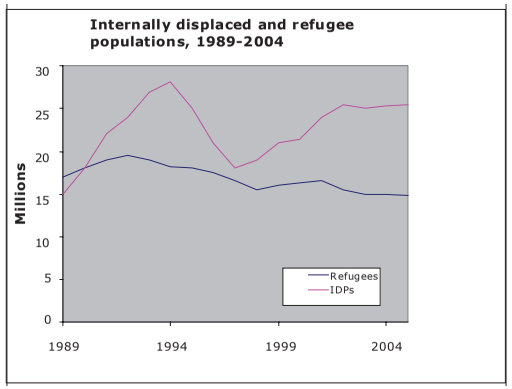
1. The present fifth report on the protection of civilians in armed conflict is submitted pursuant to the request of the President of the Security Council contained in his statement of 14 December 2004 (S/PRST/2004/46).

2. Five years ago, in April 2000, the Security Council adopted its latest resolution on the protection of civilians in armed conflict (resolution 1296 (2000)), having adopted its very first resolution on this topic (resolution 1265 (1999)) seven months earlier. The Council's adoption of these resolutions marked a significant milestone, reflecting the international community's growing commitment to better address the tragic plight of civilians trapped in situations of armed conflict. The fact that five years have elapsed since then requires that we take stock of developments, assess the collective achievements that have been made and reflect on those areas where action remains inadequate. The present report seeks to identify the emerging trends that affect the lives of civilians in conflict and the areas where relevant Security Council resolutions have had an impact on the lives of those forced to endure the hardships and tragedies of armed conflict. In so doing, the report seeks to identify measures and actions that the Security Council can take to strengthen and improve the response to the protection needs of civilians in armed conflict. The report provides a review of the main events of the past five years that have shaped the environment of protection. These have been years in which civilians have continued to be caught up in armed conflict or acts of terrorism in situations as diverse as those in Afghanistan, Burundi, Colombia, the Democratic Republic of the Congo, Iraq, the occupied Palestinian territory, Nepal, the Sudan, Uganda, West Africa and elsewhere. These are years in which the cumulative impact of conflict has continued to disproportionately affect the civilian population, especially women and children, requiring sustained attention and a renewed commitment by the Member States of the United Nations to address these concerns.

General trends

3. In the new warfare that has emerged, the impact of armed conflict on civilians goes far beyond the notion of collateral damage. Targeted attacks, forced displacement, sexual violence, forced conscription, indiscriminate killings, mutilation, hunger, disease and loss of livelihoods collectively paint an extremely grim picture of the human costs of armed conflict. Although the number of armed conflicts decreased from 50 in 1992 to 30 in 2004, today's armed conflicts are more often low-intensity conflicts fought with small arms and light weapons in both urban and rural areas. Conventional warfare undertaken by large, formed, well-disciplined units with clear command and control structures is less common. The changing nature of conflict has a profound impact on respect for civilian status and the safety and well-being of civilian populations.[1] Civilians are increasingly at risk of being caught in crossfires, targeted for reprisals, forcibly recruited, sexually enslaved or raped. Armed groups involved in these conflicts tend to be smaller and less well trained and equipped than national military forces. They consequently tend to avoid major military engagement and instead target and spread fear among civilians,[2] using them as human shields or extorting food and money for their own subsistence and support. Increasingly, today's conflicts rely upon child soldiers,[3] who are commonly recruited and used against their will, through abduction, kidnapping, enslavement and coercion or intimidation of their parents or guardians. It is estimated that children are serving in almost 75 per cent of contemporary armed conflicts.[4]

4. Over the past decade, forced displacement within borders has become one of the most disturbing features of conflict. While the overall number of refugees has slowly decreased since the early 1990s, internal displacement figures have remained relatively constant, at the 2001 level of an estimated 25 million (see graph).[5] While the overall figure for internal displacement remains constant, the situation on the ground is not static. Over the past four years approximately 3 million civilians have been newly internally displaced, including refugees who return to their country of origin but remain displaced, unable to return to their home areas, which remain insecure, while a further 3 million have returned, been integrated locally or resettled.



5. Sexual violence, particularly against women and girls, is frequently used as a deliberate method of warfare. This disturbing phenomenon has become even more horrifying in recent years, especially when rape is used as a weapon. Societal breakdown, particularly in situations of displacement, and the breakdown of law and

order compound the risks that civilians face and contribute to an overall increase in the incidence of sexual violence. This has been evidenced in numerous conflict situations in recent years, including in the Democratic Republic of the Congo, in the Darfur region of the Sudan and northern Uganda. The real collateral damage of many conflicts over the past five years lies in the breakdown of basic services and infrastructure as well as in the disruption or loss of livelihoods. This can result in increasing malnutrition, the spread of epidemic diseases and increasing incidence of HIV/AIDS, which all too often complete the harsh picture for civilians living in armed conflict. This problem has been acutely demonstrated in the Democratic Republic of the Congo, where an estimated 3.3 million people died between August 1998 and November 2002, overwhelmingly from malnutrition and diseases associated with the war.[6]

6. Humanitarian access to affected populations is vital in situations where a State or party to a conflict that bears responsibility is unable or unwilling to provide for the basic needs of civilians on their territory. In 2004, United Nations agencies were denied access to an estimated 10 million people in need of assistance and protection. In many instances security conditions prevented humanitarian personnel from reaching civilians in need of assistance and protection, or, as in Darfur, led to temporary withdrawal of humanitarian workers, with serious implications for the population concerned. Other means of denying humanitarian assistance have developed in Somalia, where aid ships are subject to piracy and aid convoys have been attacked.

II. Selected areas of concern to the Security Council

7. Over the past five years there has, in general terms, been a decrease in the levels of armed conflict. Much of this relates to the cessation of hostilities and successful peace processes following some of the world's most protracted wars. A number of countries are beginning to make the transition towards greater stability, most notably Angola, and more recently Burundi. Despite the conflict in Darfur, the situation in southern Sudan continues to progress towards transition. Recent developments in Liberia also suggest movement towards political stability. The protection needs of civilians in these transitional situations remain relevant, but differ in the form of protection that is required. While in these situations the immediate threat of violence is diminished, there is a need to protect or reassert property rights to ensure the effective reintegration of displaced communities along with appropriate support for both local and national reconciliation processes.

8. Unfortunately, over the same period a number of protracted conflicts have continued to keep millions of people displaced and in conditions of great insecurity. The conflict in northern Uganda has continued for over 18 years. Even in such seemingly intransigent environments, reconciliation processes may provide the best hope for ensuring the safety of the civilian population.

9. During the same period, there have also been a number of situations where the threats to civilians have deepened and called for extraordinary measures to be taken for their protection. The situation in Darfur has seen the greatest crisis of protection; the civilian population has been subjected to forced displacement on an unprecedented scale, as well as widespread physical and sexual violence. Despite improvements and a movement towards greater political stability, the scale of

violence against the population in the Democratic Republic of the Congo by irregular armed groups, as well as by the Congolese armed forces, continues to be a matter of deep concern. These two situations demonstrate the need to identify more effective means for the Security Council to protect civilian populations from physical and sexual violence.

10. During the last five years there have been a number of crises where acts of terrorism have brought havoc on the civilian population and have added to the complexity of ensuring the proper protection of civilians. This has been a matter of concern in Iraq, the occupied Palestinian territory and Colombia. In some cases the response to acts of terrorism may also seriously impede the civilian population's access to humanitarian assistance.

11. The emerging crises in Nepal and Myanmar highlight other concerns for the protection of civilians. In these cases humanitarian access and the ability to protect the civilian population from the long-term social and economic consequences of conflict are denied by the inability of parties to the conflict to recognize their responsibilities.

12. Whatever the nature of the threat to the protection of the civilian population, compliance with international humanitarian law, human rights law, refugee law and international criminal law by all parties concerned provides the strongest basis for ensuring respect for the safety of the civilian population. The hardships borne by civilians during armed conflict, particularly where violence is specifically directed against them, have a direct impact on durable peace, reconciliation and development. The report examines below some priority areas of protection where further action is required.

A. Violence against civilians

13. Civilians and their property are easy targets, and therefore violence and attacks against them are often deliberate tactics of modern warfare. The intention is to destroy lives and livelihoods, to instil fear or permanent harm through killing, maiming, summary executions, torture, rape and other forms of sexual violence, abductions, arbitrary detention and forced displacement and, through the destruction of dwellings and infrastructure, to make sure there is no return. In 2002 alone, the number of civilian deaths that occurred in armed attacks or battle was estimated at between 19,000 and 172,000, depending on the criteria used for assessing death as a consequence of armed conflict.[7] In many cases, particularly where the intention is to instil fear, brutal violence takes place in front of family members.

14. While violence directed against civilians in armed conflict causes many brutal deaths, even greater numbers of civilians suffer non-fatal injuries, physical disabilities, mental health problems, reproductive health problems or sexually transmitted diseases, including HIV/AIDS, as a result of violence inflicted upon them. The use of sexual violence has become more widespread and systematic, affecting a large number of women, girls, men and boys.[8] The United Nations Mission in the Democratic Republic of Congo (MONUC) estimates at least 25,000 cases of sexual violence a year in North Kivu, one region of the Democratic Republic of the Congo alone. Rape and gang rape are committed not only by irregular armed elements, but also by law enforcement agencies and armed forces, as has most recently been demonstrated in the Darfur region of the Sudan. The

extent of rape and sexual violence is difficult to assess, as many victims, particularly women, are hesitant to come forward due to fear of reprisals, intimidation, being ostracized or possibly even facing criminal charges themselves. In many cases these fears are well founded. It is imperative that these crimes be investigated in a timely and credible manner and that perpetrators be prosecuted and brought to justice. An effective national judicial system and a firm political commitment at both the local and the central level are necessary. At the same time, it is essential that appropriate health and psychosocial support be provided to the survivors of sexual violence.

15. In a significant development in combating sexual violence as a method of warfare, rape, sexual slavery, enforced prostitution and forced pregnancy have been included in the definition of crimes against humanity and war crimes, most recently and explicitly in the Rome Statute of the International Criminal Court. In the case of Darfur, the Security Council, through its referral to the International Criminal Court, reaffirmed its commitment to adopt appropriate measures to address the deliberate targeting of civilian populations and systematic, flagrant and widespread violations of international humanitarian and human rights law.

16. The restoration of law and order to prevent further violence and tackle impunity should be a key priority for the States concerned, and for the Security Council and possible peacekeeping and peacebuilding missions in support of, or, exceptionally, in lieu of, the States concerned. A number of capacity-building initiatives have been and continue to be taken throughout the United Nations system, including peacekeeping and peacebuilding missions, to strengthen the national legal, law enforcement and judicial systems. However, for a secure environment and the rule of law to be sustainable, disarmament, demobilization and reintegration measures need to be fully funded. In particular, greater efforts are required to address the increasingly complex issues of reintegration, where armed youths and other irregular armed groups will often have been the perpetrators of violence against the very community within which they need to be reintegrated.

B. Security for displaced persons and host communities

17. Displacement, both within and across borders, remains a priority protection concern. The protection needs of internally displaced persons — which range from the need for protection from armed attack, rape and other forms of sexual violence, sexual abuse and exploitation and forced recruitment to the needs associated with inadequate shelter and limited access to food, medical and other life-sustaining assistance — continue to pose an enormous humanitarian challenge. Three situations that illustrate this challenge most starkly are those in the Darfur region of the Sudan, the Democratic Republic of the Congo and northern Uganda.

18. In many instances, displacement has reached truly disturbing levels. In northern Uganda, for example, 90 per cent of the population in the districts of Gulu, Pader and Kitgum districts is displaced. The mortality rate for children under five years of age residing in camps in these districts is above emergency thresholds,[9] and over 1.45 million of the approximately 1.8 million internally displaced in northern Uganda rely almost entirely on external assistance for survival. Moreover, in situations such as these women and girls are often more vulnerable to sexual and other forms of violence.[10]

19. The conditions for internally displaced populations are compounded by the fact that an estimated one third of the 25 million internally displaced persons are effectively denied access to humanitarian assistance. Internal displacement is often protracted: in 2004, the average length of displacement was 14 years, with the overwhelming majority of internally displaced persons being displaced for more than a year. The impact of displacement is long-lasting, even at the post-conflict stage. The ultimate goal must be to enable internally displaced persons to return to their places of origin, to integrate into the communities they have joined or to resettle elsewhere, on the basis of voluntary and informed decisions and in a safe, dignified and sustainable manner. Concrete measures to adequately plan for, and support, the realization of this goal are critical. Unresolved issues such as land and property restoration can perpetuate insecurity, particularly in situations of large-scale returns of displaced persons. National institutions therefore need to be supported in order to ensure that the property and other rights related to refugees and internally displaced persons are properly addressed. I call upon the Security Council to reinforce the inclusion of adequate reintegration measures in peacekeeping and peacebuilding missions as well as in peacemaking processes.

20. Forcible displacement of civilian populations for reasons related to an armed conflict is prohibited under international law, unless the security of civilians involved or imperative military reasons so demand.[11] Yet emerging trends over the past five years indicate that forced displacement continues to be used as part of a deliberate military strategy to control populations. The brutal forced displacement of 1.8 million civilians in the Sudan's Darfur region provides a chilling example. The right to freedom of movement in northern Uganda has effectively been eliminated as a result of the Government's establishment of "free fire zones", where persons moving outside designated settlements or camps are automatically considered legitimate targets for attack. Moreover, attacks on camps, such as the attack on the Gatumba transit centre in Burundi in August 2004, which resulted in the brutal massacre of 152 Congolese refugees and the wounding of an additional 106, illustrate that camps do not necessarily enhance protection, especially when situated close to a border, as was the case in this instance.

21. The primary responsibility for the protection of civilians within their jurisdiction, including internally displaced persons, rests with the national authorities. It is therefore encouraging to note that over the past five years several countries have adopted specific policies or legislation concerning internal displacement. The adoption of policies and legislation does not, however, automatically translate into effective protection and assistance for internally displaced persons. It is therefore critical that the Guiding Principles on Internal Displacement form the framework and basis for such policies and legislation and that they be implemented faithfully, together with the Security Council resolutions pertaining to protection of civilians in armed conflict and other relevant resolutions. I urge Member States and other actors, including peacekeeping missions, to provide protection for civilians in their places of origin and for communities hosting internally displaced persons, and that the establishment of camps be seen as a last resort.

22. As invited to do by the Security Council in its resolution 1296 (2000), I have brought a number of displacement situations to the attention of the Council, as has my Under-Secretary-General for Humanitarian Affairs. The Council expressed in

the same resolution its willingness to adopt appropriate steps when necessary to help create a secure environment for civilians endangered by conflict.

23. In the light of the extreme vulnerability of most internally displaced populations, the Security Council should pursue all possible options at its disposal to prioritize, support and respond to the immediate protection needs of internally displaced persons and other conflict-affected populations. An effective peacekeeping presence early in the movement of refugees and internally displaced persons that responds to the protection needs of the displaced can provide the necessary security environment to prevent displacement and facilitate an early return. In some cases peacekeeping forces may also be the only means of ensuring that the civilian character of camps for displaced populations is maintained by preventing the infiltration of armed elements and combatants. An increased understanding by peacekeeping missions of their role in the protection of displaced persons can play an important part in creating a more secure environment for those groups of the civilian population, such as the internally displaced, that are most at risk. I therefore welcome the work being undertaken in some peacekeeping operations to better incorporate the protection needs of vulnerable groups of the population into mission planning and the deployment of peacekeeping forces.

C. Special issues related to women and children

24. One of the most tragic aspects of our collective failure to adequately protect civilians in situations of armed conflict over the past five years is the fact that women and children have continued to suffer extraordinary hardships and violence. Other thematic reports, such as those on women and peace and security[12] and on children and armed conflict,[13] address these issues in greater depth. The particular gravity of the suffering inflicted on women and children in armed conflict and the persistent violation of their human rights and fundamental freedoms demand, however, that some key issues be addressed in the present report.

25. In addition to the devastating consequences of sexual and gender-based violence in situations of armed conflict, as outlined above, specific protection needs for women and children continue to be generated by displacement, increases in female- and child-headed households and the recruitment and use of children as soldiers. Conflict also undermines the important role of women as contributors to the economic sustainability of the family and providers of protection. The importance of respecting and utilizing women as mediators, as providers of protection and as a primary force of economic activity during armed conflict and in rebuilding war-torn societies must be given greater emphasis than it has so far received.

26. The Security Council has recognized in recent resolutions that declines in educational and job opportunities that accompany long-term cycles of violence serve to increase the vulnerability of youth to engagement in armed groups. The importance of education and skills training as a key element of protection therefore cannot be overstated.

27. In circumstances that are violent and distressing to women and children, peacekeepers and United Nations staff must demonstrate exemplary personal conduct and behaviour. It is a transgression of the most egregious kind when United Nations staff and related personnel themselves sexually exploit or abuse members of

the population they have come to protect and serve. Significant efforts have been undertaken in this area since my last report to the Security Council on the protection of civilians in armed conflict (S/2004/431). Following the report of the Special Committee on Peacekeeping Operations and its Working Group on the 2005 resumed session,[14] all categories of peacekeeping personnel must adhere to these standards and obligations, thus creating uniform standards for all persons serving in United Nations missions. Over the past 21 months, investigations into allegations of sexual exploitation and abuse involving 264 United Nations peacekeeping personnel have been concluded; 16 civilians have been summarily dismissed, and 132 Blue Helmets have been repatriated (seven of whom were Commanders). I have established a group of legal experts to study ways to ensure that United Nations staff and experts on mission are held accountable for criminal acts committed while serving in United Nations peacekeeping operations and where no functioning judicial system exists; the group started its work in October 2005. These attempts notwithstanding, the United Nations needs to increase its efforts to prevent and respond to this problem. Measures for receiving and reporting complaints, ensuring timely and effective investigations, taking appropriate disciplinary action[15] and providing assistance and support to victims must be strengthened and implemented across the board. At the request of Member States,[16] I will soon present a proposal for a comprehensive, system-wide strategy for providing assistance to victims of sexual exploitation and abuse by United Nations staff and related personnel. I count on the support of Member States to ensure that our response to those who have been harmed is compassionate, timely and appropriate. I encourage the Security Council to urge personnel-contributing countries to cooperate fully in all these efforts.

D. Access to vulnerable populations

28. In my first report on the protection of civilians in armed conflict (S/1999/957) I stressed that it is the obligation of States to ensure that the affected populations have access to the assistance they require for their survival. The same responsibility lies with non-State actors. If a party to a conflict is unable to fulfil this obligation, the international community has a responsibility to ensure that humanitarian aid is provided. The Security Council heeded my recommendations by underscoring in its resolutions 1265 (1999) and 1296 (2000) the need for all parties concerned, including non-State actors as well as neighbouring States, to cooperate fully with the United Nations Humanitarian Coordinator and United Nations agencies in providing safe and unimpeded access to civilians in armed conflict, and for its part, the Council expressed its willingness to adopt appropriate steps.

29. The issue of the denial or obstruction of access to vulnerable populations by humanitarian missions has been raised in each of my four previous reports on this subject and in each of the six-monthly briefings by my Under-Secretary-General for Humanitarian Affairs. The Security Council has promptly followed up in its resolutions related to particular conflict situations, urging or demanding that the parties allow immediate, full and unimpeded access for humanitarian personnel. I have also recommended practical measures that can improve access to civilians in armed conflict, such as defining clear conditions for humanitarian access in any terms of engagement and the use of framework agreements, such as were used in Operation Lifeline Sudan. Nevertheless, there remain a number of situations in

which a more structured approach to humanitarian access would improve the protection of civilians.

30. The denial or obstruction of access to vulnerable populations continues. The United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) reported more than 660 access incidents experienced by ambulance providers and a further 1,537 by humanitarian agencies from January 2004 through July 2005 in the occupied Palestinian territory. Ongoing insecurity and Government inability to guarantee security continue to hamper access in northern Uganda, where the United Nations Children's Fund (UNICEF) estimates that in September 2005 humanitarian agencies were able to have access to only 20 per cent of the 210 camps for internally displaced persons on a regular basis without a heavily armed military escort. Recently, several aid convoys have been attacked in Darfur. In some cases — for example, in Nepal — unnecessary bureaucratic measures have been introduced to impede access, such as cumbersome registration processes for humanitarian organizations. Contact with non-State actors by humanitarian organizations for the purpose of securing access to the civilian populations in need remains a sensitive issue and can prove a serious obstacle to ensuring better protection for the civilian population. Clearer guidance on how to address access issues with non-State armed groups, without indication of recognition, and a better understanding that enabling humanitarian access is a responsibility of all parties to a conflict may make a positive difference in addressing this issue. Such guidance, as requested by the Security Council, will soon be available.

31. The role of peacekeeping missions in creating a secure and safe environment enabling humanitarian organizations to have full, safe and unhindered access to the population, including the internally displaced in need of protection and assistance, is crucial. This role has been increasingly emphasized in Security Council resolutions and incorporated into the mandate of peacekeeping missions. Peacekeeping missions may, however, find it difficult to translate their humanitarian role into the actions that are required of them. In general, in humanitarian protection terms the importance of a peacekeeping mission's role resides in facilitating access and supporting a more conducive environment for the effective provision of humanitarian assistance. Recent developments in mission planning, together with a greater awareness by peacekeeping contingents of the role that they play alongside humanitarian organizations, have led to greatly improved access and humanitarian actions in the Democratic Republic of Congo and elsewhere. The Council should consider early involvement to safeguard humanitarian access, and should, where appropriate, support regional organizations so that they can facilitate the necessary security environment for humanitarian and protection activities.

32. United Nations and associated personnel involved in humanitarian missions and the staff of humanitarian organizations have continued to be attacked, taken hostage and killed. There remain a number of cases where those responsible for acts of violence against humanitarian staff have been identified, yet judicial action against them is not being taken. The failure of States to address these issues may greatly constrain humanitarian access and sustain an unconducive environment for the provision of humanitarian assistance. To further reinforce full, safe and unhindered access, I urge the Council to consider the application of targeted sanctions in situations where access for humanitarian operations is denied as a result of specific attacks on those involved in the provision of humanitarian assistance.

III. Framework

33. The protection of civilians in armed conflict agenda continues to provide an important comprehensive framework for the complex range of issues that must be addressed to ensure respect for civilian status. Security Council resolutions 1265 (1999) and 1296 (2000) provide a solid basis for response. Regular reports and briefings to the Security Council and the development of specific tools such as the aide-memoire have been used to assist the Council in developing specific mandates and resolutions for peacekeeping missions. The road map (S/2002/1300, annex) outlines the roles and responsibilities of United Nations agencies and bodies in various aspects of protection of civilians. More recently, the ten-point platform developed by my Under-Secretary-General for Humanitarian Affairs establishes priority areas of action.

A. Progress in implementation of the framework

34. Security Council resolutions 1265 (1999) and 1296 (2000) established the areas of concern regarding the protection of civilians in armed conflict and identified actions by the United Nations, Member States and United Nations bodies that would address civilian protection concerns. The legal framework that comprises international humanitarian law, international criminal law, human rights law and refugee law has been enhanced over the past five years. The International Criminal Court has initiated investigations in the Darfur region, northern Uganda and the Democratic Republic of the Congo, with arrest warrants issued for five Lord's Resistance Army commanders. The treaty event Focus 2004 supported the call to Member States to ratify 24 key multilateral treaties related to the protection of civilians in armed conflict. Yet of the 26 countries where a total of 30 armed conflicts occurred in 2004,[17] only 13 are parties to Additional Protocol II to the Geneva Conventions, regulating internal conflicts. Serious gaps remain in the implementation of the legal framework.

35. The Security Council has addressed new challenges to the protection of civilians as they have arisen, most recently the issue of ensuring humanitarian access in Darfur. Protection concerns are better and more consistently reflected in peacekeeping mission mandates. Multidimensional peacekeeping missions have begun to integrate expertise from United Nations agencies, which is helping to develop a more complementary approach to the protection of civilians. A number of missions have now employed "civilian protection officers", who have been instrumental in developing an improved and shared understanding of protection needs. In the Democratic Republic of the Congo, MONUC has started to develop an integrated approach to addressing protection needs, drawing on all aspects of the Mission. This appears to have considerable benefits in terms of enhancing humanitarian access and responding more efficiently to major protection concerns.

B. Gaps in the current framework

36. The above notwithstanding, there are gaps in the current framework; addressing them will consolidate progress made in addressing protection needs, ensure effective mandates that better meet current protection needs and concerns and better engage regional organizations and other key partners in the protection of

civilians. For these reasons, the Security Council may wish to consider adopting a resolution incorporating developments in areas such as a more systematic, comprehensive mandate for peacekeeping and peacebuilding missions, physical protection and, especially, protection from sexual violence and child protection. Incorporating with greater clarity particular issues of concern and possible actions to be taken in a resolution would further strengthen the protection framework. Regional organizations will continue to play an important role, and closer collaboration and support are needed. Similarly, I have called for a more predictable humanitarian response in complex emergencies. Finally, the absence of a multisectoral monitoring and reporting mechanism does not allow the Council to systematically identify areas of concern or assess the impact of its actions.

IV. Next Steps

A. Physical protection: the responsibility of the State, non-State actors and the international community, particularly peacekeeping missions and regional and other intergovernmental organizations

37. The very first Security Council resolution on the protection of civilians (resolution 1265 (1999)) urged all parties to a conflict to comply with their obligations under international humanitarian, human rights and refugee law as well as decisions of the Council. The resolution called upon all parties to put an end to deliberate targeting of civilians and other protected persons and emphasized the responsibility of States to end impunity and to prosecute those responsible for genocide, crimes against humanity, serious violations of international humanitarian and human rights law and other egregious crimes perpetrated against civilians. One of the most fundamental responsibilities in situations of armed conflict is the provision of effective protection from all kinds of violence and abuse, including killing, maiming, rape and other forms of sexual violence mostly committed against women and girls; recruitment and use of child soldiers; abduction and forced displacement; denial of humanitarian access; trafficking; and forced labour and all forms of slavery. Safeguarding their physical protection is also the first concern civilians have in times of conflict. I urge all parties to comply strictly with relevant rules and principles of international law concerning the protection of civilians in armed conflict, in particular international humanitarian, human rights and refugee law, to implement fully the relevant decision of the Security Council and to cooperate fully with the United Nations peacekeeping missions and United Nations country teams in the follow-up and implementation of these commitments. I also call upon the Council to clearly address these issues in its deliberations and decision-making processes.

38. The Security Council, in its second resolution on the protection of civilians (resolution 1296 (2000)) affirmed its intention to ensure that, where appropriate, peacekeeping missions are given suitable mandates and resources to protect civilians under imminent threat, including by strengthening the United Nations ability to plan and rapidly deploy peacekeeping personnel. The need to deploy civilian police, civil administrators and humanitarian personnel was also recognized. Both resolutions highlighted the importance of including the need to fully address the special protection needs of women, children and vulnerable groups.

39. While armed conflicts may frequently occur within rather than across borders, they nonetheless have implications for the regions where they are fought. These include the flow of refugees seeking safety in neighbouring countries, human trafficking, the illicit flow of small arms and the illegal exploitation of natural resources. In many cases, such as that of West Africa, conflict in one country contributes to overall instability in the region, requiring regional approaches to the protection of civilians. This entails a comprehensive approach to the situation that ensures humanitarian access, facilitates cross-border operations, ensures protection of those who flee generalized violence and addresses the root causes of conflict and issues related to disarmament, demobilization, reintegration and rehabilitation in mandates for peacekeeping and peacebuilding missions. Strengthened regional approaches and greater coordination of protection actions are required to ensure that the protection gains achieved within a country affected by conflict are sustained.

40. Regional organizations and other intergovernmental institutions play an increasingly valuable role in the protection of civilians by bringing skills and experiences from the region to bear on the situation. A joint approach by the humanitarian community and the security forces of the African Union — providing fuel-efficient stoves to decrease the need to seek firewood outside the camps, patrolling along routes for firewood collection and deploying female police in the camps — has managed to reduce the number of reported rapes and instances of sexual violence. The civilian police components of regional organizations are particularly important, as they can maintain the civilian nature of camps while having the appropriate skills to address protection concerns. I therefore urge the regional and other intergovernmental organizations to take up the protection agenda and address cross-border issues and regional protection concerns through regional mechanisms.

41. It is time for a more systematic partnership with regional and other intergovernmental organizations in the field of protection of civilians in armed conflict. The sixth high-level meeting between myself and the heads of regional and other intergovernmental organizations in July 2005 approved a work plan to strengthen such partnership, inter alia, through the establishment of a network of interested organizations, the development of joint workshops, training programmes, policy frameworks, common standards, and strategies and tools.

42. The recent escalation of violence in the Darfur region of the Sudan, however, highlights the need for adequate support for regional organizations and underscores the particular constraints faced by the African Union because of a lack of adequate logistical support. A concerted effort is therefore necessary to support regional and other intergovernmental organizations in order to build their capacity to respond to the protection needs of civilians caught in armed conflict. I would encourage Member States and intergovernmental organizations to make every effort to support, including financially, regional organizations in their contribution to peacekeeping and peacemaking processes.

43. The countries that neighbour areas of conflict will often play a critical role in affording protection to civilians, and their support is critical in ensuring effective humanitarian assistance and protection services. I therefore urge neighbouring countries to facilitate access for humanitarian assistance to conflict-affected populations, whether in their neighbouring or still in their country of origin. I also call upon such States to bring to the attention of the Security Council, as a matter

affecting peace and security, those issues that might threaten the right of civilians to assistance.

B. Provision of humanitarian assistance

44. The many examples of the impact of the changing nature of armed conflict highlight the need to employ new humanitarian skills and resources to respond to the protection challenge. My report "In larger freedom: towards development, security and human rights for all" (A/59/2005) recognized that greater predictability in overall humanitarian response is needed. Reforms are under way to enhance response capacity, develop more predictable humanitarian financing and strengthen humanitarian coordination.

45. I welcome the efforts of the Emergency Relief Coordinator and the Inter-Agency Standing Committee to reinforce the capacity of humanitarian and protection response by establishing clear leadership and accountability in key sectors and areas of protection and through the creation of a surge-protection response capacity. The designation of the Office of the United Nations High Commissioner for Refugees as the agency with primary managerial responsibility and accountability for the protection of internally displaced persons in complex emergencies and the modernization of the Central Emergency Revolving Fund to establish a response fund that can provide immediate financial grants to initiate a prompt response will further enhance the quality of protection and humanitarian actions.

46. The prompt provision of humanitarian assistance and protection activities will help to reduce levels of displacement and can potentially avert loss of life. However, the operational tools that can deliver a prompt response need to be supported by the recognition of the right to humanitarian assistance and international acceptance of secure and prompt access for humanitarian organizations and workers to people affected by conflict.[18]

C. Peacemaking

47. A prompt and predictable humanitarian response can bring sustainable relief to civilians caught in an armed conflict only when there is a political solution to the conflict. Peacemaking, peacekeeping, peacebuilding and humanitarian response are mutually reinforcing. In this connection, I am encouraged that Member States at the World Summit in September 2005 endorsed my efforts to strengthen the United Nations good-offices capacity, including in the mediation of disputes. The Department of Political Affairs is actively pursuing this important goal. I call on Member States to ensure that the effort receives the necessary support, since inadequate or insufficient peacemaking frequently undermines our humanitarian, peacekeeping and other efforts. As peacemaking processes often emerge out of humanitarian discussions, it is vital to have close cooperation between the humanitarian agencies and the peacemakers, as well as measures to include representatives of civilians, and especially women, in the peace process.

48. For the peace process to be fully sustainable, the protection, rights and well-being of civilians affected by armed conflict will need to be addressed and be specifically and systematically integrated into all peace processes, peace agreements

and post-conflict recovery and reconstruction planning and programmes. In many cases civilian populations will see commitment to their protection and well-being as a fundamental and tangible commitment of good intent. For this reason, all ceasefire and peace agreements should include commitments by the parties in negotiation to address issues of the protection of civilians, including commitments to cease all attacks on civilians and forcible displacements, to disarm and demobilize combatants, to rehabilitate and reintegrate all affected populations, to facilitate humanitarian access, to create conditions conducive to the safe, dignified and sustainable return or local integration of refugees and internally displaced persons, based on a voluntary and informed decision, and to ensure the safety of humanitarian personnel.

49. In the light of the growing number and increasing scale of peacebuilding missions, humanitarian organizations and peacebuilders must increase their interaction and engagement. Humanitarian action, whether delivering life-sustaining assistance or safeguarding protection and assistance to civilians, will often take place alongside peacebuilding and political processes. Peacebuilding missions can establish greater complementarity of action where there is recognition of the need to ensure that humanitarian assistance is provided on the basis of the humanitarian principles of neutrality, impartiality and independence, and where humanitarian actors recognize the need to re-establish the responsibility and legitimacy of national institutions.

D. Monitoring and reporting

50. My previous reports to the Security Council have identified the need for more consistent and accurate reporting on both trends and issues of concern relating to the protection of civilians. A framework for reporting global trends is being established using the issues highlighted in the aide-memoire on the protection of civilians in armed conflict as the basis for analysis of such trends. In addition, a number of United Nations missions in countries of concern are establishing incident-reporting systems and databases that will be drawn on systematically in future reports to the Security Council.

51. In order to assist the Security Council in its decision-making and analysis, future reports on the protection of civilians, will include systematic analysis of the major trends affecting the protection of civilians with a greater emphasis on empirical information reflecting the effect of conflict on the quality of life and the well-being of civilian populations in areas of conflict. A systematic data-collection mechanism is being established jointly with the Department of Political Affairs, the Department of Peacekeeping Operations, the Office of the United Nations High Commissioner for Human Rights, UNICEF, UNHCR, the Office of the Special Representative of the Secretary-General for Children and Armed Conflict and UNRWA, which will draw on and collate information from existing monitoring and reporting mechanisms.[19] Efforts will be made to draw on and seek active collaboration with academic institutions engaged in this area.

52. So that the Security Council can receive an overview of the main issues of concern and an appreciation of the trends affecting civilian populations, the Office for the Coordination of Humanitarian Affairs will collate baseline information in the following areas: the number of civilians killed, injured or tortured; displaced

persons; civilians affected by sexual violence; civilians totally or partially denied access to humanitarian assistance and protection; security issues related to internally displaced persons, whether in camps or host communities; civilians who benefit from successful disarmament, demobilization, reintegration and rehabilitation programmes; and the progress made by States in adopting measures to strengthen the protection of civilians. Equally important are data related to numbers of child soldiers recruited; attacks on camps, schools and hospitals; and the safety and security of humanitarian and associated personnel, which clearly affects the ability to deliver humanitarian assistance and protection. This data collection will start in a pilot phase in countries of concern to the Security Council at the beginning of 2006, to be extended more widely in the course of the year. I recommend that in countries of concern to the Council it be a matter of practice to have a database or inventory of protection-related incidents and that those incidents be reported on regularly to the Council in conjunction with mission-mandated discussions or thematic discussions.

V. Conclusions

53. In my first report to the Security Council on the protection of civilians in armed conflict, I stated that protection mechanisms rely first and foremost on the willingness of State and non-State actors to comply with applicable law. In calling for a "culture of protection", I proposed that all parties needed to understand how their responsibilities for the protection of civilians should be translated into action. I further suggested that in situations where parties to a conflict commit systematic and widespread breaches of international humanitarian and human rights law and thereby create the threat of genocide, crimes against humanity and war crimes, the Council should be willing to intervene under Chapter VII of the Charter. In its subsequent resolution 1296 (2000), paragraph 5, the Council reaffirmed its readiness to consider situations where the deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security, and where necessary, to adopt appropriate steps. In my report "In larger freedom" I developed further the concept of the "responsibility to protect", elements of which have been reiterated in resolutions such as those related to children and armed conflict. I am particularly pleased that the World Summit Outcome document emphasizes the responsibility of the international community to seek appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII, and if necessary, in accordance with Chapter VII on a case-by-case basis, to provide protection from genocide, crimes against humanity, war crimes and ethnic cleansing.

54. In the five years since the adoption of Security Council resolution 1296 (2000) there have been new challenges to the safety and well-being of civilian populations, and the tools that we have at our disposal to address these concerns need to be developed accordingly. Improvements in the design of peacekeeping missions supported by mandates that address the specific protection needs of a conflict or the post-conflict environment will contribute to the protection of civilians. Enhancing the capacity and readiness of regional organizations to respond to protection concerns will also contribute significantly to the effectiveness with which the protection needs of civilians are addressed. Protection from physical and sexual violence remains one of the major challenges to civilian protection. The framework by which the Security Council can support the protection of civilians must now be updated to better reflect this new environment and the United Nations capacity to respond. Establishing the capacity to collate all necessary information concerning the protection of civilians, along with the collation of protection incidents in countries of concern to the Council, will prove to be essential in ensuring a clear focus on protection that can be reflected throughout the work and deliberations of the Council.

Notes

[1] The Uppsala Conflict Data Programme defines an armed conflict as an armed confrontation between two parties, at least one of which is the Government of a State, resulting in at least 25 battle-related deaths per year. Lotta Harbom and Peter Wallensteen, "Armed Conflict and its International Dimensions, 1946-2004", in *Journal of Peace Research*, vol. 42, No. 5 (pp. 624 and 634). The trend remains downward, irrespective of the definition of armed conflict applied.

[2] *Human Security Report 2005*, p. 34.

[3] Ibid.

[4] Ibid., pp. 35 and 111, cites a recent survey which estimates that 40 per cent of child soldiers are girls.

[5] Graph on internally displaced and refugee populations from *Internal Displacement — Global Overview of Trends and Developments in 2004*, Global IDP Project, Norwegian Refugee Council, March 2005, p. 9. The number of refugees in the graph includes Palestine refugees under the United Nations Relief and Works Agency for Palestine Refugees in the Near East mandate.

[6] *Human Security Report 2005*, p. 134.

[7] Ibid., p. 30.

[8] Rape was used as a "weapon of war" in at least 13 countries between 2001 and 2004. Ibid., p. 109.

[9] The mortality level ranged from 1.22-1.91 per 10,000 persons per day, compared with the emergency threshold of 1 death per 10,000 persons per day. "Health and mortality survey among internally displaced persons in Gulu, Kitgum and Pader districts, northern Uganda", July 2005 (conducted by the Republic of Uganda Ministry of Health, WHO, UNICEF, WFP, UNFPA and the International Rescue Committee), p. 15.

[10] *The Human Security Report 2005*, p. 108, refers to a survey in post-war Sierra Leone, which finds women and girls twice as vulnerable as other demographic groups.

[11] Additional Protocol II to the Geneva Conventions, article 17.

[12] See, for example, S/2005/636.

[13] See, for example, A/59/695-S/2005/72.

[14] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 19* (A/59/19/Rev.1), part two, the proposals, recommendations and conclusions of which were endorsed by the General Assembly in its resolution 59/300, entitled "Comprehensive review of a strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations".

[15] See staff rule 101.2 (a), covering cases within the authority of the Secretary-General. Criminal and disciplinary responsibility with respect to members of national contingents depends on the national law of the Member State concerned.

[16] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 19* (A/59/19/Rev.1); General Assembly resolution 59/300; and the 2005 World Summit Outcome (resolution 60/1).

[17] Lotta Harbom and Peter Wallensteen, "Armed Conflict and Its International Dimensions, 1946-2004", in *Journal of Peace Research*, vol. 42, No. 5, p. 624.

[18] These two issues are also highlighted in my report to the General Assembly "New international humanitarian order" (A/59/554, para. 6).

[19] I.e., the mechanism pursuant to resolution 1612 (2005) relating to children and armed conflict and mechanisms of human rights bodies of the United Nations.

Report of the Secretary-General on the protection of civilians in armed conflict, S/2007/643, 28 October 2007

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Report of the Secretary-General on the protection of civilians in armed conflict

I. Introduction

1. The present sixth report on the protection of civilians in armed conflict is submitted in accordance with Security Council resolutions 1674 (2006) and 1738 (2006). Resolution 1674 (2006) marked a watershed in the protection of civilians by providing a clear framework for action by the Council and the United Nations in this area — action that is as critical and necessary today as it was eight years ago, when the Council considered the first report on the protection of civilians.

2. The present report provides an update on progress made in implementing resolution 1674 (2006) and strengthening the framework for the protection of civilians elaborated by the Council and other partners in recent years. It takes stock of positive developments and ongoing or new concerns that affect civilians in conflict situations around the world. In doing so, it highlights four challenges of particular importance to us all: the denial of life-saving access to civilians in need; the abhorrent practice of sexual violence in conflicts and its devastating impact on individuals and communities; the critical need to address more consistently the impact of conflict on housing, land and property; and the importance of eliminating the unacceptable humanitarian toll of cluster munitions. The report ends by proposing a set of key actions for the Security Council's consideration, all aimed at further strengthening the protection framework in areas that require more prompt and systematic action.

3. My visits to a number of conflict-affected countries have convinced me that for those displaced and victimized by war, our actions matter far more than our words. Their plight has left me with a deep sense of responsibility to ensure that where we cannot prevent armed conflict, the protection of civilians is, and must remain, an absolute priority: for me, as Secretary-General, for the United Nations, for the Security Council and, above all, for the Member States, with which the primary responsibility for protecting civilians lies. Enshrined in all major moral, religious, and legal codes, and not specific to any particular culture or tradition, the protection of civilians is a human, political and legal imperative that recognizes the inherent dignity and worth of every human being. It is a cause that unites us all in the responsibility to protect civilians from abuse, to mitigate the impact of warfare and to alleviate their suffering.

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II. The nature of contemporary armed conflicts

4. Although there has been a decline in the number of conflicts around the world,[1] in those, predominantly non-international, conflicts that simmer or rage, large numbers of civilians remain at risk of, or suffer, brutality and degradation. Some are simply in the wrong place at the wrong time. Others are deliberately targeted and subjected to atrocities in an environment of almost total impunity.

5. For 35 million people, flight has become the only option. Displacement, therefore, continues to be one of the principal features of contemporary conflict and arguably the most significant humanitarian challenge that we face. But often it is only the beginning of an ordeal that may last for years or even decades, marked by suffering, deprivation and a daily fight for survival. In many cases it leads to the permanent loss of livelihoods, opportunities and cultural identity. The world's refugee population stands at 9.9 million, the highest it has been in four years. The increase stems largely from the deteriorating security and humanitarian situation in Iraq, which has forced well over 2 million people to seek refuge abroad.

6. These numbers are in addition to an estimated global population of 24.5 million persons internally displaced by conflict. In Iraq, there are some 2.2 million internally displaced that we know of. In the Sudan, although approximately 1 million have returned to the south of the country this year, insecurity in Darfur has resulted in 240,000 newly displaced, making a total of 2.2 million internally displaced in Darfur alone. Some 242,000 people have fled Darfur for the Central African Republic and Chad, neighbouring countries that also have large internally displaced populations, 300,000 and 170,000, respectively. In Somalia, some 700,000 remain internally displaced, while in the Democratic Republic of the Congo, recurrent fighting has forced over 500,000 people from their homes this year, bringing the total displaced population to over 1.2 million. In Colombia, 20,000 civilians have been displaced by non-State armed groups. Overall, there are 2.1 million registered internally displaced persons in Colombia, though some estimate the total at 3 million. In Afghanistan, violence and insecurity have resulted in renewed and increasing displacement, particularly in the southern provinces, with some 44,000 people displaced during the first half of 2007. Violence in Sri Lanka has displaced 100,000 people so far this year, particularly in the north and east of the country, though some 120,000 have been able to return to their homes in the east since May, following a decrease in hostilities.

7. The majority of conflicts today continue to be non-international. While such conflicts have always been marked by an imbalance in the military capacity of the warring parties, this asymmetry has become increasingly pronounced in a number of conflicts in recent years, most notably in the occupied Palestinian territory, but also in Afghanistan and Iraq, where national and multinational forces are fighting a variety of armed groups. In such conflicts, to overcome their inferiority in conventional military strength, militarily weaker parties have resorted to strategies that flagrantly violate international humanitarian law, such as deliberate attacks against civilians, including suicide bombings, as well as hostage-taking and intentional placement of combatants and other military objectives amid civilian infrastructure. Such acts are inexcusable violations of international humanitarian

[1] In 2006, there were 17 major armed conflicts in 16 locations, compared to 19 in 17 locations in 2004. Stockholm International Peace Research Institute, *SIPRI Yearbook 2007*.

law of which civilians bear the brunt. There is also a risk that in fighting an enemy that is difficult, if not impossible, to identify, militarily superior parties may increasingly respond with methods and means of warfare that violate the principles of distinction and proportionality, of which civilians, again, bear the brunt.

8. A further feature of contemporary conflicts is the counter-terrorism operations by which States strive to prevent and respond to acts of violence by transnational armed groups. While recognizing States' inherent right to protect themselves and those within their jurisdiction, it is essential that all aspects of such operations, be it the use of force or deprivation of liberty, be carried out in full compliance with applicable international law.

9. Another prominent feature is the contracting out of functions traditionally performed by States' security or military apparatuses to private military and security companies. In Iraq, for example, in March 2006, there were an estimated 181 such companies, with 48,000 employees, undertaking functions for multinational forces.[2] Activities undertaken by private military and security companies include the protection of personnel and assets, interrogation of prisoners and even participation in combat operations — activities that often put the employees of such companies in direct contact with the civilian population. It is well established that the employees of private military and security companies must comply with international humanitarian law. The responsibilities of the States that hire them are also well established. However, far more needs to be done to promote compliance with the law and the accountability of employees and hiring States for any violations thereof. In this respect, I welcome the initiative of the Government of Switzerland, in cooperation with the International Committee of the Red Cross, to foster intergovernmental discussion on the issues raised in relation to private military and security companies and to study and develop good practices, regulatory models and other appropriate measures to promote respect for international humanitarian law and human rights law.

III. Protecting civilians in armed conflict: progress and concerns

10. Much has been achieved in recent years towards strengthening the protection of civilians in armed conflict, including the acceptance of the responsibility to protect; increased engagement of the Council on issues relating to the protection of civilians; more regular inclusion of activities in support of protection of civilians in peacekeeping mandates; investment in strengthening the United Nations peace mediation capacity; improved coordination of protection activities among humanitarian actors; and increased momentum at the international and national levels towards combating impunity for war crimes and crimes against humanity. Considerable challenges remain, however, challenges that underline the fact that progress in protecting civilians is measured by what happens on the ground.

[2] United States Government Accountability Office, *Rebuilding Iraq — Actions Still Needed to Improve the Use of Private Security Providers*, statement of William Solis, Director, Defense Capabilities and Management, June 2006.

A. Encouraging developments

Advances in the normative framework

11. Of particular significance was the acceptance by all Member States at the 2005 World Summit of a fundamental "responsibility to protect". This represents a critically important affirmation of the primary responsibility of each State to protect its citizens and persons within its jurisdiction from genocide, war crimes, ethnic cleansing and crimes against humanity. Importantly, paragraphs 138 and 139 of the World Summit Outcome also place a responsibility upon the United Nations, including the Security Council, to support Member States in protecting their populations. This is a cardinal achievement and must result in earlier and more decisive action to prevent or mitigate the suffering of civilians in conflict areas. My Special Representative on the Prevention of Genocide and Mass Atrocities will contribute significantly to those ends.

12. Since the issuance of my last report (S/2005/740), the Security Council has also taken important steps to reinforce the normative and operational framework for the protection of civilians, including through the adoption of resolutions 1674 (2006) and 1738 (2006). The former is of particular importance in elaborating a framework for action that provides for:

(a) Inclusion in the mandates of United Nations peacekeeping missions, where appropriate and on a case-by-case basis, of provisions for:

(i) The protection of civilians under imminent threat of physical danger;

(ii) Preventing and responding to sexual violence;

(iii) Facilitating the delivery of humanitarian assistance;

(iv) Ensuring security in and around camps for refugees and the internally displaced;

(v) The creation of conditions conducive to their voluntary and safe return;

(b) The Council's continued collaboration with the Emergency Relief Coordinator and the latter's full association from the earliest stages of planning of United Nations peacekeeping and other relevant missions;

(c) Referral to the Council of relevant information and analysis regarding the protection of civilians.

More active role for peacekeepers

13. The Security Council has increasingly mandated peacekeeping operations to undertake activities in support of the protection of civilians, as demonstrated recently with the African Union-United Nations Hybrid Operation in Darfur, which is authorized to take the necessary action, in the areas of deployment of its forces and as it deems within its capabilities, to protect civilians (resolution 1769 (2007)). This was followed in September 2007 by the establishment of the United Nations Mission in the Central African Republic and Chad, with an express mandate to protect civilians with the support of the European Union operation. The Council also endorsed a policing concept aimed at ensuring the provision of law and order in refugee camps and sites with internally displaced persons in Chad (resolution 1778 (2007)).

14. While those missions are in their early stages, the activities of the United Nations Organization Mission in the Democratic Republic of the Congo underline the critical role that peacekeepers can play in protecting civilians, through a concept of operations that prioritizes the provision of security by a deterrent military presence and direct involvement to prevent and end violations of human rights and humanitarian law, but also the limitations of such a role. Similarly, troops of the African Union Mission in the Sudan (AMIS) have striven to provide some protection to displaced and other vulnerable people in Darfur. Those efforts have been undertaken in the face of serious capacity and security constraints, underlined by the outrageous killing in September 2007 of 10 AMIS personnel in a brutal attack by a rebel militia.

15. Though increasing resort to such mandates is positive, it is only a first step towards strengthening the protection of civilians by peacekeeping missions. Eight years on from the first such mandate, the Office for the Coordination of Humanitarian Affairs and the Department of Peacekeeping Operations are conducting a joint study to examine the integration of such mandates into peacekeeping missions and their impact on the ground, to draw lessons for future mandates and deployments.

Enhanced role for regional organizations

16. The important role of regional organizations in the protection of civilians was recognized by Member States during the Council's debate on the protection of civilians in June 2007 and was the focus of a meeting organized by the Office for the Coordination of Humanitarian Affairs in Dakar in April 2007, as part of the United Nations high-level meeting process. Participants included senior officials from the African Union, the Economic Community of West African States, the Organization of the Islamic Conference, the League of Arab States and other regional organizations. A key outcome was agreement on the need for regional and subregional organizations to build constituencies around, and develop policies on, the protection of civilians — a process that the Office for the Coordination of Humanitarian Affairs is currently facilitating. Similar events are planned for other regions. I encourage regional organizations to remain engaged in this process, with a view to realizing their potential to address protection concerns through their mediation, conflict resolution and, where applicable, peacekeeping activities.

Combating impunity

17. Since the issuance of my last report, there have also been critical developments in extending the reach of international justice, particularly through the work of the International Criminal Court. In addition to the warrants issued in July 2005 for the arrest of four members of the Lord's Resistance Army in Uganda, in February 2006 the Court issued an arrest warrant for the alleged recruitment or use of children under 15 years of age to participate in hostilities in the Democratic Republic of the Congo. The accused was arrested and handed over to the Court the following month. A second suspect from the Democratic Republic of the Congo was handed over to the Court in October 2007, in relation to alleged war crimes and crimes against humanity, including murder and sexual enslavement.

18. In April 2007, the Court issued two arrest warrants for war crimes and crimes against humanity allegedly committed in Darfur, including murder, attacks against

civilians and destruction of property. I urge the Government of the Sudan to take immediate steps to surrender to the Court the accused, one of whom is the State Minister for Humanitarian Affairs of the Sudan. The following month, the Prosecutor launched an investigation into the situation in the Central African Republic, in particular into allegations of rape and other acts of sexual violence.

19. These are critical developments in terms of ending the impunity that underlies and perpetuates so many abuses. Where we are unable to prevent such abuses we must at the very least ensure that their perpetrators, and those who bear political responsibility for violence against civilians, are held accountable for their actions. I call on all Member States to cooperate fully with the International Criminal Court, and other international mechanisms addressing genocide, war crimes and crimes against humanity, and for the Council to take appropriate steps to encourage and facilitate such cooperation when it is not otherwise forthcoming.

B. Issues of concern

20. The developments described above help to build an environment that is increasingly disposed, though not yet predisposed, to the protection of civilians in armed conflict. However, they still stand in stark contrast to today's reality: that in conflicts around the world, civilians continue to be killed, maimed, raped, displaced and unable to meet their basic needs. There are many important issues involved. In the present report, I want to draw particular attention to those set out below, either because of their increased prevalence in contemporary armed conflicts, their pressing nature or their profoundly worrying implications for respect for international humanitarian law.

Conduct of hostilities: further erosion of the principles of distinction and proportionality

21. The first issue is the further erosion of the principles of distinction and proportionality. The principle of distinction requires belligerents to distinguish at all times between combatants and civilians and to direct attacks only against combatants and other military objectives. In accordance with the principle of proportionality, deaths of, or injuries to, civilians and damage to civilian objects must not be excessive in relation to the direct and concrete military advantage expected from the attack. On a number of occasions in recent and ongoing conflicts, we have witnessed intentional targeting of civilians and also a tendency to interpret the principle of proportionality in a way that leads to an unjustified and troubling expansion of what constitutes permissible civilian casualties.

22. Deliberate targeting of civilians has become more widespread in places such as Afghanistan, the Democratic Republic of the Congo, Iraq, Somalia and the Sudan, creating a climate of fear aimed at destabilizing and displacing civilian populations. A particularly worrying trend is the increasing resort to suicide attacks in places including Afghanistan, Iraq, Israel and Somalia. In some cases, such attacks are aimed at military objectives but result in civilian casualties because of the inherently indiscriminate form of attack. In many others, attacks are deliberately perpetrated against civilians and civilian objects. Such attacks are most common in public places: places of worship, market squares and civilian areas where people gather in the normal course of their lives and where there is no military advantage to be

gained. The inevitable result is carnage among civilians and a pervading sense of insecurity, severely disrupting public life. In Iraq, over 700 civilians were killed and more than 1,200 injured in suicide attacks in just the first three months of 2007.[3] In one particularly deadly incident, in August 2007, suicide bombers attacked compounds inhabited by the minority Yazidi sect in Sinjar, in northern Iraq, killing over 430 civilians and wounding more than 500. In Afghanistan, the number of suicide attacks increased from 17 in 2005 to 123 in 2006, killing 237 civilians and injuring 624.[4]

23. Also of concern are incidental civilian casualties resulting from military operations conducted against non-State armed groups in places such as Somalia, Iraq and Afghanistan. In Somalia, in response to attacks from anti-Government forces, Government and Ethiopian troops on occasion used heavy force and heavy weapons in civilian areas. Information from Mogadishu's main surgical hospitals indicates that 3,200 civilians suffered weapons-related injuries between January and July 2007, including over 1,000 women and children. In Iraq, between April and July of this year, 88 civilians were killed during air strikes conducted by multinational forces in Iraq. Requests by the United Nations Assistance Mission in Iraq for information on the outcome of investigations by multinational forces into such incidents have largely gone unanswered.

24. In Afghanistan, civilian casualties have been caused by aerial bombardments and ground attacks as a result of imprecise targeting or mistaken identity, in some cases provoking expressions of concern from the Government. The Afghan Human Rights Commission claims that over 75 civilians were killed during air strikes and ground operations in September 2007 alone. It is critical that Afghan and multinational forces exercise increased care in the conduct of their operations to avoid civilian casualties. Unfortunately, in many instances security conditions limit the ability of the United Nations Assistance Mission in Afghanistan (UNAMA) to carry out independent verification of incidents involving civilian casualties, though its efforts to underline the importance of this have gained increasing traction. The leadership of the multinational forces agreed, at a United Nations-sponsored meeting on the protection of civilians, in Kabul in August 2007, to facilitate information-sharing with UNAMA and has announced concrete measures to reduce civilian casualties. After-action reviews will also be conducted in cooperation with the Government of Afghanistan in cases where civilian casualties may have occurred.

25. As a standard practice, the Security Council should make every effort to call upon parties to conflict, and multinational forces that it has authorized, to uphold their international humanitarian law and human rights obligations. In this regard, I welcome the Council's call in resolution 1776 (2007), by which it renewed the mandate of the International Security Assistance Force (ISAF) in Afghanistan, for all feasible steps to be taken to ensure that civilian life is protected and international humanitarian law and human rights law are upheld. I would urge the leadership of ISAF, as well as that of the multinational forces in Iraq, to provide specific information on steps taken to ensure the protection of civilians during the conduct of

[3] United Nations Assistance Mission for Iraq, human rights report for the period 1 January-31 March 2007.

[4] A/HRC/4/98, para. 25.

hostilities in their quarterly reports to the Council requested by resolutions 1776 (2007) and 1723 (2006), respectively.

26. At a more doctrinal level, there is increasing concern that in applying the principle of proportionality, belligerents are adopting an overly broad interpretation of what constitutes a concrete and direct military advantage and, consequently, of what may be considered permissible levels of incidental civilian casualties, particularly in the context of aerial warfare. Instead of taking into account, as envisaged by international humanitarian law, only military advantages that are substantial and a fairly immediate consequence of a specific attack, there has been a tendency to balance civilian casualties against military advantages that are hardly perceptible or may arise only in the longer term or as a result of the overall military campaign. This tendency was evident, for example, in the Government of Israel's justification for civilian casualties resulting from its military campaign against Hizbullah in 2006,[5] a campaign that was subsequently determined by the Commission of Inquiry on Lebanon (established pursuant to Human Rights Council resolution S-2/1) to constitute a significant pattern of excessive, indiscriminate and disproportionate use of force.

Impact of armed conflict on older persons and persons with disabilities

27. As discussed in greater detail in other thematic reports to the Security Council, women and children continue to suffer extreme violence and hardship during conflict. Less frequently reported are the particular risks that conflict poses for older persons and persons with disabilities. Because of their limited mobility and reduced physical strength, older persons are less able to have access to assistance. They may be left behind to guard property, or abandoned in the chaos as other family members flee. Similarly, persons with disabilities are at heightened risk of injury or death if they are not assisted in seeking safety. They may have lost mobility devices such as wheelchairs, and the physical environment is often transformed by destruction. Support networks are often disrupted, leading to increased isolation and neglect. Older persons and persons with disabilities were among those unable to flee fighting in south Lebanon in 2006 and remained at particular risk of injury and death. Even when persons with disabilities reach settlements for the displaced, mobility remains problematic, limiting their access to services.

28. In recognition of such challenges, the recently adopted Convention on the Rights of Persons with Disabilities requires States parties to take all necessary measures to ensure the protection and safety of persons with disabilities in situations of conflict. I encourage Member States to ratify the Convention and include information on such measures in their reports to the supervisory body to be established once the Convention enters into force. More immediately, national authorities and humanitarian actors must ensure systematic attention to older people and persons with disabilities in their efforts to protect and assist civilians in conflict.

Protection of journalists

29. Another issue of concern is the increasing number of journalists and media assistants killed or injured while reporting from areas of conflict. In 2006, and for

[5] See, for example, "Responding to Hezbollah attacks from Lebanon — issues of proportionality", Israeli Ministry of Foreign Affairs, 25 July 2006.

the fourth consecutive year, Iraq was reportedly the most dangerous country for the media, with 64 journalists and media assistants killed, the majority of them Iraqi nationals.[6] Another 43 were killed in Iraq during the first six months of 2007,[7] with fatalities also reported in Afghanistan, the Democratic Republic of the Congo, Haiti, the occupied Palestinian territory, Somalia and Sri Lanka. In some cases, fatalities result from excessive risk-taking, or from being caught in a crossfire. Others result from deliberate targeting by parties to conflict in order to deter or prevent reporting, particularly on abuses. The practice of embedding with a party to a conflict also puts journalists at close quarters with military objectives and may give the impression that they are combatants and thus legitimate targets.

30. Recognizing the urgency of this issue, the Council adopted resolution 1738 (2006), in which it called upon all parties to conflict to end attacks against journalists and media professionals and to comply fully with their international obligations. It urged States and all other parties to conflict to prevent violations of international humanitarian law against journalists and media professionals and, critically, to end impunity and prosecute those responsible for such violations. To move this issue forward, the Special Rapporteur on the right to freedom of opinion and expression has recommended preparing a comprehensive analysis of the issue with recommendations for strengthened protection. This would be an important step and should draw on the work of organizations with expertise in this area.

IV. Key challenges for the Council

31. As mentioned earlier, I see four key challenges of particular importance to us all and in regard to which the Council and Member States could take action to ensure more systematic and robust responses.

A. Ensuring access

32. Ensuring access is in some respects the critical challenge for the Council and Member States. Access is the fundamental prerequisite for humanitarian action and protection, and for millions of vulnerable people caught in conflict it is often the only hope and means of survival.

33. In accordance with international humanitarian law, parties to conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need. In its resolution 46/182, adopted in 1991, the General Assembly called upon States whose populations are in need of humanitarian assistance to facilitate the work of intergovernmental and non-governmental organizations in implementing such assistance, for which access to victims is essential. The Council has underlined the need for all parties concerned, including non-State actors and neighbouring States, to cooperate fully with the United Nations in providing safe, timely and unimpeded access to civilians in armed conflict. Frequently, however, we see that access is anything but safe, certainly not timely, and far from unhindered. The result is millions of people excluded from access to life-saving assistance and the minimal protection provided by the mere presence of humanitarian workers.

[6] Reporters without Borders, "Press freedom in 2006", 31 December 2006.

[7] http://www.newssafety.com/casualties/iraq.htm#2007, visited on 14 August 2007.

34. In Iraq, United Nations agencies have extremely limited access to over 4 million vulnerable civilians in central and southern governorates. In Somalia, humanitarian actors have heavily restricted access to 86 per cent of the identified vulnerable population of over 1 million people. An estimated 566,000 of the 4.1 million conflict-affected people in Darfur cannot be reached by agencies. In Afghanistan, 53 districts in five provinces in the south (excluding some provincial capitals) are largely inaccessible to humanitarian actors. In the Democratic Republic of the Congo, humanitarian actors have only partial and intermittent access to 12 million conflict-affected people. In eastern Myanmar, humanitarian actors have only partial or heavily restricted access to approximately 503,000 internally displaced persons. Aside from the implications for those in need, such as lack of food, shelter, health care and increased malnutrition and mortality rates, constraints on access also undermine the impact of assistance that can be provided, reduce the protective value of a humanitarian presence among vulnerable populations and lead to higher operational costs.

35. Constraints on, or denials of, access can take several forms. First, there are constraints imposed by the operating environment, such as destruction of infrastructure and ongoing fighting. Second, more pernicious constraints are attempts by parties to conflict to restrict or block access, thereby jeopardizing the lives of millions and prolonging their suffering. Third, and more pernicious still, are constraints resulting from deliberate attacks against humanitarian workers.

36. With regard to the first, in the Democratic Republic of the Congo, the absence of roads and airstrips in remote areas impedes access to populations in need. This is often compounded by ongoing fighting that effectively prevents populations from having access to or receiving assistance. The breakdown of law and order in conflict provides fertile ground for criminal acts motivated by financial gain, resulting in the looting of humanitarian supplies and assets. In Darfur, the disruption of chains of command resulting from the fragmentation of armed groups has led to increases in such acts.

37. Access may be restricted also by deliberately time-consuming bureaucratic procedures for importing humanitarian supplies, and restrictions or delays in issuing visas and travel permits for international staff. In Darfur, while the implementation of the joint communiqué has led to a decrease in bureaucratic constraints on humanitarian operations, belligerents continue to impose other types of restrictions and perpetrate attacks against humanitarian workers on the ground.

38. The arbitrary denial of access is a significant problem and an unacceptable practice. Humanitarian workers may be prevented from providing assistance because of the perceived political sympathies of the affected population. The Transitional Federal Government of Somalia has denied assistance to pockets of the displaced population on the grounds that family members are alleged to belong to terrorist groups. Furthermore, restrictions on freedom of movement severely impede the ability of those in need to reach services and relative safety, including abroad, or to be reached by humanitarian workers. In the occupied Palestinian territory, internal barriers, as well as heavy restrictions on cross-border movement of people and goods, compromise access to vital assistance. Access throughout the West Bank is restricted by 563 physical obstacles and is particularly difficult in areas under full Israeli control.

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39. A particularly disturbing constraint results from deliberate attacks on humanitarian workers. Such attacks are prohibited by international humanitarian law and constitute war crimes. According to one report, between 1997 and 2005 the absolute number of major acts of violence committed against humanitarian workers nearly doubled.[8] National staff represent the majority of victims, reflecting the fact that in times of heightened insecurity, international staff rely increasingly on national staff and local partners to manage aid programmes, effectively shifting the burden of risk. In Darfur, attacks against humanitarian workers increased by 150 per cent from June 2006 to June 2007. So far this year, 8 humanitarian workers have been killed, 11 wounded and over 60 assaulted; 93 vehicles have been hijacked or stolen and over 102 staff abducted in the process; 60 aid convoys have been looted; and there have been 65 armed incursions into humanitarian premises. In Afghanistan, as of August 2007, 41 humanitarian convoys had been attacked or looted; 29 attacks on humanitarian facilities had been reported; and 69 humanitarian workers had been abducted, of whom 7 were killed. In all, 41 aid workers were killed during the first seven months of 2007.

40. Despite the serious nature of these crimes and their repercussions, insufficient attempts have been made to hold perpetrators accountable. In Sri Lanka, there is still little progress in the work of the Government-established commission investigating human rights abuses, including the murders of 17 staff of Action contre la faim who were killed in a single, abhorrent act in August 2006.

41. The Office for the Coordination of Humanitarian Affairs is developing a monitoring and reporting mechanism that will facilitate more in-depth analysis of the causes and consequences of access constraints. That analysis will be annexed to future reports on the protection of civilians and included in the regular briefings to the Council by the Emergency Relief Coordinator. Importantly, it will provide an opportunity for — and expectation of — concerted action from the Council in response to particularly grave situations, action that must ensure that those in need of life-saving assistance receive it and that those who provide it do so in a secure environment in which attacks against humanitarian workers are not tolerated. Possible actions include concerted advocacy and negotiation with warring parties for the establishment of:

(a) "Deconflicting" arrangements to agree upon routes and timing of humanitarian convoys and airlifts to avoid accidental strikes on humanitarian operations;

(b) High-level diplomacy to promote humanitarian corridors and days of tranquillity;

(c) The development of a standard moratorium on visa requirements and travel permits for humanitarian workers, and on customs duties and import restrictions on humanitarian goods and equipment. The moratorium could be activated upon the recommendation of the Emergency Relief Coordinator where there is a need for rapid and life-saving assistance.

42. Consideration should also be given to enhanced accountability for instances of grave denial of humanitarian access. For example, intentionally using starvation of

[8] A. Harmer et al., "Providing aid in insecure environments: trends in policy and operations", Humanitarian Policy Group, 23 September 2006.

civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding the delivery of relief supplies, in contravention of the Geneva Conventions, was recognized as a war crime in the Statute of the International Criminal Court. To date, this criminal dimension of the denial of access appears to have been overlooked, despite the fact it jeopardizes the lives of hundreds of thousands of persons. Greater efforts to highlight the normative framework governing humanitarian access and the consequences of its denial would be welcome. Consideration of such grave cases by the International Criminal Court could be an important step in this regard.

B. A more robust response to sexual violence

43. In no other area is our collective failure to ensure effective protection for civilians more apparent — and by its very nature more shameful — than in terms of the masses of women and girls, but also boys and men, whose lives are destroyed each year by sexual violence perpetrated in conflict.

44. Sexual violence, including rape, is a war crime and may, in some situations, be of such dimensions as to constitute a crime against humanity. Sexual violence has been used as a calculated method of warfare in places such as Bosnia and Herzegovina, Liberia, Rwanda, Sierra Leone and Somalia, and is currently practised in the Central African Republic, the Democratic Republic of the Congo and the Sudan, where its use by Janjaweed and Government soldiers was described by the International Commission of Inquiry on Darfur as widespread and systematic. As a method of warfare, sexual violence is aimed at brutalizing and instilling fear in the civilian population through acts of deliberate cruelty, weakening their resistance and resilience, through humiliation and shame, and destroying the social fabric of entire communities. Victims are often left with horrific physical and psychological scars and, worse still, may have contracted a sexually transmitted disease, including HIV and AIDS. In some cases, they are shunned and abandoned by their families and communities.

45. While such violence is not confined to the Democratic Republic of the Congo, the gruelling situation in the eastern provinces of Ituri and the Kivus epitomizes the devastating effect of sexual violence in conflict. The United Nations Special Rapporteur on violence against women notes that in South Kivu province alone, where 4,500 cases of sexual violence were recorded in the first six months of 2007, acts of rape and sexual slavery perpetrated by armed groups were aimed at the complete physical and psychological destruction of women, with implications for the entire society. Women were brutally gang-raped, often in front of their families and communities. In numerous cases, male relatives were forced at gunpoint to rape their own daughters, mothers or sisters. Frequently women were shot or stabbed in their genital organs, after being raped. Women who survived months of sexual enslavement were forced to eat excrement or the flesh of murdered relatives. In the same province, units of the Congolese army were reported to have targeted communities suspected of supporting militia groups and committed acts of gang rape and murder. Individual soldiers or police officers also committed such acts, considering themselves to be above the law. These are not random acts of violence in the theatre of war but a deliberate attempt to dehumanize and destroy entire communities.

46. In Equateur province, the police and army are reported to have responded to civil unrest with armed reprisals against civilians that involve torture and mass rape. The Panzi hospital in Bukavu, which specializes in treating victims of sexual violence, receives annually 3,500 women who suffer fistula and other severe genital injuries resulting from sexual violence. That is just one institution, in one province, in a conflict-affected country the size of Western Europe.

47. The perpetrators of sexual violence regularly go unpunished. Their crimes may go unreported because of shame or fear on the part of the victims; because of the absence of assistance or mechanisms for reporting such crimes; because of a lack of faith in reporting systems; or because the victims did not survive. It is believed that for every rape that is reported, as many as 10 to 20 may go unreported. In most conflict settings, though, impunity frequently prevails because of the lack of action by those with a duty to respond — a failure that denies justice to those affected and reinforces a climate in which violence of this nature is inexplicably considered normal.

48. The international community's revulsion towards sexual violence is clear, as demonstrated in General Assembly resolution 61/134 and Council resolutions 1325 (2000), 1674 (2006) and others. Evidently, though, more decisive and rigorous action is needed to bridge the gap between the rhetoric of those resolutions and the reality on the ground and to treat acts of sexual violence for what they are — despicable war crimes and crimes against humanity that must be punished. To do otherwise, to continue standing by, year after year, violates the obligation to punish such acts and belies the solemn commitment made at the 2005 World Summit to protect civilians.

49. First, at the national level, and in accordance with the obligation to search for and prosecute persons suspected of genocide, war crimes and crimes against humanity:

(a) States within whose jurisdiction acts of sexual violence amounting to these offences occur, or where perpetrators or victims are present, must investigate, prosecute and punish perpetrators. In the case of the armed forces and the police, this should include the commanders under whom they serve if the commanders failed to take measures to prevent the violations;

(b) Where necessary, States should:

(i) Enact new laws that criminalize sexual violence;

(ii) Review overly narrow rape laws;

(iii) Resolve conflicts between the application of statutory and customary laws;

(iv) Significantly improve access to justice for victims, including the possible establishment of ad hoc judicial arrangements for dealing with these crimes;

(v) Strengthen national and local investigatory and prosecutorial capacity.

50. Second, prevention and response activities by humanitarian actors must be strengthened and better coordinated. In addition to work undertaken within their respective mandates, 12 United Nations entities have formed United Nations Action against Sexual Violence in Conflict, which aims to amplify programming and advocacy, improve coordination and accountability and support national efforts to

prevent sexual violence and respond effectively to the needs of survivors. However, given the magnitude and complexity of the issue, there is still a need to establish a clear and dedicated "institutional home" within the United Nations that would:

(a) Coordinate the activities of agencies involved in this area, including systematic information collection and coordinated needs assessments;

(b) Ensure the provision of expertise and support to the field;

(c) Develop system-wide advocacy on the issue;

(d) Act as repository of best practices for prevention of and response to sexual violence.

51. In a related context, combating sexual violence committed by peacekeeping personnel and humanitarian workers remains an important challenge within the United Nations and for troop- and police-contributing countries. In July 2007, the General Assembly adopted amendments to a model memorandum of understanding for troop and police contributors participating in peacekeeping missions (see resolution 61/291). It assigns contributing countries the responsibility to investigate sexual exploitation and abuse by members of their national contingents and grants them exclusive jurisdiction over any offences committed. Having recognized this responsibility, Member States must fully discharge their duties and ensure that the United Nations policy of zero-tolerance is uniformly applied.

C. A more effective response to housing, land and property issues

52. Another critically important challenge is the need to more effectively address housing, land and real property issues, which are often the origins of, or result from, conflict and which are therefore inextricably linked to the achievement and consolidation of lasting peace and the prevention of future violence.

53. The majority of internal conflicts in recent memory have involved underlying disputes over housing, land or property. In places such as Côte d'Ivoire, Darfur, the Kivus of the Democratic Republic of the Congo, Liberia and Timor-Leste, conflict was driven to varying degrees by disputes over land resulting from such factors as increased demographic pressure, scarcity of resources, agricultural transformation, exploitation of natural resources, insecurity of tenure and inequalities in land distribution (in particular along ethnic, religious or other divides).

54. Housing, land and property disputes and problems are also an almost inevitable consequence of armed conflict, as people flee their homes and lands in search of safety, or are forced to flee, in particular through ethnic cleansing or sectarian violence, as currently plagues Iraq. Such situations invariably give rise to complex issues that, if not prevented in the first place, must be addressed later if any future peace is to be sustained and further violence prevented. These include forced evictions; property transactions made under duress; illegal destruction or appropriation and occupation of abandoned property; the illegal confiscation of land; discriminatory application of abandonment laws; and the loss or deliberate destruction of documentary evidence of ownership. Such problems are further compounded by the application of inheritance laws that deny women and minors the right to inherit, own or use land and property.

55. A critically important step towards resolving such issues is publicly upholding and ensuring the right to safe and unimpeded return for refugees and internally displaced persons from the very moment they become displaced. Ensuring the right to return constitutes a categorical rejection of the gains of ethnic cleansing and sectarian violence and offers some measure of justice to those displaced from their homes and land, thereby removing a source of possible future tension and conflict. After four years of conflict and continuing displacement in Darfur, reaching common agreement on land tenure and compensation for the loss of property has emerged as a key element of sustainable peace. A recent report on Southern Sudan observes that the arrival of returnees in South Kordofan exacerbated long-standing tensions between different land users, with killings and injuries related to land conflicts constituting the single largest risk to returnees and local communities.[9]

56. The Council has long recognized the importance of safe and unimpeded return for refugees and internally displaced persons, as demonstrated in resolutions on the occupied Palestinian territory, Cyprus, the former Yugoslavia, Croatia, Georgia, Kosovo, Timor-Leste and the Sudan. In some cases, such as in Bosnia and Herzegovina, it has also condemned the wrongful appropriation and destruction of homes and property. However, for the reasons cited above, such recognition of the right to return must be applied by the Council with more systematic regularity. It must, moreover, be accompanied by increased attention to its practical implementation, including the need for a more comprehensive, systematic and consistent United Nations-wide approach to housing, land and property issues in both conflict and post-conflict settings.

57. Some United Nations peace operations have been directly involved in addressing these issues. The United Nations Interim Administration Mission in Kosovo administered and managed the Housing and Property Directorate and Claims Commission, initially established by the United Nations Human Settlements Programme, which has decided over 27,000 claims as of October 2007. The Land and Property Unit within the United Nations Transitional Authority in East Timor developed proposals for institutionally addressing property questions. Grievances that were left unaddressed are considered to have contributed to the recent political violence in Timor-Leste. By contrast, the United Nations Transitional Authority in Cambodia and UNAMA have not systematically addressed property issues. With regard to the example of South Kordofan above, the report asserts that despite the risk posed by conflict over land, the issue has not received adequate attention or analysis within United Nations reintegration efforts.

58. When peace operations do not engage in these activities, it does not necessarily mean that the issues are left unaddressed. In Afghanistan, the Office of the United Nations High Commissioner for Refugees (UNHCR) and non-governmental organizations engaged in activities to promote and assist restitution, including the provision of legal aid to returnees. In Burundi, the Peacebuilding Fund has provided, through UNHCR, initial financial support to establish a national property claims mechanism.

[9] S. Pantuliano, M. Buchanan-Smith and P. Murphy, "The long road home: opportunities and obstacles to the reintegration of IDPs and refugees returning to Southern Sudan and the three areas", Humanitarian Policy Group, August 2007.

59. Important though these efforts are, they do not constitute an approach that ensures consistent, systematic and comprehensive treatment of housing, land and property issues. Such an approach should include:

(a) Preventive and deterrent actions, such as the strategic deployment of peacekeeping troops to prevent evictions and the illegal appropriation of land and property, and the identification and prosecution by national courts or the International Criminal Court of those criminally responsible for the illegal appropriation or destruction of land and property;

(b) Preparatory actions, such as the early identification and registration of land and property abandoned by internally displaced persons and refugees to facilitate restitution or, where necessary, compensation, and the issuance of ownership documentation where this has been lost or destroyed;

(c) Restorative actions, such as the inclusion of the right to return and restitution of housing, land or property in all future peace agreements and all relevant Council resolutions, and the inclusion of housing, land and property issues as an integral part of future peacekeeping and other relevant missions, with provisions for dedicated, expert capacity to address these issues.

D. Eliminating the humanitarian impact of cluster munitions

60. A final key challenge is the need to eliminate the horrendous humanitarian impact of cluster munitions, characterized by the maiming and killing of civilians, particularly children, even after conflict has ended; thousands unable to return to their homes; and devastated livelihoods as fields are rendered unusable, harvests destroyed and sources of income lost for a generation.

61. The international community has become increasingly concerned about the humanitarian impact of cluster munitions, to a large degree because of the injuries, fatalities and widespread contamination of land resulting from their large-scale use by Israeli forces in Lebanon in 2006. However, Lebanon is only the latest in a line of countries to be left facing the severe humanitarian and development consequences of cluster munitions. Cluster munitions have been used in at least 23 countries and territories, including Afghanistan, Cambodia, Chad, Eritrea, Ethiopia, Iraq and Kosovo. There are also concerns about the further proliferation of cluster munitions through their future availability to, and use by, non-State armed groups. It was reported that in some instances cluster munitions were used by Hizbullah against Israel in 2006.

62. Cluster munitions are designed to have a large-area effect and can cause immediate death and injury to civilians and damage civilian objects in areas beyond the military objective. Moreover, the failure of some sub-munitions to detonate on impact creates a serious hazard that can endanger civilians for years or even decades. Children are at particular risk from unexploded sub-munitions, in part because they are attracted to their unusual shapes and colours. Children accounted for the majority of cluster-munition casualties in Cambodia between 1998 and 2007 and in Kosovo in 1999.[10] In south Lebanon there are still hundreds of thousands of unexploded sub-munitions from the conflict in 2006.

[10] *Circle of Impact*, Handicap International, 2007.

63. Cluster munitions victimize entire communities, not just individuals. The scale of the problem of unexploded remnants of war was a major factor preventing 200,000 people from returning to their homes in south Lebanon last year.[11] Access was also denied to 26 per cent of arable land.[12] With half of the working population in the south relying on agriculture, the loss of the harvest had a profound impact.[13] In the Lao People's Democratic Republic, 25 per cent of the country's land surface remains contaminated over 30 years after the use of cluster munitions.[14] Farmers, already under economic pressure, sometimes feel they have no choice but to return to their land even though it has not been cleared. Digging incidents alone have resulted in over 1,000 casualties.[10] The presence of unexploded sub-munitions over large areas also threatens the safety of humanitarian staff and peacekeepers.

64. Concerted efforts are required to end the use of cluster munitions. In November 2007, the Meeting of States Parties to the Convention on Certain Conventional Weapons will discuss a recommendation on how to address the humanitarian impact of cluster munitions, including the possibility of a new instrument. In February 2007, Norway initiated a separate process to adopt by the end of 2008 a binding instrument that will prohibit cluster munitions that cause unacceptable harm to civilians. To date, 80 States have participated in the Oslo process, as it is called, including 20 that are not parties to the Convention.

65. I applaud and encourage all endeavours to reduce, and ultimately eliminate, the impact of cluster munitions on civilians. I welcome the Oslo and Convention on Certain Conventional Weapons processes, which are complementary, mutually reinforcing and deserving of Member State support. To this end:

(a) I call on all Member States to address the horrendous humanitarian, human rights and development impact of cluster munitions by concluding a treaty that:

(i) Prohibits the use, development, production, stockpiling and transfer of cluster munitions that cause unacceptable harm to civilians;

(ii) Requires the destruction of current stockpiles of those munitions and provides for clearance, risk education and other risk mitigation activities, victim assistance, assistance and cooperation between States, and compliance and transparency measures;

(b) Until such a treaty is adopted, I urge all Member States to take domestic measures to immediately freeze the use and transfer of all cluster munitions.

[11] http://www.irinnews.org/report.aspx?reportid=61913.

[12] Statement by Chris Clark, Programme Manager for the United Nations Mine Action Programme in South Lebanon, to the International Committee of the Red Cross Expert Meeting on Humanitarian, Military, Technical and Legal Challenges of Cluster Munitions, 18-20 April 2007.

[13] http://www.fao.org/newsroom/en/news/2007/1000647/index.html, 8 August 2007.

[14] Statement by the United Nations Development Programme to the Group of Governmental Experts of States Parties to the Convention on Certain Conventional Weapons, June 2007.

V. Conclusions and actions

66. As I stated at the beginning of the present report, the protection of civilians in armed conflict is, and must remain, an absolute priority. The Security Council's continued consideration of this agenda item is an important indication of its commitment, as was the adoption of resolution 1674 (2006). A critical and consequential next step towards operationalizing that resolution and ensuring action that has a tangible impact on the ground is more systematic attention to the concerns and recommendations made in this and previous reports on the protection of civilians in the daily deliberations of the Council. To this end, I recommend that the Council consider the following actions:

Action one
Conduct of hostilities

(a) Systematically including a requirement for strict compliance with international humanitarian law, as well as human rights law, in all resolutions authorizing United Nations peacekeeping and other relevant missions;

(b) Requesting reports from United Nations peacekeeping and other relevant missions on steps taken to ensure the protection of civilians in the conduct of hostilities;

Action two
Sexual violence

(c) Requesting the systematic provision of comprehensive information on sexual violence as a specific annex to all reports to the Security Council on peacekeeping operations and other relevant missions;

(d) Referring situations of grave incidents of rape and other forms of sexual violence to the International Criminal Court and/or considering the imposition of targeted sanctions against States or non-State armed groups that perpetrate or support such crimes;

(e) In situations where impunity prevails and local justice mechanisms are overwhelmed, such as in the Democratic Republic of the Congo, supporting the establishment of ad hoc judicial arrangements to address sexual violence;

Action three
Access

(f) Ensuring that United Nations peacekeeping and other relevant missions are mandated to contribute, as may be requested and within capabilities, to the creation of security conditions that enable the provision of humanitarian assistance;

(g) Having the Emergency Relief Coordinator systematically bring to the Council's attention situations where serious access concerns exist, including through the biannual briefings and as an annex to the Secretary-General's reports on the protection of civilians;

(h) Holding situation-specific debates on access and, where appropriate, considering the referral of grave instances of denial of access, as well as situations involving attacks against humanitarian workers, to the International Criminal Court;

Action four
Housing, land and property rights

(i) Systematically including language in all relevant resolutions on the right of displaced persons and refugees to return to their homes and places of origin and on non-acceptance of the results of ethnic cleansing or sectarian violence;

(j) Promoting the establishment of effective and appropriate mechanisms at the national level for addressing housing, land and property issues;

(k) Mandating United Nations peacekeeping and other relevant missions to prevent the illegal appropriation or confiscation of land and property, to identify and register land and property abandoned by refugees and displaced persons and to issue ownership documentation where this has been lost or destroyed;

(l) Convening an Arria-formula meeting with relevant actors to further explore the content of a more consistent, systematic and comprehensive United Nations-wide approach to housing, land and property issues;

Action five
Security Council working group on the protection of civilians

(m) Establishing, consistent with resolution 1674 (2006), a dedicated, expert-level working group to facilitate the systematic and sustained consideration and analysis of protection concerns, and ensuring consistent application of the aide-memoire for the consideration of issues pertaining to the protection of civilians[15] in Council deliberations on the mandates of United Nations peacekeeping and other relevant missions, draft resolutions and presidential statements, and in Council missions.

67. Incorporating these actions into the Council's efforts to manage and address conflict will, I believe, contribute to a more systematic and effective approach to, and significant progress in, ensuring the protection of civilians. That progress must be measured not by what we declare, or recommend, or resolve to do, but by the impact of our declarations, recommendations and resolutions where and for whom it matters most — on the ground, for the millions of civilians who are at risk of, or whose lives are being torn apart by, the horrors and indignities of conflict.

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[15] S/PRST/2002/6, annex.

Convention on Cluster Munitions, 2008

DIPLOMATIC CONFERENCE FOR THE ADOPTION OF A CONVENTION ON CLUSTER MUNITIONS

CCM/77

30 May 2008
Original: ENGLISH
FRENCH
SPANISH

DUBLIN 19 – 30 MAY 2008

Convention on Cluster Munitions

The States Parties to this Convention,

Deeply concerned that civilian populations and individual civilians continue to bear the brunt of armed conflict,

Determined to put an end for all time to the suffering and casualties caused by cluster munitions at the time of their use, when they fail to function as intended or when they are abandoned,

Concerned that cluster munition remnants kill or maim civilians, including women and children, obstruct economic and social development, including through the loss of livelihood, impede post-conflict rehabilitation and reconstruction, delay or prevent the return of refugees and internally displaced persons, can negatively impact on national and international peace-building and humanitarian assistance efforts, and have other severe consequences that can persist for many years after use,

Deeply concerned also at the dangers presented by the large national stockpiles of cluster munitions retained for operational use and *determined* to ensure their rapid destruction,

Believing it necessary to contribute effectively in an efficient, coordinated manner to resolving the challenge of removing cluster munition remnants located throughout the world, and to ensure their destruction,

Determined also to ensure the full realisation of the rights of all cluster munition victims and *recognising* their inherent dignity,

Resolved to do their utmost in providing assistance to cluster munition victims, including medical care, rehabilitation and psychological support, as well as providing for their social and economic inclusion,

Recognising the need to provide age- and gender-sensitive assistance to cluster munition victims and to address the special needs of vulnerable groups,

Bearing in mind the Convention on the Rights of Persons with Disabilities which, *inter alia*, requires that States Parties to that Convention undertake to ensure and promote the full realisation of all human rights and fundamental freedoms of all persons with disabilities without discrimination of any kind on the basis of disability,

Mindful of the need to coordinate adequately efforts undertaken in various fora to address the rights and needs of victims of various types of weapons, and *resolved* to avoid discrimination among victims of various types of weapons,

Reaffirming that in cases not covered by this Convention or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law, derived from established custom, from the principles of humanity and from the dictates of public conscience,

Resolved also that armed groups distinct from the armed forces of a State shall not, under any circumstances, be permitted to engage in any activity prohibited to a State Party to this Convention,

Welcoming the very broad international support for the international norm prohibiting anti-personnel mines, enshrined in the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction,

Welcoming also the adoption of the Protocol on Explosive Remnants of War, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, and its entry into force on 12 November 2006, and *wishing* to enhance the protection of civilians from the effects of cluster munition remnants in post-conflict environments,

Bearing in mind also United Nations Security Council Resolution 1325 on women, peace and security and United Nations Security Council Resolution 1612 on children in armed conflict,

Welcoming further the steps taken nationally, regionally and globally in recent years aimed at prohibiting, restricting or suspending the use, stockpiling, production and transfer of cluster munitions,

Stressing the role of public conscience in furthering the principles of humanity as evidenced by the global call for an end to civilian suffering caused by cluster munitions and *recognising* the efforts to that end undertaken by the United Nations, the International Committee of the Red Cross, the Cluster Munition Coalition and numerous other non-governmental organisations around the world,

Reaffirming the Declaration of the Oslo Conference on Cluster Munitions, by which, *inter alia*, States recognised the grave consequences caused by the use of cluster munitions and committed themselves to conclude by 2008 a legally binding instrument that would prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians, and would establish a framework for cooperation and assistance that ensures adequate provision of care and rehabilitation for victims, clearance of contaminated areas, risk reduction education and destruction of stockpiles,

Emphasising the desirability of attracting the adherence of all States to this Convention, and *determined* to work strenuously towards the promotion of its universalisation and its full implementation,

Basing themselves on the principles and rules of international humanitarian law, in particular the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited, and the rules that the parties to a conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations against military objectives only, that in the conduct of military operations constant care shall be taken to spare the civilian population, civilians and civilian objects and that the civilian population and individual civilians enjoy general protection against dangers arising from military operations,

HAVE AGREED as follows:

Article 1
General obligations and scope of application

1. Each State Party undertakes never under any circumstances to:
   (a) Use cluster munitions;
   (b) Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions;
   (c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.

2. Paragraph 1 of this Article applies, *mutatis mutandis,* to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft.

3. This Convention does not apply to mines.

Article 2
Definitions

For the purposes of this Convention:

1. **"Cluster munition victims"** means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities;

2. **"Cluster munition"** means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions. It does not mean the following:
   (a) A munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;
   (b) A munition or submunition designed to produce electrical or electronic effects;
   (c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:
      (i) Each munition contains fewer than ten explosive submunitions;
      (ii) Each explosive submunition weighs more than four kilograms;
      (iii) Each explosive submunition is designed to detect and engage a single target object;
      (iv) Each explosive submunition is equipped with an electronic self-destruction mechanism;
      (v) Each explosive submunition is equipped with an electronic self-deactivating feature;

3. **"Explosive submunition"** means a conventional munition that in order to perform its task is dispersed or released by a cluster munition and is designed to function by detonating an explosive charge prior to, on or after impact;

4. **"Failed cluster munition"** means a cluster munition that has been fired, dropped, launched, projected or otherwise delivered and which should have dispersed or released its explosive submunitions but failed to do so;

5. **"Unexploded submunition"** means an explosive submunition that has been dispersed or released by, or otherwise separated from, a cluster munition and has failed to explode as intended;

6. **"Abandoned cluster munitions"** means cluster munitions or explosive submunitions that have not been used and that have been left behind or dumped, and that are no longer under the control of the party that left them behind or dumped them. They may or may not have been prepared for use;

7. **"Cluster munition remnants"** means failed cluster munitions, abandoned cluster munitions, unexploded submunitions and unexploded bomblets;

8. **"Transfer"** involves, in addition to the physical movement of cluster munitions into or from national territory, the transfer of title to and control over cluster munitions, but does not involve the transfer of territory containing cluster munition remnants;

9. **"Self-destruction mechanism"** means an incorporated automatically-functioning mechanism which is in addition to the primary initiating mechanism of the munition and which secures the destruction of the munition into which it is incorporated;

10. **"Self-deactivating"** means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component, for example a battery, that is essential to the operation of the munition;

11. **"Cluster munition contaminated area"** means an area known or suspected to contain cluster munition remnants;

12. **"Mine"** means a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle;

13. **"Explosive bomblet"** means a conventional munition, weighing less than 20 kilograms, which is not self-propelled and which, in order to perform its task, is dispersed or released by a dispenser, and is designed to function by detonating an explosive charge prior to, on or after impact;

14. **"Dispenser"** means a container that is designed to disperse or release explosive bomblets and which is affixed to an aircraft at the time of dispersal or release;

15. **"Unexploded bomblet"** means an explosive bomblet that has been dispersed, released or otherwise separated from a dispenser and has failed to explode as intended.

Article 3
Storage and stockpile destruction

1. Each State Party shall, in accordance with national regulations, separate all cluster munitions under its jurisdiction and control from munitions retained for operational use and mark them for the purpose of destruction.

2. Each State Party undertakes to destroy or ensure the destruction of all cluster munitions referred to in paragraph 1 of this Article as soon as possible but not later than eight years after the entry into force of this Convention for that State Party. Each State Party undertakes to ensure that destruction methods comply with applicable international standards for protecting public health and the environment.

3. If a State Party believes that it will be unable to destroy or ensure the destruction of all cluster munitions referred to in paragraph 1 of this Article within eight years of entry into force of this Convention for that State Party it may submit a request to a Meeting of States Parties or a Review Conference for an extension of the deadline for completing the destruction of such cluster munitions by a period of up to four years. A State Party may, in exceptional circumstances, request additional extensions of up to four years. The requested extensions shall not exceed the number of years strictly necessary for that State Party to complete its obligations under paragraph 2 of this Article.

4. Each request for an extension shall set out:
   (a) The duration of the proposed extension;
   (b) A detailed explanation of the proposed extension, including the financial and technical means available to or required by the State Party for the destruction of all cluster munitions referred to in paragraph 1 of this Article and, where applicable, the exceptional circumstances justifying it;
   (c) A plan for how and when stockpile destruction will be completed;
   (d) The quantity and type of cluster munitions and explosive submunitions held at the entry into force of this Convention for that State Party and any additional cluster munitions or explosive submunitions discovered after such entry into force;
   (e) The quantity and type of cluster munitions and explosive submunitions destroyed during the period referred to in paragraph 2 of this Article; and
   (f) The quantity and type of cluster munitions and explosive submunitions remaining to be destroyed during the proposed extension and the annual destruction rate expected to be achieved.

5. The Meeting of States Parties or the Review Conference shall, taking into consideration the factors referred to in paragraph 4 of this Article, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension. The States Parties may decide to grant a shorter extension than that requested and may propose benchmarks for the extension, as appropriate. A request for an extension shall be submitted a minimum of nine months prior to the Meeting of States Parties or the Review Conference at which it is to be considered.

6. Notwithstanding the provisions of Article 1 of this Convention, the retention or acquisition of a limited number of cluster munitions and explosive submunitions for the development of and training in cluster munition and explosive submunition detection, clearance or destruction techniques, or for the development of cluster munition counter-measures, is permitted. The amount of explosive submunitions retained or acquired shall not exceed the minimum number absolutely necessary for these purposes.

7. Notwithstanding the provisions of Article 1 of this Convention, the transfer of cluster munitions to another State Party for the purpose of destruction, as well as for the purposes described in paragraph 6 of this Article, is permitted.

8. States Parties retaining, acquiring or transferring cluster munitions or explosive submunitions for the purposes described in paragraphs 6 and 7 of this Article shall submit a detailed report on the planned and actual use of these cluster munitions and explosive submunitions and their type, quantity and lot numbers. If cluster munitions or explosive submunitions are transferred to another State Party for these purposes, the report shall include reference to the receiving party. Such a report shall be prepared for each year during which a State Party retained, acquired or transferred cluster munitions or explosive submunitions and shall be submitted to the Secretary-General of the United Nations no later than 30 April of the following year.

Article 4
Clearance and destruction of cluster munition remnants and risk reduction education

1. Each State Party undertakes to clear and destroy, or ensure the clearance and destruction of, cluster munition remnants located in cluster munition contaminated areas under its jurisdiction or control, as follows:
   (a) Where cluster munition remnants are located in areas under its jurisdiction or control at the date of entry into force of this Convention

for that State Party, such clearance and destruction shall be completed as soon as possible but not later than ten years from that date;

(b) Where, after entry into force of this Convention for that State Party, cluster munitions have become cluster munition remnants located in areas under its jurisdiction or control, such clearance and destruction must be completed as soon as possible but not later than ten years after the end of the active hostilities during which such cluster munitions became cluster munition remnants; and

(c) Upon fulfilling either of its obligations set out in sub-paragraphs (a) and (b) of this paragraph, that State Party shall make a declaration of compliance to the next Meeting of States Parties.

2. In fulfilling its obligations under paragraph 1 of this Article, each State Party shall take the following measures as soon as possible, taking into consideration the provisions of Article 6 of this Convention regarding international cooperation and assistance:

(a) Survey, assess and record the threat posed by cluster munition remnants, making every effort to identify all cluster munition contaminated areas under its jurisdiction or control;

(b) Assess and prioritise needs in terms of marking, protection of civilians, clearance and destruction, and take steps to mobilise resources and develop a national plan to carry out these activities, building, where appropriate, upon existing structures, experiences and methodologies;

(c) Take all feasible steps to ensure that all cluster munition contaminated areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means to ensure the effective exclusion of civilians. Warning signs based on methods of marking readily recognisable by the affected community should be utilised in the marking of suspected hazardous areas. Signs and other hazardous area boundary markers should, as far as possible, be visible, legible, durable and resistant to environmental effects and should clearly identify which side of the marked boundary is considered to be within the cluster munition contaminated areas and which side is considered to be safe;

(d) Clear and destroy all cluster munition remnants located in areas under its jurisdiction or control; and

(e) Conduct risk reduction education to ensure awareness among civilians living in or around cluster munition contaminated areas of the risks posed by such remnants.

3. In conducting the activities referred to in paragraph 2 of this Article, each State Party shall take into account international standards, including the International Mine Action Standards (IMAS).

4. This paragraph shall apply in cases in which cluster munitions have been used or abandoned by one State Party prior to entry into force of this Convention for that State Party and have become cluster munition remnants that are located in areas under the jurisdiction or control of another State Party at the time of entry into force of this Convention for the latter.

(a) In such cases, upon entry into force of this Convention for both States Parties, the former State Party is strongly encouraged to provide, *inter alia*, technical, financial, material or human resources assistance to the latter State Party, either bilaterally or through a mutually agreed third party, including through the United Nations system or other relevant organisations, to facilitate the marking, clearance and destruction of such cluster munition remnants.

(b) Such assistance shall include, where available, information on types and quantities of the cluster munitions used, precise locations of cluster munition strikes and areas in which cluster munition remnants are known to be located.

5. If a State Party believes that it will be unable to clear and destroy or ensure the clearance and destruction of all cluster munition remnants referred to in paragraph 1 of this Article within ten years of the entry into force of this Convention for that State Party, it may submit a request to a Meeting of States Parties or a Review Conference for an extension of the deadline for completing the clearance and destruction of such cluster munition remnants by a period of up to five years. The requested extension shall not exceed the number of years strictly necessary for that State Party to complete its obligations under paragraph 1 of this Article.

6. A request for an extension shall be submitted to a Meeting of States Parties or a Review Conference prior to the expiry of the time period referred to in paragraph 1 of this Article for that State Party. Each request shall be submitted a minimum of nine months prior to the Meeting of States Parties or Review Conference at which it is to be considered. Each request shall set out:

(a) The duration of the proposed extension;

(b) A detailed explanation of the reasons for the proposed extension, including the financial and technical means available to and required by the State Party for the clearance and destruction of all cluster munition remnants during the proposed extension;

(c) The preparation of future work and the status of work already conducted under national clearance and demining programmes during the initial ten year period referred to in paragraph 1 of this Article and any subsequent extensions;

(d) The total area containing cluster munition remnants at the time of entry into force of this Convention for that State Party and any additional areas containing cluster munition remnants discovered after such entry into force;

(e) The total area containing cluster munition remnants cleared since entry into force of this Convention;

(f) The total area containing cluster munition remnants remaining to be cleared during the proposed extension;

(g) The circumstances that have impeded the ability of the State Party to destroy all cluster munition remnants located in areas under its jurisdiction or control during the initial ten year period referred to in paragraph 1 of this Article, and those that may impede this ability during the proposed extension;

(h) The humanitarian, social, economic and environmental implications of the proposed extension; and

(i) Any other information relevant to the request for the proposed extension.

7. The Meeting of States Parties or the Review Conference shall, taking into consideration the factors referred to in paragraph 6 of this Article, including, *inter alia,* the quantities of cluster munition remnants reported, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension. The States Parties may decide to grant a shorter extension than that requested and may propose benchmarks for the extension, as appropriate.

8. Such an extension may be renewed by a period of up to five years upon the submission of a new request, in accordance with paragraphs 5, 6 and 7 of this Article. In requesting a further extension a State Party shall submit relevant additional information on what has been undertaken during the previous extension granted pursuant to this Article.

Article 5
Victim assistance

1. Each State Party with respect to cluster munition victims in areas under its jurisdiction or control shall, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion. Each State Party shall make every effort to collect reliable relevant data with respect to cluster munition victims.

2. In fulfilling its obligations under paragraph 1 of this Article each State Party shall:

(a) Assess the needs of cluster munition victims;
(b) Develop, implement and enforce any necessary national laws and policies;
(c) Develop a national plan and budget, including timeframes to carry out these activities, with a view to incorporating them within the existing national disability, development and human rights frameworks and mechanisms, while respecting the specific role and contribution of relevant actors;
(d) Take steps to mobilise national and international resources;
(e) Not discriminate against or among cluster munition victims, or between cluster munition victims and those who have suffered injuries or disabilities from other causes; differences in treatment should be based only on medical, rehabilitative, psychological or socio-economic needs;
(f) Closely consult with and actively involve cluster munition victims and their representative organisations;
(g) Designate a focal point within the government for coordination of matters relating to the implementation of this Article; and
(h) Strive to incorporate relevant guidelines and good practices including in the areas of medical care, rehabilitation and psychological support, as well as social and economic inclusion.

Article 6
International cooperation and assistance

1. In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance.

2. Each State Party in a position to do so shall provide technical, material and financial assistance to States Parties affected by cluster munitions, aimed at the implementation of the obligations of this Convention. Such assistance may be provided, *inter alia*, through the United Nations system, international, regional or national organisations or institutions, non-governmental organisations or institutions, or on a bilateral basis.

3. Each State Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment and scientific and technological information concerning the implementation of this Convention. The States Parties shall not impose undue restrictions on the provision and receipt of clearance and other such equipment and related technological information for humanitarian purposes.

4. In addition to any obligations it may have pursuant to paragraph 4 of Article 4 of this Convention, each State Party in a position to do so shall provide assistance for clearance and destruction of cluster munition remnants and information concerning various means and technologies related to clearance of cluster munitions, as well as lists of experts, expert agencies or national points of contact on clearance and destruction of cluster munition remnants and related activities.

5. Each State Party in a position to do so shall provide assistance for the destruction of stockpiled cluster munitions, and shall also provide assistance to identify, assess and prioritise needs and practical measures in terms of marking, risk reduction education, protection of civilians and clearance and destruction as provided in Article 4 of this Convention.

6. Where, after entry into force of this Convention, cluster munitions have become cluster munition remnants located in areas under the jurisdiction or control of a State Party, each State Party in a position to do so shall urgently provide emergency assistance to the affected State Party.

7. Each State Party in a position to do so shall provide assistance for the implementation of the obligations referred to in Article 5 of this Convention to adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for social and economic inclusion of cluster munition victims. Such assistance may be provided, *inter alia*, through the United Nations system, international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent Societies and their International Federation, non-governmental organisations or on a bilateral basis.

8. Each State Party in a position to do so shall provide assistance to contribute to the economic and social recovery needed as a result of cluster munition use in affected States Parties.

9. Each State Party in a position to do so may contribute to relevant trust funds in order to facilitate the provision of assistance under this Article.

10. Each State Party that seeks and receives assistance shall take all appropriate measures in order to facilitate the timely and effective implementation of this Convention, including facilitation of the entry and exit of personnel, materiel and equipment, in a manner consistent with national laws and regulations, taking into consideration international best practices.

11. Each State Party may, with the purpose of developing a national action plan, request the United Nations system, regional organisations, other States Parties or other competent intergovernmental or non-governmental institutions to assist its authorities to determine, *inter alia*:

(a) The nature and extent of cluster munition remnants located in areas under its jurisdiction or control;
(b) The financial, technological and human resources required for the implementation of the plan;
(c) The time estimated as necessary to clear and destroy all cluster munition remnants located in areas under its jurisdiction or control;
(d) Risk reduction education programmes and awareness activities to reduce the incidence of injuries or deaths caused by cluster munition remnants;
(e) Assistance to cluster munition victims; and
(f) The coordination relationship between the government of the State Party concerned and the relevant governmental, intergovernmental or non-governmental entities that will work in the implementation of the plan.

12. States Parties giving and receiving assistance under the provisions of this Article shall cooperate with a view to ensuring the full and prompt implementation of agreed assistance programmes.

Article 7
Transparency measures

1. Each State Party shall report to the Secretary-General of the United Nations as soon as practicable, and in any event not later than 180 days after the entry into force of this Convention for that State Party, on:

(a) The national implementation measures referred to in Article 9 of this Convention;
(b) The total of all cluster munitions, including explosive submunitions, referred to in paragraph 1 of Article 3 of this Convention, to include a breakdown of their type, quantity and, if possible, lot numbers of each type;
(c) The technical characteristics of each type of cluster munition produced by that State Party prior to entry into force of this Convention for it, to the extent known, and those currently owned or possessed by it, giving, where reasonably possible, such categories of information as may facilitate identification and clearance of cluster munitions; at a minimum, this information shall include the dimensions, fusing, explosive content, metallic content, colour photographs and other information that may facilitate the clearance of cluster munition remnants;
(d) The status and progress of programmes for the conversion or decommissioning of production facilities for cluster munitions;
(e) The status and progress of programmes for the destruction, in accordance with Article 3 of this Convention, of cluster munitions, including explosive submunitions, with details of the methods that will be used in destruction, the location of all destruction sites and the applicable safety and environmental standards to be observed;
(f) The types and quantities of cluster munitions, including explosive submunitions, destroyed in accordance with Article 3 of this Convention, including details of the methods of destruction used, the location of the destruction sites and the applicable safety and environmental standards observed;
(g) Stockpiles of cluster munitions, including explosive submunitions, discovered after reported completion of the programme referred to in sub-paragraph (e) of this paragraph, and plans for their destruction in accordance with Article 3 of this Convention;
(h) To the extent possible, the size and location of all cluster munition contaminated areas under its jurisdiction or control, to include as much detail as possible regarding the type and quantity of each type of cluster munition remnant in each such area and when they were used;
(i) The status and progress of programmes for the clearance and destruction of all types and quantities of cluster munition remnants cleared and destroyed in accordance with Article 4 of this Convention, to include the size and location of the cluster munition contaminated area cleared and a breakdown of the quantity of each type of cluster munition remnant cleared and destroyed;
(j) The measures taken to provide risk reduction education and, in particular, an immediate and effective warning to civilians living in cluster munition contaminated areas under its jurisdiction or control;
(k) The status and progress of implementation of its obligations under Article 5 of this Convention to adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for social and economic inclusion of cluster munition victims and to collect reliable relevant data with respect to cluster munition victims;
(l) The name and contact details of the institutions mandated to provide information and to carry out the measures described in this paragraph;
(m) The amount of national resources, including financial, material or in kind, allocated to the implementation of Articles 3, 4 and 5 of this Convention; and
(n) The amounts, types and destinations of international cooperation and assistance provided under Article 6 of this Convention.

2. The information provided in accordance with paragraph 1 of this Article shall be updated by the States Parties annually, covering the previous calendar year, and

reported to the Secretary-General of the United Nations not later than 30 April of each year.

3. The Secretary-General of the United Nations shall transmit all such reports received to the States Parties.

Article 8
Facilitation and clarification of compliance

1. The States Parties agree to consult and cooperate with each other regarding the implementation of the provisions of this Convention and to work together in a spirit of cooperation to facilitate compliance by States Parties with their obligations under this Convention.

2. If one or more States Parties wish to clarify and seek to resolve questions relating to a matter of compliance with the provisions of this Convention by another State Party, it may submit, through the Secretary-General of the United Nations, a Request for Clarification of that matter to that State Party. Such a request shall be accompanied by all appropriate information. Each State Party shall refrain from unfounded Requests for Clarification, care being taken to avoid abuse. A State Party that receives a Request for Clarification shall provide, through the Secretary-General of the United Nations, within 28 days to the requesting State Party all information that would assist in clarifying the matter.

3. If the requesting State Party does not receive a response through the Secretary-General of the United Nations within that time period, or deems the response to the Request for Clarification to be unsatisfactory, it may submit the matter through the Secretary-General of the United Nations to the next Meeting of States Parties. The Secretary-General of the United Nations shall transmit the submission, accompanied by all appropriate information pertaining to the Request for Clarification, to all States Parties. All such information shall be presented to the requested State Party which shall have the right to respond.

4. Pending the convening of any Meeting of States Parties, any of the States Parties concerned may request the Secretary-General of the United Nations to exercise his or her good offices to facilitate the clarification requested.

5. Where a matter has been submitted to it pursuant to paragraph 3 of this Article, the Meeting of States Parties shall first determine whether to consider that matter further, taking into account all information submitted by the States Parties concerned. If it does so determine, the Meeting of States Parties may suggest to the States Parties concerned ways and means further to clarify or resolve the matter under consideration, including the initiation of appropriate procedures in conformity with international law. In circumstances where the issue at hand is determined to be due to circumstances beyond the control of the requested State Party, the Meeting of States Parties may recommend appropriate measures, including the use of cooperative measures referred to in Article 6 of this Convention.

6. In addition to the procedures provided for in paragraphs 2 to 5 of this Article, the Meeting of States Parties may decide to adopt such other general procedures or specific mechanisms for clarification of compliance, including facts, and resolution of instances of non-compliance with the provisions of this Convention as it deems appropriate.

Article 9
National implementation measures

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

Article 10
Settlement of disputes

1. When a dispute arises between two or more States Parties relating to the interpretation or application of this Convention, the States Parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of their choice, including recourse to the Meeting of States Parties and referral to the International Court of Justice in conformity with the Statute of the Court.

2. The Meeting of States Parties may contribute to the settlement of the dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties concerned to start the settlement procedure of their choice and recommending a time-limit for any agreed procedure.

Article 11
Meetings of States Parties

1. The States Parties shall meet regularly in order to consider and, where necessary, take decisions in respect of any matter with regard to the application or implementation of this Convention, including:

(a) The operation and status of this Convention;
(b) Matters arising from the reports submitted under the provisions of this Convention;
(c) International cooperation and assistance in accordance with Article 6 of this Convention;
(d) The development of technologies to clear cluster munition remnants;
(e) Submissions of States Parties under Articles 8 and 10 of this Convention; and
(f) Submissions of States Parties as provided for in Articles 3 and 4 of this Convention.

2. The first Meeting of States Parties shall be convened by the Secretary-General of the United Nations within one year of entry into force of this Convention. The subsequent meetings shall be convened by the Secretary-General of the United Nations annually until the first Review Conference.

3. States not party to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organisations may be invited to attend these meetings as observers in accordance with the agreed rules of procedure.

Article 12
Review Conferences

1. A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention. Further Review Conferences shall be convened by the Secretary-General of the United Nations if so requested by one or more States Parties, provided that the interval between Review Conferences shall in no case be less than five years. All States Parties to this Convention shall be invited to each Review Conference.

2. The purpose of the Review Conference shall be:
   (a) To review the operation and status of this Convention;
   (b) To consider the need for and the interval between further Meetings of States Parties referred to in paragraph 2 of Article 11 of this Convention; and
   (c) To take decisions on submissions of States Parties as provided for in Articles 3 and 4 of this Convention.

3. States not party to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organisations may be invited to attend each Review Conference as observers in accordance with the agreed rules of procedure.

Article 13
Amendments

1. At any time after its entry into force any State Party may propose amendments to this Convention. Any proposal for an amendment shall be communicated to the Secretary-General of the United Nations, who shall circulate it to all States Parties and shall seek their views on whether an Amendment Conference should be convened to consider the proposal. If a majority of the States Parties notify the Secretary-General of the United Nations no later than 90 days after its circulation that they support further consideration of the proposal, the Secretary-General of the United Nations shall convene an Amendment Conference to which all States Parties shall be invited.

2. States not party to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organisations may be invited to attend each Amendment Conference as observers in accordance with the agreed rules of procedure.

3. The Amendment Conference shall be held immediately following a Meeting of States Parties or a Review Conference unless a majority of the States Parties request that it be held earlier.

4. Any amendment to this Convention shall be adopted by a majority of two-thirds of the States Parties present and voting at the Amendment Conference. The Depositary shall communicate any amendment so adopted to all States.

5. An amendment to this Convention shall enter into force for States Parties that have accepted the amendment on the date of deposit of acceptances by a majority of the States which were Parties at the date of adoption of the amendment. Thereafter it shall enter into force for any remaining State Party on the date of deposit of its instrument of acceptance.

Article 14
Costs and administrative tasks

1. The costs of the Meetings of States Parties, the Review Conferences and the Amendment Conferences shall be borne by the States Parties and States not party to this Convention participating therein, in accordance with the United Nations scale of assessment adjusted appropriately.

2. The costs incurred by the Secretary-General of the United Nations under Articles 7 and 8 of this Convention shall be borne by the States Parties in accordance with the United Nations scale of assessment adjusted appropriately.

3. The performance by the Secretary-General of the United Nations of administrative tasks assigned to him or her under this Convention is subject to an appropriate United Nations mandate.

Article 15
Signature

This Convention, done at Dublin on 30 May 2008, shall be open for signature at Oslo by all States on 3 December 2008 and thereafter at United Nations Headquarters in New York until its entry into force.

Article 16
Ratification, acceptance, approval or accession

1. This Convention is subject to ratification, acceptance or approval by the Signatories.

2. It shall be open for accession by any State that has not signed the Convention.

3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

Article 17
Entry into force

1. This Convention shall enter into force on the first day of the sixth month after the month in which the thirtieth instrument of ratification, acceptance, approval or accession has been deposited.

2. For any State that deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the first day of the sixth month after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.

Article 18
Provisional application

Any State may, at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally Article 1 of this Convention pending its entry into force for that State.

Article 19
Reservations

The Articles of this Convention shall not be subject to reservations.

Article 20
Duration and withdrawal

1. This Convention shall be of unlimited duration.

2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating withdrawal.

3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six-month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.

Article 21
Relations with States not party to this Convention

1. Each State Party shall encourage States not party to this Convention to ratify, accept, approve or accede to this Convention, with the goal of attracting the adherence of all States to this Convention.

2. Each State Party shall notify the governments of all States not party to this Convention, referred to in paragraph 3 of this Article, of its obligations under this Convention, shall promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions.

3. Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.

4. Nothing in paragraph 3 of this Article shall authorise a State Party:
   (a) To develop, produce or otherwise acquire cluster munitions;
   (b) To itself stockpile or transfer cluster munitions;
   (c) To itself use cluster munitions; or
   (d) To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.

Article 22
Depositary

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention.

Article 23
Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of this Convention shall be equally authentic.

The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, 2008

THE MONTREUX DOCUMENT

On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict

Montreux, 17 September 2008

Preface

This document is the product of an initiative launched cooperatively by the Government of Switzerland and the International Committee of the Red Cross. It was developed with the participation of governmental experts from Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine, and the United States of America in meetings convened in January and November 2006, November 2007, and April and September 2008. Representatives of civil society and of the private military and security industry were consulted.

The following understandings guided the development of this document:

1. That certain well-established rules of international law apply to States in their relations with private military and security companies (PMSCs) and their operation during armed conflict, in particular under international humanitarian law and human rights law;

2. That this document recalls existing legal obligations of States and PMSCs and their personnel (Part One), and provides States with good practices to promote compliance with international humanitarian law and human rights law during armed conflict (Part Two);

3. That this document is not a legally binding instrument and does not affect existing obligations of States under customary international law or under international agreements to which they are parties, in particular their obligations under the Charter of the United Nations (especially its articles 2(4) and 51);

4. That this document should therefore not be interpreted as limiting, prejudicing or enhancing in any manner existing obligations under international law, or as creating or developing new obligations under international law;

5. That existing obligations and good practices may also be instructive for post-conflict situations and for other, comparable situations; however, that international humanitarian law is applicable only during armed conflict;

6. That cooperation, information sharing and assistance between States, commensurate with each State's capacities, is desirable in order to achieve full respect for international humanitarian law and human rights law; as is cooperative implementation with the private military and security industry and other relevant actors;

7. That this document should not be construed as endorsing the use of PMSCs in any particular circumstance but seeks to recall legal obligations and to recommend good practices if the decision has been made to contract PMSCs;

8. That while this document is addressed to States, the good practices may be of value for other entities such as international organizations, NGOs and companies that contract PMSCs, as well as for PMSCs themselves;

9. That for the purposes of this document:

   a) "PMSCs" are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.

b) "Personnel of a PMSC" are persons employed by, through direct hire or under a contract with, a PMSC, including its employees and managers.
c) "Contracting States" are States that directly contract for the services of PMSCs, including, as appropriate, where such a PMSC subcontracts with another PMSC.
d) "Territorial States" are States on whose territory PMSCs operate.
e) "Home States" are States of nationality of a PMSC, i.e. where a PMSC is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principal place of management is the "Home State".

The participating States commend this document to the attention of other States, international organizations, NGOs, the private military and security industry and other relevant actors, which are invited to adopt those good practices that they consider appropriate for their operations. The participating States invite other States and international organizations to communicate their support for this document to the Federal Department of Foreign Affairs of Switzerland. The participating States also declare their readiness to review and, if necessary, to revise this document in order to take into account new developments.

Part One
Pertinent international legal obligations relating to private military and security companies

Introduction

The following statements aim to recall certain existing international legal obligations of States regarding private military and security companies. The statements are drawn from various international humanitarian and human rights agreements and customary international law. This document, and the statements herein, do not create legal obligations. Each State is responsible for complying with the obligations it has undertaken pursuant to international agreements to which it is a party, subject to any reservations, understandings and declarations made, and to customary international law.

A. Contracting States

1. Contracting States retain their obligations under international law, even if they contract PMSCs to perform certain activities. If they are occupying powers, they have an obligation to take all measures in their power to restore, and ensure, as far as possible, public order and safety, i.e. exercise vigilance in preventing violations of international humanitarian law and human rights law.

2. Contracting States have an obligation not to contract PMSCs to carry out activities that international humanitarian law explicitly assigns to a State agent or authority, such as exercising the power of the responsible officer over prisoner-of-war camps or places of internment of civilians in accordance with the Geneva Conventions.

3. Contracting States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs they contract, in particular to:
   a) ensure that PMSCs that they contract and their personnel are aware of their obligations and trained accordingly;
   b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;
   c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means, such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.

4. Contracting States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.

5. Contracting States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave

breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.

6. Contracting States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

7. Although entering into contractual relations does not in itself engage the responsibility of Contracting States, the latter are responsible for violations of international humanitarian law, human rights law, or other rules of international law committed by PMSCs or their personnel where such violations are attributable to the Contracting State, consistent with customary international law, in particular if they are:
   a) incorporated by the State into their regular armed forces in accordance with its domestic legislation;
   b) members of organized armed forces, groups or units under a command responsible to the State;
   c) empowered to exercise elements of governmental authority if they are acting in that capacity (i.e. are formally authorized by law or regulation to carry out functions normally conducted by organs of the State); or
   d) in fact acting on the instructions of the State (i.e. the State has specifically instructed the private actor's conduct) or under its direction or control (i.e. actual exercise of effective control by the State over a private actor's conduct).

8. Contracting States have an obligation to provide reparations for violations of international humanitarian law and human rights law caused by wrongful conduct of the personnel of PMSCs when such conduct is attributable to the Contracting States in accordance with the customary international law of State responsibility.

B. Territorial States

9. Territorial States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs operating on their territory, in particular to:
   a) disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel;
   b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;
   c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.

10. Territorial States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.

11. Territorial States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.

12. Territorial States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

13. In situations of occupation, the obligations of Territorial States are limited to areas in which they are able to exercise effective control.

C. Home States

14. Home States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs of their nationality, in particular to:
   a) disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel;
   b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;
   c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as administrative or other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.

15. Home States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.

16. Home States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.

17. Home States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

D. All other States

18. All other States have an obligation, within their power, to ensure respect for international humanitarian law. They have an obligation to refrain from encouraging or assisting in violations of international humanitarian law by any party to an armed conflict.

19. All other States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations.

20. All other States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.

21. All other States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

E. PMSCs and their personnel

22. PMSCs are obliged to comply with international humanitarian law or human rights law imposed upon them by applicable national law, as well as other applicable national law such as criminal law, tax law, immigration law, labour law, and specific regulations on private military or security services.

23. The personnel of PMSCs are obliged to respect the relevant national law, in particular the national criminal law, of the State in which they operate, and, as far as applicable, the law of the States of their nationality.

24. The status of the personnel of PMSCs is determined by international humanitarian law, on a case-by-case basis, in particular according to the nature and circumstances of the functions in which they are involved.

25. If they are civilians under international humanitarian law, the personnel of PMSCs may not be the object of attack, unless and for such time as they directly participate in hostilities.

26. The personnel of PMSCs:
    a) are obliged, regardless of their status, to comply with applicable international humanitarian law;
    b) are protected as civilians under international humanitarian law, unless they are incorporated into the regular armed forces of a State or are members of organized armed forces, groups or units under a command responsible to the State; or otherwise lose their protection as determined by international humanitarian law;
    c) are entitled to prisoner-of-war status in international armed conflict if they are persons accompanying the armed forces meeting the requirements of article 4A(4) of the Third Geneva Convention;

    d) to the extent they exercise governmental authority, have to comply with the State's obligations under international human rights law;
    e) are subject to prosecution if they commit conduct recognized as crimes under applicable national or international law.

F. Superior responsibility

27. Superiors of PMSC personnel, such as:
    a) governmental officials, whether they are military commanders or civilian superiors, or
    b) directors or managers of PMSCs, may be liable for crimes under international law committed by PMSC personnel under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law. Superior responsibility is not engaged solely by virtue of a contract.

Part Two
Good practices relating to private military and security companies

Introduction

This Part contains a description of good practices that aims to provide guidance and assistance to States in ensuring respect for international humanitarian law and human rights law and otherwise promoting responsible conduct in their relationships with PMSCs operating in areas of armed conflict. They may also provide useful guidance for States in their relationships with PMSCs operating outside of areas of armed conflict.

The good practices do not have legally binding effect and are not meant to be exhaustive. It is understood that a State may not have the capacity to implement all the good practices, and that no State has the legal obligation to implement any particular good practice, whether that State is a Contracting State, a Territorial State, or a Home State. States are invited to consider these good practices in defining their relationships with PMSCs, recognizing that a particular good practice may not be appropriate in all circumstances and emphasizing that this Part is not meant to imply that States should necessarily follow all these practices as a whole.

The good practices are intended, *inter alia*, to assist States to implement their obligations under international humanitarian law and human rights law. However, in considering regulation, States may also need to take into account obligations they have under other branches of international law, including as members of international organizations such as the United Nations, and under international law relating to trade and government procurement. They may also need to take into account bilateral agreements between Contracting States and Territorial States. Moreover, States are encouraged to fully implement relevant provisions of international instruments to which they are Parties, including anti-corruption, anti-organized crime and firearms conventions. Furthermore, any of these good practices will need to be adapted in practice to the specific situation and the State's legal system and capacity.

A. Good practices for Contracting States

States contemplating to contract PMSCs should evaluate whether their legislation, as well as procurement and contracting practices, are adequate for contracting PMSCs. This is particularly relevant where Contracting States use the services of a PMSC in a State where law enforcement or regulatory capacities are compromised.

In many instances, the good practices for Contracting States may also indicate good practices for other clients of PMSCs, such as international organizations, NGOs and companies.

In this sense, good practices for Contracting States include the following:

I. Determination of services

1. To determine which services may or may not be contracted out to PMSCs; in determining which services may not be contracted out, Contracting States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

II. Procedure for the selection and contracting of PMSCs

2. To assess the capacity of the PMSC to carry out its activities in conformity with relevant national law, international humanitarian law and international human rights law, taking into account the inherent risk associated with the services to be performed, for instance by:
   a) acquiring information relating to the principal services the PMSC has provided in the past;
   b) obtaining references from clients for whom the PMSC has previously provided similar services to those the Contracting State is seeking to acquire;
   c) acquiring information relating to the PMSC's ownership structure and conducting background checks on the PMSC and its superior personnel, taking into account relations with subcontractors, subsidiary corporations and ventures.

3. To provide adequate resources and draw on relevant expertise for selecting and contracting PMSCs.

4. To ensure transparency and supervision in the selection and contracting of PMSCs. Relevant mechanisms may include:
   a) public disclosure of PMSC contracting regulations, practices and processes;
   b) public disclosure of general information about specific contracts, if necessary redacted to address national security, privacy and commercial confidentiality requirements;
   c) publication of an overview of incident reports or complaints, and sanctions taken where misconduct has been proven; if necessary redacted to address national security, privacy and commercial confidentiality requirements;
   d) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies.

III. Criteria for the selection of PMSCs

5. To adopt criteria that include quality indicators relevant to ensuring respect for relevant national law, international humanitarian law and human rights law, as set out in good practices 6 to 13. Contracting States should consider ensuring that lowest price not be the only criterion for the selection of PMSCs.

6. To take into account, within available means, the past conduct of the PMSC and its personnel, which includes ensuring that the PMSC has:
   a) no reliably attested record of involvement in serious crime (including organized crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its personnel had engaged in past unlawful conduct, has appropriately remedied such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and, where appropriate and consistent with findings of wrongdoing, providing individuals injured by their conduct with appropriate reparation;
   b) conducted comprehensive inquiries within applicable law regarding the extent to which any of its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably attested record of not having been involved in serious crime or have not been dishonourably discharged from armed or security forces;
   c) not previously been rejected from a contract due to misconduct of the PMSC or its personnel.

7. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.

8. To take into account whether it and its personnel possess or are in the process of obtaining requisite registrations, licenses or authorizations.

9. To take into account whether it maintains accurate and up-to-date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by the Contracting State and other appropriate authorities.

10. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law; and to establish goals to facilitate uniformity and standardization of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:
    a) rules on the use of force and firearms;
    b) international humanitarian law and human rights law;
    c) religious, gender, and cultural issues, and respect for the local population;
    d) handling complaints by the civilian population, in particular by transmitting them to the appropriate authority;
    e) measures against bribery, corruption, and other crimes.

    Contracting States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.

11. To take into account whether the PMSC:
    a) acquires its equipment, in particular its weapons, lawfully;
    b) uses equipment, in particular weapons, that is not prohibited by international law;
    c) has complied with contractual provisions concerning return and/or disposal of weapons and ammunition.

12. To take into account the PMSC's internal organization and regulations, such as:
    a) the existence and implementation of policies relating to international humanitarian law and human rights law, especially on the use of force and firearms, as well as policies against bribery, corruption, and other crimes;
    b) the existence of monitoring and supervisory as well as internal accountability mechanisms, such as:
        i. internal investigation and disciplinary arrangements in case of allegations of wrong-doing by its personnel;
        ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaint mechanisms and whistle-blower protection arrangements; and
        iii. regular performance reporting, specific incident reporting, and reporting on demand to the Contracting State and under certain circumstances other appropriate authorities;
        iv. requiring PMSC personnel and its subcontracted personnel to report any misconduct to the PMSC's management or a competent authority.

13. To consider the respect of the PMSC for the welfare of its personnel, as protected by labour law and other relevant national law. Relevant factors may include:
    a) providing personnel a copy of any contract to which they are party in a language they understand;
    b) providing personnel with adequate pay and remuneration arrangements commensurate to their responsibilities and working conditions;
    c) adopting operational safety and health policies;
    d) ensuring personnel unrestricted access to their own travel documents; and
    e) preventing unlawful discrimination in employment.

IV. Terms of contract with PMSCs

14. To include contractual clauses and performance requirements that ensure respect for relevant national law, international humanitarian law and human rights law by the contracted PMSC. Such clauses, reflecting and implementing the quality indicators referred to above as selection criteria, may include:
    a) past conduct (good practice 6);
    b) financial and economic capacity (good practice 7);

    c) possession of required registration, licenses or authorizations (good practice 8);
    d) personnel and property records (good practice 9);
    e) training (good practice 10);
    f) lawful acquisition and use of equipment, in particular weapons (good practice 11);
    g) internal organization and regulation and accountability (good practice 12);
    h) welfare of personnel (good practice 13);

    Contractual clauses may also provide for the Contracting State's ability to terminate the contract for failure to comply with contractual provisions. They may also specify the weapons required for contract performance, that PMSCs obtain appropriate visas or other authorizations from the Territorial State, and that appropriate reparation be provided to those harmed by the misconduct of PMSCs and their personnel.

15. To require by contract that the conduct of any subcontracted PMSC is in conformity with relevant national law, international humanitarian law and international human rights law, including by:
    a) establishing the criteria and qualifications for the selection and ongoing employment of subcontracted PMSCs and personnel;
    b) requiring the PMSC to demonstrate that subcontractors comply with equivalent requirements as the PMSC initially contracted by the Contracting State;
    c) ensuring that the PMSC is liable, as appropriate and within applicable law, for the conduct of its subcontractors.

16. To require, if consistent with force protection requirements and safety of the assigned mission, that the personnel of the PMSC be personally identifiable whenever they are carrying out activities in discharge of their responsibilities under a contract. Identification should:
    a) be visible from a distance where mission and context allow, or consist of a non-transferable identification card that is shown upon demand;
    b) allow for a clear distinction between a PMSC's personnel and the public authorities in the State where the PMSC operates.

    The same should apply to all means of transport used by PMSCs.

17. To consider pricing and duration of a specific contract as a way to promote relevant international humanitarian law and human rights law. Relevant mechanisms may include:
    a) securities or bonds for contractual performance;
    b) financial rewards or penalties and incentives;
    c) opportunities to compete for additional contracts.

18. To require, in consultation with the Territorial State, respect for relevant regulations and rules of conduct by PMSCs and their personnel, including rules on the use of force and firearms, such as:
    a) using force and firearms only when necessary in self-defence or defence of third persons;
    b) immediate reporting to and cooperation with competent authorities, including the appropriate contracting official, in the case of use of force and firearms.

V. Monitoring compliance and ensuring accountability

19. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, to consider establishing:
    a) corporate criminal responsibility for crimes committed by the PMSC, consistent with the Contracting State's national legal system;
    b) criminal jurisdiction over serious crimes committed by PMSC personnel abroad.

20. To provide for non-criminal accountability mechanisms for improper or unlawful conduct of PMSCs and their personnel, including:
    a) contractual sanctions commensurate to the conduct, including :
        i. immediate or graduated termination of the contract;
        ii. financial penalties;
        iii. removal from consideration for future contracts, possibly for a set time period;
        iv. removal of individual wrongdoers from the performance of the contract;
    b) referral of the matter to competent investigative authorities;
    c) providing for civil liability, as appropriate.

21. To provide for, in addition to the measures in good practices 19 and 20, appropriate administrative and other monitoring mechanisms to ensure the proper execution of the contract and the accountability of contracted PMSCs and their personnel for their improper and unlawful conduct; in particular to:
    a) ensure that those mechanisms are adequately resourced and have independent audit and investigation capacity;
    b) provide Contracting State government personnel on site with the capacity and authority to oversee proper execution of the contract by the PMSC and the PMSC's subcontractors;
    c) train relevant government personnel, such as military personnel, for foreseeable interactions with PMSC personnel;
    d) collect information concerning PMSCs and personnel contracted and deployed, and on violations and investigations concerning their alleged improper and unlawful conduct;
    e) establish control arrangements, allowing it to veto or remove particular PMSC personnel during contractual performance;
    f) engage PMSCs, Territorial States, Home States, trade associations, civil society and other relevant actors to foster information sharing and develop such mechanisms.

22. When negotiating agreements with Territorial States which contain rules affecting the legal status of and jurisdiction over PMSCs and their personnel:
    a) to consider the impact of the agreements on the compliance with national laws and regulations;
    b) to address the issue of jurisdiction and immunities to ascertain proper coverage and appropriate civil, criminal, and administrative remedies for misconduct, in order to ensure accountability of PMSCs and their personnel.

23. To cooperate with investigating or regulatory authorities of Territorial and Home States, as appropriate, in matters of common concern regarding PMSCs.

B. Good practices for Territorial States

The following good practices aim to provide guidance to Territorial States for governing the supply of military and security services by PMSCs and their personnel on their territory. Territorial States should evaluate whether their domestic legal framework is adequate to ensure that the conduct of PMSCs and their personnel is in conformity with relevant national law, international humanitarian law and human rights law or whether it needs to establish further arrangements to regulate the activities of PMSCs.

Acknowledging the particular challenges faced by Territorial States in armed conflict, Territorial States may accept information provided by the Contracting State concerning the ability of a PMSC to carry out its activities in conformity with international humanitarian law, human rights law and relevant good practices.

In this sense, good practices for Territorial States include the following:

I. Determination of services

24. To determine which services may or may not be carried out on their territory by PMSCs or their personnel; in determining which services may not be carried out, Territorial States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

II. Authorization to provide military and security services

25. To require PMSCs to obtain an authorization to provide military and security services in their territory ("authorization"), including by requiring:
    a) PMSCs to obtain an operating license valid for a limited and renewable period ("corporate operating license"), or for specific services ("specific operating license"), taking into account the fulfilment of the quality criteria set out in good practices 31 to 38; and/or;
    b) individuals to register or obtain a license in order to carry out military or security services for PMSCs.

III. Procedure with regard to authorizations

26. To designate a central authority competent for granting authorizations.

27. To allocate adequate resources and trained personnel to handle authorizations properly and timely.

28. To assess, in determining whether to grant an authorization, the capacity of the PMSC to carry out its activities in conformity with relevant national law, international humanitarian law and international human rights law, taking into account the inherent risk associated with the services to be performed, for instance by:
    a) acquiring information relating to the principal services the PMSC has provided in the past;
    b) obtaining references from clients for whom the PMSC has previously provided similar services or clients in the Territorial State;
    c) acquiring information relating to the PMSC's ownership structure and conduct background checks on the PMSC and its personnel, taking into account relations with subcontractors, subsidiary corporations and ventures, or obtain information from the Contracting State on these matters.

29. To ensure transparency with regard to authorizations. Relevant mechanisms may include:
    a) public disclosure of authorization regulations and procedures;
    b) public disclosure of general information on granted authorizations, including on the identity of authorized PMSCs and their number of personnel, if necessary redacted to address national security, privacy and commercial confidentiality requirements;
    c) publication of an overview of incident reports or complaints, and sanctions taken where misconduct has been proven; if necessary redacted to address national security, privacy and commercial confidentiality requirements;
    d) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies;
    e) publishing and adhering to fair and non-discriminatory fee schedules for authorizations.

IV. Criteria for granting an authorization

30. To ensure that PMSCs fulfil certain quality criteria relevant for the respect of relevant national law, international humanitarian law and human rights law by the PMSC and its personnel, including those set out below.

31. To require that the conduct of PMSCs and of any PMSC subcontracted is in conformity with relevant national law, international humanitarian law and international human rights law,

which includes ensuring that:
a) the PMSC notifies any subcontracting of military and security services to the authorization authority;
b) the PMSC can demonstrate that its subcontractors comply with equivalent requirements as the PMSC which initially obtained an authorization by the Territorial State;
c) the subcontractor is in possession of an authorization;
d) the PMSC initially granted authorization is liable, as appropriate and within applicable law, for the conduct of its subcontractors.

32. To take into account, within available means, the past conduct of the PMSC and its personnel, which includes ensuring that the PMSC has:
a) no reliably attested record of involvement in serious crime (including organized crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its personnel had engaged in past unlawful conduct, has appropriately dealt with such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and where appropriate and consistent with findings of wrongdoing, providing individuals injured by their conduct with appropriate reparation;
b) conducted comprehensive inquiries within applicable law regarding the extent to which any of its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably attested record of not having been involved in serious crime or have not been dishonourably discharged from armed or security forces;
c) not previously had an operating license revoked for misconduct of the PMSC or its personnel.

33. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.

34. To take into account whether the PMSC maintains accurate and up-to-date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by the Territorial State and other authorities.

35. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law; and to establish goals to facilitate uniformity and standardization of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:
a) rules on the use of force and weapons;
b) international humanitarian law and human rights law;
c) religious, gender, and cultural issues, and respect for the local population;
d) complaints handling;
e) measures against bribery, corruption, and other crimes.

Territorial States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.

36. Not to grant an authorization to a PMSC whose weapons are acquired unlawfully or whose use is prohibited by international law.

37. To take into account the PMSC's internal organization and regulations, such as:
a) the existence and implementation of policies relating to international humanitarian law and human rights law, especially on the use of force and firearms, as well as policies against bribery and corruption;
b) the existence of monitoring and supervisory measures as well as internal accountability mechanisms, such as:

i. internal investigation and disciplinary arrangements in case of allegations of wrongdoing by its personnel;
ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaints mechanisms and whistle-blower protection arrangements;
iii. regular reporting on the performance of the assignment and/or specific incident reporting;
iv. requiring PMSC personnel and its subcontracted personnel to report any misconduct to the PMSC's management or a competent authority.

38. To consider the respect of the PMSC for the welfare of its personnel.

39. To take into account, in considering whether to grant a license or to register an individual, good practices 32 (past conduct) and 35 (training).

V. Terms of authorization

40. To include clauses to ensure that the conduct of the PMSC and its personnel is continuously in conformity with relevant national law, international humanitarian law and international human rights law. The authorization includes, where appropriate, clauses requiring the PMSC and its personnel to implement the quality criteria referred to above as criteria for granting general and/or specific operating licenses and relating to:
a) past conduct (good practice 32);
b) financial and economic capacity (good practice 33);
c) personnel and property records (good practice 34);
d) training (good practice 35);
e) lawful acquisitions (good practice 36);
f) internal organization and regulation and accountability (good practice 37);
g) welfare of personnel (good practice 38);

41. To require the PMSC to post a bond that would be forfeited in case of misconduct or non-compliance with the authorization, provided that the PMSC has a fair opportunity to rebut allegations and address problems.

42. To determine, when granting a specific operating license, a maximum number of PMSC personnel and equipment understood to be necessary to provide the services.

VI. Rules on the provision of services by PMSCs and their personnel

43. To have in place appropriate rules on the use of force and firearms by PMSCs and their personnel, such as:
a) using force and firearms only when necessary in self-defence or defence of third persons;
b) immediately reporting to and cooperation with competent authorities in the case of use of force and firearms.

44. To have in place appropriate rules on the possession of weapons by PMSCs and their personnel, such as:
a) limiting the types and quantity of weapons and ammunition that a PMSC may import, possess or acquire;
b) requiring the registration of weapons, including their serial number and calibre, and ammunition, with a competent authority;
c) requiring PMSC personnel to obtain an authorization to carry weapons that is shown upon demand;
d) limiting the number of employees allowed to carry weapons in a specific context or area;
e) requiring the storage of weapons and ammunition in a secure and safe facility when personnel are off duty;
f) requiring that PMSC personnel carry authorized weapons only while on duty;

g) controlling the further possession and use of weapons and ammunition after an assignment is completed, including return to point of origin or other proper disposal of weapons and ammunition.

45. To require, if consistent with force protection requirements and safety of the assigned mission, that the personnel of the PMSC be personally identifiable whenever they are carrying out activities in discharge of their responsibilities under a contract. Identification should:
    a) be visible from a distance where mission and context allow, or consist of a non-transferable identification card that is shown upon demand;
    b) allow for a clear distinction between a PMSC's personnel and the public authorities in the State where the PMSC operates.

    The same should apply to all means of transportation used by PMSCs.

VII. Monitoring compliance and ensuring accountability

46. To monitor compliance with the terms of the authorization, in particular:
    a) establish or designate an adequately resourced monitoring authority;
    b) ensure that the civilian population is informed about the rules of conduct by which PMSC have to abide and available complaint mechanisms;
    c) requesting local authorities to report on misconduct by PMSCs or their personnel;
    d) investigate reports of wrongdoing.

47. To provide a fair opportunity for PMSCs to respond to allegations that they have operated without or in violation of an authorization.

48. To impose administrative measures, if it is determined that a PMSC has operated without or in violation of an authorization; such measures may include:
    a) revocation or suspension of the authorization or putting the PMSC on notice of either of these steps in case remedial measures are not taken within a set period of time;
    b) removing specific PMSC personnel under the penalty of revoking or suspending the authorization;
    c) prohibition to re-apply for an authorization in the future or for a set period of time;
    d) forfeiture of bonds or securities;
    e) financial penalties.

49. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, to consider establishing corporate criminal responsibility for crimes committed by the PMSC, consistent with the Territorial State's national legal system.

50. To provide for non-criminal accountability mechanisms for improper and unlawful conduct of PMSC and its personnel, including:
    a) providing for civil liability;
    b) otherwise requiring PMSCs, or their clients, to provide reparation to those harmed by the misconduct of PMSCs and their personnel.

51. When negotiating agreements with Contracting States which contain rules affecting the legal status of and jurisdiction over PMSCs and their personnel:
    a) to consider the impact of the agreements on the compliance with national laws and regulations;
    b) to address the issue of jurisdiction and immunities to ascertain proper coverage and appropriate civil, criminal, and administrative remedies for misconduct, in order to ensure accountability of PMSCs and their personnel.

52. To cooperate with investigating and regulatory authorities of Contracting and Home States in matters of common concern regarding PMSCs.

C. Good practices for Home States

The following good practices aim to provide guidance to Home States for governing the supply of military and security services by PMSCs and their personnel abroad ("export"). It is recognized that other good practices for regulation – such as regulation of standards through trade associations and through international cooperation – will also provide guidance for regulating PMSCs, but have not been elaborated here.

In this understanding, Home States should evaluate whether their domestic legal framework, be it central or federal, is adequately conducive to respect for relevant international humanitarian law and human rights law by PMSCs and their personnel, or whether, given the size and nature of their national private military and security industry, additional measures should be adopted to encourage such respect and to regulate the activities of PMSCs. When considering the scope and nature of any licensing or regulatory regime, Home States should take particular notice of regulatory regimes by relevant Contracting and Territorial States, in order to minimize the potential for duplicative or overlapping regimes and to focus efforts on areas of specific concern for Home States.

In this sense, good practices for Home States include the following:

I. Determination of services

53. To determine which services of PMSCs may or may not be exported; in determining which services may not be exported, Home States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

II. Establishment of an authorization system

54. To consider establishing an authorization system for the provision of military and security services abroad through appropriate means, such as requiring an operating license valid for a limited and renewable period ("corporate operating license"), for specific services ("specific operating license"), or through other forms of authorization ("export authorization"). If such a system of authorization is established, the good practices 57 to 67 set out the procedure, quality criteria and terms that may be included in such a system.

55. To have in place appropriate rules on the accountability, export, and return of weapons and ammunition by PMSCs.

56. To harmonize their authorization system and decisions with those of other States and taking into account regional approaches relating to authorization systems.

III. Procedure with regard to authorizations

57. To assess the capacity of the PMSC to carry out its activities in respect of relevant national law, international humanitarian law and international human rights law, taking into account the inherent risk associated with the services to be performed, for instance by:
    a) acquiring information relating to the principal services the PMSC has provided in the past;
    b) obtaining references from clients for whom the PMSC has previously provided similar services or clients in the Territorial State;
    c) acquiring information relating to the PMSC's ownership structure and conduct background checks on the PMSC and its personnel, taking into account relations with subcontractors, subsidiary corporations and ventures.

58. To allocate adequate resources and trained personnel to handle authorizations properly and timely.

59. To ensure transparency with regard to the authorization procedure. Relevant mechanisms may include:

a) public disclosure of authorization regulations and procedures;
b) public disclosure of general information on specific authorizations, if necessary redacted to address national security, privacy and commercial confidentiality requirements;
c) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies;
d) publishing and adhering to fair and non-discriminatory fee schedules.

IV. Criteria for granting an authorization

60. To take into account the past conduct of the PMSC and its personnel, which include ensuring that the PMSC has:
    a) no reliably attested record of involvement in serious crime (including organized crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its personnel had engaged in past unlawful conduct, has appropriately dealt with such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and where appropriate and consistent with findings of wrongdoing, providing individuals injured by their conduct with appropriate reparation;
    b) conducted comprehensive inquiries within applicable law regarding the extent to which its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably attested record of not having been involved in serious crime or have not been dishonourably discharged from armed or security forces;
    c) not previously had an authorization revoked for misconduct of the PMSC or its personnel.

61. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.

62. To take into account whether the PMSC maintains accurate and up-to-date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by competent authorities.

63. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law; and to establish goals to facilitate uniformity and standardization of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:
    a) rules on the use of force and firearms;
    b) international humanitarian law and human rights law;
    c) religious, gender, and cultural issues, and respect for the local population;
    d) complaints handling;
    e) measures against bribery, corruption and other crimes.

    Home States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.

64. To take into account whether the PMSC's equipment, in particular its weapons, is acquired lawfully and its use is not prohibited by international law.

65. To take into account the PMSC's internal organization and regulations, such as:
    a) the existence and implementation of policies relating to international humanitarian law and human rights law;
    b) the existence of monitoring and supervisory as well as internal accountability mechanisms, such as:
        i. internal investigation and disciplinary arrangements in case of allegations of wrong-doing by its personnel;

        ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaints mechanisms and whistle-blower protection arrangements.

66. To consider the respect of the PMSC for the welfare of its personnel as protected by labour law and other relevant national law.

V. Terms of authorization granted to PMSCs

67. To include clauses to ensure that the conduct of the PMSC and its personnel respect relevant national law, international humanitarian law and international human rights law. Such clauses, reflecting and implementing the quality criteria referred to above as criteria for granting authorizations, may include:
    a) past conduct (good practice 60);
    b) financial and economic capacity (good practice 61);
    c) personnel and property records (good practice 62);
    d) training (good practice 62);
    e) lawful acquisitions (good practice 64);
    f) internal organization and regulation and accountability (good practice 65);
    g) welfare of personnel (good practice 66).

VI. Monitoring compliance and ensuring accountability

68. To monitor compliance with the terms of the authorization, in particular by establishing close links between its authorities granting authorizations and its representatives abroad and/or with the authorities of the Contracting or Territorial State.

69. To impose sanctions for PMSCs operating without or in violation of an authorization, such as:
    a) revocation or suspension of the authorization or putting the PMSC on notice of either of these steps in case remedial measures are not taken within a set period of time;
    b) prohibition to re-apply for an authorization in the future or for a set period of time;
    c) civil and criminal fines and penalties.

70. To support Territorial States in their efforts to establish effective monitoring over PMSCs.

71. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, consider establishing:
    a) corporate criminal responsibility for crimes committed by the PMSC, consistent with the Home State's national legal system;
    b) criminal jurisdiction over serious crimes committed by PMSC personnel abroad.

72. To provide for non-criminal accountability mechanisms for improper and unlawful conduct of PMSCs and their personnel, including:
    a) providing for civil liability;
    b) otherwise requiring PMSCs to provide reparation to those harmed by the misconduct of PMSCs and their personnel.

73. To cooperate with investigating or regulatory authorities of Contracting and Territorial States, as appropriate, in matters of common concern regarding PMSCs.

Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Committee of the Red Cross, 2009

INTERPRETIVE GUIDANCE ON THE NOTION OF

DIRECT PARTICIPATION IN HOSTILITIES

UNDER INTERNATIONAL HUMANITARIAN LAW

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FOREWORD

The protection of civilians is one of the main goals of international humanitarian law. Pursuant to its rules on the conduct of hostilities, the civilian population and individual civilians enjoy general protection against the effects of hostilities. Accordingly, the law obliges the parties to an armed conflict to distinguish, at all times, between the civilian population and combatants and to direct operations only against military targets. It also provides that civilians may not be the object of deliberate attack. In the same vein, humanitarian law mandates that civilians must be humanely treated if and when they find themselves in the hands of the enemy. This overarching norm finds expression in many provisions of humanitarian law, including those prohibiting any form of violence to life, as well as torture or cruel, inhuman or degrading treatment.

Unusual as it may seem today, the comprehensive protection of civilians was not always a main focus of international humanitarian law. Its origins, at least in terms of treaty rules, lie at a time when civilian populations were largely spared from the direct effects of hostilities and actual fighting was carried out only by combatants. In 1864, when the first Geneva Convention was adopted, armies faced off on battlefields with clearly drawn frontlines. It was the suffering of soldiers, often tens of thousands of them who lay wounded or dying after a military engagement, that needed to be alleviated. Only later, when technological innovations in weaponry started causing massive civilian suffering and casualties in war, did the protection of civilians also need to be addressed.

Over time, and particularly after the Second World War, the law also had to regulate the consequences of more and more frequent direct participation by civilians in hostilities. Two situations were emblematic: first, wars of national liberation in which government forces faced off against "irregular" armed formations fighting for the freedom of colonized populations. In 1977, Additional Protocol I recognized that such wars could under certain circumstances be deemed international in character. A second situation has become prevalent and remains of great concern today: armed conflicts not of an international character waged between government forces and organized non-State armed groups, or between such groups, for political, economic, or other reasons. It hardly needs to be said that these types of conflict, in which parts of the civilian population are effectively transformed into fighting forces, and in which civilians are also the main victims, continue to cause untold loss of life, injury and destruction.

International humanitarian law has addressed the trend towards increased civilian participation in hostilities by providing a basic rule, found in both Additional Protocols to the Geneva Conventions, pursuant to which civilians benefit from protection against direct attack "unless and for such time as they take a direct part in hostilities". It is the meaning of this notion – direct participation in hostilities – that the present Interpretive Guidance seeks to explain. In examining the notion of direct participation in hostilities the ICRC not only had to face longstanding dilemmas that had surrounded its practical application (e.g., can a person be a protected farmer by day and a targetable fighter at night?), but also had to grapple with more recent trends that further underlined the need for clarity. One such trend has been a marked shift in the conduct of hostilities into civilian population centres, including cases of urban warfare, characterized by an unprecedented intermingling of civilians and armed actors. Another has been the increased outsourcing of previously traditional military functions to a range of civilian personnel such as private contractors or civilian government employees, which has made distinguishing between those who enjoy protection from direct attack and those who do not ever more difficult. A third, particularly worrying trend has been the failure of persons directly participating in hostilities, whether civilians or members of armed forces or groups, to adequately distinguish themselves from the civilian population.

The Interpretive Guidance provides a legal reading of the notion of "direct participation in hostilities" with a view to strengthening the implementation of the principle of distinction. In order for the prohibition

of directing attacks against civilians to be fully observed, it is necessary that the armed forces of parties to an armed conflict – whether international or non-international – be distinguished from civilians, and that civilians who never take a direct part in hostilities be distinguished from those who do so on an individual, sporadic or unorganized basis only. The present text seeks to facilitate these distinctions by providing guidance on the interpretation of international humanitarian law relating to the notion of direct participation in hostilities. In so doing, it examines three questions: who is considered a civilian for the purposes of the principle of distinction, what conduct amounts to direct participation in hostilities and what modalities govern the loss of protection against direct attack.

The responses provided and the resulting interpretations included in the Interpretive Guidance tackle one of the most difficult, but as yet unresolved issues of international humanitarian law. The ICRC initiated reflection on the notion of direct participation in hostilities based both on the need to enhance the protection of civilians in practice for humanitarian reasons and on the international mandate it has been given to work for the better understanding and faithful application of international humanitarian law. In this context, it is appropriate that three observations be made: First, the Interpretive Guidance is an expression solely of the ICRC's views. While international humanitarian law relating to the notion of direct participation in hostilities was examined over several years with a group of eminent legal experts, to whom the ICRC owes a huge debt of gratitude, the positions enunciated are the ICRC's alone. Second, while reflecting the ICRC's views, the Interpretive Guidance is not and cannot be a text of a legally binding nature. Only State agreements (treaties) or State practice followed out of a sense of legal obligation on a certain issue (custom) can produce binding law. Third, the Guidance does not purport to change the law, but provides an interpretation of the notion of direct participation in hostilities within existing legal parameters.

The present text interprets the notion of direct participation in hostilities for the purposes of the conduct of hostilities only. Thus, apart from providing guidance on when and for how long a person is considered to have lost protection from direct attack, it does not address the consequences of direct participation in hostilities once he or she finds himself or herself in the adversary's hands. Other rules of international humanitarian law then govern, foremost among them being the already mentioned principle of humane treatment.

Unfortunately, there seems to be little reason to believe that the current trend towards increased civilian participation in hostilities will weaken over time. Today, more than ever, it is of the utmost importance that all feasible measures be taken to prevent the exposure of the civilian population to erroneous or arbitrary targeting based, among other things, on reliable guidance as to how to the principle of distinction should be implemented in the challenging and complex circumstances of contemporary warfare. By presenting this Interpretive Guidance, the ICRC hopes to make a contribution to ensuring that those who do not take a direct part in hostilities receive the humanitarian protection that they are entitled to under international humanitarian law.

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

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International Committee of the Red Cross
February 2009

INTRODUCTION

1. PURPOSE AND NATURE OF THE INTERPRETIVE GUIDANCE

The purpose of the Interpretive Guidance is to provide recommendations concerning the interpretation of international humanitarian law (IHL) as far as it relates to the notion of direct participation in hostilities. Accordingly, **the 10 recommendations made by the Interpretive Guidance, as well as the accompanying commentary, do not endeavour to change binding rules of customary or treaty IHL, but reflect the ICRC's institutional position as to how existing IHL should be interpreted** in light of the circumstances prevailing in contemporary armed conflicts.

The Interpretive Guidance draws on a variety of sources including, first and foremost, the rules and principles of customary and treaty IHL and, where necessary, the *travaux préparatoires* of treaties, international jurisprudence, military manuals, and standard works of legal doctrine. Additionally, it draws on the wealth of materials produced in the course of an expert process, jointly initiated by the ICRC and the TMC Asser Institute with the aim of clarifying the notion of direct participation in hostilities under IHL.[1] Five informal expert meetings were conducted from 2003 to 2008 in The Hague and Geneva, each bringing together 40 to 50 legal experts from academic, military, governmental, and non-governmental circles, all of whom participated in their private capacity.[2]

The Interpretive Guidance is widely informed by the discussions held during these expert meetings but does not necessarily reflect a unanimous view or majority opinion of the experts. It endeavours to propose a balanced and practical solution that takes into account the wide variety

1 All materials produced in the course of the expert process, such as reports, background documents etc., will be available at: www.icrc.org.
2 For more information on the expert process, see the document *Overview of the ICRC's Expert Process (2003-2008).*

of concerns involved and, at the same time, ensures a clear and coherent interpretation of the law consistent with the purposes and principles of IHL. **Ultimately, the responsibility for the Interpretive Guidance is assumed by the ICRC as a neutral and independent humanitarian organization mandated by the international community of States to promote and work for a better understanding of IHL.**[3] Although a legally binding interpretation of IHL can only be formulated by a competent judicial organ or, collectively, by the States themselves, the ICRC hopes that the comprehensive legal analysis and the careful balance of humanitarian and military interests underlying the Interpretive Guidance will render the resulting recommendations persuasive for States, non-State actors, practitioners, and academics alike.

The Interpretive Guidance consists of 10 recommendations, each of which summarizes the ICRC's position on the interpretation of IHL on a particular legal question, and a commentary explaining the bases of each recommendation. Throughout the text, particularly where major divergences of opinion persisted among the experts, footnotes refer to the passages of the expert meeting reports and background documents where the relevant discussions were recorded. **The sections and recommendations of the Interpretive Guidance are closely interrelated and can only be properly understood if read as a whole.** Likewise, the examples offered throughout the Interpretive Guidance are not absolute statements on the legal qualification of a particular situation or conduct, but must be read in good faith, within the precise context in which they are mentioned and in accordance with generally recognized rules and principles of IHL. They can only illustrate the principles based on which the relevant distinctions ought to be made, but cannot replace a careful assessment of the concrete circumstances prevailing at the relevant time and place.

3 See, e.g., Art. 5 [2] (c) and (g) Statutes of the International Red Cross and Red Crescent Movement.

Lastly, it should be emphasized that the Interpretive Guidance **examines the concept of direct participation in hostilities only for the purposes of the conduct of hostilities.** Its conclusions are not intended to serve as a basis for interpreting IHL regulating the status, rights and protections of persons outside the conduct of hostilities, such as those deprived of their liberty. Moreover, although the Interpretive Guidance is concerned with IHL only, **its conclusions remain without prejudice to an analysis of questions related to direct participation in hostilities under other applicable branches of international law, such as human rights law or the law governing the use of interstate force (*jus ad bellum*).**

2. THE ISSUE OF CIVILIAN PARTICIPATION IN HOSTILITIES

The primary aim of IHL is to protect the victims of armed conflict and to regulate the conduct of hostilities based on a balance between military necessity and humanity. At the heart of IHL lies the principle of distinction between the armed forces, who conduct the hostilities on behalf of the parties to an armed conflict, and civilians, who are presumed not to directly participate in hostilities and must be protected against the dangers arising from military operations. Throughout history, the civilian population has always contributed to the general war effort of parties to armed conflicts, for example through the production and supply of weapons, equipment, food, and shelter, or through economic, administrative, and political support. However, such activities typically remained distant from the battlefield and, traditionally, only a small minority of civilians became involved in the conduct of military operations.

Recent decades have seen this pattern change significantly. A continuous shift of the conduct of hostilities into civilian population centres has led to an increased intermingling of civilians with armed actors and has facilitated their involvement in activities more closely related to military operations. Even more recently, the increased outsourcing of traditionally military functions has inserted numerous private contractors, civilian intelligence personnel, and other civilian government employees into the reality of modern armed conflict. Moreover, military operations have often

attained an unprecedented level of complexity, involving the coordination of a great variety of interdependent human and technical resources in different locations.

All of these aspects of contemporary warfare have given rise to confusion and uncertainty as to the distinction between legitimate military targets and persons protected against direct attacks. These difficulties are aggravated where armed actors do not distinguish themselves from the civilian population, for example during undercover military operations or when acting as farmers by day and fighters by night. As a result, civilians are more likely to fall victim to erroneous or arbitrary targeting, while armed forces – unable to properly identify their adversary – run an increased risk of being attacked by persons they cannot distinguish from the civilian population.

3. KEY LEGAL QUESTIONS

This trend underlines the importance of distinguishing not only between civilians and the armed forces, but also between civilians who do and, respectively, do not take a direct part in hostilities. Under IHL, the concept of direct participation in hostilities refers to conduct which, if carried out by civilians, suspends their protection against the dangers arising from military operations.[4] Most notably, for the duration of their direct participation in hostilities, civilians may be directly attacked as if they were combatants. Derived from Article 3 common to the Geneva Conventions, the notion of taking a direct or active part in hostilities is found in many provisions of IHL. However, despite the serious legal consequences involved, neither the Conventions nor their Additional Protocols provide a definition of direct participation in hostilities. This situation calls for the clarification of three questions under IHL applicable in both international and non-international armed conflict:

4 For the purposes of this Interpretive Guidance, the phrases "direct participation in hostilities", "taking a direct part in hostilities" and "directly participating in hostilities" will be used synonymously.

- *Who is considered a civilian for the purposes of the principle of distinction?*
  The answer to this question determines the circle of persons who are protected against direct attack unless and for such time as they directly participate in hostilities.[5]

- *What conduct amounts to direct participation in hostilities?*
  The answer to this question determines the individual conduct that leads to the suspension of a civilian's protection against direct attack.[6]

- *What modalities govern the loss of protection against direct attack?*
  The answer to this question will elucidate issues such as the duration of the loss of protection against direct attack, the precautions and presumptions in situations of doubt, the rules and principles governing the use of force against legitimate military targets, and the consequences of regaining protection against direct attack.

5 The status, rights, and protections of persons outside the conduct of hostilities does not depend on their qualification as civilians but on the precise personal scope of application of the provisions conferring the relevant status, rights, and protections (e.g., Arts 4 GC III, 4 GC IV, 3 GC I-IV, 75 AP I, and 4 to 6 AP II).

6 For the sake of simplicity, when discussing the consequences of civilian direct participation in hostilities, the Interpretive Guidance will generally refer to loss of protection against "direct attacks". Unless stated otherwise, this terminology includes also the suspension of civilian protection against other "dangers arising from military operations" (Arts 51 [1], [3] AP I and 13 [1], [3] AP II). This entails, for example, that civilians directly participating in hostilities may not only be directly attacked themselves, but also do not have to be taken into account in the proportionality assessment when military objectives in their proximity are attacked.

Part 1:

RECOMMENDATIONS OF THE ICRC

concerning the interpretation
of international humanitarian law

relating to the notion of direct
participation in hostilities

I. THE CONCEPT OF CIVILIAN IN INTERNATIONAL ARMED CONFLICT

For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.

II. THE CONCEPT OF CIVILIAN IN NON-INTERNATIONAL ARMED CONFLICT

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat function").

III. PRIVATE CONTRACTORS AND CIVILIAN EMPLOYEES

Private contractors and employees of a party to an armed conflict who are civilians (see above I and II) are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Their activities or location may, however, expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities.

IV. DIRECT PARTICIPATION IN HOSTILITIES AS A SPECIFIC ACT

The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.

V. CONSTITUTIVE ELEMENTS OF DIRECT PARTICIPATION IN HOSTILITIES

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

VI. BEGINNING AND END OF DIRECT PARTICIPATION IN HOSTILITIES

Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.

VII. TEMPORAL SCOPE OF THE LOSS OF PROTECTION

Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians (see above II), and lose protection against direct attack, for as long as they assume their continuous combat function.

VIII. PRECAUTIONS AND PRESUMPTIONS IN SITUATIONS OF DOUBT

All feasible precautions must be taken in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities. In case of doubt, the person must be presumed to be protected against direct attack.

IX. RESTRAINTS ON THE USE OF FORCE IN DIRECT ATTACK

In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

X. CONSEQUENCES OF REGAINING CIVILIAN PROTECTION

International humanitarian law neither prohibits nor privileges civilian direct participation in hostilities. When civilians cease to directly participate in hostilities, or when members of organized armed groups belonging to a non-State party to an armed conflict cease to assume their continuous combat function, they regain full civilian protection against direct attack, but are not exempted from prosecution for violations of domestic and international law they may have committed.

Part 2:

RECOMMENDATIONS AND COMMENTARY

A. THE CONCEPT OF CIVILIAN

For the purposes of the principle of distinction, the definition of civilian refers to those persons who enjoy immunity from direct attack unless and for such time as they take a direct part in hostilities.[7] Where IHL provides persons other than civilians with immunity from direct attack, the loss and restoration of protection is governed by criteria similar to, but not necessarily identical with, direct participation in hostilities.[8] Before interpreting the notion of direct participation in hostilities itself, it will therefore be necessary to clarify the concept of civilian under IHL applicable in international and non-international armed conflict.

I. THE CONCEPT OF CIVILIAN IN INTERNATIONAL ARMED CONFLICT

For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.

1. MUTUAL EXCLUSIVENESS OF THE CONCEPTS OF CIVILIAN, ARMED FORCES AND *LEVÉE EN MASSE*

According to Additional Protocol I (AP I),[9] in situations of international armed conflict, civilians are defined negatively as all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*.[10] While treaty IHL predating Additional Protocol I does not expressly define civilians, the terminology used in the Hague Regulations (H IV R) and the four Geneva Conventions (GC I-IV) nevertheless suggests that the concepts of civilian, of armed forces, and of *levée en masse* are mutually exclusive, and that every person involved in, or affected by, the conduct of hostilities falls into one of these three categories.[11] In other words, under all instruments governing international armed conflict, the concept of civilian is negatively delimited by the definitions of armed forces and of *levée en masse*,[12] both of which shall in the following be more closely examined.

2. ARMED FORCES

a) Basic concept

According to Additional Protocol I, the armed forces of a party to the conflict comprise all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.[13] At first glance, this broad and functional concept of armed forces seems wider than that underlying the Hague Regulations and the Geneva Conventions. Although these treaties do not expressly define

7 Arts 51 [3] AP I; 13 [3] AP II. See also Henckaerts/Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules (Cambridge University Press, 2005), Rule 6 [hereafter: Customary IHL]. Regarding the terminology of "loss of protection against direct attacks" used in the Interpretive Guidance see above N 6.

8 For example, medical and religious personnel of the armed forces lose their protection in case of "hostile" or "harmful" acts outside their privileged function (Arts 21 GC I, 11 [2] AP II; Customary IHL, above N 7, Vol. I, Rule 25). Combatants *hors de combat* lose their protection if they commit a "hostile act" or "attempt to escape" (Art. 41 [2] AP I).

9 As of 1 November 2008, 168 States were party to AP I. At the same time, the ratification of GC I-IV was virtually universal (194 States party).

10 Art. 50 [1] AP I. According to Customary IHL, above N 7, Vol. I, Rule 5, this definition of civilian reflects customary IHL in international armed conflict. The categories covered by Art. 4 A [1], [2] and [3] GC III are included in the general definition of armed forces in Art. 43 [1] AP I. See also Sandoz et al. (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva: ICRC, 1987), §§ 1916 f. [hereafter: Commentary AP].

11 For example, Art. 22 [2] of the Brussels Declaration (1874) and Art. 29 H IV R (1907) refer to "civilians" in contradistinction to "soldiers". Similarly, as their titles suggest, the Geneva Conventions (1949) use the generic category of "civilian persons" (GC IV) as complementary to members of the "armed forces" (GC I and GC II). Even though the scope of application of each convention does not exactly correspond to the generic categories mentioned in their respective titles, the categories of "civilian" and "armed forces" are clearly used as mutually exclusive in all four conventions. For example, GC I, GC II and GC IV refer to "civilian" wounded, sick and shipwrecked (Art. 22 [5] GC I; Art. 35 [4] GC II; Arts 20, 21, 22 GC IV) as opposed to the generic categories protected by GC I and GC II, namely the wounded, sick and shipwrecked of the "armed forces" (titles GC I and GC II). Similarly, Art. 57 GC IV refers to "military" wounded and sick as opposed to the generic category protected by GC IV, namely "civilian persons". Other provisions of the conventions also use the term "civilian" as opposed to "military" (Art. 30 [2] GC III: "military or civilian medical unit"; Art. 32 GC IV: "civilian or military agents"; Art. 144 [1] GC IV: "military and civil instruction"; Art. 93 [2] GC III: "civilian clothing", presumably as opposed to military uniform; Arts 18, 19, 20, 57 GC IV: "civilian hospitals", presumably as opposed to military hospitals; Art. 144 [2] GC IV: "civilian, military, police or other authorities") or to "combatants and non-combatants" (Art. 15 GC IV). None of these instruments suggests the existence of additional categories of persons who would qualify neither as civilians, nor as members of the armed forces or as participants in a *levée en masse*.

12 Affirmative also *Commentary AP* (above N 10), § 1914. The International Criminal Tribunal for the former Yugoslavia (ICTY) defined the concept of civilians for situations of international armed conflict as "persons who are not, or no longer, members of the armed forces" (ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment of 3 March 2000, § 180). For the relevant discussion during the expert meetings see: Report DPH 2005, pp. 43 f., 58, 74; Report DPH 2006, pp. 10, 12 ff., 19 ff.; Report DPH 2008, pp. 35, 37.

13 Art. 43 [1] AP I; *Customary IHL*, above N 7, Vol. I, Rule 4.

armed forces, they require that members of militias and volunteer corps other than the regular armed forces recognized as such in domestic law fulfil four requirements: (a) responsible command; (b) fixed distinctive sign recognizable at a distance; (c) carrying arms openly; and (d) operating in accordance with the laws and customs of war.[14] Strictly speaking, however, these requirements constitute conditions for the post-capture entitlement of irregular armed forces to combatant privilege and prisoner-of-war status and are not constitutive elements of the armed forces of a party to a conflict.

Thus, while members of irregular armed forces failing to fulfil the four requirements may not be entitled to combatant privilege and prisoner-of-war status after capture,[15] it does not follow that any such person must necessarily be excluded from the category of armed forces and regarded as a civilian for the purposes of the conduct of hostilities.[16] On the contrary, it would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to the civilian population merely because they fail to distinguish themselves from that population, to carry their arms openly, or to conduct their operations in accordance with the laws and customs of war. Therefore, even under the terms of the Hague Regulations and the Geneva Conventions, all armed actors showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces of that party.[17]

14 Art. 1 H IV R; Arts 13 [1], [2], [3] and [6] GC I and GC II; Art. 4 A [1], [2], [3] and [6] GC III.

15 In the ICRC's view, in international armed conflict, any person failing to qualify for prisoner-of-war status under Art. 4 GC III must be afforded the fundamental guarantees set out in Art. 75 AP I, which have attained customary nature and, subject to the nationality requirements of Art. 4 GC IV, also remains a "protected person" within the meaning of GC IV.

16 As illustrated by the treatment of spies (Arts 29-31 H IV R; Art. 46 AP I) and of other combatants failing to distinguish themselves as required by IHL (Art. 44 AP I), loss of entitlement to combatant privilege or prisoner-of-war status does not necessarily lead to loss of membership in the armed forces.

17 While the prevailing opinion during the 2006 expert meeting was supportive of this interpretation, some concerns were expressed that this approach could be misunderstood as creating a category of persons protected neither by GC III nor by GC IV (Report DPH 2006, pp. 15 f.). For the ICRC's position in this respect see, e.g., above N 15.

b) Meaning and significance of "belonging to" a party to the conflict

In order for organized armed groups to qualify as armed forces under IHL, they must belong to a party to the conflict. While this requirement is made textually explicit only for irregular militias and volunteer corps, including organized resistance movements,[18] it is implied wherever the treaties refer to the armed forces "of" a party to the conflict.[19] The concept of "belonging to" requires at least a *de facto* relationship between an organized armed group and a party to the conflict. This relationship may be officially declared, but may also be expressed through tacit agreement or conclusive behaviour that makes clear for which party the group is fighting.[20] Without any doubt, an organized armed group can be said to belong to a State if its conduct is attributable to that State under the international law of State responsibility.[21] The degree of control required to make a State responsible for the conduct of an organized armed group is not settled in international law.[22] In practice, in order for an organized armed group to belong to a party to the conflict, it appears essential that it conduct hostilities on behalf and with the agreement of that party.[23]

Groups engaging in organized armed violence against a party to an international armed conflict without belonging to another party to the same conflict cannot be regarded as members of the armed forces of a party to that conflict, whether under Additional Protocol I, the Hague Regulations, or the Geneva Conventions. They are thus civilians under those three instruments.[24] Any other view would discard the dichotomy

18 See Arts 13 [2] GC I and GC II and Art. 4 A [2] GC III.

19 See, e.g. Art. 3 H IV R; Art. 4 A [1] GC III; Art. 43 AP I.

20 Pictet (ed.), *Commentary on the Third Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: ICRC, 1960), p. 57 [hereafter: *Commentary GC III*].

21 See also Report DPH 2006, p. 16.

22 For the basic positions in this respect, see, most notably, ICJ, *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua. v. United States of America*), Judgment of 27 June 1986 (Merits), § 115; ICTY, *Prosecutor v. Tadic*, Case No. IT-94-A, Judgment of 15 July 1999 (Appeals Chamber), § 145; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 27 February 2007, § 413; ILC, Report to the General Assembly on the work of its 53rd session (2001), UN Doc. A/56/10, Draft Article 8, Commentary § 5.

23 See also below N 26.

24 This was the prevailing opinion during the expert meetings (Report DPH 2006, pp. 16 ff.; Report DPH 2008, pp. 43 f.). For recent national case law reflecting this position see: Israeli High Court of Justice, *The Public Committee Against Torture et al. v. The Government of Israel et al.*, (HCJ 769/02), Judgment of 13 December 2006, § 26, where the Court held that, under IHL governing international armed conflict, independent Palestinian armed groups operating in a context of belligerent occupation necessarily qualified as civilians. With regard to the temporal scope of loss of protection for members of such groups, the Court nevertheless concluded that: "a civilian who has joined a terrorist organization which has become his'home', and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack'for such time' as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility" (*ibid.*, § 39).

in all armed conflicts between the *armed forces of the parties to the conflict* and the *civilian population*; it would also contradict the definition of international armed conflicts as confrontations between States and not between States and non-State actors.[25] Organized armed groups operating within the broader context of an international armed conflict without belonging to a party to that conflict could still be regarded as parties to a separate non-international armed conflict provided that the violence reaches the required threshold.[26] Whether the individuals are civilians or members of the armed forces of a party to the conflict would then have to be determined under IHL governing non-international armed conflicts.[27]

Lastly, it should be pointed out that organized armed violence failing to qualify as an international or non-international armed conflict remains an issue of law enforcement, whether the perpetrators are viewed as rioters, terrorists, pirates, gangsters, hostage-takers or other organized criminals.[28]

25 See also Report DPH 2006, pp. 16 ff., 52 f.; Report DPH 2008, pp. 43 f. For States party to Additional Protocol I, the law governing international armed conflicts also applies to armed conflicts between States and national liberation movements within the meaning of Article 1 [4] AP I.

26 According to *Commentary GC III* (above N 20), p. 57: "Resistance movements must be fighting on behalf of a'Party to the conflict' in the sense of Art. 2, otherwise the provisions of Art. 3 relating to non-international conflicts are applicable, since such militias and volunteer corps are not entitled to style themselves a'Party to the conflict' ". The *travaux préparatoires* are silent on the possible parallel existence of international and non-international aspects within the greater context of the same armed conflict. For the relevant discussion during the expert meetings, see Report DPH 2005, p. 10; Report DPH 2006, pp. 17 ff. and 53 f.; Report DPH 2008, pp. 43 f. It should be noted that "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" (Art. 1 [2] AP II) do not reach the threshold of "protracted armed violence", which is required for the emergence of a separate non-international armed conflict (ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, § 70).

27 See below Section II.

28 See Report DPH 2006, p. 16; Report DPH 2008, pp. 44, 49.

c) Determination of membership

For the regular armed forces of States, individual membership is generally regulated by domestic law and expressed through formal integration into permanent units distinguishable by uniforms, insignia, and equipment. The same applies where armed units of police, border guard, or similar uniformed forces are incorporated into State armed forces. Members of regularly constituted forces are not civilians, regardless of their individual conduct or the function they assume within the armed forces. For the purposes of the principle of distinction, membership in regular State armed forces ceases, and civilian protection is restored, when a member disengages from active duty and re-integrates into civilian life, whether due to a full discharge from duty or as a deactivated reservist.

Membership in irregular armed forces, such as militias, volunteer corps, or resistance movements belonging to a party to the conflict, generally is not regulated by domestic law and can only be reliably determined on the basis of functional criteria, such as those applying to organized armed groups in non-international armed conflict.[29]

3. *LEVÉE EN MASSE*

As far as the *levée en masse* is concerned, all relevant instruments are based on the same definition, which refers to the inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.[30] Participants in a *levée en masse* are the only armed actors who are excluded from the civilian population although, by definition, they operate spontaneously and lack sufficient organization and command to qualify as members of the armed forces. All other persons who directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis must be regarded as civilians.

29 See below Section II.3.(b) and, with regard to private contractors, Section III.2.

30 Art. 2 H IV R; Art. 4 [6] GC III. See also the reference to Art. 4 [6] GC III in Art. 50 [1] AP I.

4. CONCLUSION

For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Membership in irregularly constituted militia and volunteer corps, including organized resistance movements, belonging to a party to the conflict must be determined based on the same functional criteria that apply to organized armed groups in non-international armed conflict.

II. THE CONCEPT OF CIVILIAN IN NON-INTERNATIONAL ARMED CONFLICT

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat function").

1. MUTUAL EXCLUSIVENESS OF THE CONCEPTS OF CIVILIAN, ARMED FORCES AND ORGANIZED ARMED GROUPS

a) Lack of express definitions in treaty law

Treaty IHL governing non-international armed conflict uses the terms "civilian", "armed forces" and "organized armed group" without expressly defining them. These concepts must therefore be interpreted in good faith in accordance with the ordinary meaning to be given to them in their context and in the light of the object and purpose of IHL.[31]

While it is generally recognized that members of State armed forces in non-international armed conflict do not qualify as civilians, treaty law, State practice, and international jurisprudence have not unequivocally settled whether the same applies to members of organized armed groups (i.e. the armed forces of non-State parties to an armed conflict).[32] Because organized armed groups generally cannot qualify as regular armed forces under national law, it might be tempting to conclude that membership in such groups is simply a continuous form of civilian direct participation

31 Art. 31 [1] Vienna Convention on the Law of Treaties.
32 See *Customary IHL*, above N 7, Vol. I, p. 19.

in hostilities. Accordingly, members of organized armed groups would be regarded as civilians who, owing to their continuous direct participation in hostilities, lose protection against direct attack for the entire duration of their membership. However, this approach would seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction, most notably because it would create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population.[33] As the wording and logic of Article 3 GC I-IV and Additional Protocol II (AP II) reveals, civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories also in non-international armed conflict.

b) Article 3 common to the Geneva Conventions

Although Article 3 GC I-IV generally is not considered to govern the conduct of hostilities, its wording allows certain conclusions to be drawn with regard to the generic distinction between the armed forces and the civilian population in non-international armed conflict. Most notably, Article 3 GC I-IV provides that "each Party to the conflict" must afford protection to "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*".[34] Thus, both State and non-State parties to the conflict have armed forces distinct from the civilian population.[35] This passage also makes clear that members of such armed forces, in contrast to other persons, are considered as "taking no active part in the hostilities" only once they have disengaged from their fighting function ("have laid down their arms") or are placed *hors de combat*; mere suspension of combat is insufficient. Article 3 GC I-IV thus implies a concept of civilian comprising those individuals "who do not bear arms" on behalf of a party to the conflict.[36]

33 On the danger of extending the concept of direct participation in hostilities beyond specific acts, see also below Section IV.2. During the expert meetings, the approach based on continuous direct participation in hostilities was criticized as blurring the distinction made by IHL between loss of protection based on conduct (civilians) and on status or function (members of armed forces or organized armed groups). See Background Doc. DPH 2004, p. 36; Background Doc. DPH 2005, WS IV-V, p. 10; Report DPH 2005, pp. 44, 48, 50. See also the discussions in Report DPH 2006, pp. 20 ff.; Report DPH 2008, pp. 46 ff.

34 Art. 3 GC I-IV.

35 According to *Commentary GC III* (above N 20), p. 37: "Speaking generally, it must be recognized that the conflicts referred to in Art. 3 are armed conflicts, with 'armed forces' on either side engaged in 'hostilities' – conflicts, in short, which are in many respects similar to an international war […]".

36 According to Pictet (ed.), *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), p. 40: "Article 3 has an extremely wide field of application and covers members of the armed forces as well as persons who do not take part in the hostilities. In this instance, however, the Article naturally applies first and foremost to civilians – that is to people who do not bear arms".

c) Additional Protocol II

While Additional Protocol II[37] has a significantly narrower scope of application and uses terms different from those in Article 3 GC I-IV, the generic categorization of persons is the same in both instruments.[38] During the Diplomatic Conference of 1974-77, Draft Article 25 [1] AP II defined the concept of civilian as including "anyone who is not a member of the armed forces or of an organized armed group".[39] Although this article was discarded along with most other provisions on the conduct of hostilities in a last minute effort to "simplify" the Protocol, the final text continues to reflect the originally proposed concept of civilian. According to the Protocol, "armed forces", "dissident armed forces", and "other organized armed groups" have the function and ability "to carry out sustained and concerted military operations";[40] whereas the "civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations" carried out by these forces "unless and for such time as they take a direct part in hostilities".[41]

d) Reconciliation of terminology

In Additional Protocol II, the term "armed forces" is restricted to State armed forces, whereas the armed forces of non-State parties are referred to as "dissident armed forces" or "other organized armed groups". The notion

37 As of 1 November 2008, 164 States were party to AP II.

38 For the high threshold of application of Additional Protocol II, see Art. 1 [1] AP II.

39 Draft Art. 25 [1] AP II was adopted by consensus in the Third Committee on 4 April 1975 (O.R., Vol. XV, p. 320, CDDH/215/Rev.1). See also the ICRC's Commentary (October 1973) on the original version of Art. 25 [1] of the Draft of AP II submitted to the Diplomatic Conference of 1974 to 1977: "[…] sont considérés comme civils tous les êtres humains qui se trouvent sur le territoire d'une Partie contractante où se déroule un conflit armé au sens de l'article premier et qui ne font pas partie des forces armées ou groupes armés".

40 Art. 1 [1] AP II.

41 Art. 13 [1] and [3] AP I. This interpretation is further supported by the respective contexts in which the Protocol refers to "civilians" (Arts 13, 14, 17 AP II) and the "civilian population" (title Part IV AP II; Arts 5 [1] (b) and (e), 13, 14, 15, 17 and 18 AP II).

of "armed forces" in Article 3 GC I-IV, on the other hand, includes all three categories juxtaposed in Article 1 [1] AP II, namely State armed forces, dissident armed forces, and other organized armed groups. Thus, similar to situations of international armed conflict, the concept of civilian in non-international armed conflict is negatively delimited by the definition of "armed forces" (Article 3 GC I-IV) or, expressed in the terminology of Additional Protocol II, of State "armed forces", "dissident armed forces" and "other organized armed groups".[42] For the purposes of this Interpretive Guidance, the armed forces of States party to a non-international armed conflict are referred to as "State armed forces", whereas the armed forces of non-State parties are described as "organized armed groups".[43] Where not stated otherwise, the concept of "organized armed group" includes both "dissident armed forces" and "other organized armed groups" (Article 1 [1] AP II).

2. STATE ARMED FORCES

a) Basic concept

There is no reason to assume that States party to both Additional Protocols desired distinct definitions of State armed forces in situations of international and non-international armed conflict. According to the *travaux préparatoires* for Additional Protocol II, the concept of armed forces of a High Contracting Party in Article 1 [1] AP II was intended to be broad enough to include armed actors who do not necessarily qualify as armed forces under domestic law, such as members of the national guard, customs, or police forces, provided that they do, in fact, assume the function of armed forces.[44] Thus, comparable to the concept of armed forces in Additional Protocol I, State armed forces under Additional Protocol II include both the regular armed forces and other armed groups or units organized under a command responsible to the State.[45]

b) Determination of membership

At least as far as regular armed forces are concerned, membership in State armed forces is generally defined by domestic law and expressed through formal integration into permanent units distinguishable by uniforms, insignia and equipment. The same applies where armed units of police, border guard, or similar uniformed forces are incorporated into the armed forces. Members of regularly constituted forces are not civilians, regardless of their individual conduct or of the function they assume within the armed forces. For the purposes of the principle of distinction, membership in regular State armed forces ceases, and civilian protection is restored, when a member disengages from active duty and re-integrates into civilian life, whether due to a full discharge from duty or as a deactivated reservist. Just as in international armed conflict, membership in irregular State armed forces, such as militia, volunteer or paramilitary groups, generally is not regulated by domestic law and can only be reliably determined on the basis of the same functional criteria that apply to organized armed groups of non-State parties to the conflict.[46]

3. ORGANIZED ARMED GROUPS

a) Basic concept

Organized armed groups belonging to a non-State party to an armed conflict include both dissident armed forces and other organized armed groups. Dissident armed forces essentially constitute part of a State's armed

42 Affirmative ICTY, *Prosecutor v. Martic*, Case No. IT-95-11-A, Judgment of 8 October 2008, §§ 300-302. This was the prevailing view also during the expert meetings (see Report DPH 2005, pp. 43 f.; Report DPH 2006, pp. 20 ff.; Report DPH 2008, pp. 46 ff.).

43 Note that the concept of organized armed group is also used in IHL governing international armed conflict to describe organized armed actors other than the regular armed forces which operate under a command responsible to a party to the conflict and, therefore, qualify as part of the armed forces of that party (Art. 43 [1] AP I; see above Section I).

44 See *Commentary AP* (above N 10), § 4462: "The term'armed forces' of the High Contracting Party should be understood in the broadest sense. In fact, this term was chosen in preference to others suggested such as, for example,'regular armed forces', in order to cover all the armed forces, including those not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or any other similar force)", referring to O.R., Vol. X, p. 94, CDDH/I/238/Rev.1. On the potential qualification of police forces as part of the armed forces of a party to the conflict, see also the discussion in Report DPH 2005, p. 11; Report DPH 2006, pp. 43, 52 f.; Report DPH 2008, pp. 54, 64, 68.

45 According to Bothe *et al.*, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague: Martinus Nijhoff, 1982), p. 672, the terms "organized" and "under responsible command" in Art. 1 [1] AP II "inferentially […] recognize the essential conditions prescribed under art. 43 of Protocol I: that the armed force be linked to one of the parties to the conflict; that they be organized; and that they be under responsible command".

46 See above Section I.2.(c) and below Section II.3.(b).

forces that have turned against the government.[47] Other organized armed groups recruit their members primarily from the civilian population but develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity and level of sophistication as State armed forces.

In both cases, it is crucial for the protection of the civilian population to distinguish a non-State party to a conflict (e.g., an insurgency, a rebellion, or a secessionist movement) from its armed forces (i.e., an organized armed group).[48] As with State parties to armed conflicts, non-State parties comprise both fighting forces and supportive segments of the civilian population, such as political and humanitarian wings. The term organized armed group, however, refers exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense. This distinction has important consequences for the determination of membership in an organized armed group as opposed to other forms of affiliation with, or support for, a non-State party to the conflict.

b) Determination of membership

Dissident armed forces: Although members of dissident armed forces are no longer members of State armed forces, they do not become civilians merely because they have turned against their government. At least to the extent, and for as long as, they remain organized under the structures of the State armed forces to which they formerly belonged, these structures should continue to determine individual membership in dissident armed forces as well.

Other organized armed groups: More difficult is the concept of membership in organized armed groups other than dissident armed forces. Membership in these irregularly constituted groups has no basis in domestic law. It is rarely formalized through an act of integration other than taking up a certain function for the group; and it is not consistently

47 See *Commentary AP* (above N 10), § 4460.

48 Although Art. 1 AP II refers to armed conflicts "between" State armed forces and dissident armed forces or other organized armed groups, the actual parties to such a conflict are, of course, the High Contracting Party and the opposing non-State party, and not their respective armed forces.

expressed through uniforms, fixed distinctive signs, or identification cards. In view of the wide variety of cultural, political, and military contexts in which organized armed groups operate, there may be various degrees of affiliation with such groups that do not necessarily amount to "membership" within the meaning of IHL. In one case, affiliation may turn on individual choice, in another on involuntary recruitment, and in yet another on more traditional notions of clan or family.[49] In practice, the informal and clandestine structures of most organized armed groups and the elastic nature of membership render it particularly difficult to distinguish between a non-State party to the conflict and its armed forces.

As has been shown above, in IHL governing non-international armed conflict, the concept of organized armed group refers to non-State armed forces in a strictly functional sense. For the practical purposes of the principle of distinction, therefore, membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse. Instead, membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict.[50] Consequently, under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: "continuous combat function").[51] Continuous combat function does not imply *de jure* entitlement to combatant privilege.[52] Rather, it

49 Background Doc. DPH 2005, WS IV-V, P. 15.

50 On the collective or individual nature of continuous combat function, see Report DPH 2008, pp. 55 ff.

51 On the qualification of conduct as direct participation in hostilities, see below Section V.

52 Combatant privilege, namely the right to directly participate in hostilities with immunity from domestic prosecution for lawful acts of war, is afforded only to members of the armed forces of parties to an international armed conflict (except medical and religious personnel), as well as to participants in a *levée en masse* (Arts 1 and 2 H IV R; Art. 43 [1] AP I). Although all privileged combatants have a right to directly participate in hostilities, they do not necessarily have a function requiring them to do so (e.g. cooks, administrative personnel). Conversely, individuals who assume continuous combat function outside the privileged categories of persons, as well as in non-international armed conflict, are not entitled to combatant privilege under IHL (see also below Section X).

distinguishes members of the organized fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions.[53]

Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act. This case must be distinguished from persons comparable to reservists who, after a period of basic training or active membership, leave the armed group and re-integrate into civilian life. Such "reservists" are civilians until and for such time as they are called back to active duty.[54]

Individuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL. Instead, they remain civilians assuming support functions, similar to private contractors and civilian employees accompanying State armed forces.[55] Thus, recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-State party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities.[56] The same applies to individuals whose function is limited to the purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature.[57] Although such persons may accompany organized armed groups and provide substantial support to a party to the conflict, they do not assume continuous combat function and, for the purposes of the principle of distinction, cannot be regarded as members of an organized armed group.[58] As civilians, they benefit from protection against direct attack unless and for such time as they directly participate in hostilities, even though their activities or location may increase their exposure to incidental death or injury.

In practice, the principle of distinction must be applied based on information which is practically available and can reasonably be regarded as reliable in the prevailing circumstances. A continuous combat function may be openly expressed through the carrying of uniforms, distinctive signs, or certain weapons. Yet it may also be identified on the basis of conclusive behaviour, for example where a person has repeatedly directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation. Whatever criteria are applied in implementing the principle of distinction in a particular context, they must allow to reliably distinguish members of the armed forces of a non-State party to the conflict from civilians who do not directly participate in hostilities, or who do so on a merely spontaneous, sporadic or unorganized basis.[59] As will be shown, that determination remains subject to all feasible precautions and to the presumption of protection in case of doubt.[60]

53 During the expert meetings, the prevailing view was that persons cease to be civilians within the meaning of IHL for as long as they continuously assume a function involving direct participation in hostilities ("continuous combat function") for an organized armed group belonging to a party to a non-international armed conflict (Expert Paper DPH 2004 (Prof. M. Bothe); Report DPH 2005, pp. 43 f., 48 ff., 53 ff., 63 ff., 82 f.; Report DPH 2006, pp. 9 ff., 20 ff., 29-32, 66 f.; Report DPH 2008, pp. 46-60).

54 See also above Sections I.2.(c) and II.2.(b) and, more generally, below Section VII.2.

55 See below Section III.

56 Regarding the qualification of recruiting and training, financing and propaganda as direct participation in hostilities, see below Sections V.2.(a) and (b); VI.1.

57 Regarding the qualification as direct participation in hostilities of purchasing, smuggling, transporting, manufacturing and maintaining of weapons, explosives and equipment, as well as of collecting and providing intelligence, see below Sections V.1.(a); V.2.(a), (b) and (g); VI.1.

58 Obviously, such lack of "membership" does not exclude that civilian supporters of organized armed groups may incur criminal responsibility for their activities under national and, in the case of international crimes, also international law. See below Section X.

59 See also Report DPH 2006, pp. 25 ff.; Report DPH 2008, pp. 49-57.

60 See below Section VIII.

4. CONCLUSION

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat function").

III. PRIVATE CONTRACTORS AND CIVILIAN EMPLOYEES

Private contractors and employees of a party to an armed conflict who are civilians (see above I and II) are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Their activities or location may, however, expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities.

1. PARTICULAR DIFFICULTIES RELATED TO PRIVATE CONTRACTORS AND CIVILIAN EMPLOYEES

In recent decades, parties to armed conflicts have increasingly employed private contractors and civilian employees in a variety of functions traditionally performed by military personnel.[61] Generally speaking, whether private contractors and employees of a party to an armed conflict are civilians within the meaning of IHL and whether they directly participate in hostilities depends on the same criteria as would apply to any other civilian.[62] The special role of such personnel requires that these determinations be made with particular care and with due consideration for the geographic and organizational closeness of many private contractors and civilian employees to the armed forces and the hostilities.

It should also be noted that the purpose of the distinction between civilians and members of the armed forces may not be identical under domestic and international law. Depending on national legislation, membership in the armed forces may have administrative, jurisdictional, and other consequences irrelevant to the principle of distinction in the conduct of hostilities. Under IHL, the primary consequences of membership in the armed forces are the exclusion from the category of civilian and, in

61 This trend led to an initiative by the Swiss government, in cooperation with the ICRC, to address the issue of private military and security companies. This initiative resulted in the 'Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict' of 17 September 2008, agreed upon by 17 participating States.

62 On the concept of civilian, see above Sections I and II. On the concept of direct participation in hostilities, see below Sections IV to VI.

international armed conflict, the right to directly participate in hostilities on behalf of a party to the conflict (combatant privilege). Where the concepts of civilian and armed forces are defined for the purpose of the conduct of hostilities, the relevant standards must be derived from IHL.[63]

The great majority of private contractors and civilian employees currently active in armed conflicts have not been incorporated into State armed forces and assume functions that clearly do not involve their direct participation in hostilities on behalf of a party to the conflict (i.e. no continuous combat function).[64] Therefore, under IHL, they generally come within the definition of civilians.[65] Although they are thus entitled to protection against direct attack, their proximity to the armed forces and other military objectives may expose them more than other civilians to the dangers arising from military operations, including the risk of incidental death or injury.[66]

In some cases, however, it may be extremely difficult to determine the civilian or military nature of contractor activity. For example, the line between the defence of military personnel and other military objectives against enemy attacks (direct participation in hostilities) and the protection of those same persons and objects against crime or violence unrelated to the hostilities (law enforcement/defence of self or others) may be thin. It is therefore particularly important in this context to observe the general rules of IHL on precautions and presumptions in situations of doubt.[67]

2. INTERNATIONAL ARMED CONFLICT

Civilians, including those formally authorized to accompany the armed forces and entitled to prisoner–of-war status upon capture, were never meant to directly participate in hostilities on behalf of a party to the conflict.[68] As long as they are not incorporated into the armed forces, private contractors and civilian employees do not cease to be civilians simply because they accompany the armed forces and or assume functions other than the conduct of hostilities that would traditionally have been performed by military personnel. Where such personnel directly participate in hostilities without the express or tacit authorization of the State party to the conflict, they remain civilians and lose their protection against direct attack for such time as their direct participation lasts.[69]

A different conclusion must be reached for contractors and employees who, to all intents and purposes, have been incorporated into the armed forces of a party to the conflict, whether through a formal procedure under national law or *de facto* by being given a continuous combat function.[70] Under IHL, such personnel would become members of an organized armed force, group, or unit under a command responsible to a party to the conflict and, for the purposes of the principle of distinction, would no longer qualify as civilians.[71]

3. NON-INTERNATIONAL ARMED CONFLICT

The above observations also apply, *mutatis mutandis*, in non-international armed conflicts. Thus, for such time as private contractors assume a continuous combat function for an organized armed group belonging to a non-State party, they become members of that group.[72] Theoretically,

63 See Report DPH 2005, pp. 74 f.
64 On the concept of continuous combat function, see above Section II.3.(b).
65 Report DPH 2005, p. 80.
66 Report DPH 2006, pp. 34 f.
67 See below Section VIII.
68 Of the categories of persons entitled to prisoner-of-war status under Art. 4 [1] to [6] GC III, those described in Art. 4 [4] GC III (civilians accompanying the armed forces) and Art. 4 [5] GC III (civilian crew members of the merchant marine or civil aircraft) are civilians (Art. 50 [1] AP I). As any other civilians, they are excluded from the categories entitled to combatant privilege, namely members of the armed forces and participants in a *levée en masse* (Art. 43 [1] and [2], 50 [1] AP I; Arts 1 and 2 H IV R) and, therefore, do not have a right to directly participate in hostilities with immunity from domestic prosecution. See also below Section X, as well as the brief discussion in Report DPH 2006, pp. 35 f.
69 Report DPH 2005, p. 82.
70 On the concept of continuous combat function, see above Section II.3.(b). On the subsidiary functional determination of membership specifically in international armed conflict, see above Section I.3.(c).
71 The prevailing view expressed during the expert meetings was that, for the purposes of the conduct of hostilities, private contractors and employees authorized by a State to directly participate in hostilities on its behalf would cease to be civilians and become members of its armed forces under IHL, regardless of formal incorporation. It was noted that, from the historical *letters of marque and reprisal* issued to privateers to the modern combatant privilege, direct participation in hostilities with the authority of a State has always been regarded as legitimate and, as such, exempt from domestic prosecution. See Report DPH 2003, pp. 4 f.; Report DPH 2004, pp. 11 ff., 14; Expert Paper DPH 2004 (Prof. M. Schmitt), pp. 8 ff.; Report DPH 2005, pp. 74 ff. and 80 f.; Background Doc. DPH 2005, WS VIII-IX, p. 17.
72 See Report DPH 2005, pp. 81 f.

private military companies could even become independent non-State parties to a non-international armed conflict.[73] Private contractors and civilian employees who are neither members of State armed forces nor members of organized armed groups, however, must be regarded as civilians and, therefore, are protected against direct attack unless and for such time as they directly participate in hostilities.

4. CONCLUSION

Whether private contractors and employees of a party to the conflict qualify as civilians within the meaning of IHL and whether they directly participate in hostilities depends on the same criteria as are applicable to any other civilian. The geographic and organizational closeness of such personnel to the armed forces and the hostilities require that this determination be made with particular care. Those who qualify as civilians are entitled to protection against direct attack unless and for such time as they directly participate in hostilities, even though their activities and location may expose them to an increased risk of incidental injury and death. This does not rule out the possibility that, for purposes other than the conduct of hostilities, domestic law might regulate the status of private contractors and employees differently from IHL.

73 *Ibid.*

B. THE CONCEPT OF DIRECT PARTICIPATION IN HOSTILITIES

Treaty IHL does not define direct participation in hostilities, nor does a clear interpretation of the concept emerge from State practice or international jurisprudence. The notion of direct participation in hostilities must therefore be interpreted in good faith in accordance with the ordinary meaning to be given to its constituent terms in their context and in light of the object and purpose of IHL.[74]

Where treaty law refers to hostilities, that notion is intrinsically linked to situations of international or non-international armed conflict.[75] Therefore, the concept of direct participation in hostilities cannot refer to conduct occurring outside situations of armed conflict, such as during internal disturbances and tensions, including riots, isolated and sporadic acts of violence and other acts of a similar nature.[76] Moreover, even during armed conflict, not all conduct constitutes part of the hostilities.[77] It is the purpose of the present chapter to identify the criteria that determine whether and, if so, for how long a particular conduct amounts to direct participation in hostilities.

In practice, civilian participation in hostilities occurs in various forms and degrees of intensity and in a wide variety of geographical, cultural, political, and military contexts. Therefore, in determining whether a particular conduct

74 Art. 31 [1] Vienna Convention on the Law of Treaties.

75 The concept of hostilities is frequently used in treaties regulating situations of international and non-international armed conflict, for example in the following contexts: opening of hostilities, conduct of hostilities, acts of hostility, persons (not) taking part in hostilities, effects of hostilities, suspension of hostilities, end of hostilities. See Title and Art. 1 H III; Title Section II H IV R; Art. 3 [1] GC I-IV; Art. 17 GC I; Art. 33 GC II; Title Section II and Arts 21 [3], 67, 118, 119 GC III; Arts 49 [2], 130, 133, 134, 135 GC IV; Arts 33, 34, 40, 43 [2], 45, 47, 51 [3], 59, 60 AP I and Title Part IV, Section I AP I; Arts 4 and 13 [3] AP II; Arts 3 [1] – [3] and 4 ERW Protocol.

76 According to Art. 1 [2] AP II, such situations do not constitute armed conflicts.

77 In fact, armed conflict can arise without any occurrence of hostilities, namely through a declaration of war or the occupation of territory without armed resistance (Art. 2 GC I-IV). Furthermore, considerable portions of IHL deal with issues other than the conduct of hostilities, most notably the exercise of power and authority over persons and territory in the hands of a party to the conflict. See also Report DPH 2005, pp. 13, 18 f.

amounts to direct participation in hostilities, due consideration must be given to the circumstances prevailing at the relevant time and place.[78] Nevertheless, the importance of the circumstances surrounding each case should not divert attention from the fact that direct participation in hostilities remains a legal concept of limited elasticity that must be interpreted in a theoretically sound and coherent manner reflecting the fundamental principles of IHL.

78 See also below Section VIII. See further: Report DPH 2006, pp. 25 ff., 70 ff.

IV. DIRECT PARTICIPATION IN HOSTILITIES AS A SPECIFIC ACT

The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.

1. BASIC COMPONENTS OF THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES

The notion of direct participation in hostilities essentially comprises two elements, namely that of "hostilities" and that of "direct participation" therein.[79] While the concept of "hostilities" refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy,[80] "participation" in hostilities refers to the (individual) involvement of a person in these hostilities.[81] Depending on the quality and degree of such involvement, individual participation in hostilities may be described as "direct" or "indirect". The notion of direct participation in hostilities has evolved from the phrase "taking no active part in the hostilities" used in Article 3 GC I-IV. Although the English texts of the Geneva Conventions and Additional Protocols use the words "active"[82] and "direct",[83] respectively, the consistent use of the phrase "*participent directement*" in the equally authentic French texts demonstrate that the terms "direct" and "active" refer to the same quality and degree of individual participation in hostilities.[84] Furthermore, as the notion of taking a direct part in hostilities

79 Report DPH 2005, p. 17; Background Doc. DPH 2005, WS II-III, p. 2.

80 See Art. 22 H IV R (Section II on "Hostilities"). Treaty law does not establish uniform terminology for the conduct of hostilities but refers, apart from "hostilities", also to "warfare" (Title Part III, Section I and Art. 35 [1] AP I), "military operations" (Art. 53 GC IV; Art. 51 [1] AP I; Art. 13 [1] AP II), or simply "operations" (Art. 48 AP I).

81 See Arts 43 [2] AP I; 45 [1] and [3] AP I; 51 [3] AP I; 67 [1] (e) AP I; 13 [3] AP II.

82 Art. 3 GC I-IV.

83 Arts 51 [3] AP I; 43 [2] AP I; 67 [1] (e) AP I and 13 [3] AP II.

84 This was the prevailing view also during the expert meetings (Report DPH 2005, p. 29; Report DPH 2006, p. 62). The International Criminal Tribunal for Rwanda (ICTR) affirmed the synonymous meaning of the notions of "active" and "direct" participation in hostilities: ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 September 1998, § 629. At first sight, it may appear that the Preparatory Committee for the Establishment of an International Criminal Court (ICC) implied a distinction between the terms "active" and "direct" in the context of the recruitment of children when it explained that: "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". Strictly speaking, however, the Committee made a distinction between "combat" and "military activities linked to combat", not between "active" and "direct" participation.

is used synonymously in the Additional Protocols I and II, it should be interpreted in the same manner in international and non-international armed conflict.[85]

2. RESTRICTION TO SPECIFIC ACTS

In treaty IHL, individual conduct that constitutes part of the hostilities is described as direct participation in hostilities, regardless of whether the individual is a civilian or a member of the armed forces.[86] Whether individuals directly participate in hostilities on a spontaneous, sporadic, or unorganized basis or as part of a continuous function assumed for an organized armed force or group belonging to a party to the conflict may be decisive for their status as civilians, but has no influence on the scope of conduct that constitutes direct participation in hostilities. This illustrates that the notion of direct participation in hostilities does not refer to a person's status, function, or affiliation, but to his or her engagement in specific hostile acts.[87] In essence, the concept of hostilities could be described as the sum total of all hostile acts carried out by individuals directly participating in hostilities.[88]

Where civilians engage in hostile acts on a persistently recurrent basis, it may be tempting to regard not only each hostile act as direct participation in hostilities, but even their continued intent to carry out unspecified hostile acts in the future.[89] However, any extension of the concept of direct participation in hostilities beyond specific acts would blur the distinction made in IHL between *temporary, activity-based loss of protection* (due to direct participation in hostilities), and *continuous, status or function-based loss of protection* (due to combatant status or continuous combat function).[90] In practice, confusing the distinct regimes by which IHL governs the loss of protection for civilians and for members of State armed forces or organized armed groups would provoke insurmountable evidentiary problems. Those conducting hostilities already face the difficult task of distinguishing between civilians who are and civilians who are not engaged in a specific hostile act (direct participation in hostilities), and distinguishing both of these from members of organized armed groups (continuous combat function) and State armed forces. In operational reality, it would be impossible to determine with a sufficient degree of reliability whether civilians not currently preparing or executing a hostile act have previously done so on a persistently recurrent basis and whether they have the continued intent to do so again. Basing continuous loss of protection on such speculative criteria would inevitably result in erroneous or arbitrary attacks against civilians, thus undermining their protection which is at the heart of IHL.[91] Consequently, in accordance with the object and purpose of IHL, the concept of direct participation in hostilities must be interpreted as restricted to specific hostile acts.[92]

3. CONCLUSION

The notion of direct participation in hostilities refers to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. It must be interpreted synonymously in situations of international and non-international armed conflict. The treaty terms of "direct" and "active" indicate the same quality and degree of individual participation in hostilities.

85 This was the prevailing view also during the expert meetings (Background Doc. DPH 2004, p. 30; Report DPH 2004, pp. 15 ff.; Report DPH 2005, p. 13). Of course, this does not exclude that some of the consequences, particularly with regard to immunity from prosecution for having directly participated in hostilities, may be regulated differently for the various categories of persons involved in international $and non-international armed conflicts.

86 See Arts 43 [2] AP I; 51 [3] AP I; 67 [1] (e) AP I; 13 [3] AP II.

87 This was the prevailing view also during the expert meetings (see Report DPH 2004, pp. 24 f.; Report DPH 2005, pp. 17-24; Report DPH 2006, pp. 37 f.; Report DPH 2008, pp. 33 ff.).

88 For purposes of this Interpretive Guidance, the notion of "hostile" act refers to a specific act qualifying as direct participation in hostilities. According to *Commentary AP* (above N 10), § 1943, "It seems that the word 'hostilities' covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon". Verri, *Dictionary of the International Law of Armed Conflict* (Geneva: ICRC, 1992), p. 57, defines hostilities as: "acts of violence by a belligerent against an enemy in order to put an end to his resistance and impose obedience", and Salmon, *Dictionnaire de droit international public* (Bruxelles: Bruylant, 2001), p. 550 (*hostilités*): "*Ensemble des actes offensifs ou défensifs et des opérations militaires accomplis par un belligérant dans le cadre d'un conflit armé*". See also the use of the term "hostile act" in Arts 41 [2] and 42 [2] AP I. On the meaning and interrelation of the notions of "hostilities" and "hostile acts", see further: Report DPH 2004, pp. 24 f.; Report DPH 2005, pp. 17-24; Report DPH 2006, pp. 37 f.

89 Report DPH 2006, pp. 28 f.; Report DPH 2008, pp. 35-40. For a similar argument made in recent domestic case law, see: Israel HCJ, *PCATI v. Israel*, above N 24, § 39.

90 See also above, Section II.3. On the distinct temporal scopes of the loss of protection for organized armed actors and civilians, see below Section VII.

91 Report DPH 2008, pp. 36-42.

92 This also was the prevailing view during the expert meetings (see Report DPH 2006, p. 38).

V. CONSTITUTIVE ELEMENTS OF DIRECT PARTICIPATION IN HOSTILITIES

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. **the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and**
2. **there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and**
3. **the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).**

Acts amounting to direct participation in hostilities must meet three cumulative requirements: (1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.[93] Although these elements are very closely interrelated, and although there may be areas of overlap between them, each of them will be discussed separately here.

93 On the cumulative nature of these requirements, see also Report DPH 2006, pp. 40 f., 43 ff., 49 f.

1. THRESHOLD OF HARM

In order to reach the required threshold of harm, a specific act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack.

For a specific act to qualify as direct participation in hostilities, the harm likely to result from it must attain a certain threshold.[94] This threshold can be reached either by causing harm of a specifically military nature or by inflicting death, injury, or destruction on persons or objects protected against direct attack. The qualification of an act as direct participation does not require the *materialization* of harm reaching the threshold but merely the objective *likelihood* that the act will result in such harm. Therefore, the relevant threshold determination must be based on "likely" harm, that is to say, harm which may reasonably be expected to result from an act in the prevailing circumstances.[95]

a) Adversely affecting the military operations or military capacity of a party to the conflict

When an act may reasonably be expected to cause harm of a specifically *military nature*, the threshold requirement will generally be satisfied regardless of quantitative gravity. In this context, military harm should be interpreted as encompassing not only the infliction of death, injury, or destruction on military personnel and objects,[96] but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict.[97]

94 Background Doc. DPH 2004, pp. 27 f.; Background Doc. DPH 2005, WS II-III, p. 6.

95 Background Doc. DPH 2004, p. 25; Report DPH 2005, p. 33.

96 The use of weapons or other means to commit acts of violence against human and material enemy forces is probably the most uncontroversial example of direct participation in hostilities (*Customary IHL*, above N 7, Vol. I, Rule 6, p. 22).

97 During the expert meetings, there was wide agreement that the causation of military harm as part of the hostilities did not necessarily presuppose the use of armed force or the causation of death, injury or destruction (Report DPH 2005, p. 14), but essentially included "all acts that adversely affect or aim to adversely affect the enemy's pursuance of its military objective or goal" (Report DPH 2005, pp. 22 f., 31). The concerns expressed by some experts that the criterion of "adversely affecting" military operations or military capacity was too wide and vague and could be misunderstood to authorize the killing of civilians without any military necessity are addressed below in Section IX (see Report DPH 2006, pp. 41 f.).

For example, beyond the killing and wounding of military personnel and the causation of physical or functional damage to military objects, the military operations or military capacity of a party to the conflict can be adversely affected by sabotage and other armed or unarmed activities restricting or disturbing deployments, logistics and communications. Adverse effects may also arise from capturing or otherwise establishing or exercising control over military personnel, objects and territory to the detriment of the adversary. For instance, denying the adversary the military use of certain objects, equipment and territory,[98] guarding captured military personnel of the adversary to prevent them being forcibly liberated (as opposed to exercising authority over them),[99] and clearing mines placed by the adversary[100] would reach the required threshold of harm. Electronic interference with military computer networks could also suffice, whether through computer network attacks (CNA) or computer network exploitation (CNE),[101] as well as wiretapping the adversary's high command[102] or transmitting tactical targeting information for an attack.[103]

98 Report DPH 2005, pp. 11, 29.

99 The prevailing view during the expert meetings was that guarding captured military personnel was a clear case of direct participation in hostilities (Background Doc. DPH 2004, pp. 9; Report DPH 2005, pp. 15 f.). Nevertheless, to the extent practically possible, the guarding of captured military personnel as a means of preventing their liberation by the enemy should be distinguished from the exercise of administrative, judicial and disciplinary authority over them while in the power of a party to the conflict, including in case of riots or escapes, which are not part of a hostile military operation. This nuanced distinction was not discussed during the expert meetings. See also the discussion on "exercise of power or authority over persons or territory", below NN 163-165 and accompanying text.

100 Report DPH 2005, p. 31.

101 CNA have been tentatively defined as "operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computer and networks themselves" (Background Doc. DPH 2003, pp. 15 ff., with references) and may be conducted over long distances through radio waves or international communication networks. While they may not involve direct physical damage, the resulting system malfunctions can be devastating. CNE, namely "the ability to gain access to information hosted on information systems and the ability to make use of the system itself" (ibid., with references), though not of a direct destructive nature, could have equally significant military implications. During the expert meetings, CNA causing military harm to the adversary in a situation of armed conflict were clearly regarded as part of the hostilities (Report DPH 2005, p. 14).

102 See Report DPH 2005, p. 29.

103 During the expert meetings, the example was given of a civilian woman who repeatedly peeked into a building where troops had taken cover in order to indicate their position to the attacking enemy forces. The decisive criterion for the qualification of her conduct as direct participation in hostilities was held to be the importance of the transmitted information for the direct causation of harm and, thus, for the execution of a concrete military operation. See Report DPH 2004, p. 5.

At the same time, the conduct of a civilian cannot be interpreted as *adversely* affecting the military operations or military capacity of a party to the conflict simply because it fails to *positively* affect them. Thus, the refusal of a civilian to collaborate with a party to the conflict as an informant, scout or lookout would not reach the required threshold of harm regardless of the motivations underlying the refusal.

b) Inflicting death, injury or destruction on persons or objects protected against direct attack

Specific acts may constitute part of the hostilities even if they are not likely to adversely affect the military operations or military capacity of a party to the conflict. In the absence of such military harm, however, a specific act must be likely to cause at least death, injury, or destruction.[104] The most uncontroversial examples of acts that can qualify as direct participation in hostilities even in the absence of military harm are attacks directed against civilians and civilian objects.[105] In IHL, attacks are defined as "acts of violence against the adversary, whether in offence or in defence". [106] The phrase "against the adversary" does not specify the target, but the belligerent nexus of an attack,[107] so that even acts of violence directed specifically against civilians or civilian objects may amount to direct participation in hostilities.[108] For example, sniper attacks against civilians[109] and the bombardment or shelling of civilian villages or urban residential areas[110] are likely to inflict death, injury, or destruction on persons and objects protected against direct attack and thus qualify as

104 During the expert meetings, it was held that the required threshold of harm would clearly be met where an act can reasonably be expected to cause material damage to objects or persons, namely death, injury or destruction (Report DPH 2005, pp. 30 f.; Background Doc. DPH 2004, pp. 5 f., 9 f., 28).

105 Accordingly, Section III of the Hague Regulations (entitled "Hostilities") prohibits the "attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended" (Art. 25 H IV R).

106 Article 49 [1] AP I. Attacks within the meaning of IHL (Art. 49 [1] AP I) should not be confused with attacks as understood in the context of crimes against humanity (see below N 167), or with armed attacks within the meaning of the *jus ad bellum*, both of which are beyond the scope of this study.

107 On belligerent nexus, see below Section V.3. For the relevant discussions on Draft Art. 44 AP I during the Diplomatic Conference of 1974-77, see CDDH/III/SR.11, pp. 93 f.

108 Needless to say, such attacks are invariably prohibited under IHL governing both international and non-international armed conflict. See, for example, Arts 48 AP I, 51 AP I, 13 AP II; *Customary IHL*, above N 7, Vol. I, Rule 1.

109 For the qualification of sniping as an attack within the meaning of IHL, see, e.g. ICTY, *Prosecutor v. Galic*, Case No. Case No. IT-98-29-T, Judgment of 5 December 2003, § 27 in conjunction with § 52.

110 ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment of 31 January 2005, §§ 282 f. in conjunction with § 289.

direct participation in hostilities regardless of any military harm to the opposing party to the conflict.

Acts that neither cause harm of a military nature nor inflict death, injury, or destruction on protected persons or objects cannot be equated with the use of means or methods of "warfare"[111] or, respectively, of "injuring the enemy",[112] as would be required for a qualification as hostilities. For example, the building of fences or roadblocks, the interruption of electricity, water, or food supplies, the appropriation of cars and fuel, the manipulation of computer networks, and the arrest or deportation of persons may have a serious impact on public security, health, and commerce, and may even be prohibited under IHL. However, they would not, in the absence of adverse military effects, cause the kind and degree of harm required to qualify as direct participation in hostilities.

c) Summary

For a specific act to reach the threshold of harm required to qualify as direct participation in hostilities, it must be likely to adversely affect the military operations or military capacity of a party to an armed conflict. In the absence of military harm, the threshold can also be reached where an act is likely to inflict death, injury, or destruction on persons or objects protected against direct attack. In both cases, acts reaching the required threshold of harm can only amount to direct participation in hostilities if they additionally satisfy the requirements of direct causation and belligerent nexus.

111 Art. 35 [1] AP I.
112 Art. 22 H IV R (Section II on Hostilities).

2. DIRECT CAUSATION

In order for the requirement of direct causation to be satisfied, there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.

a) Conduct of hostilities, general war effort, and war sustaining activities

The treaty terminology of taking a "direct" part in hostilities, which describes civilian conduct entailing loss of protection against direct attack, implies that there can also be "indirect" participation in hostilities, which does not lead to such loss of protection. Indeed, the distinction between a person's direct and indirect participation in hostilities corresponds, at the collective level of the opposing parties to an armed conflict, to that between the conduct of hostilities and other activities that are part of the general war effort or may be characterized as war-sustaining activities.[113]

Generally speaking, beyond the actual conduct of hostilities, the general war effort could be said to include all activities objectively contributing to the military defeat of the adversary (e.g. design, production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations), while war-sustaining activities would additionally include political, economic or media activities supporting the general war effort (e.g. political propaganda, financial transactions, production of agricultural or non-military industrial goods).

113 According to *Commentary AP* (above N 10), § 1679, "to restrict this concept [i.e. of "direct participation in hostilities"] to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly. The population cannot on this ground be considered to be combatants […]". Similarly *ibid.*, Commentary Art. 51 AP I, § 1945. Affirmative also ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment of 17 July 2008, §§ 175-176. See also the distinction between taking part in hostilities" and "work of a military character" in Art. 15 [1] (b) GC IV. The position reflected in the Commentary corresponds to the prevailing opinion expressed during the expert meetings (Report DPH 2005, p. 21).

Admittedly, both the general war effort and war-sustaining activities may ultimately result in harm reaching the threshold required for a qualification as direct participation in hostilities. Some of these activities may even be indispensable to harming the adversary, such as providing finances, food and shelter to the armed forces and producing weapons and ammunition. However, unlike the conduct of hostilities, which is designed to cause – i.e. bring about the materialization of – the required harm, the general war effort and war sustaining activities also include activities that merely maintain or build up the capacity to cause such harm.[114]

b) Direct and indirect causation

For a specific act to qualify as "direct" rather than "indirect" participation in hostilities there must be a sufficiently close causal relation between the act and the resulting harm.[115] Standards such as "indirect causation of harm"[116] or "materially facilitating harm"[117] are clearly too wide, as they would bring the entire war effort within the concept of direct participation in hostilities and, thus, would deprive large parts of the civilian population of their protection against direct attack.[118] Instead, the distinction between direct and indirect participation in hostilities must be interpreted as corresponding to that between direct and indirect causation of harm.[119]

In the present context, direct causation should be understood as meaning that the harm in question must be brought about in one causal step. Therefore, individual conduct that merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm, is excluded from the concept of direct participation in hostilities. For example, imposing a regime of economic sanctions on a party to an armed conflict, depriving it of financial assets,[120] or providing its adversary with supplies and services (such as electricity, fuel, construction material, finances and financial services)[121] would have a potentially important, but still indirect, impact on the military capacity or operations of that party. Other examples of indirect participation include scientific research and design,[122] as well as production[123] and transport[124] of weapons and equipment unless carried out as an integral part of a specific military operation designed to directly cause the required threshold of harm. Likewise, although the recruitment and training of personnel is crucial to the military capacity of a party to the conflict, the causal link with the harm inflicted on the adversary will generally remain indirect.[125] Only where persons are specifically recruited and trained for the execution of a predetermined hostile act can such activities be regarded as an integral part of that act and, therefore, as direct participation in hostilities.[126]

114 According to *Commentary AP* (above N 10), § 1944, "[…]'direct' participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces". Affirmative also ICTY, *Prosecutor v. Strugar, Appeal*, (above N 16), § 178. During the expert meetings, it was emphasized that "direct participation" in hostilities is neither synonymous with "involvement in" or "contribution to" hostilities, nor with "preparing" or "enabling" someone else to directly participate in hostilities, but essentially means that an individual is personally "taking part in the ongoing exercise of harming the enemy" (Report DPH 2004, p. 10) and personally carrying out hostile acts which are "part of" the hostilities (Report DPH 2005, pp. 21, 27, 30, 34).

115 According to *Commentary AP* (above N 10), § 4787: "The term'direct participation in hostilities' […] implies that there is a sufficient causal relationship between the act of participation and its immediate consequences". See also Report DPH 2005, pp. 30, 34 ff.

116 Report DPH 2005, p. 28.

117 Background Doc. DPH 2004, p. 27; Report DPH 2005, pp. 28, 34.

118 See also Background Doc. DPH 2004, pp. 27 f.; Report DPH 2004, pp. 11, 25; Report DPH 2005, pp. 28, 34.

119 According to *Commentary AP* (above N 10), § 1679: "Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place".

120 Background Doc. DPH 2004, pp. 9 f.; Report DPH 2005, pp. 14 f.

121 Background Doc. DPH 2004, pp. 14 f.

122 Although, during the expert meetings, civilian scientists and weapons experts were generally regarded as protected against direct attack, some doubts were expressed as to whether this assessment could be upheld in extreme situations, namely where the expertise of a particular civilian was of very exceptional and potentially decisive value for the outcome of an armed conflict, such as the case of nuclear weapons experts during the Second World War (Report DPH 2006, pp. 48 f.).

123 During the expert meetings, there was general agreement that civilian workers in an ammunitions factory are merely building up the capacity of a party to a conflict to harm its adversary, but do not directly cause harm themselves. Therefore, unlike civilians actually using the produced ammunition to cause harm to the adversary, such factory workers cannot be regarded as directly participating in hostilities (see Report DPH 2003, p. 2; Report DPH 2004, pp. 6 f.; Report DPH 2005, pp. 15, 21, 28 f., 34, 38; Report DPH 2006, pp. 48 ff., 60; Report DPH 2008, p. 63). The experts remained divided, however, as to whether the construction of improvised explosive devices (IED) or missiles by non-State actors could in certain circumstances exceed mere capacity-building and, in contrast to industrial weapons production, could become a measure preparatory to a concrete military operation (see Report DPH 2006, pp. 48 f., 60).

124 On the example of a civilian driver of an ammunition truck, see below Section V.2.(e).

125 Report DPH 2004, p. 10; Report DPH 2005, pp. 35 f. For dissenting views, see: Report DPH 2006, pp. 26, 65; Report DPH 2008, p. 51, 53 ff.

126 See below Sections V.2.(c) and VI.1.

Moreover, for the requirement of direct causation to be met, it is neither necessary nor sufficient that the act be indispensable to the causation of harm.[127] For example, the financing or production of weapons and the provision of food to the armed forces may be indispensable, but not directly causal, to the subsequent infliction of harm. On the other hand, a person serving as one of several lookouts during an ambush would certainly be taking a direct part in hostilities although his contribution may not be indispensable to the causation of harm. Finally, it is not sufficient that the act and its consequences be connected through an uninterrupted causal chain of events. For example, the assembly and storing of an improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components, may be connected with the resulting harm through an uninterrupted causal chain of events, but, unlike the planting and detonation of that device, do not cause that harm directly.

c) Direct causation in collective operations

The required standard of direct causation of harm must take into account the collective nature and complexity of contemporary military operations. For example, attacks carried out by unmanned aerial vehicles may simultaneously involve a number of persons, such as computer specialists operating the vehicle through remote control, individuals illuminating the target, aircraft crews collecting data, specialists controlling the firing of missiles, radio operators transmitting orders, and an overall commander.[128] While all of these persons are integral to that operation and directly participate in hostilities, only few of them carry out activities that, in isolation, could be said to directly cause the required threshold of harm. The standard of direct causation must therefore be interpreted to include conduct that causes harm only in conjunction with other acts. More precisely, where a specific act does not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and

127 For the discussion during the expert meetings on "but for"-causation (i.e. the harm in question would not occur "but for" the act), see Report DPH 2004, pp. 11, 25; Report DPH 2005, pp. 28, 34.

128 Report DPH 2005, p. 35.

coordinated tactical operation that directly causes such harm.[129] Examples of such acts would include, *inter alia*, the identification and marking of targets,[130] the analysis and transmission of tactical intelligence to attacking forces,[131] and the instruction and assistance given to troops for the execution of a specific military operation.[132]

d) Causal, temporal, and geographic proximity

The requirement of direct causation refers to a degree of *causal* proximity, which should not be confused with the merely indicative elements of *temporal* or *geographic* proximity. For example, it has become quite common for parties to armed conflicts to conduct hostilities through delayed (i.e. temporally remote) weapons-systems, such as mines, booby-traps and timer-controlled devices, as well as through remote-controlled (i.e. geographically remote) missiles, unmanned aircraft and computer network attacks. The causal relationship between the employment of such means and the ensuing harm remains direct regardless of temporal or geographical proximity. Conversely, although the delivery or preparation of food for combatant forces may occur in the same place and at the same time as the fighting, the causal link between such support activities and the causation of the required threshold of harm to the opposing party to a conflict remains indirect. Thus, while temporal or geographic proximity to the resulting harm may indicate that a specific act amounts to direct participation in hostilities, these factors would not be sufficient in the absence of direct causation.[133] As previously noted, where the required harm has not yet materialized, the element of direct causation must be determined by reference to the harm that can reasonably be expected to directly result from a concrete act or operation ("likely" harm).[134]

129 Report DPH 2004, p. 5; Report DPH 2005, pp. 35 f.

130 Background Doc. DPH 2004, pp. 13; Report DPH 2004, p. 11, 25; Report DPH 2005, p. 31

131 Report DPH 2005, pp. 28, 31. See also the example provided in N 103, which was described as the equivalent of a "fire control system".

132 Report DPH 2004, p. 10; Report DPH 2005, pp. 33, 35 f.

133 Report DPH 2005, p. 35.

134 See above Section V.1.

e) Selected examples

Driving an ammunition truck: The delivery by a civilian truck driver of ammunition to an active firing position at the front line would almost certainly have to be regarded as an integral part of ongoing combat operations and, therefore, as direct participation in hostilities.[135] Transporting ammunition from a factory to a port for further shipping to a storehouse in a conflict zone, on the other hand, is too remote from the use of that ammunition in specific military operations to cause the ensuing harm directly. Although the ammunition truck remains a legitimate military objective, the driving of the truck would not amount to direct participation in hostilities and would not deprive a civilian driver of protection against direct attack.[136] Therefore, any direct attack against the truck would have to take the probable death of the civilian driver into account in the proportionality assessment.[137]

Voluntary human shields: The same logic applies to civilians attempting to shield a military objective by their presence as persons entitled to protection against direct attack (voluntary human shields). Where civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict, they could directly cause the threshold of harm required for a qualification as direct participation in hostilities.[138] This scenario may become particularly relevant in ground operations, such as in urban environments, where civilians may attempt to give physical cover to fighting personnel supported by them or to inhibit the movement of opposing infantry troops.[139]

Conversely, in operations involving more powerful weaponry, such as artillery or air attacks, the presence of voluntary human shields often has no adverse impact on the capacity of the attacker to identify and destroy the shielded military objective. Instead, the presence of civilians around the targeted objective may shift the parameters of the proportionality assessment to the detriment of the attacker, thus increasing the probability that the expected incidental harm would have to be regarded as excessive in relation to the anticipated military advantage.[140] The very fact that voluntary human shields are in practice considered to pose a *legal* – rather than a *physical* – obstacle to military operations demonstrates that they are recognized as protected against direct attack or, in other words, that their conduct does not amount to direct participation in hostilities. Indeed, although the presence of voluntary human shields may eventually lead to the cancellation or suspension of an operation by the attacker, the causal relation between their conduct and the resulting harm remains indirect.[141] Depending on the circumstances, it may also be questionable whether voluntary human shielding reaches the required threshold of harm.

The fact that some civilians voluntarily and deliberately abuse their legal entitlement to protection against direct attack in order to shield military objectives does not, without more, entail the loss of their protection and their liability to direct attack independently of the shielded objective.[142] Nevertheless, through their voluntary presence near legitimate military objectives, voluntary human shields are particularly exposed to the dangers of military operations and, therefore, incur an increased risk of suffering incidental death or injury during attacks against those objectives.[143]

135 Background Doc. DPH 2004, p. 28; Report DPH 2006, p. 48. A similar reasoning was recently adopted in domestic jurisprudence with regard to "driving a vehicle containing two surface-to-air missiles in both temporal and spatial proximity to both ongoing combat operations" (U.S. Military Commission, *USA v. Salim Ahmed Hamdan*, 19 December 2007, p. 6) and "driving the ammunition to the place from which it will be used for the purposes of hostilities" (Israel HCJ, *PCATI v. Israel*, above N 24, § 35).

136 Report DPH 2006, p. 48.

137 See also Report DPH 2005, pp. 32 f. Although it was recognized during the expert meetings that a civilian driver of an ammunition truck may have to face the risk of being mistaken for a member of the armed forces, it was also widely agreed that any civilian known to be present in a military objective had to be taken into account in the proportionality equation, unless and for such time as he or she directly participated in hostilities (Report DPH 2006, pp. 72 f.).

138 This view was generally shared during the expert meetings (Report DPH 2006, pp. 44 ff.; Report DPH 2008, pp. 70 ff.).

139 During the expert meetings, this scenario was illustrated by the concrete example of a woman who shielded two fighters with her billowing robe, allowing them to shoot at their adversary from behind her (Report DPH 2004, pp. 6 f.).

140 See Art. 51 [5] (a) AP I and, for the customary nature of this rule in international and non-international armed conflict, *Customary IHL*, above N 7, Vol. I, Rule 14. For the relevant discussion during the expert meetings, see Report DPH 2004, pp. 6 f.; Report DPH 2006, pp. 44 ff.; Report DPH 2008, p. 70.

141 While there was general agreement during the expert meetings that involuntary human shields could not be regarded as directly participating in hostilities, the experts were unable to agree on the circumstances in which acting as a voluntary human shield would, or would not, amount to direct participation in hostilities. For an overview of the various positions, see Report DPH 2004, p. 6; Report DPH 2006, pp. 44 ff.; Report DPH 2008, pp. 70 ff.

142 See also Art. 51 [7] and [8] AP I, according to which any violation of the prohibition on using civilians as human shields does not release the attacker from his obligations with respect to the civilian population and individual civilians, including the obligation to take the required precautionary measures.

143 See Report DPH 2004, p. 7; Report DPH 2008, pp. 71 f.

f) Summary

The requirement of direct causation is satisfied if either the specific act in question, or a concrete and coordinated military operation of which that act constitutes an integral part, may reasonably be expected to directly – in one causal step – cause harm that reaches the required threshold. However, even acts meeting the requirements of direct causation and reaching the required threshold of harm can only amount to direct participation in hostilities if they additionally satisfy the third requirement, that of belligerent nexus.

3. BELLIGERENT NEXUS

In order to meet the requirement of belligerent nexus, an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.

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a) Basic concept

Not every act that directly adversely affects the military operations or military capacity of a party to an armed conflict or directly inflicts death, injury, or destruction on persons and objects protected against direct attack necessarily amounts to direct participation in hostilities. As noted, the concept of direct participation in hostilities is restricted to specific acts that are so closely related to the hostilities conducted between parties to an armed conflict that they constitute an integral part of those hostilities.[144] Treaty IHL describes the term hostilities as the resort to means and methods of "injuring the enemy",[145] and individual attacks as being directed "against the adversary".[146] In other words, in order to amount to direct participation in hostilities, an act must not only be *objectively likely* to inflict harm that meets the first two criteria, but it must also be *specifically designed to do so in support of a party to an armed conflict and to the detriment of another* (belligerent nexus).[147]

144 See above Section IV.

145 See Art. 22 H IV R (Section II on "Hostilities").

146 See, most notably, the definition of "attacks" as acts of violence "against the adversary…" (Art. 49 [1] AP I). Report DPH 2005, pp. 22 f., 26, 40; Report DPH 2006, pp. 50 ff.

147 The requirement of belligerent nexus is conceived more narrowly than the general nexus requirement developed in the jurisprudence of the ICTY and the ICTR as a precondition for the qualification of an act as a war crime (see: ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23, Judgment of 12 June 2002 (Appeals Chamber), § 58; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96–3, Judgment of 26 May 2003 (Appeals Chamber), § 570). While the general nexus requirement refers to the relation between an act and a situation of armed conflict as a whole, the requirement of belligerent nexus refers to the relation between an act and the conduct of hostilities between the parties to an armed conflict. During the expert meetings, it was generally agreed that no conduct lacking a sufficient nexus to the hostilities could qualify as direct participation in such hostilities. See Report, DPH 2005, p. 25 and, more generally, Background Doc. DPH 2004, pp. 25 f.; Report DPH 2004, pp. 10, 25; Background Doc. DPH 2005, WS II-III, p. 8; Report DPH 2005, pp. 9 f., 22 ff., 27, 34.

Conversely, armed violence which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of another party, cannot amount to any form of "participation" in hostilities taking place between these parties.[148] Unless such violence reaches the threshold required to give rise to a separate armed conflict, it remains of a non-belligerent nature and, therefore, must be addressed through law enforcement measures.[149]

b) Belligerent nexus and subjective intent

Belligerent nexus should be distinguished from concepts such as subjective intent[150] and hostile intent.[151] These relate to the state of mind of the person concerned, whereas belligerent nexus relates to the objective purpose of the act. That purpose is expressed in the design of the act or operation and does not depend on the mindset of every participating individual.[152] As an objective criterion linked to the act alone, belligerent nexus is generally not influenced by factors such as personal distress or preferences, or by

148 Report DPH 2006, pp. 51 f.

149 The same applies, for example, to armed violence carried out by independent armed groups in international armed conflict (see also above, NN 24-27 and accompanying text). During the expert meetings there was general agreement regarding the importance of distinguishing, in contexts of armed conflict, between law enforcement operations and the conduct of hostilities. See Report DPH 2005, pp. 10 f.; Report DPH 2006, pp. 52 f.; Report DPH 2008, p. 49, 54, 62 ff.

150 During the expert meetings, there was almost unanimous agreement that the subjective motives driving a civilian to carry out a specific act cannot be reliably determined during the conduct of military operations and, therefore, cannot serve as a clear and operable criterion for "split second" targeting decisions. See Report DPH 2005, pp. 9, 26, 34, 66 f.; Report DPH 2006, pp. 50 f.; Report DPH 2008, p. 66.

151 During the expert meetings, there was agreement that hostile intent is not a term of IHL, but a technical term used in rules of engagement (ROE) drafted under national law. ROE constitute national command and control instruments designed to provide guidance to armed personnel as to their conduct in specific contexts. As such, ROE do not necessarily reflect the precise content of IHL and cannot be used to define the concept of direct participation in hostilities. For example, particular ROE may for political or operational reasons prohibit the use of lethal force in response to certain activities, even though they amount to direct participation in hostilities under IHL. Conversely, ROE may contain rules on the use of lethal force in individual self-defence against violent acts that do not amount to direct participation in hostilities. Therefore, it was generally regarded as unhelpful, confusing or even dangerous to refer to hostile intent for the purpose of defining direct participation in hostilities. See Report DPH 2005, p. 37.

152 Report DPH 2005, pp. 22 f., 26, 40; Report DPH 2006, pp. 50 f.

the mental ability or willingness of persons to assume responsibility for their conduct. Accordingly, even civilians forced to directly participate in hostilities[153] or children below the lawful recruitment age[154] may lose protection against direct attack.

Only in exceptional situations could the mental state of civilians call into question the belligerent nexus of their conduct. This scenario could occur, most notably, when civilians are totally unaware of the role they are playing in the conduct of hostilities (e.g. a driver unaware that he is transporting a remote-controlled bomb) or when they are completely deprived of their physical freedom of action (e.g. when they are involuntary human shields physically coerced into providing cover in close combat). Civilians in such extreme circumstances cannot be regarded as performing an action (i.e. as *doing something*) in any meaningful sense and, therefore, remain protected against direct attack despite the belligerent nexus of the military operation in which they are being instrumentalized. As a result, these civilians would have to be taken into account in the proportionality assessment during any military operation likely to inflict incidental harm on them.

c) Practical relevance of belligerent nexus

Many activities during armed conflict lack a belligerent nexus even though they cause a considerable level of harm. For example, the exchange of fire between police and hostage- takers during an ordinary bank robbery,[155] violent crimes committed for reasons unrelated to the conflict, and the stealing of military equipment for private use,[156] may cause the required

153 It should be noted, however, that civilians protected under the Fourth Geneva Convention may not be compelled to do work "directly related to the conduct of military operations" or to serve in the armed or auxiliary forces of the enemy (Arts 40 [2] and 51 [1] GC IV), and that civilian medical and religious personnel may not be compelled to carry out tasks which are not compatible with their humanitarian mission (Art. 15 [3] AP I; Art. 9 [1] AP II).

154 Therefore, all parties to an armed conflict are obliged to do everything feasible to ensure that children below the age of 15 years do not directly participate in hostilities and, in particular, to refrain from recruiting them into their armed forces or organized armed groups (Arts 77 [2] AP I; 4 [3] (c) AP II; *Customary IHL*, above N 7, Vol. I, Rule 137). Of course, as soon as children regain protection against direct attack, they also regain the special protection afforded to children under IHL (Arts 77 [3] AP I; 4 [3] (d) AP II).

155 See also Report DPH 2005, pp. 9, 11.

156 Report DPH 2004, p. 25.

threshold of harm, but are not specifically designed to support a party to the conflict by harming another. Similarly, the military operations of a party to a conflict can be directly and adversely affected when roads leading to a strategically important area are blocked by large groups of refugees or other fleeing civilians. However, the conduct of these civilians is not specifically designed to support one party to the conflict by causing harm to another and, therefore, lacks belligerent nexus. This analysis would change, of course, if civilians block a road in order to facilitate the withdrawal of insurgent forces by delaying the arrival of governmental armed forces (or vice versa). When distinguishing between the activities that do and those that do not amount to direct participation in hostilities, the criterion of belligerent nexus is of particular importance in the following four situations:

Individual self-defence: The causation of harm in individual self-defence or defence of others against violence prohibited under IHL lacks belligerent nexus.[157] For example, although the use of force by civilians to defend themselves against unlawful attack or looting, rape, and murder by marauding soldiers may cause the required threshold of harm, its purpose clearly is not to support a party to the conflict against another. If individual self-defence against prohibited violence were to entail loss of protection against direct attack, this would have the absurd consequence of legitimizing a previously unlawful attack. Therefore, the use of necessary and proportionate force in such situations cannot be regarded as direct participation in hostilities.[158]

Exercise of power or authority over persons or territory: IHL makes a basic distinction between the conduct of hostilities and the exercise of power or authority over persons or territory. As a result, the infliction of death, injury, or destruction by civilians on persons or objects that have fallen into their "hands"[159] or "power"[160] within the meaning of IHL does not, without more, constitute part of the hostilities.

157 This was also the prevailing opinion during the expert meetings (see Report DPH 2003, p. 6; Background Doc. DPH 2004, pp. 14, 31 f.).

158 The use of force by individuals in defence of self or others is an issue distinct from the use of force by States in self-defence against an armed attack, which is governed by the *jus ad bellum* and is beyond the scope of this study.

159 E.g. Art. 4 GC IV.

160 E.g. Art. 5 GC III; Art. 75 [1] AP I.

For example, the use of armed force by civilian authorities to suppress riots and other forms of civil unrest,[161] prevent looting, or otherwise maintain law and order in a conflict area may cause death, injury, or destruction, but generally it would not constitute part of the hostilities conducted between parties to an armed conflict.[162] Likewise, once military personnel have been captured (and, thus, are *hors de combat*), the suppression of riots and prevention of escapes[163] or the lawful execution of death sentences[164] is not designed to directly cause military harm to the opposing party to the conflict and, therefore, lacks belligerent nexus.[165]

Excluded from the concept of direct participation in hostilities is not only the lawful exercise of administrative, judicial or disciplinary authority on behalf of a party to the conflict, but even the perpetration of war crimes or other violations of IHL outside the conduct of hostilities. Thus, while collective punishment, hostage-taking, and the ill-treatment and summary execution of persons in physical custody are invariably prohibited by IHL, they are not part of the conduct of hostilities.[166] Such conduct may constitute a domestic or international crime and permit the lawful use of armed force against the perpetrators as a matter of law enforcement or defence of self or others.[167] Loss of protection against direct attack within the meaning of IHL, however, is not a sanction for criminal behaviour but a consequence of military necessity in the conduct of hostilities.[168]

161 On the belligerent nexus of civil unrest, see below N 169 and accompanying text.
162 Treaty IHL expressly confirms the law enforcement role, for example, of occupying powers (Art. 43 H IV R) and States party to a non-international armed conflict (Art. 3 [1] AP II).
163 E.g. Art. 42 GC III.
164 E.g. Arts 100 and 101 GC III.
165 See also above N 99 and accompanying text.
166 See, for example, Arts 3 GC I-IV; 32 GC IV; 75 [2] AP I. For the divergence of opinions expressed during the expert meetings on the qualification of hostage-taking as direct participation in hostilities, see Report DPH 2004, p. 4; Report DPH 2005, p. 11; Report DPH 2006, pp. 43 f.; Report DPH 2008, pp. 67 ff.
167 The concept of "attack" in the context of crimes against humanity does not necessarily denote conduct amounting to direct participation in hostilities under IHL. As explained by the ICTY "[t]he term 'attack' in the context of a crime against humanity carries a slightly different meaning than in the laws of war. [It] is not limited to the conduct of hostilities. It may also encompass situations of mistreatment of persons taking no active part in hostilities, such as someone in detention" (ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23, Judgment of 22 February 2001 (Trial Chamber), § 416, confirmed by the Appeals Chamber in its Judgment in the same case of 12 June 2002, § 89). See also Report DPH 2006, pp. 42 f.
168 For the relevant discussion during the expert meetings, see Report DPH 2008, pp. 63-65.

Civil unrest: During armed conflict, political demonstrations, riots, and other forms of civil unrest are often marked by high levels of violence and are sometimes responded to with military force. In fact, civil unrest may well result in death, injury and destruction and, ultimately, may even benefit the general war effort of a party to the conflict by undermining the territorial authority and control of another party through political pressure, economic insecurity, destruction and disorder. It is therefore important to distinguish direct participation in hostilities – which is specifically designed to support a party to an armed conflict against another – from violent forms of civil unrest, the primary purpose of which is to express dissatisfaction with the territorial or detaining authorities.[169]

Inter-civilian violence: Similarly, in order to become part of the conduct of hostilities, use of force by civilians against other civilians, even if widespread, must be specifically designed to support a party to an armed conflict in its military confrontation with another.[170] This would not be the case where civilians merely take advantage of a breakdown of law and order to commit violent crimes.[171] Belligerent nexus is most likely to exist where inter-civilian violence is motivated by the same political disputes or ethnic hatred that underlie the surrounding armed conflict and where it causes harm of a specifically military nature.

d) Practical determination of belligerent nexus

The task of determining the belligerent nexus of an act can pose considerable practical difficulties. For example, in many armed conflicts, gangsters and pirates operate in a grey zone where it is difficult to distinguish hostilities from violent crime unrelated to, or merely facilitated by, the armed conflict. These determinations must be based on the information reasonably available to the person called on to make the determination, but they must always be deduced from objectively verifiable factors.[172] In practice, the decisive question should be whether the conduct

169 See also Report DPH 2004, p. 4; Report DPH 2008, p. 67.
170 See also Report DPH 2004, p. 4; Report DPH 2005, pp. 8, 11.
171 With regard to the existence of a general nexus between civilian violence and the surrounding armed conflict, a similar conclusion was reached in ICTR, *Prosecutor v. Rutaganda* (above N 147), § 570.
172 Report DPH 2005, pp. 9 f., 22, 26, 28, 34, 40.

of a civilian, in conjunction with the circumstances prevailing at the relevant time and place, can reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party. As the determination of belligerent nexus may lead to a civilian's loss of protection against direct attack, all feasible precautions must be taken to prevent erroneous or arbitrary targeting and, in situations of doubt, the person concerned must be presumed to be protected against direct attack.[173]

e) Summary

In order to meet the requirement of belligerent nexus, an act must be specifically designed to directly cause the required threshold of harm in support of a party to an armed conflict and to the detriment of another. As a general rule, harm caused (a) in individual self-defence or defence of others against violence prohibited under IHL, (b) in exercising power or authority over persons or territory, (c) as part of civil unrest against such authority, or (d) during inter-civilian violence lacks the belligerent nexus required for a qualification as direct participation in hostilities.

4. CONCLUSION

Applied in conjunction, the three requirements of *threshold of harm, direct causation* and *belligerent nexus* permit a reliable distinction between activities amounting to direct participation in hostilities and activities which, although occurring in the context of an armed conflict, are not part of the conduct of hostilities and, therefore, do not entail loss of protection against direct attack.[174] Even where a specific act amounts to direct participation in hostilities, however, the kind and degree of force used in response must comply with the rules and principles of IHL and other applicable international law.[175]

173 See below Section VIII.

174 The use of force in response to activities not fulfilling these requirements must be governed by the standards of law enforcement and of individual self-defence, taking into account the threat to be addressed and the nature of the surrounding circumstances.

175 See below Section IX.

VI. BEGINNING AND END OF DIRECT PARTICIPATION IN HOSTILITIES

Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.

As civilians lose protection against direct attack "for such time" as they directly participate in hostilities, the beginning and end of specific acts amounting to direct participation in hostilities must be determined with utmost care.[176] Without any doubt, the concept of direct participation in hostilities includes the immediate execution phase of a specific act meeting the three criteria of *threshold of harm, direct causation* and *belligerent nexus*. It may also include measures preparatory to the execution of such an act, as well as the deployment to and return from the location of its execution, where they constitute an integral part of such a specific act or operation.[177]

1. PREPARATORY MEASURES

Whether a preparatory measure amounts to direct participation in hostilities depends on a multitude of situational factors that cannot be comprehensively described in abstract terms.[178] In essence, preparatory measures amounting to direct participation in hostilities correspond to what treaty IHL describes as "military operation[s] preparatory to an attack".[179] They are of a specifically military nature and so closely linked

176 See also the discussion in Report DPH 2006, pp. 54-63. On the temporal scope of the loss of protection, see below Section VII.

177 See also the related discussion on direct causation in collective operations, above Section V.2. (c).

178 For the relevant discussions during the expert meetings, see: Background Doc. DPH 2004, pp. 7, 10, 13, 21; Background Doc. DPH 2005, WS VI-VII, p. 10; Report DPH 2005, p. 19; Report DPH 2006, pp. 56-63. Regarding the distinction of preparatory measures, deployments and withdrawals entailing loss of protection against direct attack from preparations, attempts and other forms of involvement entailing criminal responsibility, see Report DPH 2006, pp. 57 ff.

179 Art. 44 [3] AP I.

to the subsequent execution of a specific hostile act that they already constitute an integral part of that act. Conversely, the preparation of a general campaign of unspecified operations would not qualify as direct participation in hostilities. In line with the distinction between direct and indirect participation in hostilities, it could be said that preparatory measures *aiming to carry out a specific hostile act* qualify as direct participation in hostilities, whereas preparatory measures *aiming to establish the general capacity to carry out unspecified hostile acts* do not.[180]

It is neither necessary nor sufficient for a qualification as direct participation that a preparatory measure occur immediately before (temporal proximity) or in close geographical proximity to the execution of a specific hostile act or that it be indispensable for its execution. For example, the loading of bombs onto an airplane for a direct attack on military objectives in an area of hostilities constitutes a measure preparatory to a specific hostile act and, therefore, qualifies as direct participation in hostilities. This is the case even if the operation will not be carried out until the next day, if the target will be selected only during the operation, and if great distance separates the preparatory measure from the location of the subsequent attack. Conversely, transporting bombs from a factory to an airfield storage place and then to an airplane for shipment to another storehouse in the conflict zone for unspecified use in the future would constitute a general preparatory measure qualifying as mere indirect participation.

Similarly, if carried out with a view to the execution of a specific hostile act, all of the following would almost certainly constitute preparatory measures amounting to direct participation in hostilities: equipment, instruction, and transport of personnel; gathering of intelligence; and preparation, transport, and positioning of weapons and equipment. Examples of general preparation not entailing loss of protection against direct attack would commonly include purchase, production, smuggling and hiding of weapons; general recruitment and training of personnel; and financial, administrative or political support to armed actors.[181] It should be reiterated that these examples can only illustrate the principles based on which the necessary distinctions ought to be made and cannot replace a careful assessment of the totality of the circumstances prevailing in the concrete context and at the time and place of action.[182]

180 See above, N 114 and accompanying text, as well as Section V.2.(b).

2. DEPLOYMENT AND RETURN

Where the execution of a specific act of direct participation in hostilities requires prior geographic deployment, such deployment already constitutes an integral part of the act in question.[183] Likewise, as long as the return from the execution of a hostile act remains an integral part of the preceding operation, it constitutes a military withdrawal and should not be confused with surrender or otherwise becoming *hors de combat*.[184] A deployment amounting to direct participation in hostilities begins only once the deploying individual undertakes a physical displacement with a view to carrying out a specific operation. The return from the execution of a specific hostile act ends once the individual in question has physically separated from the operation, for example by laying down, storing or hiding the weapons or other equipment used and resuming activities distinct from that operation.

181 On the qualification of such activities as direct participation in hostilities see also above Section V.2.(a)(b).

182 During the expert meetings, it was emphasized that the distinction between preparatory measures that do and, respectively, do not qualify as direct participation in hostilities should be made with utmost care so as to ensure that loss of civilian protection would not be triggered by acts too remote from the actual fighting. In order for the word "direct" in the phrase direct participation in hostilities to retain any meaning, civilians should be liable to direct attack exclusively during recognizable and proximate preparations, such as the loading of a gun, and during deployments in the framework of a specific military operation (Report DPH 2006, pp. 55, 60 f.).

183 See *Commentary AP* (above N 10), §§ 1679, 1943, 4788, which recalls that several delegations to the Diplomatic Conference of 1974-77 had indicated that the concept of hostilities included preparations for combat and return from combat. In their responses to the 2004 Questionnaire, a majority of experts considered that deployment to the geographic location of a hostile act should already qualify as direct participation in hostilities and, though more hesitantly, tended towards the same conclusion with regard to the return from that location. See Background Doc. DPH 2004, pp. 7 (I, 1.3.), 10 (I, 2.4.), 13 (I, 3.4.), 20 (I, 6.4.). See also Report DPH 2005, pp. 65 f.

184 While this was also the prevailing opinion during the expert meetings (see Report DPH 2005, p. 66) some experts feared that the continued loss of protection after the execution of a specific hostile act invited arbitrary and unnecessary targeting (Report DPH 2006, pp. 56 f., 61 ff.).

Whether a particular individual is engaged in deployment to or return from the execution of a specific hostile act depends on a multitude of situational factors, which cannot be comprehensively described in abstract terms. The decisive criterion is that both the deployment and return be carried out as an integral part of a specific act amounting to direct participation in hostilities. That determination must be made with utmost care and based on a reasonable evaluation of the prevailing circumstances.[185] Where the execution of a hostile act does not require geographic displacement, as may be the case with computer network attacks or remote-controlled weapons systems, the duration of direct participation in hostilities will be restricted to the immediate execution of the act and preparatory measures forming an integral part of that act.

3. CONCLUSION

Where preparatory measures and geographical deployments or withdrawals constitute an integral part of a specific act or operation amounting to direct participation in hostilities, they extend the beginning and end of the act or operation beyond the phase of its immediate execution.

185 See Report DPH 2005, p. 66; Report DPH 2006, p. 55.

C. MODALITIES GOVERNING THE LOSS OF PROTECTION

Under customary and treaty IHL, civilians lose protection against direct attack either by directly participating in hostilities or by ceasing to be civilians altogether, namely by becoming members of State armed forces or organized armed groups belonging to a party to an armed conflict.[186] In view of the serious consequences for the individuals concerned, the present chapter endeavours to clarify the precise modalities that govern such loss of protection under IHL. The following sections examine the temporal scope of the loss of protection against direct attack (VII), the precautions and presumptions in situations of doubt (VIII), the rules and principles governing the use of force against legitimate military targets (IX), and the consequences of regaining protection against direct attack (X).

In line with the aim of the Interpretive Guidance, this chapter will focus on examining loss of protection primarily in case of direct participation in hostilities (civilians), but also in case of continuous combat function (members of organized armed groups), as the latter concept is intrinsically linked to the concept of direct participation in hostilities.[187] It will not, or only marginally, address the loss of protection in case of membership in State armed forces, which largely depends on criteria unrelated to direct participation in hostilities, such as formal recruitment, incorporation, discharge or retirement under domestic law.[188] Subject to contrary provisions of IHL, this does not exclude the applicability of the conclusions reached in Sections VII to X, *mutatis mutandis*, to members of State armed forces as well.

186 Regarding the terminology of "loss of protection against direct attacks" used in the Interpretive Guidance see above N 6.

187 On the concept of continuous combat function, see above Section II.3.(b).

188 On the applicability of the criterion of continuous combat function for the determination of membership in irregularly constituted militia, volunteer corps and resistance movements belonging to States, see above Section I.2.(c).

VII. TEMPORAL SCOPE OF THE LOSS OF PROTECTION

Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians (see above II), and lose protection against direct attack, for as long as they assume their continuous combat function.

1. CIVILIANS

According to treaty and customary IHL applicable in international and non-international armed conflict, civilians enjoy protection against direct attack "unless and for such time" as they take a direct part in hostilities.[189] Civilians directly participating in hostilities do not cease to be part of the civilian population, but their protection against direct attack is temporarily suspended. The phrase "unless and for such time" clarifies that such suspension of protection lasts exactly as long as the corresponding civilian engagement in direct participation in hostilities.[190] This necessarily entails that civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities (so-called "revolving door" of civilian protection).

The "revolving door" of civilian protection is an integral part, not a malfunction, of IHL. It prevents attacks on civilians who do not, at the time, represent a military threat. In contrast to members of organized armed groups, whose continuous function it is to conduct hostilities on behalf of a party to the conflict, the behaviour of individual civilians depends on a multitude of constantly changing circumstances and, therefore, is very difficult to anticipate. Even the fact that a civilian has repeatedly taken a direct part in hostilities, either voluntarily or under pressure, does not allow a reliable prediction as to future conduct.[191] As the concept of direct participation in hostilities refers to specific hostile acts, IHL restores the civilian's protection against direct attack each time his or her engagement in a hostile act ends.[192] Until the civilian in question again engages in a specific act of direct participation in hostilities, the use of force against him or her must comply with the standards of law enforcement or individual self-defence.

Although the mechanism of the "revolving door" of protection may make it more difficult for the opposing armed forces or organized armed groups to respond effectively to the direct participation of civilians in hostilities, it remains necessary to protect the civilian population from erroneous or arbitrary attack and must be acceptable for the operating forces or groups as long as such participation occurs on a merely spontaneous, unorganized or sporadic basis.

2. MEMBERS OF ORGANIZED ARMED GROUPS

Members of organized armed groups belonging to a non-State party to the conflict cease to be civilians for as long as they remain members by virtue of their continuous combat function.[193] Formally, therefore, they no longer benefit from the protection provided to civilians "unless and for such time" as they take a direct part in hostilities. Indeed, the restriction of loss of protection to the duration of specific hostile acts was designed to respond to spontaneous, sporadic or unorganized hostile acts by civilians

189 Arts 51 [3] AP I; 13 [3] AP II; *Customary IHL*, above N 7, Vol. I, Rule 6. The customary nature of this rule was affirmed also in ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment of 29 July 2004, § 157, with references to earlier case law. For recent domestic jurisprudence expressly accepting the customary nature of Art. 51 [3] AP I, including the phrase "for such time as" see: Israel HCJ, *PCATI v. Israel*, above N 24, § 30.

190 On the beginning and end of direct participation in hostilities see above Section VI.

191 Regarding the practical impossibility of reliably predicting the future conduct of a civilian, see also Report DPH 2006, pp. 66 ff.

192 According to *Commentary AP* (above N 10), § 4789: "If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked". See also the description of direct participation in hostilities as potentially "intermittent and discontinuous" in ICTY, *Prosecutor v. Strugar*, Appeal, (above N 16), § 178. Although, during the expert meetings, the mechanism of the revolving door of protection gave rise to some controversy, the prevailing view was that, under the texts of Art. 3 [1] GC I-IV and the Additional Protocols, continuous loss of civilian protection could not be based on recurrent acts by individual civilians, but exclusively on the concept of membership in State armed forces or in an organized armed group belonging to a non-State party to the conflict. See Report DPH 2004, pp. 22 f.; Report DPH 2005, pp. 63 f.; Report DPH 2006, pp. 64-68; Report DPH 2008, pp. 33-44.

193 On the mutual exclusivity of the concepts of civilian and organized armed group, see above Section II.1. On the concept of continuous combat function, see above Section II.3.(b).

and cannot be applied to organized armed groups. It would provide members of such groups with a significant operational advantage over members of State armed forces, who can be attacked on a continuous basis. This imbalance would encourage organized armed groups to operate as farmers by day and fighters by night. In the long run, the confidence of the disadvantaged party in the capability of IHL to regulate the conduct of hostilities satisfactorily would be undermined, with serious consequences ranging from excessively liberal interpretations of IHL to outright disrespect for the protections it affords.[194]

Instead, where individuals go beyond spontaneous, sporadic, or unorganized direct participation in hostilities and become members of an organized armed group belonging to a party to the conflict, IHL deprives them of protection against direct attack for as long as they remain members of that group.[195] In other words, the "revolving door" of protection starts to operate based on membership.[196] As stated earlier, membership in an organized armed group begins in the moment when a civilian starts *de facto* to assume a continuous combat function for the group, and lasts until he or she ceases to assume such function.[197] Disengagement from an organized armed group need not be openly declared; it can also be expressed through conclusive behaviour, such as a lasting physical distancing from the group and reintegration into civilian life or the permanent resumption of an exclusively non-combat function (e.g., political or administrative activities). In practice, assumption of, or disengagement from, a continuous combat function depends on criteria that may vary with the political, cultural, and military context.[198]

194 Report DPH 2005, p. 49; Report DPH 2006, p. 65.

195 According to *Commentary AP* (above N 10), § 4789: "Those who belong to armed forces or armed groups may be attacked at any time". See also Expert Paper DPH 2004 (Prof. M. Bothe). Protection against direct attack is restored where members of armed groups fall *hors de combat* as a result of capture, surrender, wounds or any other cause (Art. 3 [1] GC I-IV. See also Art. 41 AP I.).

196 During the expert meetings, this widely supported compromise was described as a "functional membership approach". For an overview of the discussions, see Report DPH 2003, p. 7; Background Doc. DPH 2004, pp. 34 ff.; Report DPH 2004, pp. 22 f.; Report DPH 2005, pp. 49, 59-65; 82 ff.; Report DPH 2006, pp. 29 ff., 65 f.

197 See above Section II.3. See also Report DPH 2005, p. 59.

198 See also above Section II.3. During the expert meetings, it was emphasized that the question of whether affirmative disengagement had taken place must be determined based on the concrete circumstances (Report DPH 2005, p. 63). On the precautions and presumptions to be observed in situations of doubt, see below Section VIII.

That determination must therefore be made in good faith and based on a reasonable assessment of the prevailing circumstances, presuming entitlement to civilian protection in case of doubt.[199]

3. CONCLUSION

Under customary and treaty IHL, civilians directly participating in hostilities, as well as persons assuming a continuous combat function for an organized armed group belonging to a party to the conflict, lose their entitlement to protection against direct attack. As far as the temporal scope of the loss of protection is concerned, a clear distinction must be made between civilians and organized armed actors. While civilians lose their protection for the duration of each specific act amounting to direct participation in hostilities, members of organized armed groups belonging to a party to the conflict are no longer civilians and, therefore, lose protection against direct attack for the duration of their membership, that is to say, for as long as they assume their continuous combat function.

199 During the expert meetings, it was repeatedly pointed out that, while the "revolving door" of protection was part of the rule on civilian direct participation in hostilities expressed in Arts 51 [3] AP I and 13 [3] AP II, the practical distinction between members of organized armed groups and civilians was very difficult. During reactive operations carried out in response to an attack, the operating forces often lacked sufficient intelligence and had to rely on assumptions that were made based on individual conduct. Therefore, such operations would generally be restricted to the duration of the concrete hostile acts to which they responded. Conversely, *proactive* operations initiated by the armed forces based on solid intelligence regarding the function of a person within an organized armed group could also be carried out at a moment when the targeted persons were not directly participating in hostilities (see Report DPH 2006, pp. 56 f.)

VIII. PRECAUTIONS AND PRESUMPTIONS IN SITUATIONS OF DOUBT

All feasible precautions must be taken in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities. In case of doubt, the person must be presumed to be protected against direct attack.

One of the main practical problems caused by various degrees of civilian participation in hostilities is that of doubt as to the identity of the adversary. For example, in many counter-insurgency operations, armed forces are constantly confronted with individuals adopting a more or less hostile attitude. The difficulty for such forces is to distinguish reliably between members of organized armed groups belonging to an opposing party to the conflict, civilians directly participating in hostilities on a spontaneous, sporadic, or unorganized basis, and civilians who may or may not be providing support to the adversary, but who do not, at the time, directly participate in hostilities. To avoid the erroneous or arbitrary targeting of civilians entitled to protection against direct attack, there must be clarity as to the precautions to be taken and the presumptions to be observed in situations of doubt.

1. THE REQUIREMENT OF FEASIBLE PRECAUTIONS

Prior to any attack, all feasible precautions must be taken to verify that targeted persons are legitimate military targets.[200] Once an attack has commenced, those responsible must cancel or suspend the attack if it becomes apparent that the target is not a legitimate military target.[201] Before and during any attack, everything feasible must be done to determine whether the targeted person is a civilian and, if so, whether he or she is directly participating in hostilities. As soon as it becomes apparent that the targeted person is entitled to civilian protection, those responsible must refrain from launching the attack, or cancel or suspend it if it is already underway. This determination must be made in good faith and in view of all information that can be said to be reasonably available in the specific situation.[202] As stated in treaty IHL, "[f]easible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations".[203] In addition, a direct attack against a civilian must be cancelled or suspended if he or she becomes *hors de combat*.[204]

2. PRESUMPTION OF CIVILIAN PROTECTION

For the purposes of the principle of distinction, IHL distinguishes between two generic categories of persons: civilians and members of the armed forces of the parties to the conflict. Members of State armed forces (except medical and religious personnel) or organized armed groups are generally regarded as legitimate military targets unless they surrender or otherwise become *hors de combat*. Civilians are generally protected against direct attack unless and for such time as they directly participate in hostilities. For each category, the general rule applies until the requirements for an exception are fulfilled.

Consequently, in case of doubt as to whether a specific civilian conduct qualifies as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that this conduct does not

200 Art. 57 [2] (a) (i) AP I. According to *Customary IHL*, above N 7, Vol. I, Rule 16, this rule has attained customary nature in both international and non-international armed conflict.

201 Art. 57 [2] (b) AP I. According to *Customary IHL*, above N 7, Vol. I, Rule 19, this rule has attained customary nature in both international and non-international armed conflict.

202 Report DPH 2006, p. 70 ff.

203 Arts 3 [4] CCW Protocol II (1980); 1 [5] CCW Protocol III (1980); 3 [10] CCW Amended Protocol II (1996). See also the French text of Art. 57 AP I ("*faire tout ce qui est pratiquement possible*").

204 Apart from the determination as to whether a civilian is directly participating in hostilities, the principle of precaution in attack also requires that all feasible precautions be taken to avoid and in any event minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. It also obliges those responsible to refrain from launching, to cancel or suspend attacks that are likely to result in incidental harm that would be "excessive" compared to the anticipated military advantage (see Art. 57 [2] (a) (ii); Art. 57 [2] (a) (iii) and Art. 57 [2] (b) AP I and, with regard to the customary nature of these rules in both international and non-international armed conflict, *Customary IHL*, above N 7, Vol. I, Rules 17, 18 and 19).

amount to direct participation in hostilities.[205] The presumption of civilian protection applies, *a fortiori*, in case of doubt as to whether a person has become a member of an organized armed group belonging to a party to the conflict.[206] Obviously, the standard of doubt applicable to targeting decisions cannot be compared to the strict standard of doubt applicable in criminal proceedings but rather must reflect the level of certainty that can reasonably be achieved in the circumstances. In practice, this determination will have to take into account, *inter alia*, the intelligence available to the decision maker, the urgency of the situation, and the harm likely to result to the operating forces or to persons and objects protected against direct attack from an erroneous decision.

The presumption of civilian protection does not exclude the use of armed force against civilians whose conduct poses a grave threat to public security, law and order without clearly amounting to direct participation in hostilities. In such cases, however, the use of force must be governed by the standards of law enforcement and of individual self-defence, taking into account the threat to be addressed and the nature of the surrounding circumstances.[207]

3. CONCLUSION

In practice, civilian direct participation in hostilities is likely to entail significant confusion and uncertainty in the implementation of the principle of distinction. In order to avoid the erroneous or arbitrary targeting of civilians entitled to protection against direct attack, it is therefore of particular importance that all feasible precautions be taken in determining whether a person is a civilian and, if so, whether he or she is directly participating in hostilities. In case of doubt, the person in question must be presumed to be protected against direct attack.

205 During the expert meetings, it was agreed that, in case of doubt as to whether a civilian constituted a legitimate military target, that civilian had to be presumed to be protected against direct attack (Report DPH 2005, pp. 44 f., 67 f.; Report DPH 2006, p. 70 ff.).

206 For situations of international armed conflict, this principle has been codified in Art. 50 [1] AP I. With regard to non-international armed conflicts, see also *Commentary AP* (above N 10), § 4789, which states that, "in case of doubt regarding the status of an individual, he is presumed to be a civilian".

207 See also Report DPH 2005, pp. 11 f.

IX. RESTRAINTS ON THE USE OF FORCE IN DIRECT ATTACK

In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

Loss of protection against direct attack, whether due to direct participation in hostilities (civilians) or continuous combat function (members of organized armed groups), does not mean that the persons concerned fall outside the law. It is a fundamental principle of customary and treaty IHL that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited".[208] Indeed, even direct attacks against legitimate military targets are subject to legal constraints, whether based on specific provisions of IHL, on the principles underlying IHL as a whole, or on other applicable branches of international law.

1. PROHIBITIONS AND RESTRICTIONS LAID DOWN IN SPECIFIC PROVISIONS OF IHL

Any military operation carried out in a situation of armed conflict must comply with the applicable provisions of customary and treaty IHL governing the conduct of hostilities.[209] These include the rules derived from the principles of distinction, precaution, and proportionality, as well as the prohibitions of denial of quarter and perfidy. They also include the restriction or prohibition of selected weapons and the prohibition of means and methods of warfare of a nature to cause superfluous injury

208 Article 22 H IV R. See also Article 35 [1] AP I: "In any armed conflict, the right of the Parties to the conflict to choose methods and means of warfare is not unlimited".

209 See also Report DPH 2006, p. 76; Report DPH 2008, pp. 24, 29 ff.

or unnecessary suffering (*maux superflus*).[210] Apart from the prohibition or restriction of certain means and methods of warfare, however, the specific provisions of IHL do not expressly regulate the kind and degree of force permissible against legitimate military targets. Instead, IHL simply refrains from providing certain categories of persons, including civilians directly participating in hostilities, with protection from direct "attacks", that is to say, from "acts of violence against the adversary, whether in offence or in defence".[211] Clearly, the fact that a particular category of persons is not protected against offensive or defensive acts of violence is not equivalent to a legal entitlement to kill such persons without further considerations. At the same time, the absence of an unfettered "right" to kill does not necessarily imply a legal obligation to capture rather than kill regardless of the circumstances.

2. THE PRINCIPLES OF MILITARY NECESSITY AND HUMANITY [212]

In the absence of express regulation, the kind and degree of force permissible in attacks against legitimate military targets should be determined, first of all, based on the fundamental principles of military necessity and humanity, which underlie and inform the entire normative framework of IHL and, therefore, shape the context in which its rules must be interpreted.[213] Considerations of military necessity and humanity neither derogate from nor override the specific provisions of IHL, but constitute guiding principles for the interpretation of the rights and duties of belligerents within the parameters set by these provisions.[214]

Today, the principle of military necessity is generally recognized to permit "only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources".[215] Complementing and implicit in the principle of military necessity is the principle of humanity, which "forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes".[216] In conjunction, the principles of military necessity and of humanity reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.[217]

210 See, for example, the prohibitions or restrictions imposed on the use of poison (Art. 23 [1] (a) H IV R; 1925 Geneva Protocol prohibiting asphyxiating, poisonous or other gases and analogous liquids, materials or devices), expanding bullets (1899 Hague Declaration IV/3) and certain other weapons (CCW-Convention and Protocols of 1980, 1995 and 1996, 1997 Mine Ban Convention, Convention on Cluster Munitions of 2008), as well as the prohibition of methods involving the denial of quarter (Art. 40 AP I; Art. 23 [1] (d) H IV R) and the resort to treachery or perfidy (Art. 23 [1] (b) H IV R; Art. 37 AP I). See also Report DPH 2006, p. 76; Report DPH 2008, pp. 18 f.

211 Article 49 [1] AP I.

212 During the expert meetings, Section IX.2. of the Interpretive Guidance remained highly controversial. While one group of experts held that the use of lethal force against persons not entitled to protection against direct attack is permissible only where capture is not possible, another group of experts insisted that, under IHL, there is no legal obligation to capture rather than kill. Throughout the discussions, however, it was neither claimed that there was an obligation to assume increased risks in order to protect the life of an adversary not entitled to protection against direct attack, nor that such a person could lawfully be killed in a situation where there manifestly is no military necessity to do so. For an overview of the relevant discussions see Report DPH 2004, pp. 17 ff.; Report DPH 2005, pp. 31 f., 44. ff., 50, 56 f., 67; Report DPH 2006, pp. 74-79; Report DPH 2008, pp. 7-32.

213 See, most notably: *Commentary AP* (above N 10), § 1389.

214 Report DPH 2008, pp. 7 f., 19 f. See also the statement of Lauterpacht that "the law on these subjects [i.e. on the conduct of hostilities] must be shaped – so far as it can be shaped at all – by reference not to existing law but to more compelling considerations of humanity, of the survival of civilisation, and of the sanctity of the individual human being" (cited in: *Commentary AP* (above N 10), § 1394).

215 United Kingdom: Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: OUP, 2004), Section 2.2 (Military Necessity). Similar interpretations are provided in numerous other contemporary military manuals and glossaries. See, for example, NATO: *Glossary of Terms and Definitions (AAP-6V)*, p. 2-M-5; United States: Department of the Army, *Field Manual 27-10* (1956), § 3; US Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, *NWP 1–14 M/MCWP 5–12-1/ COMDTPUB P5800.7A* (2007), § 5.3.1, p. 5-2.; France: Ministry of Defence, *Manuel de Droit des Conflits Armés* (2001), pp. 86 f.; Germany: Federal Ministry of Defence, *Triservice Manual ZDv 15/2: Humanitarian Law in Armed Conflicts* (August 1992) § 130; Switzerland: Swiss Army, *Regulations 51.007/IV, Bases légales du comportement à l'engagement* (2005), § 160. Historically, the modern concept of military necessity has been strongly influenced by the definition provided in Art. 14 of the "Lieber Code" (United States: *Adjutant General's Office, General Orders No. 100*, 24 April 1863).

216 United Kingdom, *Manual of the Law of Armed Conflict* (above N 215), Section 2.4 (Humanity). Although no longer in force, see also the formulation provided in: United States: Department of the Air Force, *Air Force Pamphlet, AFP 110–31* (1976), § 1-3 (2), p. 1-6. Thus, as far as they aim to limit death, injury or destruction to what is actually necessary for legitimate military purposes, the principles of military necessity and of humanity do not oppose, but mutually reinforce, each other. Only once military action can reasonably be regarded as necessary for the accomplishment of a legitimate military purpose, do the principles of military necessity and humanity become opposing considerations which must be balanced against each other as expressed in the specific provisions of IHL.

217 See *Commentary AP* (above N 10), § 1395. See also the determination of the International Court of Justice that the prohibition on the use of means and methods of warfare of a nature to cause unnecessary suffering to combatants constitutes an intransgressible principle of international customary law and a cardinal principle of IHL, which outlaws the causation of "harm greater than that unavoidable to achieve legitimate military objectives". See ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear. Weapons*, 8 July 1996, § 78.

While it is impossible to determine, *ex ante*, the precise amount of force to be used in each situation, considerations of humanity require that, within the parameters set by the specific provisions of IHL, no more death, injury, or destruction be caused than is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.[218] What kind and degree of force can be regarded as necessary in an attack against a particular military target involves a complex assessment based on a wide variety of operational and contextual circumstances. The aim cannot be to replace the judgment of the military commander by inflexible or unrealistic standards; rather it is to avoid error, arbitrariness, and abuse by providing guiding principles for the choice of means and methods of warfare based on his or her assessment of the situation.[219]

In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL. The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.[220]

For example, an unarmed civilian sitting in a restaurant using a radio or mobile phone to transmit tactical targeting intelligence to an attacking air force would probably have to be regarded as directly participating in hostilities. Should the restaurant in question be situated within an area firmly controlled by the opposing party, however, it may be possible to neutralize the military threat posed by that civilian through capture or other non-lethal means without additional risk to the operating forces or the surrounding civilian population. Similarly, under IHL, an insurgent military commander of an organized armed group would not regain civilian protection against direct attack simply because he temporarily discarded his weapons, uniform and distinctive signs in order to visit relatives inside government-controlled territory. Nevertheless, depending on the circumstances, the armed or police forces of the government may be able to capture that commander without resorting to lethal force. Further, large numbers of unarmed civilians who deliberately gather on a bridge in order to prevent the passage of governmental ground forces in pursuit of an insurgent group would probably have to be regarded as directly participating in hostilities. In most cases, however, it would be reasonably possible for the armed forces to remove the physical obstacle posed by these civilians through means less harmful than a direct military attack on them.

218 See also the Declaration of St. Petersburg (1868), which states: "That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable [original French version: *mettre hors de combat*] the greatest possible number of men".

219 It has long been recognized that matters not expressly regulated in treaty IHL should not, "for want of a written provision, be left to the arbitrary judgment of the military commanders" (Preamble H II; Preamble H IV) but that, in the words of the famous Martens Clause, "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience" (Art. 1 [2] AP I). First adopted in the Preamble of Hague Convention II (1899) and reaffirmed in subsequent treaties and jurisprudence for more than a century, the Martens Clause continues to serve as a constant reminder that, in situations of armed conflict, a particular conduct is not necessarily lawful simply because it is not expressly prohibited or otherwise regulated in treaty law. See, e.g., Preambles H IV R (1907), AP II (1977), CCW (1980); Arts 63 GC I, 62 GC II, 142 GC III, 158 GC IV (1949); ICJ, *Nuclear Weapons AO* (above N 217), § 78; ICTY, *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T-14, Judgment of January 2000, § 525). For the discussion on the Martens Clause during the expert meetings, see Report DPH 2008, pp. 22 f.).

220 For recent national case law reflecting this position see: Israel HCJ, *PCATI v. Israel*, above N 24, § 40, where the Court held that "a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. […] Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required […]. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities […]. Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used".

In sum, while operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.[221] In such situations, the principles of military necessity and of humanity play an important role in determining the kind and degree of permissible force against legitimate military targets. Lastly, although this Interpretive Guidance concerns the analysis and interpretation of IHL only, its conclusions remain without prejudice to additional restrictions on the use of force, which may arise under other applicable frameworks of international law such as, most notably, international human rights law or the law governing the use of interstate force (*jus ad bellum*).[222]

3. CONCLUSION

In situations of armed conflict, even the use of force against persons not entitled to protection against direct attack remains subject to legal constraints. In addition to the restraints imposed by IHL on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

221 It is in this sense that Pictet's famous statement should be understood that "[i]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil". See Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht, Nijhoff 1985), pp. 75 f. During the expert meetings, it was generally recognized that the approach proposed by Pictet is unlikely to be operable in classic battlefield situations involving large-scale confrontations (Report DPH 2006, pp. 75 f., 78) and that armed forces operating in situations of armed conflict, even if equipped with sophisticated weaponry and means of observation, may not always have the means or opportunity to capture rather than kill (Report DPH 2006, p. 63).

222 According to Art. 51 [1] AP I the rule expressed in Art. 51 [3] AP I is "additional to other applicable rules of international law". Similarly, Art. 49 [4] AP I recalls that the provisions of Section I AP I (Arts 48-67) are "additional to the rules concerning humanitarian protection contained […] in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians […] against the effects of hostilities". While these provisions refer primarily to sources of IHL other than AP I itself, they also aim to include "instruments of more general applicability that continue to apply wholly or partially in a situation of armed conflict" (see *Commentary AP* (above N 10), §§ 128-131), such as "the regional and universal Conventions and Covenants relating to the protection of human rights" (*ibid*., Commentary Art. 49 AP I, § 1901) and other applicable treaties, which "can have a positive influence on the fate of the civilian population in time of armed conflict" (*ibid*., Commentary Art. 51 [1] AP I, § 1937). During the expert meetings, some experts suggested that the arguments made in Section IX should be based on the human right to life. The prevailing view was, however, that the Interpretive Guidance should not examine the impact of human rights law on the kind and degree of force permissible under IHL. Instead, a general savings clause should clarify that the text of the Interpretive Guidance was drafted without prejudice to the applicability of other legal norms, such as human rights law (Report DPH 2006, pp. 78 f.; Report DPH 2008, p. 21 f.).

X. CONSEQUENCES OF REGAINING CIVILIAN PROTECTION

International humanitarian law neither prohibits nor privileges civilian direct participation in hostilities. When civilians cease to directly participate in hostilities, or when members of organized armed groups belonging to a non-State party to an armed conflict cease to assume their continuous combat function, they regain full civilian protection against direct attack, but are not exempted from prosecution for violations of domestic and international law they may have committed.

1. LACK OF IMMUNITY FROM DOMESTIC PROSECUTION

IHL provides an express "right" to directly participate in hostilities only for members of the armed forces of parties to international armed conflicts and participants in a *levée en masse*.[223] This right does not imply an entitlement to carry out acts prohibited under IHL, but merely provides combatants with immunity from domestic prosecution for acts which, although in accordance with IHL, may constitute crimes under the national criminal law of the parties to the conflict (the so-called combatant privilege).[224] The absence in IHL of an express right for civilians to directly participate in hostilities does not necessarily imply an international prohibition of such participation. Indeed, as such, civilian direct participation in hostilities is neither prohibited by IHL[225] nor criminalized

223 Art. 43 [2] AP I (except medical and religious personnel); Arts 1 and 2 H IV R.

224 Conversely, combatant privilege provides no immunity from prosecution under international or national criminal law for violations of IHL.

225 This was also the prevailing view during the expert meetings (see Report DPH 2006, p. 81). The experts also agreed that the legality or illegality of an act under national or international law is irrelevant for its qualification as direct participation in hostilities (Background Doc. DPH 2004, p. 26; Report DPH 2004, p. 17; Report DPH 2005, p. 9; Report DPH 2006, p. 50).

under the statutes of any prior or current international criminal tribunal or court.[226] However, because civilians – including those entitled to prisoner of war status under Article 4 [4] and [5] GC III – are not entitled to the combatant privilege, they do not enjoy immunity from domestic prosecution for lawful acts of war, that is, for having directly participated in hostilities while respecting IHL.[227] Consequently, civilians who have directly participated in hostilities and members of organized armed groups belonging to a non-State party to a conflict[228] may be prosecuted and punished to the extent that their activities, their membership, or the harm caused by them is penalized under national law (as treason, arson, murder, etc.).[229]

2. OBLIGATION TO RESPECT IHL

The case law of international military tribunals that followed the Second World War,[230] the ICTY and the ICTR consistently affirms that even individual civilians can violate provisions of IHL and commit war crimes. It is the character of the acts and their nexus to the conflict, not the status of the perpetrator, that are decisive for their relevance under IHL.[231] There can be no doubt that civilians directly participating in hostilities must respect the rules of IHL, including those on the conduct of hostilities, and may be held responsible for war crimes just like members of State armed forces or organized armed groups. For example, it would be a violation of IHL if civilians were to direct hostile acts against persons and objects protected against direct attack, to deny quarter to adversaries hors de combat, or to capture, injure or kill an adversary by resort to perfidy.

In practice, the prohibition on perfidy is of particular interest, as civilians directly participating in hostilities often do not carry arms openly or otherwise distinguish themselves from the civilian population. When civilians capture, injure, or kill an adversary and in doing so they fail to distinguish themselves from the civilian population in order to lead the adversary to believe that they are entitled to civilian protection against direct attack, this may amount to perfidy in violation of customary and treaty IHL.[232]

3. CONCLUSION

In the final analysis, IHL neither prohibits nor privileges civilian direct participation in hostilities. Therefore, when civilians cease to directly participate in hostilities, or when individuals cease to be members of organized armed groups because they disengage from their continuous combat function, they regain full civilian protection against direct attack. However, in the absence of combatant privilege, they are not exempted from prosecution under national criminal law for acts committed during their direct participation or membership. Moreover, just like members of State armed forces or organized armed groups belonging to the parties to an armed conflict, civilians directly participating in hostilities must respect the rules of IHL governing the conduct of hostilities and may be held individually responsible for war crimes and other violations of international criminal law.

226 Neither the statutes of the Military Tribunals that followed the Second World War (i.e. the International Military Tribunal in Nuremberg and the International Military Tribunal for the Far East in Tokyo), nor the current statutes of the ICTY, the ICTR, the ICC and the Special Court for Sierra Leone (SCSL) penalize civilian direct participation in hostilities as such.

227 The Martens Clause (above N 219) expresses a compromise formulated after the States participating in the 1899 Peace Conference had been unable to agree on whether civilians taking up arms against an established occupying power should be treated as privileged combatants or as *franc-tireurs* subject to execution. Since then, States have successively extended the combatant privilege to participants in a *levée en masse*, militias and volunteer corps (H IV R, 1907), organized resistance movements (GC I-III, 1949) and certain national liberation movements (AP I, 1977). As far as civilians are concerned, however, IHL still neither prohibits their direct participation in hostilities, nor affords them immunity from domestic prosecution.

228 Obviously, where Additional Protocol I is applicable, members of the armed forces of national liberation movements within the meaning of Article 1 [4] AP I would benefit from combatant privilege and, thus, from immunity against prosecution for lawful acts of war, even though the movements to which they belong are non-State parties to an armed conflict.

229 See also Background Doc. DPH 2004, p. 26; Report DPH 2004, p. 17; Report DPH 2005, p. 9; Report DPH 2006, pp. 80 f.

230 See above N 226.

231 For the nexus criterion as established by the ICTY and the ICTR see, most notably, ICTY, *Prosecutor v Tadic*, Interlocutory Appeal (above N 26), §§ 67, 70; ICTY, *Prosecutor v. Kunarac et al.* (above N 147), §§ 55 ff.; ICTR, *Prosecutor v. Rutaganda* (above N 147), §§ 569 f.

232 Arts 23 [1] (b) H IV R; 37 [1] AP I (international armed conflict). For the customary nature of this rule in non-international armed conflict, see *Customary IHL*, above N 7, Vol. I, Rule 65. Under the ICC statute, the treacherous killing or wounding of "individuals belonging to the hostile nation or army" (international armed conflict: Art. 8 [2] (b) (xi)) or of a "combatant adversary" (non-international armed conflict: Art. 8 [2] (e) (ix)) is a war crime.

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Report of the Secretary-General on the protection of civilians in armed conflict

I. Introduction

1. The present report is submitted pursuant to the request contained in the statement of the President of the Security Council of 27 May 2008 (S/PRST/2008/18).

2. The year 2009 marks the tenth anniversary of the consideration by the Security Council of the protection of civilians in armed conflict as a thematic issue. As with most anniversaries, there is cause for celebration but also for a critical review of progress made. The protection of civilians has come to occupy a prominent place on the Council's agenda, as manifested in the biannual open debates and the Secretary-General's periodic reports. Most importantly, the protection of civilians has increasingly permeated the country-specific deliberations and decisions of the Council. This has resulted in concrete proposals and decisions intended to improve the situation of countless men, women, girls and boys affected by the horrors and indignities of war. It has also contributed to the increasing awareness among Member States and the broader international community of the need to respond to protection issues.

3. A decade ago, members of the Security Council questioned whether situations of internal armed conflict constituted a threat to international peace and security, and thus a matter for Council consideration. Currently, based on the experience of conflicts in such places as Afghanistan, Chad, the Central African Republic, the Democratic Republic of the Congo, Liberia, Rwanda, Sierra Leone, Somalia and the Sudan, the regional dimensions and destabilizing effects of internal conflicts have been firmly recognized and the Council is progressively more willing to address the protection needs of civilians in such situations.

4. Nonetheless, further efforts to strengthen the protection of civilians remain crucial. While the last 10 years have seen peace come to some of the world's major conflicts, others have continued to smolder and burn and new ones have broken out. Common to old and new ones alike are persistent and sometimes appalling levels of human suffering owing to the fundamental failure of parties to conflict to fully respect and ensure respect for their obligations to protect civilians. Actions on the ground have not yet matched the progress in words and the development of international norms and standards.

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5. This is a failure that demands a reinvigorated commitment by the Security Council, Member States and the United Nations to the protection of civilians and to the promotion of respect for the principles of international humanitarian law, human rights law and refugee law on which the concept is founded. In practical terms, it requires determined action to meet the five core challenges outlined in the present report: enhancing compliance by parties to conflict with international law, in particular in the conduct of hostilities; enhancing compliance with the law by non-State armed groups; enhancing protection through more effective and better resourced peacekeeping and other relevant missions; enhancing humanitarian access; and enhancing accountability for violations of the law.

II. A decade of protection of civilians

6. On 12 February 1999, at the end of its first debate on the protection of civilians, the Security Council adopted a presidential statement expressing grave concern at the growing civilian toll of conflict (S/PRST/1999/6). It noted that civilians account for the vast majority of casualties and are increasingly directly targeted by combatants.

7. The statement also acknowledged the relevance of the issue to the Security Council. Noting that large-scale human suffering is both a consequence of and a contributing factor to instability and further conflict, and bearing in mind its primary responsibility for the maintenance of international peace and security, the Council affirmed the need for the international community to assist and protect civilians affected by conflict.

A. Ten years of normative progress

8. In the aforementioned statement of February 1999, the President, on behalf of the Security Council, requested my predecessor to submit a report with recommendations for improving the protection of civilians. To date, the Council has considered six such reports. These have raised a range of issues, reflecting the fact that improving the protection of civilians is not a purely humanitarian task; rather, it is a task that requires focus and action in the peacekeeping, human rights, rule of law, political, security, development and disarmament fields. The reports have also underlined the fact that improving the protection of individuals and communities is not a substitute for political processes aimed at preventing or ending conflict and building sustainable peace.

9. The six reports contain over 100 recommendations that address such issues as the ratification of international instruments, protection of specific groups, humanitarian access, sexual violence, impunity, small arms and the role of peacekeeping missions and regional organizations. Several of these issues were reflected in landmark Security Council resolutions on the protection of civilians (1265 (1999), 1296 (2000), 1674 (2006) and 1738 (2006)) as well as, albeit inconsistently, in an increasing number of situation-specific resolutions and peacekeeping mandates.

10. Some of these issues have been addressed also in the Security Council's work on women, peace and security and on children and armed conflict. In particular,

resolution 1820 (2008) signalled the Council's strengthened commitment to address sexual violence in conflict. The adoption of resolution 1612 (2005), the establishment of the Working Group on Children and Armed Conflict, and the work of my Special Representative on this issue, as well as the efforts of mandated agencies, their partners and the child protection components of peacekeeping missions, have all contributed to important advances in enhancing protection for children affected by conflict.

11. The Security Council has also adopted eight presidential statements on the protection of civilians. The annex to the most recent of these (S/PRST/2009/1) contains the third version of the aide-memoire adopted by the Council on the protection of civilians in armed conflict, which identifies key protection concerns in contemporary conflicts and, based on past practice, actions which the Council could take to respond.

12. Also in January, the Security Council Expert Group on the Protection of Civilians, whose establishment I recommended in my last report (S/2007/643) to mainstream protection into the Council's actions, was convened for the first time to discuss the situation in Côte d'Ivoire, before the renewal of the mandate of the United Nations peacekeeping operation in that country. It has since met two more times, in advance of the renewal of the mandates of the United Nations Assistance Mission in Afghanistan (UNAMA) and the United Nations Mission in the Sudan, and has contributed to further reflecting protection concerns in the respective Council resolutions.

13. The Expert Group provides an important forum for the Office for the Coordination of Humanitarian Affairs to informally brief the Security Council on behalf of the humanitarian community, with a view to ensuring that protection concerns are identified and addressed in the Council's resolutions and actions on specific situations. I would urge that the Council make extensive use of the Expert Group and, through it, give practical relevance to the aide-memoire and the wealth of experience and best practice developed over the last 10 years.

B. Enhancing protection on the ground

14. While such developments are an essential starting point, they are of limited value if they do not translate into concrete improvements in the protection of civilians on the ground, or contribute to efforts to this end by the various United Nations and other humanitarian and human rights organizations. The inclusion of protection activities in the mandates of peacekeeping missions, beginning with the United Nations Mission in Sierra Leone in 1999, is among the most significant of Security Council actions to this end. The requirements for the adequate implementation of such mandates are further discussed in section III of the present report.

15. Also within the peacekeeping context, the Security Council has taken important steps to improve protection for specific groups. Women and children were identified in the first Secretary-General's report as requiring special protection measures. These included ensuring that their needs are addressed by peacekeeping missions which, in turn, contributed to the deployment of gender and child protection advisers in several missions, reinforcing the work of mandated humanitarian agencies in the respective fields. Of particular note was the Council's

request, contained in its resolution 1794 (2007), that the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) pursue a Mission-wide strategy to address sexual violence. In March 2009, United Nations actors and their national and international partners finalized a comprehensive strategy to combat sexual violence. The strategy is crucial and warrants support from all concerned. Similar strategies should be developed in other contexts where sexual violence is widespread.

16. In addition to women and children, the Security Council has sought to enhance protection for refugees and internally displaced persons by mandating peacekeeping missions to protect camps and sites from armed attacks and to maintain their civilian and humanitarian character by supporting the disarmament and separation of combatants. The Council's endorsement of the Détachement intégré de sécurité to protect camps in Chad (resolution 1778 (2007)), following training by the United Nations Mission in the Central African Republic and Chad (MINURCAT), is noteworthy in this regard. Day and night patrols have been conducted since October 2008 and, as of April 2009, 81 individuals suspected of serious crimes have been arrested.

17. The Security Council has also promoted durable solutions for refugees and displaced persons that are safe, voluntary and dignified. Peacekeeping missions have been mandated to support the return of refugees and displaced persons, notably through the creation of secure environments and restoration of the rule of law. In Kosovo and Timor-Leste this contributed to the establishment of mechanisms to address housing, land and property issues. As noted in my last report, such issues are critical to safe return as they often lie at the origins of, or result from, conflict and are inextricably linked to achieving peace and preventing future violence. Greater efforts are needed by the Council and the international community at large to address housing, land and property issues on a consistent basis in peace agreements, operational programmes and through the establishment of appropriate restitution mechanisms. I would urge the Council to revisit the corresponding recommendations in my last report.

18. The Security Council should also place greater emphasis on preventing displacement in situations of conflict. The latest figures reveal that 26 million persons are currently internally displaced as a result of conflict, in addition to the approximately 11 million refugees who have crossed borders in search of safety. In its resolution 1674 (2006), the Council recalls the prohibition of forcible displacement under circumstances that violate international humanitarian law. More needs to be done to implement this prohibition, and to prevent the conditions that lead to displacement and the misery and degradation that follow. To this end, rapid and pre-emptive action by peacekeeping missions in areas of imminent displacement could significantly contribute to preventing the deterioration of conditions so that civilians are not forced or obliged to flee.

19. The Security Council has also called upon parties to conflict to end attacks against journalists. The International News Safety Institute reports that 29 journalists were killed while reporting on conflicts in 2008. I would recall the need, expressed in resolution 1738 (2006), for States and other parties to conflict to prevent such attacks and prosecute those responsible.

20. Further efforts to enhance protection on the ground are apparent in the application of targeted measures by the Security Council. For example, in its

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resolutions 1572 (2004) and 1591 (2005), on Côte d'Ivoire and the Sudan, respectively, the Council called upon Member States to impose travel bans and asset freezes against persons responsible for human rights and humanitarian law violations. While several individuals have been listed on these grounds, implementation of the measures against them has been limited. This is regrettable given the importance of targeted measures as a response to and possible deterrent against violations. Member States should urgently take the steps necessary to fully implement the relevant resolutions.

21. The Security Council has also imposed arms embargoes in relation to several conflicts in order to stem the availability of arms and the human suffering resulting from their use, albeit with mixed results. In its resolution 1612 (2005), the Council urged Member States to control the illicit trade of small arms to parties that do not respect international law relating to the protection of children. While this is an important step to enhance the protection of children, it is necessary to take a broader approach involving similar measures against parties that do not respect international law relating to the protection of civilians more generally.

22. In addition to controls on the illicit trade in small arms, I would draw attention to continuing efforts to agree on international standards for the import, export and transfer of conventional arms. The absence of such standards contributes significantly to conflict and undermines the safety and security of civilians. In particular, I urge Member States participating in the open-ended working group on an arms trade treaty to ensure that respect for international humanitarian law and human rights law are among the criteria for assessing arms transfer decisions.

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C. The enduring need to strengthen further the protection of civilians

23. Significant though they are, for all the reports, resolutions and actions of the last decade, the situation that confronts civilians in current conflicts is depressingly similar to that which prevailed in 1999. Civilians still account for the vast majority of casualties and continue to be targeted and subjected to indiscriminate attacks and other violations by parties to conflict. Ten years on, there remains an enduring need for the Security Council and Member States to strengthen further the protection of civilians. Moreover, as the tragic events in Sri Lanka demonstrate, even conflicts that are not perceived by all Council members to have implications for international peace and security could have a dramatic impact on civilians and may warrant Council attention.

24. The need to strengthen protection further lies, in part, in the changing nature of conflict in the last 10 years. The proliferation and fragmentation of non-State armed groups has contributed to the increasingly asymmetric nature of conflict in places such as Afghanistan, Iraq, Pakistan and Somalia. This has had a profoundly negative impact on civilians, as armed groups have sought to overcome their military inferiority by using strategies that flagrantly violate international law, including attacks against civilians and the use of civilians to shield military objectives. The risks for civilians are further heightened as militarily superior parties, in fighting an enemy that is often difficult, if not impossible, to identify, respond with methods and means of warfare that may violate the principles of distinction and proportionality, of which civilians again bear the brunt.

25. In a number of conflicts, we have seen increased reliance on private military and security companies, with sometimes fatal consequences for civilians. In this connection, I welcome the understanding reached among 17 States in September 2008 on the Montreux Document (S/2008/636, annex). It is an initiative of the Government of Switzerland and the International Committee of the Red Cross (ICRC) that clarifies international law as it relates to such companies operating in conflict and may serve as a basis for national regulation.

III. The five core challenges

26. Ultimately, the enduring need to strengthen the protection of civilians stems from the fundamental, and equally enduring, failure of parties to conflict to comply fully with their legal obligations to protect civilians. It is a failure that demands reinvigorated commitment and determined action so as to meet the following core challenges: enhancing compliance with international law; enhancing compliance by non-State armed groups; enhancing protection through more effective and better resourced United Nations peacekeeping and other relevant missions; enhancing humanitarian access; and enhancing accountability for violations.

A. Enhancing compliance

27. A defining feature of most, if not all, contemporary conflicts is the failure of the parties to respect and ensure respect for their legal obligations to protect civilians and spare them from the effects of hostilities. All violations are of concern and initiatives are being pursued, both within and outside the United Nations, to prevent and better respond to such issues as sexual violence and forced recruitment. The focus of the present report, however, is on improving compliance with international humanitarian law in the conduct of hostilities. The failure of parties to conflict in this respect leads not only to the death and injury of hundreds of civilians in conflicts every week, but also to the displacement of thousands more forced to flee from attacks and the destruction of their homes, communities and livelihoods into an existence marked by the heightened risk of further violations as well as all the suffering and psychological anguish.

28. Constant care must be taken to spare the civilian population from the effects of hostilities. This requires, inter alia, strict compliance by parties to conflict with international humanitarian law and, in particular, the principles of distinction and proportionality, and the requirement to take all feasible precautions in attack and defence. Under no circumstances do violations of these rules by one party to a conflict justify violations by others.

29. For those launching attacks, this includes doing everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and refraining from indiscriminate attacks, including those that may be expected to cause incidental civilian casualties which would be excessive in relation to the concrete and direct military advantage anticipated from that specific attack. For those in defence, it means removing civilians and civilian objects from the vicinity of military objectives and avoiding locating military objectives within or near densely populated areas. It also means not using the presence, or ordering the

movement, of civilians to render areas immune from military operations or to shield military objectives from attack.

30. Disturbingly, violation of these rules appears almost commonplace. The intensification of fighting in the Vanni region of Sri Lanka, for example, was reportedly marked by the repeated use of heavy weapons by Sri Lankan armed forces in attacks on areas containing large numbers of civilians, including the so-called "no-fire zones", with reports of multiple strikes on medical facilities. Combined with the refusal of the Liberation Tigers of Tamil Eelam to allow civilians within its control to seek safety in an attempt to render areas immune from attack and to seek military and propaganda advantage, the consequences for civilians were catastrophic. Thousands were killed and wounded and their plight further compounded by extremely limited access to medical and other assistance.

31. The Israeli offensive in Gaza earlier this year resulted in high numbers of casualties, in particular among children, and the extensive destruction of, and damage to, homes, schools, including those run by the United Nations, and civilian infrastructure, raising extremely grave concerns as to Israel's compliance with international humanitarian law. Concerns also existed as to whether the civilian population was used to render areas immune from attack, as Hamas militants allegedly used residential buildings as bases from which to launch attacks against Israeli forces. Reports also indicate the possible use of schools and hospitals by Hamas militants to shield themselves and their weapons from attack.

32. In Afghanistan, according to UNAMA, over 1,100 civilians were killed during 2008 in attacks by anti-Government elements, including suicide attacks and attacks on educational facilities, teaching staff and students, in particular females. In addition, over 800 civilians were reportedly killed or injured in air strikes, search operations and force protection incidents involving national and international armed forces. Air strikes alone accounted for over 550 civilian casualties. I welcome the efforts made by the International Security Assistance Force and other international forces to minimize the risk of civilian casualties. However, I would emphasize the need for continued robust action in this regard, including the continuous review of tactics and procedures and the conduct of after-action reviews. I would also urge that air strikes and other incidents causing the death or injury of civilians or damage to civilian property be promptly investigated, adequate and timely information provided on the outcome of investigations and condolence payments made to those affected.

33. I would remind all parties to conflict of their obligations scrupulously to respect and ensure respect for the relevant rules. I would also urge them to consider practical steps that could be taken to spare civilians from the effects of hostilities, a process that may in some situations benefit from more discussion with local populations and their leaders, civilian authorities, civil society or humanitarian actors.

34. In Afghanistan, for example, wherever possible, alternatives to air strikes as a means of warfare must be further pursued. To minimize civilian casualties resulting from attacks targeting national and international forces, military facilities should not be located in, and military convoys should avoid wherever possible transiting through, civilian areas. In this connection, I would urge the development of strict guidance concerning the escalation of the use of armed force in the context of force protection incidents.

35. The choice of weapons is critical in minimizing and reducing the impact of hostilities on civilians. My last report highlighted efforts to address the humanitarian impact of cluster munitions. Since then we have seen much needed and commendable progress, with the adoption last year of the Convention on Cluster Munitions. Significant progress is evident also in reducing the number of victims of anti-personnel mines, following the entry into force in 1999 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction. I strongly urge all States that have not yet done so to ratify both Conventions without delay.

36. While such progress in relation to cluster munitions and anti-personnel mines is welcome, I am increasingly concerned at the humanitarian impact of explosive weapons, in particular when used in densely populated areas. As demonstrated by this year's hostilities in Sri Lanka and Israel's campaign in Gaza, the use in densely populated environments of explosive weapons that have so-called "area effect" inevitably has an indiscriminate and severe humanitarian impact. First, in terms of the risk to civilians caught in the blast radius or killed or injured by damaged and collapsed buildings. Secondly, in terms of damage to infrastructure vital to the well-being of the civilian population, such as water and sanitation systems. I urge Member States, in consultation with relevant United Nations and other actors, to consider this issue further. I would also call upon States that have not yet done so to ratify Protocol V to the Convention on Certain Conventional Weapons with a view to addressing, in a timely and effective manner, the serious humanitarian problems caused by explosive remnants of war.

37. The Security Council also has a critical role in promoting systematic compliance with the law. In particular, the Council should:

(a) Use all available opportunities to condemn violations, without exception, and remind parties of, and demand compliance with, their obligations;

(b) Publicly threaten and, if necessary, apply targeted measures against the leadership of parties that consistently defy the demands of the Security Council and routinely violate their obligations to respect civilians;

(c) Systematically request reports on violations and consider mandating commissions of inquiry to examine situations where concerns exist regarding serious violations of international humanitarian law and human rights law, including with a view to identifying those responsible and prosecuting them at the national level, or referring the situation to the International Criminal Court.

B. Enhancing compliance by non-State armed groups

38. Together with the increased prevalence of non-international armed conflicts, pitting States against non-State armed groups, or two or more such groups against each other, a common feature of contemporary conflicts is the proliferation and fragmentation of such groups. They encompass a range of identities, motivations and varying degrees of willingness to observe international humanitarian law and human rights standards.

39. Armed groups are bound by international humanitarian law and must refrain from committing acts that would impair the enjoyment of human rights. For some groups, attacks and the commission of other violations against civilians are deliberate

strategies, intended to maximize casualties and destabilize societies. Others may be less inclined to attack civilians deliberately, but their actions still have an adverse impact on the safety and security of civilians. We need urgently to develop a comprehensive approach towards improving compliance by all these groups with the law, encompassing actions that range from engagement to enforcement.

40. As stated in common article 3 of the Geneva Conventions and in Additional Protocol II thereto, the application of international humanitarian law does not affect the legal status of non-State parties to a conflict. In order to spare civilians the effects of hostilities, obtain access to those in need and ensure that aid workers can operate safely, humanitarian actors must have consistent and sustained dialogue with all parties to conflict, State and non-State. Moreover, while engagement with non-State armed groups will not always result in improved protection, the absence of systematic engagement will almost certainly mean more, not fewer, civilian casualties in current conflicts.

41. The extensive experience of ICRC in working with armed groups, as well as that of United Nations actors and various non-governmental organizations, has demonstrated the possible benefits of dialogue on protection. Engagement can take the form of dissemination and training on international humanitarian law and human rights law standards. The incentives for armed groups to comply with the law should be emphasized, including increased likelihood of reciprocal respect for the law by opposing parties.

42. Bearing in mind that armed groups have legal obligations, engagement may be based around the conclusion of codes of conduct, unilateral declarations and special agreements, as envisaged under international humanitarian law, through which groups expressly commit themselves to comply with their obligations or undertake commitments that go above and beyond what are required by the law. Such instruments have been concluded in a number of contexts, including in Colombia, Liberia, Nepal, the Philippines, Sierra Leone, Sri Lanka, the Sudan and the former Yugoslavia. Their conclusion can send a clear signal to the groups' members and lead to the establishment of appropriate internal disciplinary measures. They also provide an important basis for follow-up interventions. It is, however, critically important that such tools and the commitments and principles therein are incorporated into instructions and communicated to the groups' members.

43. Other initiatives include those of my Special Representative on Children and Armed Conflict with respect to ending the recruitment and use of children by armed groups. Another specific and successful example is the Geneva Call Deed of Commitment, which seeks to end the use of anti-personnel mines by armed groups. To date, 38 groups have signed the Deed and have, for the most part, refrained from using anti-personnel mines, cooperated in mine action in areas under their control and destroyed stockpiles.

44. Member States can themselves promote compliance by armed groups. Members of such groups have little legal incentive to comply with international humanitarian law if they are likely to face domestic criminal prosecution for their mere participation in a non-international armed conflict, regardless of whether they respect the law or not. Granting amnesty for merely participating in hostilities, though not in respect of any war crimes and serious violations of human rights law which may have been committed, as envisaged in Additional Protocol II to the Geneva Conventions, may in some circumstances help provide the necessary incentive.

45. At the absolute minimum, it is critical that Member States support, or at least do not impede, efforts by humanitarian organizations to engage armed groups in order to seek improved protection for civilians — even those groups that are proscribed in some national legislation. Engagement through training or the conclusion of special agreements can provide entry points for dialogue on more specific concerns, such as humanitarian access, protection of humanitarian workers and sexual violence. Of particular relevance to the Security Council, such dialogue can also in some instances contribute to confidence-building between parties which can lead, in time, to the cessation of hostilities and the restoration of peace and security.

46. There will be times when engagement proves futile. However, it should not be dismissed out of hand. Armed groups are not monoliths. They have entry points, such as through the local population, and members who may be more predisposed to engagement. However, when such efforts fail, alternatives must be considered, including the application of the measures outlined in paragraph 37 above, namely systematic condemnation of violations committed by armed groups and demands for compliance together with the application of targeted measures.

47. As a first step towards developing a more comprehensive approach to armed groups, it may be useful to convene an Arria formula meeting to discuss the experience of United Nations and non-governmental actors in working with armed groups and to identify additional measures that the Security Council and Member States could take to improve compliance.

C. Protection of civilians and United Nations peacekeeping and other relevant missions

48. The inclusion of protection activities within the mandates of United Nations peacekeeping missions and other relevant missions has been a significant development in the efforts of the Security Council to improve protection on the ground. The protection roles assigned to these missions include ensuring physical protection, in particular for those under imminent threat of physical danger, assisting in the creation of conditions conducive to the voluntary, safe and dignified return of refugees and internally displaced persons, ensuring the protection of humanitarian personnel and facilitating the provision of assistance, ensuring child protection and addressing sexual violence.

49. The very presence of a peacekeeping operation will usually help to dampen any residual conflict and deter the escalation of violence, including against civilians. This role in assisting the host authorities to provide a safe and secure environment is perhaps the single largest contribution that these missions can make to protection. In recent years, from Sierra Leone to Liberia to Burundi and beyond, peacekeeping operations have made lasting contributions to the safety and security of civilian populations. Much more needs to be done, however, in responding to situations where conflict re-emerges, or threatens to re-emerge, and in understanding the full range of options available to missions and the capacities required to better implement mandates to protect civilians.

50. An independent study, commissioned by the Office for the Coordination of Humanitarian Affairs and the Department of Peacekeeping Operations, to be completed in the summer of 2009, will provide a detailed analysis of the

implementation of such mandates and recommendations for improving their impact. The findings of the study will be shared with the Security Council in due course. In the meantime, a number of issues bear highlighting.

51. In its resolution 1674 (2006) the Security Council states its intention to ensure that mandates include clear guidelines as to what missions can and should do to protect civilians. Such clear direction from the Council would be welcome and, ideally, would be informed by a realistic assessment of what is possible based on consultations with the Secretariat, troop and police contributors and other stakeholders. Currently, there remains a disconnect between mandates, intentions, expectations, interpretations and real implementation capacity.

52. This means that the "protection of civilians" mandate in peacekeeping missions remains largely undefined as both a military task and as a mission-wide task. Each mission interprets its protection mandate as best it can in its specific context. Some missions, such as the African Union-United Nations Hybrid Operation in Darfur (UNAMID) and MONUC, have developed force directives or mission-wide guidance to this end. Of course, heads of missions and force commanders must have latitude to interpret the mandate in light of their specific circumstances. However, this should take place within a broader policy framework that includes clear direction as to possible courses of action, including in situations where the armed forces of the host State are themselves perpetrating violations against civilians, as well as indicative tasks and the necessary capabilities for their implementation.

53. Protection of civilians is not a military task alone. All components of a mission, including police, humanitarian affairs, human rights, child protection, mine action, gender, political and civil affairs, public information, rule of law and security sector reform, can and must contribute to discharging the mission's protection mandate. To this end, more missions are beginning to develop inclusive mission-specific protection strategies and plans of action, in consultation with Special Representatives of the Secretary-General, Force Commanders, humanitarian country teams, the host Government and communities. This is a welcome development and all missions should be encouraged to develop such inclusive strategies, establishing priorities, actions and clear roles and responsibilities.

54. Resolution 1674 (2006) also sets forth the intention of the Security Council to ensure that the protection of civilians is prioritized in decisions concerning the use of "available capacity and resources" in the implementation of mission mandates. While the development of the above-mentioned strategies will help the prioritization and resource allocation effort, this also points to another important issue: ensuring that the "available capacity and resources" are appropriate for the task at hand and are made available in a timely manner. This is particularly important in volatile situations in which peacekeeping missions must operate with robust rules of engagement.

55. In elaborating protection mandates, strategies and plans of action, it is essential that all actors remain mindful of the constraints faced by peacekeeping operations in identifying adequate resources, capacities and capabilities to meet the mandated tasks. The popular and political expectations of what peacekeeping operations can achieve must be calibrated against the resources available to the mission and against the political, geographical and operational context.

56. In Darfur, for example, despite the intolerable situation confronting the civilian population (further aggravated by the recent expulsions and subsequent reduction in the presence of several major non-governmental organizations), as of 31 March 2009, the total strength of UNAMID military personnel stood at 13,134, that is, 67 per cent of its mandated strength. Many of the personnel are the engineers and logisticians required to establish and support the Mission, not infantry and other mobile capabilities. The strength of its police personnel stood at 2,478, that is, 38 per cent of its mandated strength. UNAMID thus remains severely constrained in its ability to conduct protection-related operations.

57. But it is not simply a question of having the right personnel, with the right skills, on the ground in sufficient numbers. Having the right equipment (for example, air mobility and night vision equipment), the right training for all mission personnel in how to deliver more effective protection and the ability to use the personnel that are on the ground tactically are all absolutely crucial.

D. Humanitarian access

58. Access is the fundamental prerequisite for humanitarian action (see annex). Under international humanitarian law, parties to conflict must protect and meet the basic needs of persons within their control. In situations where they are unwilling or unable to do so, humanitarian actors have an important subsidiary role to play. In such circumstances, parties should agree to relief operations that are humanitarian and impartial in character and conducted without any adverse distinction, and must allow and facilitate rapid and unimpeded passage of relief consignments, equipment and personnel. In its resolution 46/182, the General Assembly called upon States whose populations are in need of humanitarian assistance to facilitate the work of intergovernmental and non-governmental organizations in implementing such assistance "for which access to victims is essential". The Security Council has also underlined the need for all parties concerned, including non-State actors and neighbouring States, to cooperate fully with the United Nations in providing safe, timely and unimpeded access to civilians in armed conflict.

59. In response to calls from members of the Security Council for better analysis, monitoring and response to access restrictions, an annex has been included to the present report. As detailed in the annex, access is increasingly unsafe in many places, frequently delayed and often impeded, leaving millions of vulnerable people deprived of life-saving assistance. Constraints on access should have consequences for those who impose them, not merely for those who suffer from them. The Council has an important role to play in ensuring an environment that is conducive to facilitating access to those in need. More specifically, key findings suggest that the Council should:

(a) Consistently condemn and call for the immediate removal of impediments to humanitarian access that violate international humanitarian law;

(b) Call for strict compliance by parties to conflict and third States with their obligations to allow and facilitate the rapid and unimpeded passage of relief consignments, equipment and personnel, and encourage States to promote respect for humanitarian principles;

(c) Call upon parties to conflict to allow safe passage for civilians seeking to flee zones of fighting;

(d) Call upon parties to conflict to agree to the temporary suspension of hostilities and implement days of tranquillity in order to enable relief actions by humanitarian actors;

(e) Call upon parties to conflict to cooperate with humanitarian organizations in the establishment of de-conflicting arrangements in order to facilitate the delivery of assistance during hostilities;

(f) Call upon relevant parties to conclude and implement agreements so as to expedite the deployment of humanitarian personnel and assets. Negotiations could be assisted by the development of a standard moratorium on visa requirements, work and travel permits, and on customs duties and import restrictions on humanitarian goods and equipment;

(g) Mandate United Nations peacekeeping and other relevant missions, where appropriate and as requested, to assist in creating conditions conducive to safe, timely and unimpeded humanitarian action;

(h) Apply targeted measures against individuals obstructing access to, or the distribution of, humanitarian assistance;

(i) Refer grave and prolonged instances of the wilful impediment of relief supplies to the International Criminal Court.

60. Considering the frequency and gravity of attacks and other violations against humanitarian workers, as detailed in the annex, the Security Council is urged to:

(a) Consistently condemn and call for the immediate cessation of all acts of violence and other forms of harassment deliberately targeting humanitarian workers;

(b) Call for strict compliance by parties to conflict with international humanitarian law, including the duty to respect and protect relief personnel and installations, material, units and vehicles involved in humanitarian assistance;

(c) Call upon States affected by armed conflict to assist in creating conditions conducive to safe, timely and unimpeded humanitarian action;

(d) Call upon Member States that have not done so to ratify and implement the Convention on the Safety of United Nations and Associated Personnel and its Optional Protocol;

(e) Apply targeted measures against individuals responsible for attacks against humanitarian workers and assets;

(f) Refer grave instances of attacks against humanitarian workers to the International Criminal Court.

E. Enhancing accountability

61. Integral to the foregoing challenges is the need to ensure accountability for violations of international humanitarian law and human rights law, both for individual perpetrators and for parties to conflict. In many conflicts, it is to a large

degree the absence of accountability and, worse still, the lack in many instances of any expectation thereof, that allows violations to thrive.

62. In its resolution 1674 (2006), the Security Council reaffirmed that ending impunity is essential if a society in conflict or recovering from conflict is to come to terms with past violations and prevent their recurrence. The Council also drew attention to the range of possible justice and reconciliation mechanisms, including national, international and "mixed" criminal courts and tribunals, and truth and reconciliation commissions, noting that such mechanisms can promote not only individual criminal responsibility for serious crimes, but also peace, truth, reconciliation and the rights of victims. In addition to supporting the restoration of the rule of law in general, the Council should call for and support security sector reform and transitional justice mechanisms, as appropriate, including by mandating peacekeeping and other relevant missions accordingly.

63. Importantly, resolution 1674 (2006) emphasizes the responsibility of States to prosecute those suspected of genocide, crimes against humanity and war crimes. The Security Council itself has set important examples by establishing the International Tribunals for the former Yugoslavia and for Rwanda, in 1993 and 1994, respectively, and requesting the establishment in 2004 of the International Commission of Inquiry on Darfur followed, on the basis of the Commission's findings, by the referral of the situation to the International Criminal Court. However, States and other parties to conflict, as appropriate, must follow the Council's lead and do more to exercise their responsibilities to ensure accountability and, in so doing, deter further violations. Moreover, ensuring accountability at the national level, rather than resorting to such international mechanisms as the International Criminal Court, would help to alleviate some of the tensions that are perceived to exist between the pursuit of justice, on the one hand, and the pursuit of peace, on the other.

64. In terms of steps at the national level, the removal in October 2008 of 25 members of the Colombian armed forces for failures relating to alleged enforced disappearances, as well as prosecutions this year in the United States of America of military personnel accused of war crimes in Iraq, are instructive of the type of national-level actions that need to be pursued. It is imperative that we move beyond such isolated examples and take concrete steps at the national level to instil, in particular among combatants, a genuine expectation of accountability in war.

65. In particular, Member States, as well as non-State parties to conflict, as appropriate, should:

(a) Provide training to combatants on international humanitarian law and human rights law, including refresher training;

(b) Issue manuals, orders and instructions setting out their obligations and ensure the availability of legal advisers to inform commanders on the application of the law;

(c) Ensure that orders and instructions are observed by establishing effective disciplinary procedures, central to which must be strict adherence to the principle of command responsibility.

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66. If it is not already the case, Member States should, in addition:

(a) Adopt national legislation for the prosecution of persons suspected of genocide, crimes against humanity, war crimes and other serious violations of human rights law;

(b) Search for and, on the basis of universal jurisdiction, prosecute persons suspected of grave breaches of international humanitarian law and serious violations of human rights law, or extradite them;

(c) Ratify the statute of the International Criminal Court without delay;

(d) Cooperate fully with the International Criminal Court and similar mechanisms.

67. For its part, the Security Council is urged to:

(a) Insist that Member States cooperate fully with the International Criminal Court and similar mechanisms;

(b) Enforce such cooperation, as necessary, through targeted measures;

(c) Systematically request reports on violations and consider mandating commissions of inquiry to examine situations where concerns exist about serious violations of international humanitarian law and human rights law, including with a view to identifying those responsible and their being held accountable at the national level, or subjected to targeted measures and/or the situation referred to the International Criminal Court.

68. Significant developments in advancing individual criminal responsibility should not distract us from another critical dimension of accountability: the responsibility of parties to conflict to comply with international humanitarian law and human rights law, and the duty to make reparations for violations thereof. Emphasis on this dimension is important for a number of reasons.

69. First, not all violations of international humanitarian law are war crimes for which there is individual criminal responsibility. Moreover, some violations of international humanitarian law are crimes in international armed conflict but not in non-international armed conflict, which is the prevailing type of contemporary conflict, and international criminal responsibility exists only for a small minority of human rights violations. State responsibility, however, exists in relation to all violations of international humanitarian and human rights law.

70. Secondly, the outcome of criminal proceedings are verdicts of guilt or innocence and, unlike determinations of State responsibility, do not necessarily give rise to an obligation to make reparations. Both during and after conflict, where civilians often lose their possessions and assets, including those vital to their livelihoods, reparations are essential to allowing them to rebuild their lives. As with all forms of accountability, reparations can also play a significant role in deterring violations.

71. The right of individuals to reparations for gross violations of international human rights law and serious violations of international humanitarian law, and the steps required to give effect to this right, were spelled out in the United Nations Basic Principles and Guidelines on the issue, adopted by the General Assembly in its resolution 60/147. I would urge Member States to take the Basic Principles into account and promote respect for them.

72. Although infrequent, reparations mechanisms have been established at the international and national levels. Such mechanisms include the United Nations Compensation Commission, established by the Security Council in its resolution 687 (1991), and the Eritrea-Ethiopia Claims Commission, established pursuant to the peace agreement of December 2000. The Commission allowed individuals to file claims against States for acts that, inter alia, violated international humanitarian law and human rights law. Reference should also be made to property restitution mechanisms established in Bosnia and Herzegovina, Kosovo and Timor-Leste and, most recently, to the establishment, pursuant to General Assembly resolution ES-10/17, of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory, following the Advisory Opinion of the International Court of Justice of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The Register is mandated to receive claims from all natural or legal persons who have suffered material damage as a result of the construction of the wall.

73. This dimension of accountability must not be overlooked. I would urge the Security Council to call upon States to establish, or to itself mandate, in relevant contexts, mechanisms to receive claims alleging violations of international humanitarian law and human rights law and to support their establishment.

IV. Conclusions and next steps

74. The last 10 years have provided us with a tantalizing sense of the potential of the protection of civilians agenda. The task before us now is to take the necessary steps to fully realize that potential and meet the five core challenges identified in the present report.

75. The report provides pertinent recommendations to this end, premised on the overriding need to enhance compliance and accountability in conflict, that is to say, compliance by all parties to conflict with the applicable law and the demands and decisions of the Security Council, and accountability for those individuals and parties that fail to comply therewith.

76. Fortunately, the Security Council has the tools required for taking these recommendations forward. In practice, this entails:

(a) Consistent application of the aide-memoire on the protection of civilians in the deliberations of the Security Council, to assist in identifying the pertinent issues and the required responses;

(b) Regular meetings of the Expert Group, in advance of the establishment and renewal of peacekeeping mandates and with regard to situations impacting adversely on civilians, to ensure that relevant protection concerns and possible responses are discussed and incorporated into the Council's actions;

(c) Consistent condemnation of violations of the law by all parties to conflict, without exception, and demands for their compliance;

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(d) Ensuring of consequences for non-compliance, including:

(i) The imposition — and full implementation — of targeted measures against those individuals and parties that ignore or defy the Council's demands;

(ii) Mandating commissions of inquiry to examine situations where concerns exist regarding serious violations of international humanitarian law and human rights law, including with a view to identifying those responsible and prosecuting them at the national level, or referring the situation to the International Criminal Court;

(e) The timely deployment, in relevant situations, of peacekeeping missions or additional temporary capacity with robust protection mandates, appropriate guidance for their implementation and the requisite human and logistical and tactical capacity to ensure the protection of civilians on the ground.

77. I have asked the Under-Secretary-General for Humanitarian Affairs to consult with members of the Security Council on how to take forward the recommendations in the present report, and any additional recommendations that Council members and other Member States may wish to advance during the open debate on protection of civilians in June 2009. The outcome of these consultations will be presented at the open debate in November 2009.

78. At the open-debate in November, I would urge the Security Council and Member States to seize the opportunity of the tenth anniversary of the protection of civilians to reinvigorate their commitment to this agenda and, above all, to work with the United Nations and other relevant actors in a comprehensive and determined effort to make the protection of civilians more systematically and consistently a reality for all those caught or trapped in the conflicts of today, or those of tomorrow.

Annex

Constraints on humanitarian access

1. Safe, timely and unhindered access is fundamental to efforts to protect civilians and assist those in need. Yet, throughout the world, including in countries on the agenda of the Security Council, the harsh reality is that, owing to a variety of constraints, millions of people have inadequate access to assistance essential for their survival and well-being during times of armed conflict.

2. Understanding the distinct types and patterns of constraints on humanitarian access in a given situation is essential to responding to them. To this end, the Office for the Coordination of Humanitarian Affairs is undertaking more systematic monitoring and analysis of such constraints. The initial findings of that analysis form the basis for the present annex. It aims to provide the Security Council with information on key trends in access constraints and possible measures to contribute to an environment conducive to facilitating access to those in need.

I. Types of constraints

3. Constraints on humanitarian access in armed conflict take different forms. Not all constraints are deliberate in nature and they do not all constitute violations of international humanitarian law. Some are a consequence of the physical environment, such as challenging terrain, harsh climate and inadequate infrastructure, and pose primarily logistical challenges.

4. Other constraints are a consequence of Government policies or the practices of local actors which interfere with humanitarian operations. Still others are related to the intensity of fighting or frequent violence against aid workers and assets.

5. In most conflicts, it is a combination of constraints that prevents aid from reaching civilian populations in need, when and where they need it. The implications for humanitarian operations are decreased effectiveness of activities and increased operational costs. The consequences for conflict-affected populations are protracted suffering and increased risk of displacement, disease and malnourishment.

II. The most severe and prevalent constraints

6. Three types of constraints on access currently pose the greatest challenges owing to their widespread and frequent occurrence and the severity of their implications for humanitarian personnel and operations and of their consequences for populations in need. These are bureaucratic constraints imposed by Governments and other authorities, the intensity of hostilities and attacks on humanitarian personnel and assets.

A. Bureaucratic constraints

7. Bureaucratic restrictions imposed at some, or all, stages of an aid operation can be onerous and time-consuming, and too often cause significant delays in the provision of aid. While, under international humanitarian law, humanitarian

activities are subject to the consent of the affected State, restrictions must not place undue burden on those operations at the expense of timely access to, and to the detriment of, the affected population.

1. Restrictions on entry into the country of operations

8. Bureaucratic restrictions are often imposed on the entry of humanitarian organizations, staff and goods into the country of operations. These lay down complex and lengthy procedures, for example, for negotiating technical agreements with host States, can affect which organizations may operate and where, and complicate the issuance of visas and permits for staff as well as the import of relief supplies. There are many examples, of which three recent cases are described below.

9. In Sri Lanka, permission for the entry of humanitarian personnel into the country requires three levels of authorization, including the relevant line ministries and the Ministries of Defence and Foreign Affairs. The result is delays in staff deployments and significant staff hours consumed processing the required documents.

10. In the Sudan, lapses in the implementation of the 2004 and 2007 Joint Communiqués between the Government and the United Nations, which sought to streamline bureaucratic procedures affecting humanitarian operations, have meant that it typically takes several months to start new humanitarian projects, including recruiting national staff and finalizing technical agreements. For example, it has taken non-governmental organizations up to 27 weeks to deploy international personnel.

11. Furthermore, in March 2009, the Government of the Sudan took the unprecedented decision of suspending the activities of 16 international and national non-governmental organizations. This action contravened the intent of the Joint Communiqués and undermined the considerable effort invested to ensure their implementation. The expulsions had direct humanitarian consequences, including an initially increased risk of water-borne disease for over 900,000 people and significantly reduced surveillance of, and capacity to respond to, outbreaks of communicable disease in Darfur. It also severely compromised the logistical capacity of the humanitarian effort in Darfur, thus constraining the availability of such basic goods as shelter materials. Recent negotiations and efforts to fill the gaps in capacity, have attempted to minimize the impact of the expulsions. However, such a decision would have been much better avoided. The Government of the Sudan has now agreed to new procedures and coordination structures so as to better facilitate relief activities in the Sudan. The implementation of these arrangements must be closely monitored and reinforced in coming months to enable humanitarian actors to adequately and expeditiously address the needs of the affected population of Darfur.

12. Following the hostilities in August 2008, conflicting policies regulating access to South Ossetia were adopted by the relevant parties. The Georgian law on the occupied territories prohibits any humanitarian activity except that accredited by Georgia and undertaken from within Georgia. However, the South Ossetian side and the Government of the Russian Federation insist that humanitarian actors enter South Ossetia via the Russian Federation with the authorization of the South Ossetian side. Although ICRC has re-established its activities in South Ossetia, United Nations humanitarian agencies have yet to receive a response to their attempts to establish a dialogue with the South Ossetian leadership. As a result,

while the Government of the Russian Federation undertook significant relief operations in the wake of the hostilities in August 2008, United Nations agencies have been unable to determine the extent of, and respond to, any outstanding humanitarian needs in the area.

2. Restrictions on operations

13. Once on the ground, humanitarian actors often have to comply with various additional bureaucratic procedures. In some contexts, non-compliance with the minutiae of such procedures can have serious repercussions for humanitarian organizations and beneficiaries, including the closure of operations. Restrictions are often applied to place limits on access to specific areas, on the amount and type of permitted relief items, and how they must be transported.

14. Parties to conflict are entitled to prevent the diversion to their opponents of goods which could be used for military purposes and often take measures to prevent aid distributions consisting of potentially dual-use items. Such measures must be tailored so as not to prevent humanitarian assistance from reaching populations in need. The risk of improper use of relief items can be reduced by allowing humanitarian agencies to manage and monitor the provision of humanitarian aid.

15. For example, even prior to the intensification of hostilities in Sri Lanka, restrictions on the movement of relief items into areas controlled by the Liberation Tigers of Tamil Eelam (LTTE) hindered the provision of humanitarian assistance to those in need. Essential items, such as construction materials, were prohibited. The resulting shortfalls in construction materials affected the fulfilment of shelter and sanitation needs of the affected population, while requests for medicines and for fuel quotas for humanitarian organizations often went unanswered, were only allowed in part, or were delayed or denied. As a result, hospitals were consistently short of essential medicines and lacked sufficient fuel to operate generators, refrigerators and ambulance services.

16. Restrictions are often applied inconsistently, creating unpredictability in the implementation of activities and crippling the flow of humanitarian aid. The import of humanitarian supplies into Gaza, for example, remains subject to unclear and inconsistent criteria and procedures. Together with restrictions on certain relief materials, limitations are imposed on the transfer of cash for humanitarian activities and permission for humanitarian personnel to enter Gaza is often denied or delayed. The cumulative effect of these restrictions and their unpredictability contribute to the protracted suffering of Gaza's civilian population. Since the end of hostilities in January 2009, the Government of Israel has continued to refuse the entry of essential building materials required for the repair or reconstruction of essential public infrastructure, including water supply, sanitation and private homes. Over 50,000 persons continue to be homeless, some of whom live in tents, while water, electricity and sanitation remain inadequate.

17. Furthermore, while bureaucratic impediments often take the form of policies issued at a central level, an overwhelming accumulation of ad hoc and evolving demands imposed by local level officials frequently affect the most basic aspects of humanitarian operations and often contradict central Government policies. In Ethiopia, for example, while the Government has begun to allow humanitarian activities in the Ogaden region, including the provision of food aid for distribution by local actors, access for humanitarian organizations is limited by requirements

imposed by local military commanders who often do not recognize such permissions.

18. In Somalia, local authorities have demanded that humanitarian organizations register and pay fees in each locality where they want to operate, while local armed groups have threatened humanitarian organizations against complying with such demands. In Darfur, the constant proliferation of additional ad hoc restrictions by central and local Government authorities adds to the complexity of impediments on assistance activities. For example, permission is required to move goods from Khartoum to State capitals, where additional restrictions on the means by which supplies are deployed to areas of humanitarian activity are imposed. Humanitarian personnel spend significant portions of their time navigating multiple and often inconsistent demands. The lengthy delays associated with each level of bureaucracy have even resulted in food and medicines becoming spoiled.

3. Impediments to the movement of humanitarian personnel and goods

19. Checkpoints and roadblocks established by State as well as non-State actors also frequently obstruct the movement of relief personnel and goods. In south-central Somalia, for example, hundreds of checkpoints and roadblocks, frequent searches of vehicles and personnel, as well as extortion by the many different armed actors operating checkpoints, result in numerous delays and the diversion of assistance. Road travel that should take a few hours can take days. In February 2009, security committees in Mogadishu and Banadir, formed by the parties to the Djibouti Agreement, gave armed groups 48 hours to dismantle roadblocks in the region, thus providing some, albeit limited, relief from harassment and extortion.

20. In the occupied Palestinian territories, impediments to the passage of humanitarian personnel and goods are prolific. In the West Bank, in 2008, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) recorded 918 incidents of interference with the passage of personnel and goods, a 210 per cent increase compared to 2007, resulting in the loss of 16,500 staff hours.

21. In Gaza, the restrictions on border crossings that were imposed in June 2007, which currently remain in effect, continue to impede humanitarian operations and early recovery efforts. For example, the requirement of the Government of Israel that humanitarian goods enter via the Kerem Shalom military crossing rather than via the main commercial crossing point of Karni, which has greater capacity to handle large volumes of goods, adds significant travel time and expense. Furthermore, goods must be unloaded, screened and then reloaded on the opposite side of the border, a requirement which the World Food Programme (WFP) and UNRWA estimate adds $1.5 to $2 million per year to programme costs. The lack of spare parts for medical equipment at hospitals and clinics has had a serious impact on the health of the population of Gaza, already weakened by inadequate diet and limited access to specialist medical treatment abroad.

B. Intensity of hostilities

22. In contexts such as Afghanistan, the Central African Republic, Chad, Colombia, the Democratic Republic of the Congo, Iraq, the occupied Palestinian territories, Pakistan, Somalia, Sri Lanka and the Sudan, the intensity of hostilities

frequently precludes access to affected populations and prevents or interrupts ongoing assistance activities. These problems are often exacerbated by the fact that parties to conflict have failed to establish arrangements to enable aid delivery by humanitarian organizations.

23. In Afghanistan, hostilities in the south and south-east of the country have severely impeded movement of both civilian populations and humanitarian organizations, affecting access to assistance in these areas. In the Democratic Republic of the Congo, access has typically been influenced by outbreaks of intense fighting when peace negotiations have stalled. Renewed hostilities between Government forces and the Lord's Resistance Army (LRA) towards the end of 2008 hampered the movement of humanitarian personnel to those affected by the fighting in North Kivu, Haut-Uélé and Ituri. Intense fighting in October and November 2008 forced humanitarian agencies to temporarily evacuate Goma and several other humanitarian hubs. More than 14,000 people who sought refuge from LRA violence in the town of Doruma were cut off from humanitarian aid for nearly two months. Frequent population movements and limited access have prevented a thorough assessment of needs in the east of the country, and it is estimated that up to 100,000 people remain unable to access humanitarian aid.

24. In Sri Lanka, following the relocation of humanitarian agencies from the Vanni in September 2008, a limited number of relief convoys and sea shipments were able to transport some aid to the conflict zone. But these fell far short of the assistance required, including for critically needed medical supplies to treat and evacuate wounded civilians, which has meant that otherwise treatable injuries have frequently resulted in deaths and amputations.

25. Meanwhile, currently, the increased presence of State and non-State parties to the conflict and the intensification of hostilities in north-western Pakistan present significant challenges to reaching the affected civilian population. The United Nations Emergency Relief Coordinator has dispatched a Senior Humanitarian Adviser to help facilitate dialogue so as to obtain the necessary security assurances and to establish appropriate operational modalities so that humanitarian actors can respond to the growing humanitarian need.

26. Few humanitarian agencies and only a fraction of the aid required were permitted into Gaza during the three weeks of hostilities that began in late December 2008. Unilateral suspensions in hostilities were observed but were of insufficient duration to allow safe access to medical services and the distribution of sufficient assistance to the affected population, or to address public health problems resulting from the destruction of civilian infrastructure, in particular public water supply and sanitation facilities. A non-governmental organization survey of the conflict-affected population carried out at the end of January 2009 found that 89 per cent of respondents had not received any assistance since the onset of hostilities.

27. Periodic armed skirmishes have also interrupted the provision of assistance in contexts such as the Central African Republic, Chad, the Democratic Republic of the Congo, the Sudan and Somalia. For example, attacks in a residential area of Mogadishu in January 2008 resulted in the suspension for 20 days of an emergency food programme for 5,000 extremely vulnerable people. In the Central African Republic, a rebel attack on Batangafo in February 2009 resulted in the temporary suspension of emergency school feeding programmes affecting, 22,000 beneficiaries. Though such disruptions may be temporary, they occur frequently and affect

thousands of vulnerable people whose well-being depends on consistent and reliable access to assistance.

28. Access problems are not only a result of the inability of humanitarian actors to reach affected populations. Often it is these populations that face difficulties in safely reaching locations where assistance can be provided. During the same hostilities in Gaza, civilians wishing to seek sanctuary in Egypt or Israel to escape the intense aerial bombardment and heavy ground fighting were unable to do so owing to the closure of the border crossing points by the relevant authorities. An estimated one quarter of the population of 1.5 million people was displaced during the fighting, many of whom were obliged to move from one location to another in an effort to find safety. In Sri Lanka, following the intensification of hostilities in the Vanni in 2008, LTTE forcibly prevented civilians from seeking safety and assistance outside the conflict zone.

C. Violence against humanitarian personnel and theft of assets

29. One of the most significant constraints on access is the striking increase in recent years in attacks against humanitarian workers and assets. Violence against humanitarian workers greatly restricts their mobility on the ground, often results in the suspension and, sometimes, cessation of assistance activities, and places the well-being of hundreds of thousands of people at risk.

30. Such violence may be perpetrated by criminal actors for economic gain or by State or non-State actors for political purposes. While it is often difficult to distinguish between these different motivations, it is important to do so, as this will inform the type of response required to mitigate the risks.

1. Global trends

31. Recent statistical analysis on aid worker insecurity published by the Overseas Development Institute reveals that attacks on humanitarian personnel, facilities and assets have increased significantly in recent years. The overall upward trend since 1997 is marked by a sharp increase in incidents since 2006, with 2008 marking the greatest number of humanitarian workers affected by violence in 12 years. The incidence of kidnapping of humanitarian personnel alone has increased by 350 per cent in the past three years.

32. While the overall number of humanitarian workers has grown over the last decade, the relative increase in incidents against humanitarian personnel and assets surpasses that growth. Around 75 per cent of attacks on aid workers in the past three years have occurred in Afghanistan, Chad, Iraq, Pakistan, Somalia, Sri Lanka and the Sudan. Three of these contexts — Afghanistan, Somalia and the Sudan — account for more than 60 per cent of attacks since 2006.

33. National personnel, in particular local contractors of United Nations agencies and non-governmental organization staff, continue to be the most vulnerable, though there has also been a sharp increase in attacks on international staff in the past three years. ICRC is the only humanitarian organization to have experienced a decline in attacks on its personnel. The study attributes this, in part, to the organization's approach to security management which, importantly, emphasizes dialogue with potential sources of threats.

2. Violence against humanitarian personnel

34. Humanitarian personnel have been killed, abducted or otherwise subjected to violence in such places as Afghanistan, Chad, the Democratic Republic of the Congo, Iraq, Pakistan, the Philippines, Somalia, Sri Lanka and the Sudan.

35. In the Democratic Republic of the Congo, more than 20 violent attacks on humanitarian personnel occurred in the first two months of 2009, as compared to 14 during the same period in 2008. In Darfur, attacks and other crimes against humanitarian workers have constantly increased since the international aid effort intensified four years ago. In the first four months of 2009 alone, three humanitarian workers were killed, 18 were assaulted and 15 were abducted.

36. In Somalia, since November 2007, humanitarian workers have been victims of more than 200 violent incidents, including 37 fatalities. Sixteen abducted humanitarian workers remain captive. A bomb attack on the United Nations compound in Hargeisa, which killed two staff members and wounded several others, resulted in the suspension of one third of United Nations activities in Somaliland.

37. In Afghanistan, in 2008, there were 7 abductions of United Nations personnel and 12 armed attacks on United Nations facilities. In addition, 31 non-governmental organization workers were killed that year, the greatest number of fatalities since 2002 and twice those killed in 2007. In addition, there were 170 violent incidents against non-governmental organization personnel, including 78 abductions and 27 staff seriously wounded, an increase of 20 per cent compared to 2007. The first three months of 2009 have seen a 25 per cent increase over the same period in 2008 in incidents directly affecting non-governmental organizations, with abductions and attacks by armed groups involving the use of small arms posing the greatest threats.

38. The severity and prevalence of violence can lead to the suspension or cessation of aid activities and therefore frequently deprives extremely vulnerable people of life-saving assistance. For example, the killing of three staff members in Somalia in January 2008 forced one non-governmental organization to end health services which performed around 70 surgeries and 200 emergency consultations every month.

39. In Iraq, the lack of acceptance of United Nations and non-governmental organization humanitarian actors by Iraqi armed groups and significant security risks to personnel have resulted in heavy reliance on the remote management of humanitarian programmes. Experience has shown, however, that remote management is typically appropriate only in the short term as, over time, programme quality and effectiveness diminishes and other, more sustainable, options must be developed. Limited access in Iraq has had significant humanitarian consequences. In September 2008, some 38 per cent of the 1.6 million internally displaced persons had not received any humanitarian assistance during their displacement.

3. Theft of humanitarian assets

40. Parties to conflict and criminal groups frequently prey upon the assets of humanitarian actors, in particular where chains of command are weak or there is a general breakdown of law and order.

41. The theft of humanitarian supplies and assets, in particular vehicles, is an increasingly acute threat to humanitarian action in several conflicts. In Afghanistan, over 40 humanitarian aid convoys and 47 aid facilities were attacked, ambushed or looted in 2008. In Darfur, the number of humanitarian vehicles hijacked or stolen in 2008 doubled compared to 2007, as did the number of armed assaults on humanitarian premises. This trend has continued in 2009, with 41 vehicles hijacked and 54 armed assaults as of mid-April.

42. Humanitarian workers and supplies are particularly vulnerable on roads. In Darfur, for example, owing to insecurity on the roads, many areas have, for several years, been accessible only by air. Travel from Nyala to Kass in Southern Darfur takes only two hours by road. However, the level of banditry requires most agencies to travel by air, increasing the cost of providing assistance to over 200,000 people in Kass and surrounding areas. This is further compounded by constraints on the ability of the United Nations Humanitarian Air Service to operate, including the lack of predictable financing.

43. In North Kivu province of the Democratic Republic of the Congo, 124 violent incidents against humanitarian agencies were reported in 2008 and the trend has increased in 2009. Such incidents are primarily economically motivated and fuelled by the incomplete demobilization of ex-combatants, the fragmentation and proliferation of armed groups and the non-payment of salaries to members of the national armed forces.

44. In Chad, criminal groups have exploited the breakdown of law and order in the east of the country to loot humanitarian supplies. This has frequently led to the temporary suspension of humanitarian activities in the border area, affecting some 180,000 internally displaced persons, 250,000 refugees, as well as the local population. The withdrawal of Chadian security forces from Dogdore precipitated a spate of thefts of non-governmental organization supplies in September 2008 and in February and March 2009. This resulted in the suspension of water, sanitation and health services for 28,000 internally displaced persons.

4. Motivations

45. Violence against humanitarian personnel and the theft of humanitarian assets can have either economic or political motivations. Understanding those motivations, as far as possible, and the affiliations of perpetrators is essential to developing appropriate responses.

46. Violence against humanitarian personnel may be perpetrated by parties to conflict in furtherance of their political aims. For example, it may be intended to deprive a civilian population of its means of subsistence in order to demoralize the enemy. Alternatively, such violence may be in response to a perceived connection between humanitarian organizations and national and international political actors that are, or are perceived to be, associated with the enemy. The above-mentioned Overseas Development Institute analysis identified an increase in explicitly politically motivated attacks, from 29 per cent of incidents in 2003 to 49 per cent in 2008. Consistent with this finding, a non-governmental organization which analyses aid worker insecurity in Afghanistan found that 65 per cent of violent incidents in 2008 were attributed to non-State armed groups — a marked departure from 2007, when 61 per cent of incidents were attributed to criminal actors.

47. In a number of situations, the risks faced by humanitarian workers are further heightened by the negative, even overtly hostile, attitudes of Government officials and other prominent individuals towards humanitarian organizations which are often portrayed through the national media. In Somalia, Sri Lanka and the Sudan, this has contributed to an overall threatening atmosphere and has increased the difficulty of negotiating access. In some cases, senior Government officials have publicly condemned humanitarian agencies for engaging in improper conduct, including accusations of active support for a party to the conflict.

48. The theft of assets is often economically motivated and tends to be enabled by weaknesses in chains of command and fuelled by the fragmentation and proliferation of armed groups in the wake of ceasefire or peace agreements, and the incomplete or delayed reintegration and rehabilitation of ex-combatants. Such threats may be mitigated through increased efforts to address these specific problems and other conditions which may give rise to security vacuums and an increase in criminality.

49. In some contexts, parties to conflict and criminal groups may collaborate in the pursuit of both economically and politically motivated attacks on humanitarian agencies. This is particularly pronounced in Afghanistan and Somalia. In the case of Somalia, for example, criminal actors have been known to sell abductees to political actors.

III. Addressing access constraints

50. Humanitarian organizations face significant policy and operational dilemmas in overcoming access constraints and in ensuring that measures adopted to reach populations in urgent need are not detrimental to sustained access in the long run. While constraints must be addressed in a context-specific manner, there are examples of good practice on which to build.

51. Such basic measures as rebuilding roads and bridges, pre-positioning stocks and ensuring the availability of affordable air services can help establish more consistent access. Pooled management of vital assets by humanitarian agencies can assist in securing these assets from theft and ensuring their timely deployment. Where feasible and appropriate, and good alternatives are not available, peacekeeping assets may be able to provide backup logistics capacity to access areas which cannot otherwise be reached or to pre-position essential relief items within a tight time frame. Forward operating bases of peacekeeping missions may provide the opportunity for humanitarian actors to establish an initial presence in areas where humanitarian operations have not yet been established.

52. The simplification of administrative regulations to expedite the provision of assistance was the raison d'être of the above-mentioned Joint Communiqués of 2004 and 2007 between the Government of the Sudan and the United Nations. The Joint Communiqués established and reinforced a moratorium on all restrictions on humanitarian work in Darfur as well as "fast track" procedures for processing immigration and customs requirements. While this agreement initially improved the timeliness of bureaucratic processes and the deployment of humanitarian personnel and assets, as noted above, lapses in its implementation have emerged over time.

53. States should consider taking measures to facilitate the provision of humanitarian assistance, for example, through the adoption of domestic legislation that foresees expedited visa processing and customs clearance for relief personnel, goods and equipment; exemptions from taxes, duties and fees on relief activities; and simplified means for humanitarian organizations to acquire domestic legal personality in order to operate legally in the country. Guidance in this respect could be drawn from the "Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance".

54. Also in the context of the Sudan, reference should be made to the consistent advocacy efforts of United Nations actors, Security Council Member States and influential States in the region, undertaken in the wake of the expulsions of non-governmental organizations in March 2008. Such efforts helped foster an environment conducive to access negotiations which, in turn, resulted in steps taken by the Government to enable urgent relief activities as well as agreement for expanded coordination and monitoring mechanisms at the State, federal and international levels.

55. In terms of addressing threats to the safety of relief consignments, the provision of naval escorts by several Member States has played an important role in facilitating safe passage for humanitarian supplies in the face of continuing piracy off the Somali coast. By mid-2008, 27 ships carrying over 118,000 metric tons of food for approximately 1.2 million beneficiaries reached Somalia. However, such escorts need to be provided more consistently. The absence of a naval escort throughout August 2008 meant that WFP was able to deliver only 50 per cent of the food consignment for that month, affecting over 1 million people.

56. Also with regard to the safety and security of humanitarian workers and operations, although the European Union Force (EUFOR) in Chad was not originally conceived or structured to carry out policing functions, it adapted its operations to assist in preventing criminality against the humanitarian community, including through its patrols, securing key areas and supply routes, and establishing perimeters within which humanitarian actors could operate without direct accompaniment. It is envisaged that MINURCAT, which took over from EUFOR in March 2009, will continue these activities, though its deployment currently stands at less than 50 per cent of its mandated strength, relying in particular on the Détachement intégré de sécurité. Greater consideration could be given by the Security Council to the use of policing capacity to deter criminal activity in areas of humanitarian operations as well as in seeking to build domestic policing capacity.

57. In the case of the Democratic Republic of the Congo, the use of MONUC armed escorts, as required by United Nations security management procedures, has helped establish and maintain access to affected populations. However, with the recently increased direct involvement of MONUC in operations against armed groups, there is a risk that humanitarian agencies may be caught up in attacks against MONUC, or may experience difficulty in negotiating access with armed groups owing to the perception that their activities support political objectives.

58. Indeed, in particularly insecure environments, while the use of armed escorts can facilitate secure access to populations that would not otherwise be reached, if those providing such services are parties to conflict or otherwise actively engaged in hostilities, this may undermine the perception of neutrality and independence of humanitarian actors and reduce their acceptance on the part of all parties to the

conflict and among local populations. Approaches must be found to address security concerns in a way that does not impede humanitarian operations or put beneficiaries at further risk.

59. Systematic dialogue with all parties to conflict, including non-State armed groups, is imperative to establish understanding and acceptance of the neutral and impartial character of humanitarian assistance and the operational modalities of humanitarian agencies, and to sustain access in the long run. In addition, dialogue can be structured around negotiating context-specific arrangements, such as days of tranquillity to conduct immunization or other public health campaigns. In Afghanistan, for example, in 2007 and 2008, the United Nations Children's Fund and the World Health Organization obtained agreement from Afghan and international military forces and from armed opposition groups to undertake polio vaccinations on designated days of tranquillity. The modus operandi of these and similar initiatives should be developed and implemented as and where needed.

60. Similarly, de-conflicting arrangements, whereby communications channels between humanitarian actors and parties to conflict are established to coordinate the time and locations of relief activities, can help to ensure that military operations do not interfere with the delivery of humanitarian assistance. The creation of humanitarian corridors may also be appropriate in situations where security and respect for such corridors can be assured by all parties to conflict for as long as they are needed to provide humanitarian aid.

61. It is regrettable that, in some instances, humanitarian actors have been actively discouraged or expressly forbidden by the affected State from entering into dialogue with non-State groups. The need for, and importance of, such dialogue must be more widely understood by Member States.

IV. Considerations for the Security Council

62. While there are, as indicated, certain initiatives that must be pursued by humanitarian and other relevant actors to facilitate and improve access, the Security Council has an important role to play in promoting an environment that is conducive to the facilitation of humanitarian access to those in need. More specifically, as mentioned above, Council should:

(a) Consistently condemn and call for the immediate removal of impediments to humanitarian access that violate international humanitarian law;

(b) Call for strict compliance by parties to conflict and third States with their obligations to allow and facilitate the rapid and unimpeded passage of relief consignments, equipment and personnel, and encourage States to promote respect for humanitarian principles;

(c) Call upon parties to conflict to allow safe passage for civilians seeking to flee zones of fighting;

(d) Call upon parties to conflict to agree to the temporary suspension of hostilities and implement days of tranquillity in order to enable relief actions by humanitarian actors;

(e) Call upon parties to conflict to cooperate with humanitarian organizations in the establishment of de-conflicting arrangements in order to facilitate the delivery of assistance during hostilities;

(f) Call upon relevant parties to conclude and implement agreements to expedite the deployment of humanitarian personnel and assets. Negotiations could be assisted by the development of a standard moratorium on visa requirements, work and travel permits, and on customs duties and import restrictions on humanitarian goods and equipment;

(g) Mandate United Nations peacekeeping and other relevant missions, where appropriate and as requested, to assist in creating conditions conducive to safe, timely and unimpeded humanitarian action;

(h) Apply targeted measures against individuals obstructing access to, or the distribution of, humanitarian assistance;

(i) Refer grave and prolonged instances of the wilful impediment of relief supplies to the International Criminal Court.

63. In addition, as mentioned above, considering the frequency and gravity of attacks and other violations against humanitarian workers, the Security Council should:

(a) Consistently condemn and call for the immediate cessation of all acts of violence and other forms of harassment deliberately targeting humanitarian workers;

(b) Call for strict compliance by parties to conflict with international humanitarian law, including the duty to respect and protect relief personnel and installations, material, units and vehicles involved in humanitarian assistance;

(c) Call upon States affected by armed conflict to assist in creating conditions conducive to safe, timely and unimpeded humanitarian action;

(d) Call upon Member States that have not done so to ratify and implement the Convention on the Safety of United Nations and Associated Personnel and its Optional Protocol;

(e) Apply targeted measures against individuals responsible for attacks against humanitarian workers and assets;

(f) Refer grave instances of attacks against humanitarian workers to the International Criminal Court.

Report of the Secretary-General on the protection of civilians in armed conflict, S/2010/579, 11 November 2010

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Report of the Secretary-General on the protection of civilians in armed conflict

I. Introduction

1. The present eighth report on the protection of civilians in armed conflict is submitted pursuant to Security Council resolution 1894 (2009).

2. The adoption of resolution 1894 (2009) on 11 November 2009 was a fitting commemoration of 10 years of thematic action by the Security Council on the protection of civilians and a welcome manifestation of the ongoing commitment of the Council to that critical issue. The resolution marked a significant step towards responding to some of the five core challenges identified in my previous report of 29 May 2009 (S/2009/277), namely, the need to enhance compliance by parties to conflict with international law, enhance compliance by non-State armed groups, enhance protection by United Nations peacekeeping and other relevant missions, enhance humanitarian access and enhance accountability for violations.

3. The present report provides an update on progress made in responding to those core challenges. It takes stock of positive developments and ongoing or new concerns affecting civilians in today's conflicts and makes additional recommendations for responding to the core challenges. In doing so, the report emphasizes the fundamental need to focus efforts on making a tangible difference where and for whom it matters most: in the midst of conflict and for the hundreds of thousands of civilians — women, men and children — confronting the horrors, pain and suffering of war on a daily basis. Whether as the intended targets of attack or the incidental victims of the use of force, civilians continue to account for the majority of casualties in conflict. The unstinting and rigorous attention of the Security Council to their situation remains vital and must be at the centre of its deliberations and actions. This is particularly the case in the many protracted violent crises and conflicts that persistently pose unacceptable levels of risk to civilians, with little prospect of peaceful resolution in the near future.

4. Through its thematic resolutions on the protection of civilians, including, most recently, resolution 1894 (2009), as well as resolutions relating to children and armed conflict and to women and peace and security; the mandating of peacekeeping missions to protect civilians; the adoption of the aide-memoire on the protection of civilians (see S/PRST/2009/1); and the creation of the informal Expert Group on the Protection of Civilians, the Security Council has over the course of the past 11 years established a comprehensive framework through which to pursue more

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effective protection on the ground. While this framework may be further developed, the emphasis must now be on making progress in enhancing protection on the ground.

5. For the Security Council, that means the systematic application of the aide-memoire and the regular use of the Expert Group to inform the development and revision of peacekeeping and other mission mandates, as well as other forms of Security Council action on protection. It means monitoring progress in providing protection to civilians and ensuring the implementation of the Council's resolutions. For United Nations country teams and peacekeeping and other relevant missions, it means more effective coordination, strategy setting and prioritizing; regular monitoring of the protection of civilians; and candid reporting to relevant bodies, including the Council, on obstacles to and opportunities for progress. For all involved — parties to conflict, the Security Council, Member States and the United Nations more broadly — it means redoubling efforts to meet the five core challenges and enhance respect for the principles of international humanitarian law, human rights law and refugee law on which the protection of civilians is founded.

II. The state of the protection of civilians

6. To the extent that progress can be reported in the protection of civilians in the 18 months since my previous report, it is not on account of parties to conflict having scrupulously observed their obligations under international law. On the contrary, such progress rests with developments at the normative level and, above all, with the efforts of United Nations actors, in particular humanitarian agencies and peacekeeping missions, and other international and non-governmental organizations to enhance protection, as well as with the courage and ingenuity of the affected populations.

A. Ongoing and emerging concerns

7. A significant factor in the failure of armed parties to conflict to observe international law is the continued prevalence of non-international armed conflicts, often marked by the proliferation and fragmentation of non-State armed groups. This has contributed to the asymmetric nature of conflict in places such as Afghanistan, the Democratic Republic of the Congo, Pakistan, Somalia, the Sudan and Yemen.

8. The consequences for civilians have been devastating, as armed groups have often sought to overcome their military inferiority by employing strategies that flagrantly violate international law. These range from deliberate attacks against civilians, including sexual violence, to attacks on civilian objects such as schools, to abduction, forced recruitment and using civilians to shield military objectives. The risks for civilians are further increased as militarily superior parties, in fighting an enemy that is often difficult to identify, respond with means and methods of warfare that may violate the principles of distinction and proportionality, giving rise to further civilian casualties.

9. In Afghanistan, for example, the United Nations Assistance Mission in Afghanistan (UNAMA) reports that in 2009 almost 6,000 civilians were killed or

injured as a result of hostilities. During the first half of this year, UNAMA documented more than 3,200 civilian deaths and injuries. Some 75 per cent of these deaths and injuries were attributed to anti-Government elements, which have increasingly used more powerful and sophisticated improvised explosive devices. Civilian casualties attributed to pro-Government forces declined by 30 per cent compared with the first half of 2009. Of particular note is the 64 per cent decrease in casualties resulting from air strikes, following the issuance by the International Security Assistance Force (ISAF) in July 2009 of a tactical directive on such attacks. Nonetheless, air strikes continue to account for the highest proportion of civilian casualties attributable to pro-Government forces.

10. In the Democratic Republic of the Congo, armed groups continue to attack civilians in the Kivus, including by committing appalling acts of sexual violence, as well as in Equateur Province and Orientale Province, where attacks by the Lord's Resistance Army (LRA) have increased in remote areas. Reports also continue of violations committed by the Forces armées de la République démocratique du Congo (FARDC), including rape and looting.

11. In Somalia, Médecins Sans Frontières (MSF) reports that, during the first seven months of 2010, of 2,854 patients treated by MSF-sponsored medical teams at its hospital in Mogadishu, 48 per cent had suffered "war-related injuries". Sixty-four per cent of those patients had sustained serious blast injuries, consistent with continual intensive mortar fire in residential areas. Thirty-eight per cent of those with war-related injuries were women or children under 14 years of age. The register of the surgical programme at the hospital, which began its operations in September 2007, shows that 50 per cent of the 11,888 patients treated there had suffered "war-related injuries".

12. In Darfur, civilians continue to be attacked by all parties to the conflict, and intertribal clashes have claimed a large number of civilian casualties. According to the African Union-United Nations Hybrid Operation in Darfur (UNAMID), more than 900 civilians have been killed so far this year. Meanwhile, the United Nations Mission in the Sudan (UNMIS) continues to receive reports of serious violations carried out by the Sudan People's Liberation Army during military operations and civilian disarmament campaigns, as well as reports of LRA attacks against villages on the southern border.

13. Displacement within and across borders remains a defining characteristic of conflict, as civilians flee violence or are forced from their homes, often in violation of international law. At the end of 2009, more than 27 million people remained internally displaced by conflict, including 11.6 million in sub-Saharan Africa, while the world's refugee population stood at more than 15 million. Alarmingly, the number of newly displaced continues to outnumber returns, and durable solutions are woefully absent for millions of internally displaced persons and refugees in situations of protracted displacement.

14. As highlighted in my previous two reports, housing, land and property issues feature prominently in contemporary conflicts. Disputes over land and resources continue to be both drivers and consequences of conflict. There is increasing recognition of the need to address these issues, particularly in relation to the return of internally displaced persons and refugees and the restitution of their housing, land and other property, including by paying attention to the difficulties faced by women in such situations. Restitution is only one possible component of the

response, however. Many refugees and internally displaced persons may have had irregular tenancy rights prior to displacement, may be occupying land that belongs to or is legally occupied by others, or may be competing with others who also have claims to land and property under customary or statutory legal frameworks. Returning to the situation prior to displacement may not be possible or desirable, and alternative solutions to restitution must be found.

15. Women and children continue to suffer extreme violence and hardship during conflict. Sexual violence, including rape, remains tragically prominent among the atrocities to which women and girls in particular, but also boys and men, are subjected. The mass rapes in Kibua in the eastern Democratic Republic of the Congo over four days in July and August 2010 illustrate catastrophic failures both in prevention and response, which must be addressed. As well as being subject to sexual violence, children continue to be killed and maimed in conflict, and many become orphans. They are frequently forced to take up arms or act as spies, or are used as suicide bombers and human shields by armed forces or groups. They are often disproportionately affected by displacement, and deprived of education, health care and access to justice.

16. Attacks against journalists in conflict situations remain of concern. During 2009 and 2010, journalists were reportedly killed in Afghanistan, Colombia, the Democratic Republic of the Congo, Iraq, Israel, Lebanon, Pakistan, the occupied Palestinian territories, Somalia, Sri Lanka and Yemen. I would remind the Security Council of the pressing need, as expressed in resolution 1738 (2006), for States and other parties to conflict to prevent attacks against journalists and prosecute those responsible. I would also encourage the Human Rights Council to consider positively the recommendation of the former and current Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression to study the issue and develop proposals for strengthened protection.

17. The increased use of unmanned aerial vehicles, or drones, such as in Afghanistan and Pakistan, has received significant attention since my previous report. A significant number of States now possess such technology, and some have already developed weapons systems, many of them involving explosive weapons, in which weapons can be fired from such vehicles by remote control. This development in the way in which wars are fought presents a number of concerns regarding compliance with international law. Although there is nothing inherently illegal about the use of drones in armed conflict, it is unclear whether all the persons targeted by drones were combatants or were directly participating in hostilities, thus raising questions about compliance with the principle of distinction. Drone attacks are also reported to have caused hundreds of civilian casualties, raising questions about compliance with the principle of proportionality. Finally, accountability for failure to comply with international law is difficult to ensure when drone attacks are conducted outside the military chain of command and beyond transparent mechanisms of civilian or military control. This is an area that will continue to be carefully monitored.

18. As recognized by the Security Council in resolution 1894 (2009), the excessive accumulation and destabilizing effect of small arms and light weapons pose a considerable impediment to the provision of humanitarian assistance and can exacerbate and prolong conflicts, endanger civilians and undermine the security and confidence required for peace and stability. The Council has imposed arms

embargoes in a number of situations, including the Democratic Republic of the Congo, Somalia and the Sudan, as well as created mechanisms to monitor implementation. Nonetheless, illicit trafficking continues into these and other countries. At the Fourth Biennial Meeting of States to Consider the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (see A/CONF.192/BMS/2010/3), which took place in June 2010, a variety of measures to help prevent the illicit trade in weapons was elaborated. I would urge Member States to implement those measures without delay. Of course, it is not only illicitly traded weapons that harm civilians. Licit transfers are also of concern when the weapons are used to commit violations against civilians. I would urge Member States participating in the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty to ensure that respect for international humanitarian law and human rights law is among the criteria for making arms transfer decisions.

B. Encouraging developments

19. Sobering though the reality is, there are encouraging developments to report, though largely at the normative level.

Advances at the normative level

20. Resolution 1894 (2009) includes important provisions that respond to some of the five core challenges, including in relation to promoting compliance with the law, the role of peacekeeping and other missions in protection, and enhancing humanitarian access and accountability. These are discussed further below.

21. Resolution 1888 (2009) led to the appointment in February 2010 of my Special Representative on Sexual Violence in Conflict. I am confident that the work of the Special Representative will lead to a more coherent and consistent approach to preventing and responding to sexual violence, as well as to more systematic reporting. I call on parties to conflict and other Member States to fully support her work. In resolution 1888 (2009), the Security Council also called for the establishment of an innovative mechanism — the team of experts — which is mandated, inter alia, to work with national legal and judicial officials to address impunity, including by strengthening national capacity.

22. The Council's adoption of resolution 1882 (2009) further enhances child protection by expanding the listing of parties in the annexes of my annual report to the General Assembly and the Security Council on children and armed conflict to include those who kill and maim children or commit rape and other forms of sexual violence against children. Importantly, in that resolution, the Council also reaffirmed its intention to take action against persistent perpetrators, including by enhancing communications between the Working Group on Children and Armed Conflict and the sanctions committees.

23. Encouraging developments are also evident in the way and extent to which protection is addressed in Security Council resolutions. For example, there has been more frequent reference to the obligations of parties under international humanitarian and human rights law. In situation-specific resolutions, the Council has increasingly called for protection to be prioritized in the implementation of peacekeeping mandates. Missions have been requested to develop protection

strategies. There has also been greater specificity in the protection concerns to be addressed, including detention, the use of human shields and particular types of weapons, and the need to consider all forms of durable solutions for internally displaced persons and refugees.

24. Along with the aide-memoire, the Security Council's informal Expert Group on the Protection of Civilians has contributed to this process and is proving a useful vehicle through which to inform the Council's deliberations on particular situations from a protection perspective. Since its establishment in January 2009, the Expert Group has met 17 times and considered Afghanistan, the Central African Republic, Chad, Côte d'Ivoire, the Democratic Republic of the Congo, Iraq, Somalia and the Sudan.

25. Given the magnitude of the displacement crisis in Africa, I welcome the adoption in October 2009 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa. I would urge States members of the African Union to sign and ratify the Convention without delay so as to enable its rapid entry into force. States affected by displacement are also encouraged, with the support of relevant United Nations actors, to establish domestic normative frameworks to prevent and respond to this grave problem.

26. I would also urge those States that have yet to do so to ratify the Convention on Cluster Munitions, which entered into force on 1 August 2010. Given the fundamental importance of the choice of weapons in minimizing the effect of hostilities on civilians, the Convention constitutes a significant step towards protecting civilians from the insidious effects of such weapons. In a similar vein, I welcome the agreement reached at the 2010 Review Conference of the Rome Statute to amend article 8 of the Statute and extend individual criminal responsibility for the use of poison; poisoned weapons; asphyxiating, poisonous or other gases and all analogous liquids, materials or devices; and bullets that expand or flatten in the body, to non-international armed conflicts, which are, as noted, the predominant form of contemporary conflict.

27. I welcome the entry into force in August 2010 of the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel. While the Convention applies in relation to personnel engaged in peacekeeping operations, the Protocol expands legal protection to all United Nations staff "delivering humanitarian, political or development assistance in peacebuilding" or "delivering emergency humanitarian assistance". I would urge States to sign and ratify the Convention and its Optional Protocol without delay.

28. My previous report referred to concerns relating to the continuing reliance on private military and security companies in a number of conflicts. In that connection, I welcomed the adoption of the Montreux Document (see A/63/467-S/2008/636, annex), the culmination of a process initiated by Switzerland and the International Committee of the Red Cross (ICRC), which seeks to clarify international law as it relates to private military and security companies operating in armed conflicts. Prompted by this initiative, the private security industry, working with a number of States and non-governmental organizations, is developing a code of conduct based on international humanitarian and human rights law. Consideration has been given to oversight of the code by an independent institution with the means to hold to account and sanction those who violate its standards. This would be an important mechanism.

29. In a related development, the Human Rights Council in October 2010 approved the establishment of an open-ended intergovernmental working group to consider the possibility of elaborating a legally binding instrument on the regulation, monitoring and oversight of the impact of the activities of private military and security companies on human rights. I would encourage Member States to participate in the working group to build consensus on a practical legal framework that reinforces existing rules of international humanitarian and human rights law.

30. Over the past year, dialogue on the responsibility to protect has moved away from the more contentious issues and perceptions related to international intervention. My most recent report on the responsibility to protect (A/64/864) focused on early warning and assessment, which Member States seem to be taking up more readily, as reflected in the informal interactive dialogue held by the General Assembly in August 2010. In the meantime, I continue to encourage the institutionalization of the collaboration between my Special Advisers on the prevention of genocide and on the responsibility to protect, including options for a joint office.

Countering impunity

31. Efforts to counter impunity continue to gather pace. July 2010 saw the first conviction by the Extraordinary Chambers in the Courts of Cambodia, of Kaing Guek Eav for crimes against humanity and grave breaches of the 1949 Geneva Conventions. That same month, the International Criminal Court (ICC) issued an indictment for the President of the Sudan on three counts of genocide. This is in addition to the indictment already issued for war crimes and crimes against humanity. In terms of domestic judicial proceedings, for example, there was the conviction by an Israeli military court in October 2010 of two Israeli soldiers for using a Palestinian child as a human shield during Operation Cast Lead in 2009, as well as the ongoing prosecution of a number of military personnel of the United States of America who are accused of involvement in the murder of three Afghan civilians earlier this year. There was also the arrest of individuals by the authorities in Germany in November 2009, and France in October 2010, for allegedly committing war crimes and crimes against humanity in Rwanda and the Democratic Republic of the Congo, respectively. October 2010 also saw the arrest by the national authorities of the leader of an armed group allegedly involved in the aforementioned rapes in Kibua in the Democratic Republic of the Congo. Welcome though they are, as discussed in greater detail below, such arrests and prosecutions remain simply too few in the face of existing and mounting allegations of serious violations of humanitarian law and human rights in these and other contexts.

Policy development

32. At the policy level, the United Kingdom of Great Britain and Northern Ireland and Switzerland have adopted strategies on the protection of civilians. These address such issues as strengthening the normative framework, the operational response and building national capacity. I would encourage other Member States to also reflect on their role in supporting the protection of civilians and to develop similar policies. The Secretariat stands ready to support such efforts.

Strengthening protection on the ground

33. Of particular note, there has been progress in strengthening protection on the ground. Special mention should be made of the specific mandate entrusted by the international community to the ICRC in the protection of civilians. In addition to ICRC, an increasing number of humanitarian organizations now prioritize protection and have either mainstreamed it across their programmes or are implementing specific protection projects. The implementation of the cluster approach by United Nations and other humanitarian organizations and the establishment of field-based protection clusters, as well as the development of new protection tools, guidance and standards, are ensuring a more coordinated and professional response to protection concerns. Nevertheless, the need for more comprehensive and consistent action remains.

34. Important measures are being introduced to improve the implementation of protection mandates by peacekeeping and other relevant missions, based largely on the recommendations of the November 2009 independent study *Protecting Civilians in the Context of United Nations Peacekeeping Operations*, which was jointly commissioned by the Office for the Coordination of Humanitarian Affairs and the Department of Peacekeeping Operations. Several of these recommendations were reflected in resolution 1894 (2009) and have led to particular initiatives (which are discussed further below), including the development by the Department of Peacekeeping Operations and the Department of Field Support of an operational concept regarding the protection of civilians in United Nations peacekeeping operations. Similar initiatives are being undertaken at the regional level. The African Union is finalizing guidelines on the protection of civilians for its peace operations, while the European Union is revising its guidelines on the protection of civilians in European Union-led crisis management operations. I would encourage further coordination between regional and international organizations on these complementary initiatives.

35. Understanding of the different approaches to applying protection on the ground is increasing. In resolution 1894 (2009), the Security Council noted the practical measures taken by peacekeeping missions and United Nations country teams to protect civilians, and requested the inclusion of “best practice” in the present report. The Department of Peacekeeping Operations and the Global Protection Cluster are collecting lessons learned and good practice in protection. Their findings to date underline the critical role of humanitarian workers, peacekeepers and other actors in enhancing protection on the ground. Of particular importance, they have identified a number of themes that will usefully inform future protection efforts.

36. First, they have confirmed that effective protection requires a presence among civilian populations and, in particular, those at risk. This has long been recognized by humanitarian actors and has increasingly been employed by peacekeeping missions through standing military and police patrols and other force deployments, such as mobile operating bases, which increase the reach of a limited number of troops and enhance their deterrence and response capacity for protecting civilians.

37. Second, regular assessments of potential threats to civilians, including through constant interaction with the populations concerned, and the establishment of early warning systems are critical to ensuring timely action. A number of peacekeeping missions and humanitarian actors have established assessment and warning

mechanisms that allow them to respond to potential threats early and with preventive measures. In Timor-Leste, for example, telephone hotlines have been established for civilians and local authorities to contact the United Nations Integrated Mission in Timor-Leste.

38. Third, coordinated action on geographical and operational priorities among all relevant protection actors is essential, in accordance with their mandates. The routine establishment of dedicated protection clusters or working groups at the national level and, in many cases, at the local level has significantly contributed to the ability of humanitarian actors to respond in a coordinated manner to ongoing or anticipated protection concerns. Responses have included ensuring a humanitarian presence in areas of concern, advocating with the local and national authorities and working closely with and calling on the more robust support of peacekeeping missions. Consideration has been given in some settings to developing joint protection strategies and implementation mechanisms. For example, in the Sudan, a network of 15 inter-agency protection working groups was established countrywide under the lead of the protection of civilians unit of UNMIS. They undertook field assessments, follow-up on individual cases and returnee monitoring.

39. Within peacekeeping missions, the protection of civilians is greatly enhanced when all components (military, police and civilian) are engaged, rather than this task being relegated to only the military component. Some protection initiatives, such as the joint protection teams, which have been widely used in the Democratic Republic of the Congo, have been based on this approach. Composed of staff from civil affairs, human rights, gender, political affairs, child protection and public information sections, the teams are deployed on a temporary basis to military outposts to gather information and provide analytical support to help design context-specific action plans to protect civilians.

40. Fourth, the efforts of the civilian population to protect itself must be supported. Communities facing violence often have well-established early-warning mechanisms that allow them to move to safer areas before they are attacked. In several contexts, women have employed different strategies to avoid sexual violence when collecting firewood and undertaking other daily tasks. Approaches to protection that involve the participation of affected communities and that build on the capacities of those communities should be adopted, while State authorities who retain the primary responsibility for protection should be engaged. In the Sudan, for example, United Nations police, the United Nations Development Programme and the local authorities have empowered internally displaced persons to work with the national police in crime prevention and the maintenance of law and order in camps.

41. Fifth, the allocation of sufficient resources for discrete protection activities and initiatives is key, and expands the capability of humanitarian organizations and peacekeeping missions to protect civilians. For example, UNAMID police and formed police units installed lights and cameras around the perimeter of camps for displaced persons in order to deter attacks and record information on those intent on harming civilians.

42. Last but not least, and underpinning all such efforts, is the need for the proactive engagement of senior United Nations officials on the ground, including my Special Representatives and Humanitarian Coordinators, with the parties to conflict, with a view to advocating on behalf of those at risk and preventing threats to civilians from further escalating.

III. The five core challenges

43. Such developments notwithstanding, still more needs to be done to meet the five core challenges to ensuring more effective protection for civilians, as identified in my previous report, namely enhancing compliance by parties to conflict with international law, enhancing compliance by non-State armed groups, enhancing protection by United Nations peacekeeping and other relevant missions, enhancing humanitarian access and enhancing accountability for violations of the law.

A. Enhancing compliance

44. Constant care must be taken by parties to conflict to spare the civilian population from the effects of hostilities. Failure to do so may result in the death and injury of civilians targeted or otherwise caught in attacks. It is also frequently the precursor to displacement and an increased risk of other violations, including sexual violence and forced recruitment; physical and mental suffering; and a potentially chronic dependency on humanitarian assistance.

45. Sparing civilians from the effects of hostilities requires, inter alia, strict compliance by parties to conflict with international humanitarian law and, in particular, with the principles of distinction and proportionality. It also requires that parties take all feasible precautions in attack and defence. The law is also clear that under no circumstances do violations of these rules by one party to a conflict justify violations by its opponent, yet, as can be seen in such contexts as those mentioned above, violations continue to be commonplace, with often devastating consequences for civilians.

46. The Security Council has repeatedly condemned the deliberate targeting of civilians; however, in resolution 1894 (2009), the Council took its concerns further. It condemned as flagrant violations of international humanitarian law attacks directed against civilians and protected objects, as well as indiscriminate or disproportionate attacks and the utilization of the presence of civilians to render certain points, areas or military forces immune to military operations, and demanded that all parties immediately end such practices. This broadening and increased precision in the scope of the Council's concern is welcome and, indeed, reflective of the law.

47. In resolution 1894 (2009), the Security Council further referred to its willingness to respond to situations of conflict in which civilians were targeted or humanitarian assistance was deliberately obstructed, including through the consideration of appropriate measures at its disposal. In my previous report, I recommended various steps the Council could take to promote systematic compliance with international law, such as the application of targeted measures against parties that consistently defied the Council's demands and routinely violated their legal obligations to respect civilians. These recommendations still stand, and it is hoped that resolution 1894 (2009) indicates an increased willingness on the part of the Council to take such action.

48. In my previous report, I noted my increasing concern at the humanitarian impact of explosive weapons, particularly when used in densely populated areas. Explosive weapons include artillery shells, missile and rocket warheads, various kinds of bombs, cluster munitions, landmines, grenades and improvised explosive

devices. A common feature of explosive weapons is that they are indiscriminate within their zones of blast and fragmentation effect, which makes their use highly problematic in populated areas.

49. Data collected by various organizations concerning a range of conflicts, including Afghanistan, Iraq, Somalia and Yemen, reveals substantial and ongoing civilian suffering caused by explosive weapons when they are used in populated areas. Civilians within the vicinity of an explosion are likely to be killed or injured by the blast and fragmentation effects of such weapons. They may be harmed by the collapse of buildings or suffer as a result of damage to infrastructure that is vital to the well-being of the civilian population, such as hospitals and sanitation systems. The use of explosive weapons also creates unexploded ordnance that persists as a threat to civilians until it is removed.

Recommendations

50. **I would urge Member States, United Nations actors and international and non-governmental organizations to consider the issue of explosive weapons closely, including by supporting more systematic data collection and analysis of the human costs of their use. This is essential to deepening the understanding of the humanitarian impact of such weapons and to informing the development of policy and practice that would strengthen the implementation of international humanitarian and human rights law. The annual report on the protection of civilians in armed conflict produced by UNAMA provides a good overview of the nature of attacks involving civilian casualties. It is an example of good practice in this area that I would encourage other United Nations missions and actors to adapt to their specific circumstances.**

51. **I would also urge increased cooperation by Member States, both in terms of collecting and making available to the United Nations and other relevant actors information on civilian harm resulting from the use of explosive weapons and in terms of issuing policy statements that outline the conditions under which explosive weapons might be used in populated areas.**

B. Enhancing compliance by non-State armed groups

52. Improved compliance with international humanitarian law and human rights law will always remain a distant prospect in the absence of, and absent acceptance of the need for, systematic and consistent engagement with non-State armed groups. Whether engagement is sought with armed groups in Afghanistan, Colombia, the Democratic Republic of the Congo, the occupied Palestinian territories, Pakistan, Somalia, the Sudan, Uganda, Yemen or elsewhere, experience shows that lives can be saved by engaging armed groups in order to seek compliance with international humanitarian law in their combat operations and general conduct, gain safe access for humanitarian purposes and dissuade them from using certain types of weapons.

53. Indeed, while armed groups are diverse in their motivations and conduct, there are those which have shown a readiness to establish and implement commitments in conformity with their obligations under international humanitarian law and with human rights law. Some non-State armed groups have been receptive to training on these topics. Some have adopted codes of conduct, unilateral declarations and special agreements, as envisaged under international humanitarian law, through

which they commit to comply with their obligations or even undertake commitments that go beyond those required by the law. Some groups have agreed to and implemented action plans, pursuant to Security Council resolution 1612 (2005), to bring their conduct into line with international norms regarding children in armed conflict and, in particular, to release children in their ranks. Forty-one armed groups have signed the Geneva Call Deed of Commitment, resulting in the destruction of approximately 20,000 stockpiled anti-personnel mines and thousands of improvised explosive devices and abandoned ordnance.

54. Recent research has identified a number of incentives for non-State armed groups to comply with international norms to protect civilians.[1] The primary incentive for compliance appears to be the group's own self-interest, which has military, political, and legal aspects. With respect to the military arguments for compliance, respect for norms by one party to a conflict typically encourages respect for norms by the other party or parties. Conversely, although not justified by the law, abuses and violations committed by one party are normally met with a similar response from the other party or parties. The political arguments for compliance centre on the desire of many non-State armed groups and/or the causes they espouse to be recognized as "legitimate". The legal arguments for compliance centre primarily on the avoidance of international criminal sanction, which is best achieved through the effective command and control by an armed group of its members. In addition, there are important humanitarian arguments for compliance that relate to the desire of certain non-State armed groups to respect human dignity. This desire should not be underestimated, and may allow for opportunities to go beyond actual international obligations and hold such groups to standards that provide a higher level of protection for civilians than those strictly demanded by international law.

55. Engagement with armed groups for humanitarian ends is clearly possible and, indeed, necessary in order to negotiate safe humanitarian access to those in need. I am encouraged that the ongoing discussions on this issue during the Security Council's biannual open debates on the protection of civilians reveals an increasing appreciation by Member States of the importance of engagement for humanitarian purposes. This is yet to translate, however, into broad acceptance of such engagement or, moreover, into a willingness to refrain from adopting measures that impede or, in some cases, criminalize engagement with non-State armed groups. For example, in Somalia concerns exist that some donor States, particularly those that have designated Al-Shabaab as a terrorist organization, have introduced conditions into their funding agreements with humanitarian organizations that impose limits on operations in Al-Shabaab-controlled areas. In Gaza, the humanitarian funding policies of some donor States have sought to limit contact with Hamas by the humanitarian organizations they fund, even though Hamas exercises effective control over Gaza and is thus a key interlocutor in ensuring that aid reaches those who need it. Humanitarian agencies also voiced concerns over the possible humanitarian impact of domestic legislation, such as that in the United States, which criminalizes various forms of material support to prohibited groups.

[1] Geneva Academy of International Humanitarian Law and Human Rights, "Armed non-State actors and international norms: towards a better protection of civilians in armed conflicts". Available from www.adh-geneve.ch/pdfs/armednonstateactors.pdf.

Recommendations

56. **I would again stress the need for a comprehensive approach towards improving compliance with the law by non-State armed groups. Such an approach would involve an increased understanding of the motivations of specific groups and their incentives to comply with international law, and the development of strategies for engaging such groups, with a view to seeking improved protection for civilians, including safe and secure humanitarian access to those in need.**

57. **More immediately, I would urge Member States to consider the potential humanitarian consequences of their legal and policy initiatives and to avoid introducing measures that have the effect of inhibiting humanitarian actors in their efforts to engage armed groups for the humanitarian purposes referred to above.**

C. Protection of civilians by United Nations peacekeeping and other operations

58. From Chad to Côte d'Ivoire, the Democratic Republic of the Congo to Liberia, and Sierra Leone to the Sudan, United Nations peacekeeping missions have had a significant impact on enhancing the protection of civilian populations. As noted in my previous report, however, the implementation of mandates to protect civilians has had its challenges.

59. Improvements are being sought. These include the development of a Department of Peacekeeping Operations-Department of Field Support operational concept for the protection of civilians in United Nations peacekeeping operations and the development of a framework to guide the preparation by missions of strategies to protect civilians, which were expressly requested by the Security Council in resolution 1894 (2009). As the framework covers only the development of protection strategies, further operational guidance will be required on other aspects of the implementation of protection mandates by peacekeeping missions. To date, strategies for protecting civilians have been developed by United Nations missions in Côte d'Ivoire, the Democratic Republic of the Congo and the Sudan, and are currently being developed in Lebanon. I urge other relevant missions to start the process.

60. In resolution 1894 (2009), the Security Council also requested the inclusion of more comprehensive and detailed information on the protection of civilians in armed conflict in my reports on country-specific situations, and the development of guidance to that end. Such information is vital in order for the Council to take effective action against the perpetrators of violations, provide peacekeeping missions with realistic and achievable mandates and monitor the implementation of those mandates. Guidance is currently being developed by the Secretariat.

61. In resolution 1894 (2009), the Security Council requested that peacekeeping missions with protection of civilian mandates conduct predeployment training and senior leadership training on the protection of civilians. The Council further requested troop- and police-contributing countries to ensure appropriate training of their personnel participating in peacekeeping missions in order to heighten awareness and responsiveness to protection concerns. The Special Committee on

Peacekeeping Operations has requested the Department of Peacekeeping Operations to develop training modules for all peacekeeping personnel that cover mandated tasks, including the protection of civilians. The Department of Peacekeeping Operations has begun to make progress on this, and the modules are due for completion in early 2011. In partnership with the United Nations Entity for Gender Equality and the Empowerment of Women and United Nations Action against Sexual Violence in Conflict, the Department of Peacekeeping Operations is also developing scenario-based training materials for military peacekeepers on sexual violence.

62. A recurring concern is the need to provide missions with the necessary resources to implement protection mandates. This is crucial in order to fulfil the expectations of the Security Council, which sets the mandates, and, more importantly, the civilian populations that missions are mandated to protect. In resolution 1894 (2009), the Council itself stressed that mandated protection activities must be given priority in decisions about the use of available capacity and resources but also reaffirmed the importance of greater awareness among its members of the resource and field-support implications of its decisions. At the request of the Special Committee on Peacekeeping Operations, the Department of Peacekeeping Operations and the Department of Field Support are outlining resource and capability requirements for the implementation of mandates to protect civilians, which will help raise awareness. In this connection, I am concerned at the recent and anticipated further withdrawal of helicopters from the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) and UNMIS, as well as the existing gaps in UNAMID, and the negative repercussions this has on force projection, a crucial component of the protection response of those missions.

63. Implementing a protection mandate is challenging enough, but it is even more so when the armed and security forces of the host State, which often receives technical and other support from the United Nations mission, are implicated in the perpetration of human rights and international humanitarian law violations. In 2009, the then United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) was severely criticized for its support to elements of FARDC who were accused of serious violations of international humanitarian law during military operations against the Forces démocratiques de libération du Rwanda.

64. On my instruction, the Mission elaborated and implemented a conditionality policy according to which it would not support military operations by FARDC units if there were grounds to believe that such units would violate international humanitarian and human rights law in the course of the operation. The Mission would also participate in or support only those FARDC operations that were jointly planned with the Mission. It would, moreover, immediately intercede with the FARDC command if elements of a unit receiving support from the Mission were believed to be committing grave violations, and suspend support if FARDC took no action or if violations continued. Provisions to that effect were subsequently included in Security Council resolution 1906 (2009).

65. This challenge is not unique to the Democratic Republic of the Congo. The United Nations also provides technical and financial support to the African Union Mission in Somalia, the operations of which have caused alarming numbers of civilian casualties and raised grave concerns as to compliance with international

humanitarian law. In the light of these cases, the Secretariat is undertaking a process aimed at ensuring consistency among missions and agreement on basic principles that must be included in any future case-specific conditionality policies.

66. In resolution 1894 (2009), the Security Council reaffirmed its practice of requiring benchmarks to measure and review progress in the implementation of peacekeeping mandates and stressed the importance of including indicators regarding the protection of civilians. Benchmarks are critical to measuring progress and demonstrating that the protection of civilians not only is an aspirational policy statement at the normative level but also can and does have practical meaning on the ground. Benchmarks also serve to engage members of the Security Council, in a more focused and sustained manner, in addressing specific threats and challenges to civilians in conflict areas. They are necessary yardsticks for affected States and communities, as well as international organizations, to measure how much more, how much longer and in what specific areas continued support and efforts are needed.

67. The need to measure progress against benchmarks is particularly acute in the context of mission drawdown, which is an issue of increased concern. In recent months, some United Nations peacekeepers have begun to withdraw from the Democratic Republic of the Congo, while the United Nations Mission in the Central African Republic and Chad (MINURCAT) is expected to withdraw completely by the end of 2010. The protection and humanitarian implications of drawdown vary depending on the local context; however, to reduce the possible risk of increased levels of instability, violence and protection concerns, including diminished physical protection, it is essential that drawdown be based not on arbitrarily imposed timelines but rather on the achievement of clear benchmarks, including in relation to the protection of civilians.

68. In this light, I am encouraged by Security Council resolution 1923 (2010) concerning the drawdown of MINURCAT. Its articulation of specific protection tasks and benchmarks that Chad has committed to implement and meet is critically important. These include ensuring the security and protection of civilians in danger and the voluntary, safe return or resettlement of internally displaced persons. Importantly, the resolution provides for a joint Government of Chad-United Nations high-level working group to regularly assess the protection situation and the measures adopted by the Government to implement the various tasks. Resolution 1923 (2010) provides a useful example of the benchmarks and requirements the Council could insist upon for ensuring that drawdown is undertaken with full cognizance of its impact on the protection of civilians. Effective monitoring and reporting by the high-level working group on the implementation of these provisions will be crucial, in order to both keep the Council informed of progress and to highlight to donor States areas that will need additional support.

69. Indeed, drawdown is of concern also in terms of the severe resource implications for the humanitarian and development actors that remain once a mission has withdrawn. These actors may have previously relied on the mission for security, logistical and other support derived from assessed rather than voluntary contributions. Once missions withdraw from contexts that still pose security and logistical challenges, humanitarian and development actors will require additional capacity and resources to ensure their security and continued operation. The same reasoning applies to other areas that were formally supported by the mission and

financed from assessed contributions, such as rule of law, human rights and child protection activities. I will include information on the possible operational and financial implications of mission drawdown in my reports to the Security Council. Member States must be fully aware of the potential consequences of withdrawal and, in particular, the need for increased voluntary contributions to support crucial ongoing humanitarian and development activities, especially those related to protection.

Recommendations

70. **Pursuant to resolution 1894 (2009), peacekeeping and other relevant operations should develop specific benchmarks against which to measure and review progress in the implementation of mandates to protect civilians.**

71. **In advance of the drawdown of United Nations peacekeeping and other relevant operations, the Security Council, or Member States more generally, should urge the articulation of benchmarks relating to the protection of civilians. The Council should also urge the establishment of an appropriate mechanism to measure and report on progress against such benchmarks.**

72. **In the context of drawdown, donor States are encouraged to anticipate and respond in a timely manner to increased funding requirements for the humanitarian and development actors that remain.**

D. Humanitarian access

73. Access is the fundamental prerequisite to humanitarian action, yet, as demonstrated in the annex to the present report, access is all too frequently compromised. Bureaucratic constraints, active hostilities, deliberate attacks against humanitarian workers, the economically motivated theft of humanitarian supplies and equipment, or a combination of all of the above continue to undermine efforts to protect and assist those in need.

74. In resolution 1894 (2009), the Security Council noted with grave concern the severity and prevalence of constraints on humanitarian access, the frequency and gravity of attacks against humanitarian personnel and the implications of such attacks for humanitarian operations. The Council further stressed the importance of parties to armed conflict cooperating with humanitarian personnel in order to allow and facilitate access to conflict-affected populations.

75. Importantly, in that resolution the Security Council reaffirmed its role in promoting an environment that is conducive to facilitating humanitarian access. To that end, the Council expressed its intention to call on parties to armed conflict to comply with their obligations under international humanitarian law to facilitate the rapid and unimpeded passage of relief consignments, equipment and personnel and to respect and protect humanitarian personnel. The Council further expressed its intention to consistently condemn and call for the immediate cessation of all acts of violence and other forms of intimidation deliberately directed against humanitarian personnel, and to take appropriate steps in response to deliberate attacks against humanitarian personnel.

76. The continued attention of the Security Council to access constraints is welcome, although this issue still requires a more comprehensive and consistent

approach. The Council has continued to express concern about restrictions on humanitarian access in several situations and has called on all parties to provide rapid and unimpeded access to all persons in need of assistance. Nevertheless, greater precision is needed in specifying the nature of such restrictions and, moreover, actions to be taken to counter them, such as expediting customs examination and clearance procedures and waiving or streamlining processes for travel permits. The Council has also repeatedly condemned attacks against humanitarian workers in Afghanistan, Darfur, the Democratic Republic of the Congo, Somalia and elsewhere. In very few cases, however, has the Council called for accountability for those responsible for such attacks.

77. In addition to a more comprehensive and consistent approach, several of the possible Council actions identified in my previous report remain relevant. These include calling on parties to conflict to allow safe passage for civilians seeking to flee zones of fighting and to agree on measures to enable relief actions during active fighting, such as a temporary suspension of hostilities, days of tranquillity and "de-confliction" arrangements.[2]

78. The Security Council could also support efforts to address the particular problem of increased criminality in armed conflict by encouraging United Nations peacekeeping and other missions to identify and analyse factors contributing to such criminality and actions that could mitigate the impact of those factors on humanitarian access. This would be in line with the Council's role, as stated in resolution 1894 (2009), in promoting an environment conducive to the facilitation of humanitarian access, and would make a valuable contribution to maintaining safe access by addressing a problem that increasingly threatens humanitarian operations in Chad, Darfur, the Democratic Republic of the Congo and elsewhere. Such analysis would also contribute to the work of missions, as the factors that lie behind increased criminality have implications for disarmament, demobilization, reintegration and rehabilitation; security sector reform; and the rule of law.

Recommendations

79. **The Security Council is urged to take a more consistent and comprehensive approach to addressing access constraints, in particular in implementing the provisions of resolution 1894 (2009).**

80. **The Security Council is also urged to ensure enhanced accountability for grave instances of deliberate delays or denials of access for humanitarian operations, as well as situations involving attacks against humanitarian workers, including through referrals to ICC or encouraging domestic prosecutions.**

81. **In this connection, and in line with resolution 1894 (2009), the Security Council should request the Emergency Relief Coordinator to systematically bring to its attention situations in which humanitarian operations are deliberately obstructed and to suggest possible response actions for consideration by the Council.**

[2] De-confliction arrangements involve coordinating the time and location of relief activities and movements by humanitarian organizations through liaison between those organizations and the parties to conflict during hostilities.

E. Enhancing accountability

82. Fundamental to enhancing compliance is the need to enhance accountability for violations of international humanitarian and human rights law, both for parties to conflict and individual perpetrators. As noted in my previous report, in many conflicts it is to a large degree the absence of accountability, and, worse still, the lack in many instances of any expectation thereof, that allow violations to thrive.

83. My previous report outlined several recommendations to enhance accountability. These still stand, and some were reiterated by the Security Council in resolution 1894 (2009). Specifically, in that resolution, the Council called upon all parties concerned to disseminate information about, and provide training to combatants on, international humanitarian, human rights and refugee law and to ensure that orders and instructions issued to combatants complied with international law and were observed, including by establishing effective disciplinary procedures. The Council emphasized, moreover, the responsibility of States to comply with their obligations to investigate and prosecute persons suspected of war crimes, crimes against humanity, genocide or other serious violations of international humanitarian law.

84. The emphasis on the responsibility of States to investigate and prosecute such crimes is warranted, and, as noted above in section II.B, there have been further positive, if incremental, steps at the national level. These are critically important developments, not least in terms of raising the expectation of accountability among belligerents; however, they remain simply too few in the face of existing and mounting allegations of serious violations of humanitarian and human rights law in today's conflicts.

85. As evidenced in the biannual Security Council open debates on the protection of civilians, Member States ascribe considerable importance to the principle of complementarity, and several of them have stressed that international efforts to enhance accountability should support, rather than supplant, national efforts. This is fundamental but will often require financial and technical support. Particular attention should be given in this regard to measures that enhance access to justice for victims, which is frequently problematic, not least in relation to sexual violence cases.

86. I note also that, in resolution 1894 (2009), the Security Council emphasized the need to enhance international cooperation in support of national mechanisms, and drew attention to the full range of justice and reconciliation mechanisms to be considered, including national, international and "mixed" criminal courts and tribunals. The War Crimes Chamber of the Court of Bosnia and Herzegovina, the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Sierra Leone are all important models of mechanisms to support much-needed national-level investigations and prosecutions.

87. At the same time, it is imperative that international steps to ensure accountability not be held hostage to unnecessarily slow or otherwise ineffective national efforts. In this regard, an important, if at times politically sensitive, first step towards ensuring accountability is the mandating of commissions of inquiry. Action of this sort sends an important signal that violations will be pursued and that victims will not be ignored, and can pave the way for formal national or international judicial proceedings. In resolution 1894 (2009), the Security Council

emphasized the importance of addressing compliance by parties to armed conflict with international law and noted the methods used for gathering information on alleged violations. It further underlined the importance of timely, objective, reliable and accurate information and considered the possibility, to that end, of using the International Humanitarian Fact-Finding Commission established by article 90 of the First Additional Protocol to the Geneva Conventions.

88. The International Humanitarian Fact-Finding Commission is one option at the disposal of the Security Council. The Council has in the past also requested the establishment of ad hoc commissions in relation to the former Yugoslavia, Rwanda and Darfur, pursuant to resolutions 780 (1992), 935 (1994) and 1564 (2004), respectively. The findings and recommendations of these commissions contributed to the establishment of the International Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as the decision of the Council to refer the situation in Darfur to ICC.

89. It is not only the Security Council that can take initiatives in this area. The Human Rights Council has mandated a number of fact-finding commissions, with secretariat support provided by the Office of the United Nations High Commissioner for Human Rights, including the United Nations Fact-Finding Commission on the Gaza Conflict, established in April 2009. The report of the Fact-Finding Commission, issued in September 2009, found that serious violations of international humanitarian law and human rights law had been committed by Israeli armed forces and Palestinian armed groups. The Human Rights Council has instituted a system of reporting to monitor progress in implementing the Commission's recommendations, as well as a committee of independent experts to monitor and assess any domestic, legal or other proceedings undertaken by Israel and the Palestinian side.

90. Establishing commissions of inquiry and similar mechanisms can be politically sensitive, yet they clearly have utility in ascertaining the facts and recommending follow-up action with a view to ensuring accountability for violations. I intend to request Secretariat departments directly involved in launching and supporting inquiries to undertake a review of the United Nations experience in these processes, in consultation with other relevant departments, with a view to identifying how such processes might be used on a more consistent and less politically influenced basis. Scrutiny must be the norm.

91. In the case of Sri Lanka, instead of establishing a fact-finding or accountability mechanism, I appointed in June 2010, as follow-up to my May 2009 joint statement with President Rajapaksa, a panel of experts to advise me on Sri Lanka's efforts to address violations of international humanitarian and human rights law that may have occurred during the conflict.

92. As mentioned in my previous report, victims have a right to reparations for violations of human rights law and international humanitarian law. Reparations can play an important deterrent, as well as restorative, role.

93. In this connection, I note the emerging practice of several States, one that other parties to armed conflict might consider, of acknowledging the harm they cause to civilians and compensating victims. The practice of making amends may range from public apologies to financial payments and livelihood assistance provided to individuals, families and communities. This practice must not be seen,

however, as an alternative to prosecuting those responsible for violations of international humanitarian and human rights law and delivering justice to the victims and their families and communities.

94. In Afghanistan, for example, this practice has been implemented by most States participating in ISAF through apologies and different monetary schemes; however, the States participating in ISAF have widely varying policies and practices, and military commanders have significant discretion to investigate and execute existing policies. The North Atlantic Treaty Organization adopted a set of non-binding guidelines in June 2010 to streamline the process for addressing harm to civilians and to ensure fairness, predictability and sensitivity to victims. I would encourage ISAF to ensure that information on the process for making claims is disseminated among the population and that such claims are decided in a timely manner.

Recommendations

95. **Member States are encouraged to provide financial and technical assistance to support more effective national efforts to investigate and prosecute serious violations of international humanitarian and human rights law.**

96. **Member States are encouraged to consider the possibility of "mixed" criminal courts and tribunals when national mechanisms are unable to cope with the existing or potential caseload.**

97. **Member States that have yet to do so are encouraged to sign and ratify the Rome Statute of ICC.**

98. **The Security Council should:**

(a) **Systematically include in relevant situation-specific resolutions provisions relating to:**

(i) **The need to disseminate information about, and provide training for combatants on, international humanitarian, human rights and refugee law, and to establish effective disciplinary procedures to ensure that orders and instructions issued to combatants are observed;**

(ii) **The need for States to take appropriate steps to comply with their obligations to investigate and prosecute persons suspected of war crimes, crimes against humanity, genocide or other serious violations of human rights law;**

(b) **Insist that Member States cooperate fully with ICC and similar mechanisms. This includes, for States parties to the Rome Statute, apprehending persons indicted by ICC who are on their territory;**

(c) **Enforce such cooperation, as necessary, through targeted measures;**

(d) **Systematically request reports on violations and consider mandating commissions of inquiry to examine situations in which concerns exist about serious violations of international humanitarian and human rights law, including with a view to identifying those responsible and their being held accountable at the national level or subjected to targeted measures and/or the situation being referred to ICC;**

(e) **Call upon States to establish, or mandate, mechanisms to receive claims from individuals alleging to be the victims of violations of international humanitarian law and human rights law.**

IV. Conclusions and actions

99. The present report began with a clear and simple message: that we must focus our efforts on enhancing protection where and for whom it matters most — on the ground, in the midst of conflict and for the hundreds of thousands of civilians who are, on a daily basis, at risk of, or fall victim to, serious violations of international humanitarian law and human rights law.

100. In both the present report and in my previous report, I have outlined pertinent recommendations intended to meet the five core challenges and, above all, facilitate protection on the ground. I would strongly urge the Security Council and Member States to consider these recommendations and implement them accordingly.

101. In addition, I would urge members of the Security Council and other Member States to consider three actions that are implicit in the present report and absolutely fundamental to enhancing collective efforts to enhance the protection of civilians. The first two apply specifically to the Council, while the third concerns the role of United Nations humanitarian and peacekeeping operations.

Action one
Ensuring a comprehensive approach

102. It is imperative that we move away from the current selective approach to the protection of civilians in armed conflict. In resolution 1894 (2009), the Security Council reiterated its willingness to respond to situations of armed conflict where civilians were being targeted or humanitarian assistance was being deliberately obstructed, including through the consideration of appropriate measures at its disposal. It would also be important for the Council to consider extending this willingness to act to conflicts of which it is not already seized, as they often raise many of the same, and sometimes more acute, protection concerns that are seen in those situations that are already on the Council's agenda. Such conflicts may equally warrant or, by their very nature, demand Council attention, condemnation and action, in line with the thematic resolutions on the protection of civilians and the actions listed in the aide-memoire.

103. **I would urge the Security Council to find new and innovative ways to address those contexts that are not formally on its agenda but in which significant concerns exist in relation to the protection of civilians, including through Arria-formula meetings and expert-level meetings of a less formal character. The Secretariat stands ready to assist in this regard.**

Action two
Ensuring a consistent approach

104. The stated commitment of the Security Council to the protection of civilians as a thematic issue is evident, including through its work in the informal Expert Group on the Protection of Civilians; however, the need for a more comprehensive approach notwithstanding, there must be greater consistency in the manner and

extent to which the Council addresses protection in those contexts of which it is actually seized.

105. **Members of the Security Council are encouraged to systematically apply the aide-memoire, continue to make extensive use of the informal Expert Group on the Protection of Civilians and consider other ways in which the Expert Group could further inform the Council's deliberations, including through specific briefings on thematic protection concerns and on progress made in addressing country-specific protection concerns against benchmarks.**

Action three
Ensuring an accountable approach

106. Systematic monitoring and reporting on the impact of our efforts to improve the protection of civilians is essential. We must track progress, including in terms of the implementation of the Security Council's resolutions; identify areas of concern and appropriate response actions; and ensure an approach in which those involved are accountable for their actions or lack thereof.

107. The Security Council has recognized the need for benchmarks against which peacekeeping missions should report on the implementation of their mandates, including in relation to the protection of civilians. This is fundamental, not least in terms of the drawdown of missions, particularly those that have played an instrumental role in protecting civilians.

108. A broader approach is needed, however. We need to systematically monitor, review and report on the protection of civilians in all relevant situations and, moreover, on the role of all relevant actors in the response, including but not limited to peacekeeping missions, which are merely one protection actor and present only in a limited number of situations. We need to systematically assess and report on the extent to which our actions are making civilians safer.

109. **I intend to ask the Emergency Relief Coordinator to develop, in consultation with relevant United Nations and other actors, indicators for systematic monitoring and reporting on the protection of civilians in armed conflict.**

110. While our efforts to protect civilians on the ground have not kept pace with developments at the normative level, we cannot afford to be dismissive of their impact. As the daily work of countless humanitarian and human rights workers, peacekeepers and political negotiators demonstrates, protection can be done. We need, however, to make it a priority for our actions, operationally and politically, thereby reflecting the very spirit of the United Nations and its Charter. In this respect, our focus, more than 10 years after the Security Council first considered this issue, must shift from describing shortcomings and urging normative change to clearly improving our tools on the ground and monitoring progress — or failure. This is the task that now lies before the Council and, indeed, all of us.

Annex

Constraints on humanitarian access

1. Constraints on humanitarian access in situations of armed conflict take different forms, affecting both access by humanitarian personnel to civilian populations in need and access by civilian populations to assistance and services. Not all constraints are deliberate, and not all constitute violations of international law.

2. My previous report included an annex identifying different types of access constraints. It highlighted three in particular as posing the greatest challenge, owing to their widespread and frequent occurrence and their severe consequences for humanitarian personnel and operations and populations in need: bureaucratic constraints imposed by Governments and other authorities; the intensity of hostilities; and attacks on humanitarian personnel and theft of assets. Eighteen months on, these same constraints continue to seriously affect humanitarian operations and undermine the well-being of civilian populations in conflicts throughout the world.

I. Bureaucratic constraints

3. Bureaucratic restrictions on the entry of personnel, goods and equipment into an affected State, as well as on their movement within the country of operations, can be onerous and time-consuming to comply with and often cause significant delays in the provision of assistance. While, under international humanitarian law, humanitarian activities require the consent, and are subject to the control, of the parties to conflict, those parties are obliged to give such consent to impartial relief operations and must facilitate and allow humanitarian activities to be carried out, including the full, safe and unhindered access by humanitarian personnel to civilian populations in need. Restrictions should not place undue burden on humanitarian operations at the expense of timely access to, and to the detriment of, the affected population.

4. In support of facilitating the timely entry of goods and equipment into affected States, in September 2010 the Office for the Coordination of Humanitarian Affairs and the World Customs Organization signed a memorandum of understanding in which they agreed to cooperate in establishing and promoting measures to expedite the import of relief items and equipment during emergency situations. Drawing on customs-related components of existing conventions, the Office for the Coordination of Humanitarian Affairs and the World Customs Organization have also developed model language concerning, for example, expedited customs examination and clearance procedures. The Security Council can support solutions to ongoing bureaucratic constraints by calling on affected States to refer to the model language for the development of bilateral agreements with humanitarian agencies and to overcome bottlenecks in customs procedures in a timely manner.

5. Meanwhile, bureaucratic constraints continue to restrict access and the delivery of assistance to those in need. In the occupied Palestinian territories, for example, restrictions on the entry of humanitarian goods, imposed as part of Israel's blockade of Gaza since June 2007, continue to impede recovery efforts and

undermine the well-being of the civilian population. Since June 2010, Israel has incrementally relaxed restrictions on commercial goods entering Gaza, and some United Nations recovery projects have been approved by Israeli authorities. Nevertheless, the reconstruction of homes, medical facilities and water and sewerage systems damaged during Operation Cast Lead continues to be impeded by restrictions on the import of construction materials and spare parts intended for humanitarian projects. Time-consuming procedures for monitoring the entry of individual truckloads, as well as existing restrictions on the type and quantity of items that can be brought in and on the movement of humanitarian personnel, continue to impede the implementation of a humanitarian response commensurate with the existing humanitarian need.

6. In Sri Lanka, restrictions on access by United Nations agencies and non-governmental organizations to affected populations across the north were eased in the first half of 2010 in recognition of their expertise and capacity to facilitate post-conflict recovery and reconstruction. Nevertheless, an accumulation of procedures to obtain permission for organizations to operate and carry out certain activities creates a considerable burden for humanitarian actors and greatly reduces the timeliness and efficiency of aid operations. Clearance must be obtained from the Ministry of Defence to access and operate in camps for the displaced, as well as in areas of return. In addition to vehicle checks, the staff of non-governmental organizations may have to undergo body searches prior to entering camps for the displaced. Procedures and paperwork requirements for staff, vehicles and programmes are problematic not only because of their quantity but also because they are not always interpreted consistently by authorities at the local, regional and central levels. New demands or sudden and seemingly arbitrary denials of visas or permission to travel or implement activities result in significant delays and a high degree of unpredictability in humanitarian and recovery/reconstruction programming and implementation. In addition, specific activities, though approved, are restricted by extremely limited timeframes for implementation and geographical coverage. This occurs to such an extent that most humanitarian actors are engaged in an almost constant, time-consuming process of applying for approval to implement activities.

7. In the Sudan, the suspension of humanitarian workers continues, affecting most recently staff of the International Organization for Migration and the Office of the United Nations High Commissioner for Refugees (UNHCR), although the expulsion of UNHCR staff was subsequently reversed. In response to complaints from humanitarian organizations over continuing threats of expulsion, in August 2010 the Government of the Sudan agreed to the establishment of a tripartite mechanism consisting of the Ministries of Foreign Affairs and Humanitarian Affairs and the United Nations Humanitarian Coordinator to review possible expulsions on a case-by-case basis with a view to facilitating their reversal.

8. The high-level committee, established upon the conclusion of the 2007 joint communiqué between the Government of the Sudan and the United Nations and aimed at streamlining bureaucratic procedures affecting humanitarian operations, was expanded and strengthened with the support of the Minister of Humanitarian Affairs following the suspension in March 2009 of the activities of 16 international and national non-governmental organizations. State joint committees and subcommittees on humanitarian programmes and the safety and security of aid workers and property have been established. Overall, although some State-level

meetings have been held, the joint committees in the three Darfur states are still not functional. This greatly reduces the opportunity for dialogue between the authorities and humanitarian actors on humanitarian needs and possible responses thereto.

9. In Yemen, gaining access to a specific location on a specific date requires complex negotiation with multiple actors, and travel is often unpredictable. Prior consultations are required with numerous actors: the central authorities; the local governor; Al-Houthi insurgents; local leaders who may exercise de facto control over an area; and local contacts who can warn of the presence of criminal or otherwise hostile groups. Such conditions underscore the importance of building trust locally at all levels of governmental and non-governmental structures, which in turn requires considerable investment in a long-term presence in situations of protracted conflict.

10. In addition to impeding access by humanitarian actors to those in need, policies instituted by national authorities may lead to segments of the civilian population being unable to access assistance. In Pakistan, registration criteria have sometimes excluded civilians who fled their homes out of fear of impending attack rather than because they were warned by the military to evacuate or because their area was designated as "conflict-affected". This effectively excludes many thousands of people in need from access to food and distributions of tents and non-food items. In Yemen, the Government stopped registering internally displaced persons in July 2010 over concerns that not all persons seeking registration were actually displaced. Although such concerns may be legitimate, they must be addressed in such a way as to ensure that those in genuine need of assistance and services are identified and not excluded from access to them.

11. Humanitarian actors operating in south and central Somalia are continually caught between competing demands by Al-Shabaab and local authorities to pay taxes or conduct their activities in a certain way. In January of this year, the World Food Programme (WFP) temporarily suspended operations across southern Somalia as a result of unacceptable demands by local non-State actors regarding aid delivery. A press statement issued by Al-Shabaab subsequently banned all WFP operations in Somalia. The suspension of operations resulted in approximately 750,000 planned beneficiaries being cut off from food distributions in a country where one in five children in the south and central regions is malnourished.

12. Normally, when faced with such demands, humanitarian actors seek to maintain dialogue, to explain and build acceptance of their humanitarian purpose and to negotiate acceptable terms for continuing their activities. Dialogue with all State and non-State actors for humanitarian ends is not optional but rather is an inevitable necessity in order to reach all civilians in need and ensure the impartial provision of aid. This is true in all conflicts, including Afghanistan, the Central African Republic, the Democratic Republic of the Congo, the occupied Palestinian territories, Pakistan, Somalia, the Sudan and Yemen. As indicated earlier, however, some donor States have introduced conditions into funding agreements, or adopted funding policies or national legislation, that have the effect of imposing limits on, or even criminalizing, contact by humanitarian organizations with non-State armed groups.

13. While the political strategies of some Member States may require policies or legislation aimed at the political or economic isolation of certain groups, such

measures should not result in harm to the civilian population through the effective imposition of restrictions on efforts to care for them and ensure their survival.

II. Ongoing hostilities

14. Ongoing hostilities regularly impede the ability of humanitarian organizations to reach and assist conflict-affected populations in a timely manner in such contexts as Afghanistan, the Central African Republic, Darfur, the Democratic Republic of the Congo, Pakistan, Somalia and Yemen.

15. In the eastern Democratic Republic of the Congo, for example, access is severely constrained owing to ongoing operations by the Forces armées de la République démocratique du Congo (FARDC) and non-State armed groups, including an increase in attacks by the Lord's Resistance Army in Haut and Bas Uélé. This has a significant impact on the distribution of assistance and supplies, including, for example, the timely provision of post-exposure prophylaxis kits to rape victims in order to prevent HIV infection.

16. In Somalia, hostilities during much of 2010 have severely constrained access for international humanitarian actors and had seriously negative consequences for the operations of local humanitarian organizations. The situation is particularly acute in Mogadishu, where fighting has prevented a large proportion of assistance activities, interfered with access to health services and resulted in the periodic localized suspension of wet feeding and supplementary feeding programmes for 266,000 beneficiaries.

17. In Pakistan, humanitarian actors cite ongoing hostilities as the most significant impediment to access. For example, as a result of active hostilities, regular assistance is not currently reaching the displaced or other conflict-affected populations in parts of the Federally Administered Tribal Area, such as the North Waziristan or Kurram agencies.

18. The ability of the civilian population to access assistance and services is as important as access by humanitarian actors to those in need. For example, health workers have reported increases in preventable deaths when people are unable to reach medical facilities in a safe and timely manner because of fighting. Recent fighting between anti-Government elements and the International Security Assistance Force (ISAF) and Afghan forces in Kandahar has inhibited access by the civilian population to health-care centres, including for treatment of conflict-related injuries.

19. In eastern Jebel Marra in Darfur, fighting in early 2010 between rival rebel factions and between rebel and Government forces displaced approximately 100,000 civilians and precipitated the suspension of humanitarian activities in February 2010. The population of Jebel Marra was already vulnerable to food insecurity and disease prior to the suspension of assistance. The absence of timely and necessary assistance has led to fears of possible disease outbreaks, with suspected cases of measles, as well as reports of malnutrition and bloody diarrhoea. Although the intensity of hostilities has declined, the Government has repeatedly denied permission to humanitarian organizations to travel to areas under the control of the Sudan Liberation Army-Abdul Wahid in order to assess the situation and resume humanitarian operations.

20. Such examples underline the importance of implementing measures designed to facilitate access during active hostilities, including the creation of humanitarian corridors or temporary suspensions in hostilities to allow the evacuation of civilians and the passage of relief workers and supplies. Days of tranquillity should continue to be promoted to ensure that vaccination programmes continue during conflict. They may serve as a model to facilitate other humanitarian activities during hostilities. Such measures necessitate engagement by humanitarian actors with all parties to conflict. The Security Council can support these measures by calling on parties to conflict to agree to them and facilitate their implementation. The Office for the Coordination of Humanitarian Affairs is conducting a study on operating in complex security environments, which will identify, in part, good practice with regard to such arrangements. The results of the study may further inform possible Council action.

III. Violence against humanitarian personnel and theft of assets

21. The increase in violence against humanitarian personnel over the past decade is the most severe trend in constraints affecting access. More than 100 humanitarian workers were killed each year in 2008 and 2009, more than three times the number killed a decade ago and twice the number killed in 2005. Those abducted and injured in attacks have numbered more than 200 each year for the past four years. National humanitarian personnel bear the brunt of this risk. In the past year, United Nations personnel have been most affected by insecurity in Afghanistan, Pakistan and Somalia, and continue to face serious challenges in carrying out humanitarian operations in these contexts.

22. So far in 2010, at least 51 humanitarian workers have been killed and 82 abducted.[a] While these figures suggest a downward trend in the overall casualty rate for humanitarian workers in armed conflict, the actual risk to humanitarian personnel has not decreased. Rather, the reduced levels of violence against humanitarian personnel are largely a result of reduced humanitarian presence and ground movements in reaction to increased violence, particularly in Darfur and Somalia. As a result, humanitarian agencies suffer not only continuously high and unacceptable levels of threat to their staff but also vastly reduced levels of access to affected populations.

23. Politically motivated violence against humanitarian personnel and economically motivated criminality are particularly problematic in Afghanistan, the Central African Republic, Chad, the Democratic Republic of the Congo, Somalia, the Sudan and Yemen. In South Sudan, for example, violence against and intimidation of humanitarian personnel have actually increased during the past year. Since February 2010, there have been 99 reports of violence against humanitarian workers involving security forces or harassment by the South Sudan authorities. Thirty-five of these incidents were particularly serious, involving physical abuse, detention without charge or assault on humanitarian premises. Attacks have targeted both national and international staff, and several humanitarian workers have been hospitalized for injuries sustained during attacks by the security forces. Some cases have involved the occupation of schools and clinics or the looting of health and food

[a] See the *Aid Worker Security Database*, available from www.humanitarianoutcomes.org. Figures for 2010 are provisional.

stocks, and have reduced humanitarian services in some sectors to alarmingly low levels. On some occasions, the vehicles of humanitarian organizations have been taken by the security forces to facilitate troop movements.

24. In Darfur, abduction remains a serious concern for the humanitarian community. The incidence of vehicle hijacking has decreased significantly compared with 2009. So far in 2010, 15 vehicles have been hijacked (with 9 of those hijackings occurring during August), compared with 73 in 2009. In Somalia, while there have been numerous serious and fatal attacks on humanitarian workers in 2009 and 2010, the overall number of attacks has decreased significantly this year. In both contexts, however, these downward trends are the result of significantly reduced humanitarian presence and ground movements, which have greatly reduced access.

25. A more significant shift has occurred in Afghanistan. While United Nations security measures continue to limit the movement of United Nations humanitarian actors in areas controlled by non-State armed groups, some non-governmental organizations have sought to adapt their security management measures, establish and maintain dialogue with anti-Government elements and adjust their posture and relationships with other actors so as to convey their neutrality, impartiality and independence. As a result, according to the Afghanistan Non-Governmental Organization Safety Office, attacks on non-governmental organizations involving improvised explosive devices and small arms have each declined by more than 35 per cent over the past year. Conversely, the Safety Office reports a significant increase in attacks on private development contractors that are closely aligned with ISAF- and Government-implemented counter-insurgency activities. While adjustments made by non-governmental organizations in their security management, as described above, have enabled them to maintain programming on the ground, such security is localized and depends on contact with and acceptance by armed groups and community-level leaders in the immediate area. In the meantime, continued threats during travel along roads in areas where there is no clear chain of command among the armed groups that may be present mean a high dependency on costly air travel. This affects the ability of humanitarian actors to assess and address needs in new locations and underscores the importance of more proactive and comprehensive access negotiation with all relevant parties.

26. Given their primary responsibility for ensuring a secure environment for humanitarian operations, States often insist on providing armed escorts to humanitarian organizations in response to ongoing threats. In Pakistan, the national staff of non-governmental organizations continue to remain as vulnerable to violence in 2010 as they were in 2009. Twenty-two employees have been killed, wounded or abducted so far in 2010, compared with 28 in 2009. The Pakistani authorities have sought to address threats to humanitarian operations, including through the provision of armed escorts, for example, in the provinces of Khyber Pakhtunkhwa and Punjab.

27. In situations of armed conflict and where attacks against humanitarian workers are primarily political in nature, however, the use of armed escorts provided by national security forces can undermine the neutrality and independence of humanitarian actors, and the perception thereof, which is essential to establishing their acceptance by all parties to conflict and to minimizing threats against them and the persons they are trying to assist. Accompaniment by State security or armed forces also inhibits the ability of humanitarian actors to engage non-State armed

groups in order to gain safe access to populations in need, particularly when such forces are also parties to conflict.

28. In such situations, armed escorts should be used only as a last resort. The principle of last resort, as it relates to the use of military assets in humanitarian operations, including armed escorts, is widely recognized by States;[b] however, greater understanding of the thinking behind the criteria and conditions of last resort by all parties who seek to facilitate humanitarian access would enable consideration of alternative means for ensuring safe and timely access.

29. In situations where violence against humanitarian personnel and the theft of assets is primarily motivated by economic concerns and perpetrated by criminal groups, armed escorts can have a positive deterrent effect. In the Democratic Republic of the Congo, 152 such incidents have affected humanitarian operations so far this year, including 33 armed incursions into premises and 43 incidents of violence used during the theft of assets, two thirds of which occurred in North Kivu. Non-State armed groups were responsible for 35 of these incidents, 89 were perpetrated by unknown criminal groups and the remaining 28 by FARDC. In Chad, violence against humanitarian organizations and theft are perpetrated primarily by criminal actors for economic gain, and have recently spread to new areas and taken on new forms, including abduction and breaking into premises. Abductions have forced some non-governmental organizations to reduce or suspend activities in border areas with the Sudan.

30. Pursuant to United Nations security measures, United Nations agencies in eastern Chad are required to rely on armed escorts provided by the United Nations Mission in the Central African Republic and Chad (MINURCAT), and agencies in much of the Democratic Republic of the Congo are required to rely on armed escorts provided by the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). This has helped deter economically motivated violence, including vehicle hijackings and the theft of supplies, and has generally contributed to area security. In Chad, however, humanitarian agencies anticipate operational setbacks in the coming months as a result of the withdrawal of MINURCAT forces by the end of 2010, in a context marked by the limited capacity of the national security forces and an expected increase in criminality during the upcoming dry season. Similar concerns exist in relation to the Democratic Republic of the Congo and the drawdown of MONUSCO, which has secured areas where humanitarian activities could then be implemented.

31. The Government of Chad has indicated its intention to provide armed escorts to humanitarian organizations, but it is unclear whether sufficient capacity exists to accommodate humanitarian movements in a timely manner. In addition, whenever operating in a situation of armed conflict, there remain, as noted above, concerns over the risks to the perception, and therefore security, of humanitarian organizations when armed escorts are provided by national security forces rather than United Nations peacekeeping missions, in this case MINURCAT. In both Chad and the Democratic Republic of the Congo, the national security forces, particularly through enhanced policing capacity, should develop alternative approaches to minimize these risks while helping create an environment conducive to

[b] See Inter-Agency Standing Committee, "Guidelines on the use of military and civil defence assets to support United Nations humanitarian activities in complex emergencies" (March 2003).

humanitarian action, such as carrying out patrols along key supply routes and in areas of humanitarian activity rather than providing direct accompaniment.

32. Finally, mention should be made of the continued threat that piracy poses to humanitarian shipments off the east coast of Africa, even though the provision of naval escorts has successfully facilitated safe passage and humanitarian cargo has not been affected in 2010. Nevertheless, the capacity of Somali pirates to attack commercial vessels as far as 897 nautical miles (1,661 km) from the Somali coast is a worrying development and underscores the importance of continued naval escorts.

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26 November 2012

International Criminal Law

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25. *Prosecutor* v. *Anto Furundžija, ICTY, 10 December 1998* (summary) 480

26. *Prosecutor* v. *Zejnil Delalić et al., ICTY Appeals Chamber, 20 February 2001 ("Čelebići")* (summary) 484

27. *Prosecutor* v. *Dario Kordić and Mario Čerkez, ICTY, 26 February 2001* (summary) 490

28. *Prosecutor* v. *Enver Hadžihasanović and Amir Kubura, ICTY Appeals Chamber, 22 April 2008* (summary) 494

29. *Prosecutor* v. *Alfred Musema, ICTR, 27 January 2000* (summary) 500

30. *Prosecutor* v. *Thomas Lubanga Dyilo, ICC, 14 March 2012* (summary) 506

COURSE OUTLINE - INTERNATIONAL CRIMINAL LAW

Course description

The course will focus on the four crimes most generally recognized as comprising international criminal law, namely: genocide, war crimes, crimes against humanity and aggression.

The course will examine the jurisprudence of international criminal tribunals, including the Nuremberg, Tokyo, Rwanda, and former Yugoslavia tribunals. More recent "hybrid" tribunals will be examined as will the genesis of the International Criminal Court. The course will consider the Rome Statute of the International Criminal Court, in particular the crimes set out in that Statute.

The course will also look at the special elements of international criminal liability including universal jurisdiction, command responsibility, joint criminal enterprise, duress and superior orders.

Objectives

At the conclusion of the course, students should be able to:

- Display an understanding of the underlying principles of international criminal law.
- Apply the principles of international criminal law to contemporary issues of concern to the international community.

Course content

The course structure will include the following topics:

1. Sources and principles of international criminal law
2. The concept of international criminal responsibility including individual responsibility, joint criminal enterprise and command responsibility
3. Aggression (crimes against the peace)
4. Crimes against humanity
5. Genocide
6. War crimes
7. Defences and excuses in international criminal law including superior orders
8. International criminal law – discussions and perspectives

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, 1945

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Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945.

Full text

AGREEMENT

Whereas the United Nations have from time to time made declarations of their intention that war criminals shall be brought to justice;
And whereas the Moscow Declaration of 30 October 1943, on German atrocities in Occupied Europe stated that those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free Governments that will be created therein;
And whereas this Declaration was stated to be without prejudice to the case of major criminals whose offences have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies;
Now therefore the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics (hereinafter called "the Signatories") acting in the interests of all the United Nations and by their representatives duly authorized thereto have concluded this Agreement.

Article 1. There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.

Art. 2. The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement.

Art. 3. Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavours to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories.

Art. 4. Nothing in this Agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.

Art. 5. Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence.

Art. 6. Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals.

Art. 7. This Agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any Signatory to give, through the diplomatic channel, one month's notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance of this Agreement.

In witness whereof the undersigned have signed the present Agreement.

Done in quadruplicate in London this eighth day of August 1945, each in English, French and Russian, and each text to have equal authenticity.

(Here follow signatures)

CHARTER

I : CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL

Article 1. In pursuance of the Agreement signed on 8 August 1945, by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis.

Art. 2. The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfil his functions, his alternate shall take his place.

Art. 3. Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel. Each Signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a trial, other than by an alternate.

Art. 4.
(a) The presence of all four members of the Tribunal or the alternate for any absent member shall be necessary to constitute the quorum.
(b) The members of the Tribunal shall, before any trial begins, agree among themselves upon the selection from their number of a President, and the President shall hold office during that trial, or as may otherwise be agreed by a vote of not less than three members. The principle of rotation of presidency for successive trials is agreed. If, however, a session of the Tribunal takes place on the territory of one of the four Signatories, the representative of that Signatory on the Tribunal shall preside.
(c) Save as aforesaid the Tribunal shall take decisions by a majority vote and in case the votes are evenly divided, the vote of the President shall be decisive; provided always that convictions and sentences shall only be imposed by affirmative votes of at least three members of theTribunal.

Art. 5. In case of need and depending on the numbers of the matters to be Lied, other Tribunals may be set up; and the establishment, functions and procedure of each Tribunal shall be identical, and shall be governed by this Charter.

II : JURISDICTION AND GENERAL PRINCIPLES

Art. 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
(a) ' Crimes against peace: ' namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
(b) ' War crimes: ' namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) ' Crimes against humanity.- ' namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the

Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Art. 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Art. 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Art. 9. At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.
After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Art. 10. In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

Art. 11. Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

Art. 12. The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

Art. 13. The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

III : COMMITTEE FOR THE INVESTIGATION AND PROSECUTION OF MAJOR WAR CRIMINALS

Art. 14. Each Signatory shall appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals.
The Chief Prosecutors shall act as a committee for the following purposes:
(a) to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff,
(b) to settle the final designation of major war criminals to be tried by the Tribunal,
(c) to approve the Indictment and the documents to be submitted therewith,
(d) to lodge the Indictment and the accompanying documents with the Tribunal,
(e) to draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 13 of this Charter. The Tribunal shall have power to accept, with or without amendments, or to reject, the rules so recommended.
The Committee shall act in all the above matters by a majority vote and shall appoint a Chairman as may be convenient and in accordance with the principle of rotation: provided that if there is an equal division of vote concerning the designation of a Defendant to be tried by the Tribunal, or the crimes with which he shall be charged, that proposal will be adopted which was made by the party which proposed that the particular Defendant be tried, or the particular charges be preferred against him.

Art. 15. The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties:
(a) investigation, collection and production before or at the Trial of all necessary evidence,
(b) the preparation of the Indictment for approval by the Committee in accordance with paragraph (c) of Article 14 hereof,
(c) the preliminary examination of all necessary witnesses and of the Defendants,
(d) to act as prosecutor at the Trial,
(e) to appoint representatives to carry out such duties as may be assigned to them,
(f) to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.
It is understood that no witness or Defendant detained by any Signatory shall be taken out of the possession of that Signatory without its assent.

IV : FAIR TRIAL FOR DEFENDANTS

Art. 16. In order to ensure fair trial for the Defendants, the following procedure shall be followed:
(a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial.
(b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.
(c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.
(d) A Defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of Counsel.
(e) A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defence, and to cross-examine any witness called by the Prosecution.

V : POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

Art. 17. The Tribunal shall have the power:
(a) to summon witnesses to the Trial and to require their attendance and testimony and to put questions to them,
(b) to interrogate any Defendant,
(c) to require the production of documents and other evidentiary material,
(d) to administer oaths to witnesses,
(e) to appoint officers for the carrying out of any task designated by the Tribunal including the power to have evidence taken on commission.

Art. 18. The Tribunal shall:
(a) confine the Trial strictly to an expeditious hearing of the issues raised by the charges,
(b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,
(c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Art. 19. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.

Art. 20. The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof.

Art. 21. The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other Tribunals of any of the United Nations.

Art. 22. The permanent seat of the Tribunal shall be in Berlin. The first meetings of the members of the Tribunal and of the Chief Prosecutors shall be held at Berlin in a place to be designated by the Control Council for Germany. The first trial shall be held at Nuremberg, and any subsequent trials shall be held at such places as the Tribunal may decide.

Art. 23. One or more of the Chief Prosecutors may take part in the prosecution at each Trial. The function of any Chief Prosecutor may be discharged by him personally, or by any person or persons authorized by him.
The function of Council for a Defendant may be discharged at the Defendant's request by any Counsel professionally qualified to conduct cases before the Courts of his own country, or by any other person who may be specially authorized thereto by the Tribunal.

Art. 24. The proceedings at the Trial shall take the
following course:
(a) The Indictment shall be read in court.
(b) The Tribunal shall ask each Defendant whether he pleads "guilty" or " not guilty."
(c) The Prosecution shall make an opening statement.
(d) The Tribunal shall ask the Prosecution and the Defence what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.
(e) The witnesses for the Prosecution shall be examined and after that the witnesses for the Defence. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defence.
(f) The Tribunal may put any question to any witness and to any Defendant, at any time.
(g) The Prosecution and the Defence shall interrogate and may cross-examine any witnesses and any Defendant who gives testimony.
(h) Defence shall address the court.
(i) The Prosecution shall address the court.
(j) Each Defendant may make a statement to the Tribunal.
(k) The Tribunal shall deliver judgment and pronounce sentence.

Art. 25. All official documents shall be produced, and all court proceedings conducted, in English, French and Russian, and in the language of the Defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting, as the Tribunal considers desirable in the interests of justice and public opinion.

VI : JUDGMENT AND SENTENCE

Art. 26. The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.

Art. 27. The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just.

Art. 28. In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

Art. 29. In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. If the Control Council for Germany, after any Defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 14 hereof for such action as they may consider proper, having regard to the interests of justice.

VII : EXPENSES

Art. 30. The expenses of the Tribunal and of the Trials shall be charged by the Signatories against the funds allotted for maintenance of the Control Council for Germany.

Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal (United Nations General Assembly resolution 95 (I) of 11 December 1946)

Requests the Secretary-General to provide such assistance as the Committee may require for its work.

Fifty-fifth plenary meeting,
11 December 1946.

• • •

At the same plenary meeting, the General Assembly, on the recommendation of the President, appointed the following States to serve on the Committee:

Argentina, Australia, Brazil, China, Colombia, Egypt, France, India, Netherlands, Panama, Poland, Sweden, Union of Soviet Socialist Republics, United Kingdom, United States of America, Venezuela, Yugoslavia.

95 (I). Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal

The General Assembly,

Recognizes the obligation laid upon it by Article 13, paragraph 1, sub-paragraph a, of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;

Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;

Therefore,

Affirms the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal;

Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946,[1] to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

Fifty-fifth plenary meeting,
11 December 1946.

96 (I). The Crime of Genocide

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the

[1] See page 187.

Invite le Secrétaire général à fournir à la Commission toute l'aide dont elle pourrait avoir besoin pour l'accomplissement de ses travaux.

Cinquante-cinquième séance plénière,
le 11 décembre 1946.

• • •

A la même séance plénière, l'Assemblée générale, sur la recommandation de son Président, décida de nommer membres de cette Commission les Etats suivants:

Argentine, Australie, Brésil, Chine, Colombie, Egypte, France, Inde, Pays-Bas, Panama, Pologne, Suède, Union des Républiques socialistes soviétiques, Royaume-Uni, Etats-Unis d'Amérique, Venezuela, Yougoslavie.

95 (I). Confirmation des principes de droit international reconnus par le statut de la Cour de Nuremberg

L'Assemblée générale,

Reconnaît l'obligation qui lui incombe aux termes de l'Article 13, paragraphe 1, alinéa a, de la Charte, de provoquer des études et de faire des recommandations en vue d'encourager le développement progressif et la codification du droit international;

Prend acte de l'Accord relatif à la création d'une Cour militaire internationale chargée de poursuivre et de châtier les grands criminels de guerre de l'Axe européen, Accord signé à Londres le 8 août 1945, ainsi que du statut joint en annexe; prend acte également du fait que des principes analogues ont été adoptés dans le statut de la Cour militaire internationale chargée de juger les grands criminels de guerre en Extrême-Orient, statut promulgué à Tokyo, le 19 janvier 1946;

En conséquence,

Confirme les principes de droit international reconnus par le statut de la Cour de Nuremberg, et par l'arrêt de cette Cour;

Invite la Commission chargée de la codification du droit international, créée par la résolution de l'Assemblée générale en date du 11 décembre 1946,[1] à considérer comme une question d'importance capitale les projets visant à formuler, dans le cadre d'une codification générale des crimes commis contre la paix et la sécurité de l'humanité ou dans le cadre d'un Code de droit criminel international, les principes reconnus dans le statut de la Cour de Nuremberg et dans l'arrêt de cette Cour.

Cinquante-cinquième séance plénière,
le 11 décembre 1946.

96 (I). Le crime de génocide

Le génocide est le refus du droit à l'existence à des groupes humains entiers, de même que l'homicide est le refus du droit à l'existence à un individu; un tel refus bouleverse la conscience hu-

[1] Voir page 187.

Convention on the Prevention and Punishment of the Crime of Genocide, 1948

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No. 1021

AUSTRALIA, BULGARIA, CAMBODIA, CEYLON, CZECHOSLOVAKIA, etc.

Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by the General Assembly of the United Nations on 9 December 1948

Official texts: Chinese, English, French, Russian and Spanish.
Registered ex officio *on 12 January 1951.*

AUSTRALIE, BULGARIE, CAMBODGE, CEYLAN, TCHÉCOSLOVAQUIE, etc.

Convention pour la prévention et la répression du crime de génocide. Adoptée par l'Assemblée générale des Nations Unies le 9 décembre 1948

Textes officiels anglais, chinois, espagnol, français et russe.
Enregistrée d'office le 12 janvier 1951.

No. 1021. CONVENTION[1] ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE. ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 9 DECEMBER 1948

THE CONTRACTING PARTIES,

HAVING CONSIDERED the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946[2] that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;

RECOGNIZING that at all periods of history genocide has inflicted great losses on humanity; and

BEING CONVINCED that, in order to liberate mankind from such an odious scourge, international co-operation is required,

HEREBY AGREE AS HEREINAFTER PROVIDED:

[1] Came into force on 12 January 1951, the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession, in accordance with article XIII.

The following States deposited with the Secretary-General of the United Nations their instruments of ratification or accession on the dates indicated:

Ratifications

AUSTRALIA	8 July 1949
By a notification received on 8 July 1949 the Government of Australia extended the application of the Convention to all territories for the conduct of whose foreign relations Australia is responsible.	
Czechoslovakia	21 December 1950
ECUADOR	21 December 1949
EL SALVADOR	28 September 1950
ETHIOPIA	1 July 1949
FRANCE	14 October 1950
GUATEMALA	13 January 1950
HAITI	14 October 1950
ICELAND	29 August 1949
ISRAEL	9 March 1950
LIBERIA	9 June 1950
NORWAY	22 July 1949
PANAMA	11 January 1950
PHILIPPINES	7 July 1950
YUGOSLAVIA	29 August 1950

Accessions

BULGARIA	21 July 1950
CAMBODIA	14 October 1950
CEYLON	12 October 1950
COSTA RICA	14 October 1950
JORDAN	3 April 1950
KOREA	14 October 1950
LAOS	8 December 1950
MONACO	30 March 1950
POLAND	14 November 1950
ROMANIA	2 November 1950
SAUDI ARABIA	13 July 1950
TURKEY	31 July 1950
VIET-NAM	11 August 1950

* With reservations. For text of reservations, see pp. 314-322 of this volume.

[2] United Nations, document A/64/Add. 1. 31 January 1947.

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(*a*) Killing members of the group;

(*b*) Causing serious bodily or mental harm to members of the group;

(*c*) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(*d*) Imposing measures intended to prevent births within the group;

(*e*) Forcibly transferring children of the group to another group.

Article III

The following acts shall be punishable:

(*a*) Genocide;

(*b*) Conspiracy to commit genocide;

(*c*) Direct and public incitement to commit genocide;

(*d*) Attempt to commit genocide;

(*e*) Complicity in genocide.

Article IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.

Article VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory

of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article VII

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

Article IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Article X

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Article XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation[1] to sign has been addressed by the General Assembly.

[1] In accordance with resolution 368 (IV) (United Nations, document A/1251, 28 December 1949), adopted by the General Assembly at its 266th meeting on 3 December 1949, the Secretary-General was requested to despatch invitations to sign and ratify or to accede to the Convention..."to each non-member State which is or hereafter becomes an active member of one or more of the specialized agencies of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice".

Accordingly, invitations were addressed to the following States on the dates indicated below:

6 December 1949
Albania
Austria
Bulgaria
Ceylon
Finland
Hungary
Ireland
Italy
Korea
Monaco
Portugal
Romania
Switzerland
Hashimite Kingdom of the Jordan

27 March 1950
Indonesia

10 April 1950
Liechtenstein

31 May 1950
Cambodia
Laos
Viet-Nam

20 December 1950
Germany

28 May 1951
Japan

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation[1] as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article XII

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Article XIII

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a *procès-verbal*[2] and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article XIV

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

Article XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

[1] See note page 282.
[2] See p. 312 of this volume.

Article XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

Article XVII

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:

(*a*) Signatures, ratifications and accessions received in accordance with article XI;

(*b*) Notifications received in accordance with article XII;

(*c*) The date upon which the present Convention comes into force in accordance with article XIII;

(*d*) Denunciations received in accordance with article XIV;

(*e*) The abrogation of the Convention in accordance with article XV;

(*f*) Notifications received in accordance with article XVI.

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Article XVIII

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in article XI.

Article XIX

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 1973

Treaty Series

Treaties and international agreements
registered
or filed and recorded
with the Secretariat of the United Nations

VOLUME 1015

Recueil des Traités

Traités et accords internationaux
enregistrés
ou classés et inscrits au répertoire
au Secrétariat de l'Organisation des Nations Unies

United Nations · Nations Unies
New York, 1984

No. 14861

MULTILATERAL

International Convention on the Suppression and Punishment of the Crime of *Apartheid*. Adopted by the General Assembly of the United Nations on 30 November 1973

Authentic texts: English, French, Chinese, Russian and Spanish.

Registered ex officio *on 18 July 1976.*

MULTILATÉRAL

Convention internationale sur l'élimination et la répression du crime d'*apartheid*. Adoptée par l'Assemblée générale des Nations Unies le 30 novembre 1973

Textes authentiques : anglais, français, chinois, russe et espagnol.

Enregistrée d'office le 18 juillet 1976.

INTERNATIONAL CONVENTION[1] ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF *APARTHEID*

The States Parties to the present Convention,

Recalling the provisions of the Charter of the United Nations, in which all Members pledged themselves to take joint and separate action in co-operation with the Organization for the achievement of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Considering the Universal Declaration of Human Rights,[2] which states that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour or national origin,

Considering the Declaration on the Granting of Independence to Colonial Countries and Peoples,[3] in which the General Assembly stated that the process of liberation is irresistible and irreversible and that, in the interests of human dignity, progress and justice, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,

Observing that, in accordance with the International Convention on the Elimination of All Forms of Racial Discrimination,[4] States particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction,

Observing that, in the Convention on the Prevention and Punishment of the Crime of Genocide,[5] certain acts which may also be qualified as acts of *apartheid* constitute a crime under international law,

[1] Came into force on 18 July 1976 in respect of the following States, i.e. the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession, in accordance with article XV (1). The instruments of ratification or accession were deposited as follows:

State	Date of deposit of the instrument of ratification or accession (a)	State	Date of deposit of the instrument of ratification or accession (a)
Benin	30 December 1974	Mongolia	8 August 1975
Bulgaria	18 July 1974	Poland	15 March 1976
Byelorussian Soviet Socialist Republic	2 December 1975	Qatar	19 March 1975
Chad	23 October 1974	Somalia	28 January 1975
Czechoslovakia	25 March 1976	Syrian Arab Republic	1 June 1976
Ecuador	12 May 1975	Ukrainian Soviet Socialist Republic	10 November 1975
German Democratic Republic	12 August 1974	Union of Soviet Socialist Republics	26 November 1975
Guinea	3 March 1975	United Arab Emirates*	15 October 1975
Hungary	20 June 1974	United Republic of Tanzania	11 June 1976 *a*
Iraq*	9 July 1975	Yugoslavia	1 July 1975

Subsequently, the Convention came into force in respect of the following State on the thirtieth day after the date of the deposit of its instrument of accession, in accordance with article XV (2).

State	Date of deposit of the instrument of accession
Libyan Arab Republic	9 July 1976

(With effect from 8 August 1976.)

* For the texts of the declarations made upon ratification, see p. 296 of this volume.

[2] United Nations, *Official Records of the General Assembly, Third Session*, Part I, p. 71.

[3] *Ibid., Fifteenth Session, Supplement No. 16* (A/4684), p. 66.

[4] United Nations, *Treaty Series*, vol. 660, p. 195

[5] *Ibid.*, vol. 78, p. 227.

Observing that, in the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity,[1] "inhuman acts resulting from the policy of *apartheid*" are qualified as crimes against humanity,

Observing that the General Assembly of the United Nations has adopted a number of resolutions in which the policies and practices of *apartheid* are condemned as a crime against humanity,

Observing that the Security Council has emphasized that *apartheid* and its continued intensification and expansion seriously disturb and threaten international peace and security,

Convinced that an International Convention on the Suppression and Punishment of the Crime of *Apartheid* would make it possible to take more effective measures at the international and national levels with a view to the suppression and punishment of the crime of *apartheid*,

Have agreed as follows:

Article I. 1. The States Parties to the present Convention declare that *apartheid* is a crime against humanity and that inhuman acts resulting from the policies and practices of *apartheid* and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.

2. The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of *apartheid*.

Article II. For the purpose of the present Convention, the term "the crime of *apartheid*", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(*a*) denial to a member or members of a racial group or groups of the right to life and liberty of person:

  (i) by murder of members of a racial group or groups;

  (ii) by the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

  (iii) by arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(*b*) deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(*c*) any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

[1] United Nations, *Treaty Series*, vol. 754, p. 73.

(*d*) any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

(*e*) exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

(*f*) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose *apartheid*.

Article III. International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they:

(*a*) commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention;

(*b*) directly abet, encourage or co-operate in the commission of the crime of *apartheid*.

Article IV. The State Parties to the present Convention undertake:

(*a*) to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of *apartheid* and similar segregationist policies or their manifestations and to punish persons guilty of that crime;

(*b*) to adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.

Article V. Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.

Article VI. The States Parties to the present Convention undertake to accept and carry out in accordance with the Charter of the United Nations the decisions taken by the Security Council aimed at the prevention, suppression and punishment of the crime of *apartheid*, and to co-operate in the implementation of decisions adopted by other competent organs of the United Nations with a view to achieving the purposes of the Convention.

Article VII. 1. The States Parties to the present Convention undertake to submit periodic reports to the group established under article IX on the legislative, judicial, administrative or other measures that they have adopted and that give effect to the provisions of the Convention.

2. Copies of the reports shall be transmitted through the Secretary-General of the United Nations to the Special Committee on *Apartheid*.

Article VIII. Any State Party to the present Convention may call upon any competent organ of the United Nations to take such action under the Charter of the United Nations as it considers appropriate for the prevention and suppression of the crime of *apartheid*.

Article IX. 1. The Chairman of the Commission on Human Rights shall appoint a group consisting of three members of the Commission on Human Rights, who are also representatives of States Parties to the present Convention, to consider reports submitted by States Parties in accordance with article VII.

2. If, among the members of the Commission on Human Rights, there are no representatives of States Parties to the present Convention or if there are fewer than three such representatives, the Secretary-General of the United Nations shall, after consulting all States Parties to the Convention, designate a representative of the State Party or representatives of the States Parties which are not members of the Commission on Human Rights to take part in the work of the group established in accordance with paragraph 1 of this article, until such time as representatives of the States Parties to the Convention are elected to the Commission on Human Rights.

3. The group may meet for a period of not more than five days, either before the opening or after the closing of the session of the Commission on Human Rights, to consider the reports submitted in accordance with article VII.

Article X. 1. The States Parties to the present Convention empower the Commission on Human Rights:

(*a*) to request United Nations organs, when transmitting copies of petitions under article 15 of the International Convention on the Elimination of All Forms of Racial Discrimination, to draw its attention to complaints concerning acts which are enumerated in article II of the present Convention;

(*b*) to prepare, on the basis of reports from competent organs of the United Nations and periodic reports from States Parties to the present Convention, a list of individuals, organizations, institutions and representatives of States whicb are alleged to be responsible for the crimes enumerated in article II of the Convention, as well as those against whom legal proceedings have been undertaken by States Parties to the Convention;

(*c*) to request information from the competent United Nations organs concerning measures taken by the authorities responsible for the administration of Trust and Non-Self-Governing Territories, and all other Territories to which General Assembly resolution 1514 (XV) of 14 December 1960 applies, with regard to such individuals alleged to be responsible for crimes under article II of the Convention who are believed to be under their territorial and administrative jurisdiction.

2. Pending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV), the provisions of the present Convention shall in no way limit the right of petition granted to those peoples by other international instruments or by the United Nations and its specialized agencies.

Article XI. 1. Acts enumerated in article II of the present Convention shall not be considered political crimes for the purpose of extradition.

2. The States Parties to the present Convention undertake in such cases to grant extradition in accordance with their legislation and with the treaties in force.

Article XII. Disputes between States Parties arising out of the interpretation, application or implementation of the present Convention which have not been settled by negotiation shall, at the request of the States Parties to the dispute, be brought before the International Court of Justice, save where the parties to the dispute have agreed on some other form of settlement.

Article XIII. The present Convention is open for signature by all States. Any State which does not sign the Convention before its entry into force may accede to it.

Article XIV. 1. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article XV. 1. The present Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

Article XVI. A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

Article XVII. 1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request.

Article XVIII. The Secretary-General of the United Nations shall inform all States of the following particulars:

(*a*) signatures, ratifications and accessions under articles XIII and XIV;

(*b*) the date of entry into force of the present Convention under article XV;

(*c*) denunciations under article XVI;

(*d*) notifications under article XVII.

Article XIX. 1. The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Convention to all States.

United Nations Security Council resolution 827 (1993) of 25 May 1993

UNITED NATIONS

S

Security Council

Distr.
GENERAL

S/RES/827 (1993)
25 May 1993

RESOLUTION 827 (1993)

Adopted by the Security Council at its 3217th meeting, on 25 May 1993

The Security Council,

Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

Having considered the report of the Secretary-General (S/25704 and Add.1) pursuant to paragraph 2 of resolution 808 (1993),

Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing", including for the acquisition and the holding of territory,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

Noting in this regard the recommendation by the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia for the establishment of such a tribunal (S/25221),

Reaffirming in this regard its decision in resolution 808 (1993) that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991,

Considering that, pending the appointment of the Prosecutor of the International Tribunal, the Commission of Experts established pursuant to resolution 780 (1992) should continue on an urgent basis the collection of information relating to evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law as proposed in its interim report (S/25274),

Acting under Chapter VII of the Charter of the United Nations,

1. Approves the report of the Secretary-General;

2. Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report;

3. Requests the Secretary-General to submit to the judges of the International Tribunal, upon their election, any suggestions received from States for the rules of procedure and evidence called for in Article 15 of the Statute of the International Tribunal;

4. Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute;

5. Urges States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;

6. Decides that the determination of the seat of the International Tribunal is subject to the conclusion of appropriate arrangements between the United Nations and the Netherlands acceptable to the Council, and that the International Tribunal may sit elsewhere when it considers it necessary for the efficient exercise of its functions;

7. Decides also that the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law;

8. Requests the Secretary-General to implement urgently the present resolution and in particular to make practical arrangements for the effective

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functioning of the International Tribunal at the earliest time and to report periodically to the Council;

9. Decides to remain actively seized of the matter.

Statute of the International Criminal Tribunal for the former Yugoslavia (as amended), 1993

UNITED
NATIONS

International Tribunal for the Prosecution
of Persons Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Date: September 2009

Original: English & French

UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

(ADOPTED 25 MAY 1993 BY RESOLUTION 827)
(AS AMENDED 13 MAY 1998 BY RESOLUTION 1166)
(AS AMENDED 30 NOVEMBER 2000 BY RESOLUTION 1329)
(AS AMENDED 17 MAY 2002 BY RESOLUTION 1411)
(AS AMENDED 14 AUGUST 2002 BY RESOLUTION 1431)
(AS AMENDED 19 MAY 2003 BY RESOLUTION 1481)
(AS AMENDED 20 APRIL 2005 BY RESOLUTION 1597)
(AS AMENDED 28 FEBRUARY 2006 BY RESOLUTION 1660)
(AS AMENDED 29 SEPTEMBER 2008 BY RESOLUTION 1837)
(AS AMENDED 7 JULY 2009 BY RESOLUTION 1877)

ICTY RELATED RESOLUTIONS:
Resolution 1503 of 28 August 2003
Resolution 1504 of 4 September 2003
Resolution 1534 of 26 March 2004
Resolution 1581 of 18 January 2005
Resolution 1613 of 26 July 2005
Resolution 1629 of 30 September 2005
Resolution 1668 of 10 April 2006
Resolution 1775 of 14 September 2007
Resolution 1786 of 28 November 2007
Resolution 1800 of 20 February 2008

(Not an official document. This compilation is based on original United Nations resolutions.)

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OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

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UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

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UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

(ADOPTED 25 MAY 1993 BY RESOLUTION 827)
(AS AMENDED 13 MAY 1998 BY RESOLUTION 1166)
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(AS AMENDED 29 SEPTEMBER 2008 BY RESOLUTION 1837)
(AS AMENDED 7 JULY 2009 BY RESOLUTION 1877)

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.

Article 1
Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2
Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Article 3
Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

Article 4
Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

3. The following acts shall be punishable:

(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide.

Article 5
Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

Article 6
Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7
Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 8
Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

Article 9
Concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Article 10
Non-bis-in-idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

(a) the act for which he or she was tried was characterized as an ordinary crime; or
(b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 11
Organization of the International Tribunal

The International Tribunal shall consist of the following organs:

(a) the Chambers, comprising three Trial Chambers and an Appeals Chamber;
(b) the Prosecutor; and
(c) a Registry, servicing both the Chambers and the Prosecutor.

Article 12
Composition of the Chambers

1. The Chambers shall be composed of a maximum of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of twelve *ad litem* independent judges appointed in accordance with article 13 *ter*, paragraph 2, of the Statute, no two of whom may be nationals of the same State.

2. A maximum at any one time of three permanent judges and six *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges, except in the circumstances specified in paragraph 5 below. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the Statute and shall render judgement in accordance with the same rules.

3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.

4. A person who for the purposes of membership of the Chambers of the International Tribunal could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

5. The Secretary-General may, at the request of the President of the International Tribunal appoint, from among the *ad litem* judges elected in accordance with Article 13 *ter*, reserve judges to be present at each stage of a trial to which they have been appointed and to replace a judge if that judge is unable to continue sitting.

6. Without prejudice to paragraph 2 above, in the event that exceptional circumstances require for a permanent judge in a section of a Trial Chamber to be replaced resulting in a section solely comprised of *ad litem* judges, that section may continue to hear the case, notwithstanding that its composition no longer includes a permanent judge.

Article 13
Qualifications of judges

The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 13 *bis*
Election of permanent judges

1. Fourteen of the permanent judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 13 of the Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") in accordance with article 12 *bis* of the Statute of that Tribunal;
(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-eight and not more than forty-two candidates, taking due account of the adequate representation of the principal legal systems of the world;
(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect fourteen permanent judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 13 of the Statute, for the remainder of the term of office concerned.

3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

Article 13 *ter*
Election and appointment of *ad litem* judges

1. The *ad litem* judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 13 of the Statute, taking into account the importance of a fair representation of female and male candidates.
(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than fifty-four candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution.
(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the twenty-seven *ad litem* judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected.
(e) The *ad litem* judges shall be elected for a term of four years. They shall be eligible for re-election.

2. During any term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal shall bear in mind the criteria set out in article 13 of the Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the *ad litem* judge received in the General Assembly.

Article 13 *quater*
Status of *ad litem* judges

1. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall:

(a) Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal;
(b) Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal;
(c) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal;
(d) Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to try.

2. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall not:

(a) Be eligible for election as, or to vote in the election of, the President of the Tribunal or the Presiding Judge of a Trial Chamber pursuant to article 14 of the Statute;
(b) Have power:

(i) To adopt rules of procedure and evidence pursuant to article 15 of the Statute. They shall, however, be consulted before the adoption of those rules;
(ii) To review an indictment pursuant to article 19 of the Statute;
(iii) To consult with the President in relation to the assignment of judges pursuant to article 14 of the Statute or in relation to a pardon or commutation of sentence pursuant to article 28 of the Statute.

3. Notwithstanding, paragraphs 1 and 2 above, an *ad litem* judge who is serving as a reserve judge shall, during such time as he or she so serves:

(a) Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal;
(b) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal;
(c) Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to and for that purpose to enjoy subject to paragraph 2 above, the same powers as permanent judges.

4. In the event that a reserve judge replaces a judge who is unable to continue sitting, he or she will, as of that time, benefit from the provisions of paragraph 1 above.

Article 14
Officers and members of the Chambers

1. The permanent judges of the International Tribunal shall elect a President from amongst their number.

2. The President of the International Tribunal shall be a member of the Appeals Chamber and shall preside over its proceedings.

3. After consultation with the permanent judges of the International Tribunal, the President shall assign four of the permanent judges elected or appointed in accordance with article 13 *bis* of the Statute to the Appeals Chamber and nine to the Trial Chambers. Notwithstanding the provisions of article 12, paragraph 1, and article 12, paragraph 3, the President may assign to the Appeals Chamber up to four additional permanent judges serving in the Trial Chambers, on the completion of the cases to which each judge is assigned. The term of office of each judge redeployed to the Appeals Chamber shall be the same as the term of office of the judges serving in the Appeals Chamber.

4. Two of the permanent judges of the International Tribunal for Rwanda elected or appointed in accordance with article 12 *bis* of the Statute of that Tribunal shall be assigned by the President of that Tribunal, in consultation with the President of the International Tribunal, to be members of the Appeals Chamber and permanent judges of the International Tribunal. Notwithstanding the provisions of article 12, paragraph 1, and article 12, paragraph 3, up to four additional permanent judges serving in the Trial Chambers of the International Criminal Tribunal for Rwanda may be assigned to the Appeals Chamber by the President of that Tribunal, on the completion of the cases to which each judge is assigned. The term of office of each judge redeployed to the Appeals Chamber shall be the same as the term of office of the judges serving in the Appeals Chamber.

5. After consultation with the permanent judges of the International Tribunal, the President shall assign such *ad litem* judges as may from time to time be appointed to serve in the International Tribunal to the Trial Chambers.

6. A judge shall serve only in the Chamber to which he or she was assigned.

7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of the Trial Chamber as a whole.

Article 15
Rules of procedure and evidence

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

Article 16
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 17
The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 18
Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.

4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 19
Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 20
Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 21
Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) to be tried without undue delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
(g) not to be compelled to testify against himself or to confess guilt.

Article 22
Protection of victims and witnesses

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 23
Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24
Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 25
Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) an error on a question of law invalidating the decision; or
(b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 26
Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.

Article 27
Enforcement of sentences

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

Article 28
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

Article 29
Co-operation and judicial assistance

1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) the identification and location of persons;
(b) the taking of testimony and the production of evidence;
(c) the service of documents;
(d) the arrest or detention of persons;
(e) the surrender or the transfer of the accused to the International Tribunal.

Article 30
The status, privileges and immunities of the International Tribunal

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal.

Article 31
Seat of the International Tribunal

The International Tribunal shall have its seat at The Hague.

Article 32
Expenses of the International Tribunal

The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

Article 33
Working languages

The working languages of the International Tribunal shall be English and French.

Article 34
Annual report

The President of the International Tribunal shall submit an annual report of the International Tribunal to the Security Council and to the General Assembly.

Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (as amended), 2010

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991

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PART ONE
GENERAL PROVISIONS

Rule 1
Entry into Force
(Adopted 11 Feb 1994)

These Rules of Procedure and Evidence, adopted pursuant to Article 15 of the Statute of the Tribunal, shall come into force on 14 March 1994.

Rule 2
Definitions
(Adopted 11 Feb 1994)

(A) In the Rules, unless the context otherwise requires, the following terms shall mean:

Rules: The Rules of Procedure and Evidence in force;
(Amended 25 July 1997)

Statute: The Statute of the Tribunal adopted by Security Council resolution 827 of 25 May 1993;

Tribunal: The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established by Security Council resolution 827 of 25 May 1993.

* * *

Accused: A person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47; (Amended 25 July 1997)

Ad litem Judge: A Judge appointed pursuant to Article 13 *ter* of the Statute; (Amended 12 Apr 2001)

Arrest: The act of taking a suspect or an accused into custody pursuant to a warrant of arrest or under Rule 40; (Amended 25 July 1997)

Bureau: A body composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers;

Defence: The accused, and/or the accused's counsel; (Amended 17 Nov 1999)

Investigation: All activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence, whether before or after an indictment is confirmed; (Amended 25 July 1997)

Parties: The Prosecutor and the Defence; (Amended 17 Nov 1999)

Permanent Judge: A Judge elected or appointed pursuant to Article 13 *bis* of the Statute; (Amended 12 Apr 2001)

President: The President of the Tribunal;

Prosecutor: The Prosecutor appointed pursuant to Article 16 of the Statute;

Regulations: The provisions framed by the Prosecutor pursuant to Rule 37 (A) for the purpose of directing the functions of the Office of the Prosecutor; (Amended 30 Jan 1995, amended 12 Nov 1997)

State: (i) A State Member or non-Member of the United Nations;

(ii) an entity recognised by the constitution of Bosnia and Herzegovina, namely, the Federation of Bosnia and Herzegovina and the Republic Srpska; or

(iii) a self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not;

(Amended 30 Jan 1995, amended 12 Dec 2002)

Suspect: A person concerning whom the Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the Tribunal has jurisdiction; (Amended 30 Jan 1995, amended 12 Nov 1997)

Transaction: A number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan;

Victim: A person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.

(B) In the Rules, the masculine shall include the feminine and the singular the plural, and vice-versa.

Rule 3
Languages
(Adopted 11 Feb 1994)

(A) The working languages of the Tribunal shall be English and French.

(B) An accused shall have the right to use his or her own language. (Amended 12 Nov 1997)

(C) Other persons appearing before the Tribunal, other than as counsel, who do not have sufficient knowledge of either of the two working languages, may use their own language. (Amended 30 Jan 1995, amended 12 Nov 1997)

(D) Counsel for an accused may apply to the Presiding Judge of a Chamber for leave to use a language other than the two working ones or the language of the accused. If such leave is granted, the expenses of interpretation and translation shall be borne by the Tribunal to the extent, if any, determined by the President, taking into account the rights of the defence and the interests of justice.

(E) The Registrar shall make any necessary arrangements for interpretation and translation into and from the working languages.

(F) If:

(i) a party is required to take any action within a specified time after the filing or service of a document by another party; and

(ii) pursuant to the Rules, that document is filed in a language other than one of the working languages of the Tribunal,

time shall not run until the party required to take action has received from the Registrar a translation of the document into one of the working languages of the Tribunal. (Amended 25 July 1997)

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Rule 4
Meetings away from the Seat of the Tribunal
(Adopted 11 Feb 1994)

A Chamber may exercise its functions at a place other than the seat of the Tribunal, if so authorised by the President in the interests of justice.

Rule 5
Non-compliance with Rules
(Adopted 11 Feb 1994, amended 30 Jan 1995)

(A) Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief if it finds that the alleged non-compliance is proved and that it has caused material prejudice to that party. (Amended 12 Nov 1997)

(B) Where such an objection is raised otherwise than at the earliest opportunity, the Trial Chamber may in its discretion grant relief if it finds that the alleged non-compliance is proved and that it has caused material prejudice to the objecting party. (Amended 12 Nov 1997)

(C) The relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with the fundamental principles of fairness. (Amended 12 Nov 1997)

Rule 6
Amendment of the Rules
(Adopted 11 Feb 1994)

(A) Proposals for amendment of the Rules may be made by a Judge, the Prosecutor or the Registrar and shall be adopted if agreed to by not less than ten permanent Judges at a plenary meeting of the Tribunal convened with notice of the proposal addressed to all Judges. (Amended 4 Dec 1998, amended 12 Apr 2001)

(B) An amendment to the Rules may be otherwise adopted, provided it is unanimously approved by the permanent Judges. (Amended 12 Apr 2001)

(C) Proposals for amendment of the Rules may otherwise be made in accordance with the Practice Direction issued by the President. (Amended 4 Dec 1998)

(D) An amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case. (Amended 4 Dec 1998, amended 1 Dec 2000, amended 13 Dec 2000)

Rule 7
Authentic Texts
(Adopted 11 Feb 1994)

The English and French texts of the Rules shall be equally authentic. In case of discrepancy, the version which is more consonant with the spirit of the Statute and the Rules shall prevail.

PART TWO
PRIMACY OF THE TRIBUNAL

Rule 7 *bis*
Non-compliance with Obligations
(Adopted 25 July 1997)

(A) In addition to cases to which Rule 11, Rule 13, Rule 59 or Rule 61 applies, where a Trial Chamber or a permanent Judge is satisfied that a State has failed to comply with an obligation under Article 29 of the Statute which relates to any proceedings before that Chamber or Judge, the Chamber or Judge may advise the President, who shall report the matter to the Security Council. (Amended 12 Apr 2001)

(B) If the Prosecutor satisfies the President that a State has failed to comply with an obligation under Article 29 of the Statute in respect of a request by the Prosecutor under Rule 8, Rule 39 or Rule 40, the President shall notify the Security Council thereof.

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Rule 8
Request for Information
(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 12 Nov 1997)

Where it appears to the Prosecutor that a crime within the jurisdiction of the Tribunal is or has been the subject of investigations or criminal proceedings instituted in the courts of any State, the Prosecutor may request the State to forward all relevant information in that respect, and the State shall transmit such information to the Prosecutor forthwith in accordance with Article 29 of the Statute.

Rule 9
Prosecutor's Request for Deferral
(Adopted 11 Feb 1994)

Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:

(i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;

(ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or

(iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,

the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal.
(Amended 30 Jan 1995)

Rule 10
Formal Request for Deferral
(Adopted 11 Feb 1994)

(A) If it appears to the Trial Chamber seised of a proposal for deferral that, on any of the grounds specified in Rule 9, deferral is appropriate, the Trial Chamber may issue a formal request to the State concerned that its court defer to the competence of the Tribunal. (Amended 30 Jan 1995)

(B) A request for deferral shall include a request that the results of the investigation and a copy of the court's records and the judgement, if already delivered, be forwarded to the Tribunal.

(C) Where deferral to the Tribunal has been requested by a Trial Chamber, any subsequent trial shall be held before another Trial Chamber. (Amended 3 May 1995, amended 17 Nov 1999)

Rule 11
Non-compliance with a Request for Deferral
(Adopted 11 Feb 1994, amended 25 July 1997)

If, within sixty days after a request for deferral has been notified by the Registrar to the State under whose jurisdiction the investigations or criminal proceedings have been instituted, the State fails to file a response which satisfies the Trial Chamber that the State has taken or is taking adequate steps to comply with the request, the Trial Chamber may request the President to report the matter to the Security Council.

Rule 11 *bis*
Referral of the Indictment to Another Court

(Adopted 12 Nov 1997, amended 30 Sept 2002)

(A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the "Referral Bench"), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or
(Amended 10 June 2004)

(iii) having jurisdiction and being willing and adequately prepared to accept such a case,
(Amended 10 June 2004)

so that those authorities should forthwith refer the case to the appropriate court for trial within that State. (Amended 30 Sept 2002, amended 11 Feb 2005)

(B) The Referral Bench may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. (Amended 30 Sept 2002, amended 10 June 2004, amended 11 Feb 2005)

(C) In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004)[1], consider the gravity of the crimes charged and the level of responsibility of the accused. (Amended 30 Sept 2002, amended 28 July 2004, amended 11 Feb 2005)

(D) Where an order is issued pursuant to this Rule:

(i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;

[1] U.N. Doc. S/RES/1534 (2004).

(ii) the Referral Bench may order that protective measures for certain witnesses or victims remain in force;
(Amended 11 Feb 2005)

(iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;

(iv) the Prosecutor may send observers to monitor the proceedings in the national courts on her behalf.

(Amended 30 Sept 2002)

(E) The Referral Bench may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred to trial. (Amended 30 Sept 2002, amended 11 Feb 2005)

(F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a national court, the Referral Bench may, at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10. (Amended 30 Sept 2002, amended 11 Feb 2005)

(G) Where an order issued pursuant to this Rule is revoked by the Referral Bench, it may make a formal request to the State concerned to transfer the accused to the seat of the Tribunal and the State shall accede to such a request without delay in keeping with Article 29 of the Statute. The Referral Bench or a Judge may also issue a warrant for the arrest of the accused. (Amended 30 Sept 2002, amended 11 Feb 2005)

(H) A Referral Bench shall have the powers of, and insofar as applicable shall follow the procedures laid down for, a Trial Chamber under the Rules. (Amended 11 Feb 2005)

(I) An appeal by the accused or the Prosecutor shall lie as of right from a decision of the Referral Bench whether or not to refer a case. Notice of appeal shall be filed within fifteen days of the decision unless the accused was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the accused is notified of the decision. (Amended 11 Feb 2005)

Rule 12
Determinations of Courts of any State
(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 10 July 1998)

Subject to Article 10, paragraph 2, of the Statute, determinations of courts of any State are not binding on the Tribunal.

Rule 13
Non Bis in Idem
(Adopted 11 Feb 1994, amended 30 Jan 1995)

When the President receives reliable information to show that criminal proceedings have been instituted against a person before a court of any State for a crime for which that person has already been tried by the Tribunal, a Trial Chamber shall, following *mutatis mutandis* the procedure provided in Rule 10, issue a reasoned order requesting that court permanently to discontinue its proceedings. If that court fails to do so, the President may report the matter to the Security Council.

PART THREE
ORGANIZATION OF THE TRIBUNAL

Section 1: The Judges

Rule 14
Solemn Declaration
(Adopted 11 Feb 1994)

(A) Before taking up duties each Judge shall make the following solemn declaration:

"I solemnly declare that I will perform my duties and exercise my powers as a Judge of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 honourably, faithfully, impartially and conscientiously". (Amended 12 Nov 1997)

(B) The declaration shall be signed by the Judge and witnessed by, or by a representative of, the Secretary-General of the United Nations. The declaration shall be kept in the records of the Tribunal. (Amended 12 Nov 1997)

(C) A Judge whose service continues without interruption after expiry of a previous period of service shall not make a new declaration. (Amended 12 Nov 1997)

Rule 15
Disqualification of Judges
(Adopted 11 Feb 1994, amended 15 June 1995, amended 25 June 1996, amended 5 July 1996, amended 25 July 1997, amended 17 Nov 1999)

(A) A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

(B) (i) Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial

or appeal upon the above grounds. The Presiding Judge shall confer with the Judge in question and report to the President. (Amended 30 Jan 1995)

(ii) Following the report of the Presiding Judge, the President shall, if necessary, appoint a panel of three Judges drawn from other Chambers to report to him its decision on the merits of the application. If the decision is to uphold the application, the President shall assign another Judge to sit in the place of the Judge in question.

(iii) The decision of the panel of three Judges shall not be subject to interlocutory appeal.

(iv) If the Judge in question is the President, the responsibility of the President in accordance with this paragraph shall be assumed by the Vice-President or, if he or she is not able to act in the application, by the permanent Judge most senior in precedence who is able to act.

(Amended 21 July 2005)

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(C) The Judge of the Trial Chamber who reviews an indictment against an accused, pursuant to Article 19 of the Statute and Rules 47 or 61, shall not be disqualified for sitting as a member of the Trial Chamber for the trial of that accused. Such a Judge shall also not be disqualified for sitting as a member of the Appeals Chamber to hear any appeal in that case. (Amended 6 Oct 1995, amended 2 July 1999, amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000, amended 12 Dec 2002, amended 21 July 2005)

(D) (i) No Judge shall sit on any appeal in a case in which that Judge sat as a member of the Trial Chamber. (Amended 10 July 1998, amended 4 Dec 1998, amended 1 Dec 2000, amended 13 Dec 2000, amended 12 Dec 2002, amended 21 July 2005)

(ii) No Judge shall sit on any State Request for Review pursuant to Rule 108 *bis* in a matter in which that Judge sat as a member of the Trial Chamber whose decision is to be reviewed. (Amended 10 July 1998)

Rule 15 *bis*
Absence of a Judge
(Adopted 17 Nov 1999)

(A) If

(i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and
(Amended 1 Dec 2000, amended 13 Dec 2000)

(ii) the remaining Judges of the Chamber are satisfied that it is in the interests of justice to do so,

those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than five working days. (Amended 12 Dec 2002)

(B) If

(i) a Judge is, for illness or urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and
(Amended 1 Dec 2000, amended 13 Dec 2000)

(ii) the remaining Judges of the Chamber are not satisfied that it is in the interests of justice to order that the hearing of the case continue in the absence of that Judge, then

(a) those remaining Judges of the Chamber may nevertheless conduct those matters which they are satisfied it is in the interests of justice that they be disposed of notwithstanding the absence of that Judge, and
(b) the remaining Judges of the Chamber may adjourn the proceedings.

(Amended 29 Mar 2006)

(C) If a Judge is, for any reason, unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the remaining Judges of the Chamber shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided

for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of all the accused, except as provided for in paragraphs (D) and (G). (Amended 12 Dec 2002, amended 29 Mar 2006)

(D) If, in the circumstances mentioned in the last sentence of paragraph (C), an accused withholds his consent, the remaining Judges may nonetheless decide whether or not to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice. This decision is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken from the decision to continue proceedings with a substitute Judge or the Appeals Chamber affirms that decision, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made. (Amended 12 Dec 2002, amended 29 Mar 2006)

(E) For the purposes of paragraphs (C) and (D), due consideration shall be given to paragraph 6 of Article 12 of the Statute. (Amended 29 Mar 2006)

(F) Appeals under paragraph (D) shall be filed within seven days of filing of the impugned decision. When such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from the filing of the written decision.
(Amended 29 Mar 2006)

(Amended 12 Dec 2002)

(G) If, in a trial where a reserve Judge has been assigned in accordance with Rule 15 *ter*, a Judge is unable to continue sitting and a substitute Judge is not assigned pursuant to paragraphs (C) or (D), the trial shall continue with the reserve Judge replacing the Judge who is unable to continue sitting.
(Amended 29 Mar 2006)

(H) In case of illness or an unfilled vacancy or in any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members.

Rule 15 *ter*
Reserve Judges
(Adopted 29 Mar 2006)

(A) The President may, in the interests of justice, assign a reserve Judge to sit with a Trial Chamber in a trial.

(B) A reserve Judge shall be present at each stage of a trial to which that Judge has been assigned.

(C) A reserve Judge may pose questions which are necessary to the reserve Judge's understanding of the trial. (Amended 8 Dec 2010)

(D) A reserve Judge shall be present, but shall not vote, during any deliberations in a trial.

Rule 16
Resignation
(Adopted 11 Feb 1994)

A Judge who decides to resign shall communicate the resignation in writing to the President who shall transmit it to the Secretary-General of the United Nations.

Rule 17
Precedence
(Adopted 11 Feb 1994)

(A) All Judges are equal in the exercise of their judicial functions, regardless of dates of election, appointment, age or period of service.

(B) The Presiding Judges of the Trial Chambers shall take precedence according to age after the President and the Vice-President.

(C) Permanent Judges elected or appointed on different dates shall take precedence according to the dates of their election or appointment; Judges elected or appointed on the same date shall take precedence according to age. (Amended 12 Apr 2001)

(D) In case of re-election, the total period of service as a Judge of the Tribunal shall be taken into account.

(E) *Ad litem* Judges shall take precedence after the permanent Judges according to the dates of their appointment. *Ad litem* Judges appointed on the same date shall take precedence according to age. (Amended 12 Apr 2001)

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Section 2: The Presidency

Rule 18
Election of the President
(Adopted 11 Feb 1994)

(A) The President shall be elected for a term of two years, or such shorter term as shall coincide with the duration of his or her term of office as a Judge. The President may be re-elected once. (Amended 12 Nov 1997)

(B) If the President ceases to be a member of the Tribunal or resigns from office before the expiration of his or her term, the permanent Judges shall elect from among their number a successor for the remainder of the term. (Amended 12 Nov 1997, amended 12 Apr 2001)

(C) The President shall be elected by a majority of the votes of the permanent Judges composing the Tribunal. If no Judge obtains such a majority, the second ballot shall be limited to the two Judges who obtained the greatest number of votes on the first ballot. In the case of equality of votes on the second ballot, the Judge who takes precedence in accordance with Rule 17 shall be declared elected. (Amended 12 Apr 2001)

Rule 19
Functions of the President
(Adopted 11 Feb 1994)

(A) The President shall preside at all plenary meetings of the Tribunal. The President shall coordinate the work of the Chambers and supervise the activities of the Registry as well as exercise all the other functions conferred on the President by the Statute and the Rules. (Amended 12 Nov 1997)

(B) The President may from time to time, and in consultation with the Bureau, the Registrar and the Prosecutor, issue Practice Directions, consistent with the Statute and the Rules, addressing detailed aspects of the conduct of proceedings before the Tribunal. (Amended 25 July 1997)

Rule 20
The Vice-President
(Adopted 11 Feb 1994)

(A) The Vice-President shall be elected for a term of two years, or such shorter term as shall coincide with the duration of his or her term of office as a permanent Judge. The Vice President may be re-elected once. (Amended 12 Nov 1997, amended 12 Apr 2001)

(B) The Vice-President may sit as a member of a Trial Chamber or of the Appeals Chamber.

(C) Rules 18 (B) and (C) shall apply *mutatis mutandis* to the Vice-President. (Amended 1 Dec 2000, amended 13 Dec 2000)

Rule 21
Functions of the Vice-President
(Adopted 11 Feb 1994, amended 12 Nov 1997, amended 1 Dec 2000, amended 13 Dec 2000)

Subject to Rule 22 (B), the Vice-President shall exercise the functions of the President in case of the latter's absence or inability to act.

Rule 22
Replacements
(Adopted 11 Feb 1994)

(A) If neither the President nor the Vice-President remains in office or is able to carry out the functions of the President, these shall be assumed by the senior permanent Judge, determined in accordance with Rule 17 (C). (Amended 12 Apr 2001, amended 12 July 2001)

(B) If the President is unable to exercise the functions of Presiding Judge of the Appeals Chamber, that Chamber shall elect a Presiding Judge from among its number. (Amended 12 Nov 1997)

(C) The President and the Vice-President, if still permanent Judges, shall continue to discharge their functions after the expiration of their terms until the election of the President and the Vice-President has taken place. (Amended 12 July 2001)

Section 3: Internal Functioning of the Tribunal

Rule 23
The Bureau
(Adopted 11 Feb 1994)

(A) The Bureau shall be composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers.

(B) The President shall consult the other members of the Bureau on all major questions relating to the functioning of the Tribunal.

(C) The President may consult with the *ad litem* Judges on matters to be discussed in the Bureau and may invite a representative of the *ad litem* Judges to attend Bureau meetings. (Amended 12 Apr 2001)

(D) A Judge may draw the attention of any member of the Bureau to issues that the Judge considers ought to be discussed by the Bureau or submitted to a plenary meeting of the Tribunal.

(E) If any member of the Bureau is unable to carry out any of the functions of the Bureau, these shall be assumed by the senior available Judge determined in accordance with Rule 17. (Amended 25 Feb 1999)

Rule 23 *bis*
The Coordination Council
(Adopted 1 Dec 2000, amended 13 Dec 2000)

(A) The Coordination Council shall be composed of the President, the Prosecutor and the Registrar.

(B) In order to achieve the mission of the Tribunal, as defined in the Statute, the Coordination Council ensures, having due regard for the responsibilities and the independence of any member, the coordination of the activities of the three organs of the Tribunal.

(C) The Coordination Council shall meet once a month at the initiative of the President. A member may at any time request that additional meetings be held. The President shall chair the meetings.

(D) The Vice-President, the Deputy Prosecutor and the Deputy Registrar may *ex officio* represent respectively, the President, the Prosecutor and the Registrar.

Rule 23 *ter*
[Deleted]
(Adopted 1 Dec 2000, amended 13 Dec 2000, deleted 8 Dec 2010)

Rule 24
Plenary Meetings of the Tribunal
(Adopted 11 Feb 1994)

Subject to the restrictions on the voting rights of *ad litem* Judges set out in Article 13 *quater* of the Statute, the Judges shall meet in plenary to:

(i) elect the President and Vice-President;

(ii) adopt and amend the Rules;

(iii) adopt the Annual Report provided for in Article 34 of the Statute;

(iv) decide upon matters relating to the internal functioning of the Chambers and the Tribunal;

(v) determine or supervise the conditions of detention;

(vi) exercise any other functions provided for in the Statute or in the Rules.

(Amended 12 Apr 2001)

Rule 25
Dates of Plenary Sessions
(Adopted 11 Feb 1994)

(A) The dates of the plenary sessions of the Tribunal shall normally be agreed upon in July of each year for the following calendar year.

(B) Other plenary meetings shall be convened by the President if so requested by at least nine permanent Judges, and may be convened whenever the exercise of the President's functions under the Statute or the Rules so requires. (Amended 12 Nov 1997, amended 4 Dec 1998, amended 12 Apr 2001)

Rule 26
Quorum and Vote
(Adopted 11 Feb 1994)

(A) The quorum for each plenary meeting of the Tribunal shall be ten permanent Judges. (Amended 4 Dec 1998, amended 12 Apr 2001)

(B) Subject to Rules 6 (A), (B) and 18 (C), the decisions of the plenary meetings of the Tribunal shall be taken by the majority of the Judges present. In the event of an equality of votes, the President or the Judge acting in the place of the President shall have a casting vote. (Amended 12 Apr 2001)

Section 4: The Chambers

Rule 27
Rotation
(Adopted 11 Feb 1994)

(A) Permanent Judges shall rotate on a regular basis between the Trial Chambers and the Appeals Chamber. Rotation shall take into account the efficient disposal of cases. (Amended 12 Apr 2001)

(B) The Judges shall take their places in their new Chamber as soon as the President thinks it convenient, having regard to the disposal of part-heard cases.

(C) The President may at any time temporarily assign a member of a Trial Chamber or of the Appeals Chamber to another Chamber.

Rule 28
Reviewing and Duty Judges
(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 23 Apr 1996, amended 12 Nov 1997)

(A) On receipt of an indictment for review from the Prosecutor, the Registrar shall consult with the President. The President shall refer the matter to the Bureau which shall determine whether the indictment, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal. If the Bureau determines that the indictment meets this standard, the President shall designate one of the permanent Trial Chamber Judges for the review under Rule 47. If the Bureau determines that the indictment does not meet this standard, the President shall return the indictment to the Registrar to communicate this finding to the Prosecutor (Amended 17 Nov 1999, amended 12 Apr 2001, amended 6 Apr 2004)

(B) The President, in consultation with the Judges, shall maintain a roster designating one Judge as duty Judge for the assigned period of seven days. The duty Judge shall be available at all times, including out of normal Registry hours, for dealing with applications pursuant to paragraphs (C) and (D) but may refuse to deal with any application out of normal Registry hours if not satisfied as to its urgency. The roster of duty Judges shall be published by the Registrar. (Amended 12 Nov 1997, amended 17 Nov 1999, amended 12 Apr 2001, amended 11 Mar 2005)

(C) All applications in a case not otherwise assigned to a Chamber, other than the review of indictments, shall be transmitted to the duty Judge. Where accused are jointly indicted, a submission relating only to an accused who is not in the custody of the Tribunal, other than an application to amend or withdraw part of the indictment pursuant to Rule 50 or Rule 51, shall be transmitted to the duty Judge, notwithstanding that the case has already been assigned to a Chamber in respect of some or all of the co-accused of that accused. The duty Judge shall act pursuant to Rule 54 in dealing with applications under this Rule. (Amended 17 Nov 1999, amended 21 Dec 2001)

(D) Where a case has already been assigned to a Trial Chamber:

(i) where the application is made out of normal Registry hours, the application shall be dealt with by the duty Judge if satisfied as to its urgency;

(ii) where the application is made within the normal Registry hours and the Trial Chamber is unavailable, it shall be dealt with by the duty Judge if satisfied as to its urgency or that it is otherwise appropriate to do so in the absence of the Trial Chamber.

In such case, the Registry shall serve a copy of all orders or decisions issued by the duty Judge in connection therewith on the Chamber to which the matter is assigned. (Amended 17 Nov 1999, amended 21 Dec 2001)

(E) During periods of court recess, regardless of the Chamber to which he or she is assigned, in addition to applications made pursuant to paragraph (D) above, the duty Judge may:

(i) take decisions on provisional detention pursuant to Rule 40 *bis*;

(ii) conduct the initial appearance of an accused pursuant to Rule 62.

The Registry shall serve a copy of all orders or decisions issued by the duty Judge in connection therewith on the Chamber to which the matter is assigned. (Amended 14 July 2000, amended 21 Dec 2001)

(F) The provisions of this Rule shall apply *mutatis mutandis* to applications before the Appeals Chamber. (Amended 21 Dec 2001)

Rule 29
Deliberations
(Adopted 11 Feb 1994)

The deliberations of the Chambers shall take place in private and remain secret.

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Section 5: The Registry

Rule 30
Appointment of the Registrar
(Adopted 11 Feb 1994, amended 10 July 1998, amended 12 Apr 2001)

The President shall seek the opinion of the permanent Judges on the candidates for the post of Registrar, before consulting with the Secretary-General of the United Nations pursuant to Article 17, paragraph 3, of the Statute.

Rule 31
Appointment of the Deputy Registrar and Registry Staff
(Adopted 11 Feb 1994)

The Registrar, after consultation with the Bureau, shall make recommendations to the Secretary-General of the United Nations for the appointment of the Deputy Registrar and other Registry staff.

Rule 32
Solemn Declaration
(Adopted 11 Feb 1994)

(A) Before taking up duties, the Registrar shall make the following declaration before the President:

> "I solemnly declare that I will perform the duties incumbent upon me as Registrar of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 in all loyalty, discretion and good conscience and that I will faithfully observe all the provisions of the Statute and the Rules of Procedure and Evidence of the Tribunal".

(Amended 12 Nov 1997)

(B) Before taking up duties, the Deputy Registrar shall make a similar declaration before the President. (Amended 12 Nov 1997)

(C) Every staff member of the Registry shall make a similar declaration before the Registrar.

Rule 33
Functions of the Registrar
(Adopted 11 Feb 1994)

(A) The Registrar shall assist the Chambers, the plenary meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. Under the authority of the President, the Registrar shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication. (Amended 12 Nov 1997)

(B) The Registrar, in the execution of his or her functions, may make oral and written representations to the President or Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions, including that of implementing judicial decisions, with notice to the parties where necessary. (Amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000)

(C) The Registrar shall report regularly on his or her activities to the Judges meeting in plenary and to the Prosecutor. (Amended 1 Dec 2000, amended 13 Dec 2000)

Rule 33 *bis*
Functions of the Deputy Registrar
(Adopted 1 Dec 2000, amended 13 Dec 2000)

(A) The Deputy Registrar shall exercise the functions of the Registrar in the event of the latter's absence from duty or inability to act or upon the Registrar's delegation.

(B) The Deputy Registrar, in consultation with the President, shall in particular:

(i) direct and administer the Chambers Legal Support Section; in particular, in conjunction with the administrative services of the Registry, the Deputy Registrar shall oversee the assignment of appropriate resources to the Chambers with a view to enabling them to accomplish their mission;

(ii) take all appropriate measures so that the decisions rendered by the Chambers and Judges are executed, especially sentences and penalties;

(iii) make recommendations regarding the missions of the Registry which affect the judicial activity of the Tribunal.

Rule 34
Victims and Witnesses Section
(Adopted 11 Feb 1994)

(A) There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to:

(i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and

(ii) provide counselling and support for them, in particular in cases of rape and sexual assault.

(Amended 2 July 1999)

(B) Due consideration shall be given, in the appointment of staff, to the employment of qualified women.

Rule 35
Minutes
(Adopted 11 Feb 1994, amended 12 Nov 1997)

Except where a full record is made under Rule 81, the Registrar, or Registry staff designated by the Registrar, shall take minutes of the plenary meetings of the Tribunal and of the sittings of the Chambers, other than private deliberations.

Rule 36
Record Book
(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 12 Nov 1997)

The Registrar shall keep a Record Book which shall list, subject to any Practice Direction under Rule 19 or any order of a Judge or Chamber providing for

the non-disclosure of any document or information, all the particulars of each case brought before the Tribunal. The Record Book shall be open to the public.

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Section 6: The Prosecutor

Rule 37
Functions of the Prosecutor
(Adopted 11 Feb 1994)

(A) The Prosecutor shall perform all the functions provided by the Statute in accordance with the Rules and such Regulations, consistent with the Statute and the Rules, as may be framed by the Prosecutor. Any alleged inconsistency in the Regulations shall be brought to the attention of the Bureau to whose opinion the Prosecutor shall defer. (Amended 30 Jan 1995, amended 12 Nov 1997)

(B) The Prosecutor's powers and duties under the Rules may be exercised by staff members of the Office of the Prosecutor authorised by the Prosecutor, or by any person acting under the Prosecutor's direction. (Amended 25 July 1997, amended 12 Nov 1997)

Rule 38
Deputy Prosecutor
(Adopted 11 Feb 1994)

(A) The Prosecutor shall make recommendations to the Secretary-General of the United Nations for the appointment of a Deputy Prosecutor. (Amended 12 Nov 1997)

(B) The Deputy Prosecutor shall exercise the functions of the Prosecutor in the event of the latter's absence from duty or inability to act or upon the Prosecutor's express instructions. (Amended 25 July 1997, amended 12 Nov 1997)

PART FOUR
INVESTIGATIONS AND RIGHTS OF SUSPECTS

Section 1: Investigations

Rule 39
Conduct of Investigations
(Adopted 11 Feb 1994)

In the conduct of an investigation, the Prosecutor may:

(i) summon and question suspects, victims and witnesses and record their statements, collect evidence and conduct on-site investigations;

(ii) undertake such other matters as may appear necessary for completing the investigation and the preparation and conduct of the prosecution at the trial, including the taking of special measures to provide for the safety of potential witnesses and informants;
(Amended 30 Jan 1995)

(iii) seek, to that end, the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organization (INTERPOL); and

(iv) request such orders as may be necessary from a Trial Chamber or a Judge.

Rule 40
Provisional Measures
(Adopted 11 Feb 1994)

In case of urgency, the Prosecutor may request any State:

(i) to arrest a suspect or an accused provisionally;
(Amended 4 Dec 1998)

(ii) to seise physical evidence;

(iii) to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.

The State concerned shall comply forthwith, in accordance with Article 29 of the Statute. (Amended 30 Jan 1995)

Rule 40 *bis*
Transfer and Provisional Detention of Suspects
(Adopted 23 Apr 1996)

(A) In the conduct of an investigation, the Prosecutor may transmit to the Registrar, for an order by a Judge assigned pursuant to Rule 28, a request for the transfer to and provisional detention of a suspect in the premises of the detention unit of the Tribunal. This request shall indicate the grounds upon which the request is made and, unless the Prosecutor wishes only to question the suspect, shall include a provisional charge and a summary of the material upon which the Prosecutor relies.

(B) The Judge shall order the transfer and provisional detention of the suspect if the following conditions are met:

(i) the Prosecutor has requested a State to arrest the suspect provisionally, in accordance with Rule 40, or the suspect is otherwise detained by State authorities;

(ii) after hearing the Prosecutor, the Judge considers that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction; and

(iii) the Judge considers provisional detention to be a necessary measure to prevent the escape of the suspect, injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation.

(C) The order for the transfer and provisional detention of the suspect shall be signed by the Judge and bear the seal of the Tribunal. The order shall set forth the basis of the application made by the Prosecutor under paragraph (A), including the provisional charge, and shall state the Judge's grounds for

making the order, having regard to paragraph (B). The order shall also specify the initial time-limit for the provisional detention of the suspect, and be accompanied by a statement of the rights of a suspect, as specified in this Rule and in Rules 42 and 43. (Amended 12 Apr 2001)

(D) The provisional detention of a suspect shall be ordered for a period not exceeding thirty days from the date of the transfer of the suspect to the seat of the Tribunal. At the end of that period, at the Prosecutor's request, the Judge who made the order, or another permanent Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing of the Prosecutor and the suspect assisted by counsel, to extend the detention for a period not exceeding thirty days, if warranted by the needs of the investigation. At the end of that extension, at the Prosecutor's request, the Judge who made the order, or another permanent Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing of the Prosecutor and the suspect assisted by counsel, to extend the detention for a further period not exceeding thirty days, if warranted by special circumstances. The total period of detention shall in no case exceed ninety days, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the requested State. (Amended 25 July 1997, amended 12 Nov 1997, amended 1 Dec 2000, amended 13 Dec 2000, amended 12 Apr 2001)

(E) The provisions in Rules 55 (B) to 59 *bis* shall apply *mutatis mutandis* to the execution of the transfer order and the provisional detention order relative to a suspect.

(F) After being transferred to the seat of the Tribunal, the suspect, assisted by counsel, shall be brought, without delay, before the Judge who made the order, or another permanent Judge of the same Trial Chamber, who shall ensure that the rights of the suspect are respected. (Amended 12 Nov 1997, amended 12 Apr 2001)

(G) During detention, the Prosecutor and the suspect or the suspect's counsel may submit to the Trial Chamber of which the Judge who made the order is a member, all applications relative to the propriety of provisional detention or to the suspect's release. (Amended 12 Nov 1997)

(H) Without prejudice to paragraph (D), the Rules relating to the detention on remand of accused persons shall apply *mutatis mutandis* to the provisional detention of persons under this Rule. (Amended 1 Dec 2000, amended 13 Dec 2000)

Rule 41
Retention of Information

(Adopted 11 Feb 1994, amended 12 Nov 1997, amended 1 Dec 2000, amended 13 Dec 2000)

Subject to Rule 81, the Prosecutor shall be responsible for the retention, storage and security of information and physical material obtained in the course of the Prosecutor's investigations until formally tendered into evidence.

Rule 42
Rights of Suspects during Investigation

(Adopted 11 Feb 1994)

(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect understands:

(i) the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it; (Amended 30 Jan 1995)

(ii) the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning; and (Amended 30 Jan 1995)

(iii) the right to remain silent, and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence. (Amended 30 Jan 1995)

(Amended 12 Nov 1997, amended 21 July 2005)

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel. (Amended 12 Nov 1997)

Rule 43
Recording Questioning of Suspects
(Adopted 11 Feb 1994)

Whenever the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded, in accordance with the following procedure:

(i) the suspect shall be informed in a language the suspect understands that the questioning is being audio-recorded or video-recorded;
(Amended 6 Oct 1995, amended 12 Nov 1997, amended 21 July 2005)

(ii) in the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded;
(Amended 6 Oct 1995)

(iii) at the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything the suspect has said, and to add anything the suspect may wish, and the time of conclusion shall be recorded;
(Amended 12 Nov 1997)

(iv) a copy of the recorded tape will be supplied to the suspect or, if multiple recording apparatus was used, one of the original recorded tapes;
(Amended 30 Jan 1995, amended 12 Dec 2002)

(v) after a copy has been made, if necessary, of the recorded tape, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect; and
(Amended 12 Dec 2002)

(vi) the tape shall be transcribed if the suspect becomes an accused.
(Amended 12 Dec 2002)

(Amended 6 Oct 1995)

Section 2: Of Counsel

Rule 44
Appointment, Qualifications and Duties of Counsel
(Adopted 11 Feb 1994, amended 25 July 1997)

(A) Counsel engaged by a suspect or an accused shall file a power of attorney with the Registrar at the earliest opportunity. Subject to any determination by a Chamber pursuant to Rule 46 or 77, a counsel shall be considered qualified to represent a suspect or accused if the counsel satisfies the Registrar that he or she:

(i) is admitted to the practice of law in a State, or is a university professor of law;

(ii) has written and oral proficiency in one of the two working languages of the Tribunal, unless the Registrar deems it in the interests of justice to waive this requirement, as provided for in paragraph (B);

(iii) is a member in good standing of an association of counsel practicing at the Tribunal recognised by the Registrar;

(iv) has not been found guilty or otherwise disciplined in relevant disciplinary proceedings against him in a national or international forum, including proceedings pursuant to the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal, unless the Registrar deems that, in the circumstances, it would be disproportionate to exclude such counsel;

(v) has not been found guilty in relevant criminal proceedings;

(vi) has not engaged in conduct whether in pursuit of his or her profession or otherwise which is dishonest or otherwise discreditable to a counsel, prejudicial to the administration of justice, or likely to diminish public confidence in the International Tribunal or the administration of justice, or otherwise bring the International Tribunal into disrepute; and

(vii) has not provided false or misleading information in relation to his or her qualifications and fitness to practice or failed to provide relevant information.

(Amended 12 Nov 1997, amended 1 Dec 2000, amended 13 Dec 2000, amended 14 July 2000, amended 13 Dec 2001, amended 12 July 2002, amended 28 July 2004)

(B) At the request of the suspect or accused and where the interests of justice so demand, the Registrar may admit a counsel who does not speak either of the two working languages of the Tribunal but who speaks the native language of the suspect or accused. The Registrar may impose such conditions as deemed appropriate, including the requirement that the counsel or accused undertake to meet all translations and interpretation costs not usually met by the Tribunal, and counsel undertakes not to request any extensions of time as a result of the fact that he does not speak one of the working languages. A suspect or accused may seek the President's review of the Registrar's decision. (Amended 14 July 2000, amended 28 July 2004)

(C) In the performance of their duties counsel shall be subject to the relevant provisions of the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Tribunal, the Host Country Agreement, the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel adopted by the Registrar and approved by the permanent Judges. (Amended 25 July 1997, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Dec 2001, amended 28 July 2004)

(D) An Advisory Panel shall be established to assist the President and the Registrar in all matters relating to defence counsel. The Panel members shall be selected from representatives of professional associations and from counsel who have appeared before the Tribunal. They shall have recognised professional legal experience. The composition of the Advisory Panel shall be representative of the different legal systems. A Directive of the Registrar shall set out the structure and areas of responsibility of the Advisory Panel. (Amended 14 July 2000)

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Rule 45
Assignment of Counsel

(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 12 Nov 1997)

(A) Whenever the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel. Such assignments shall be treated in accordance with the procedure established in a Directive set out by the Registrar and approved by the permanent Judges. (Amended 14 July 2000, amended 12 Apr 2001)

(B) For this purpose, the Registrar shall maintain a list of counsel who:

(i) fulfil all the requirements of Rule 44, although the language requirement of Rule 44 (A)(ii) may be waived by the Registrar as provided for in the Directive;

(ii) possess established competence in criminal law and/or international criminal law/international humanitarian law/international human rights law;

(iii) possess at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings; and

(iv) have indicated their availability and willingness to be assigned by the Tribunal to any person detained under the authority of the Tribunal lacking the means to remunerate counsel, under the terms set out in the Directive.

(Amended 25 June 1996, amended 5 July 1996, amended 14 July 2000, amended 28 July 2004)

(C) The Registrar shall maintain a separate list of counsel who, in addition to fulfilling the qualification requirements set out in paragraph (B), are readily available as "duty counsel" for assignment to an accused for the purposes of the initial appearance, in accordance with Rule 62. (Amended 10 July 1998, amended 14 July 2000, amended 28 July 2004)

(D) The Registrar shall, in consultation with the permanent Judges, establish the criteria for the payment of fees to assigned counsel. (Amended 12 Apr 2001, amended 12 Dec 2002)

(E) Where a person is assigned counsel and is subsequently found not to be lacking the means to remunerate counsel, the Chamber may, on application by the Registrar, make an order of contribution to recover the cost of providing counsel. (Amended 30 Jan 1995, amended 14 July 2000, amended 28 July 2004)

(F) A suspect or an accused electing to conduct his or her own defence shall so notify the Registrar in writing at the first opportunity. (Amended 30 Jan 1995, amended 12 Nov 1997)

Rule 45 *bis*
Detained Persons
(Adopted 25 June 1996, amended 5 July 1996)

Rules 44 and 45 shall apply to any person detained under the authority of the Tribunal.

Rule 45 *ter*
Assignment of Counsel in the Interests of Justice
(Adopted 4 Nov 2008)

The Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused.

Rule 46
Misconduct of Counsel
(Adopted 11 Feb 1994, amended 13 Dec 2001)

(A) If a Judge or a Chamber finds that the conduct of a counsel is offensive, abusive or otherwise obstructs the proper conduct of the proceedings, or that a counsel is negligent or otherwise fails to meet the standard of professional competence and ethics in the performance of his duties, the Chamber may, after giving counsel due warning:

(i) refuse audience to that counsel; and/or

(ii) determine, after giving counsel an opportunity to be heard, that counsel is no longer eligible to represent a suspect or an accused before the Tribunal pursuant to Rule 44 and 45.

(Amended 12 Nov 1997, amended 13 Dec 2001, amended 28 July 2004)

(B) A Judge or a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in the counsel's State of admission or, if a university professor of law and not otherwise admitted to the profession, to the governing body of that counsel's University. (Amended 12 Nov 1997, amended 28 July 2004)

(C) Under the supervision of the President, the Registrar shall publish and oversee the implementation of a Code of Professional Conduct for defence counsel. (Amended 14 July 2000)

PART FIVE
PRE-TRIAL PROCEEDINGS

Section 1: Indictments

Rule 47
Submission of Indictment by the Prosecutor
(Adopted 11 Feb 1994, amended 25 July 1997)

(A) An indictment, submitted in accordance with the following procedure, shall be reviewed by a Judge designated in accordance with Rule 28 for this purpose. (Amended 25 July 1997)

(B) The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material. (Amended 12 Nov 1997)

(C) The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.

(D) The Registrar shall forward the indictment and accompanying material to the designated Judge, who will inform the Prosecutor of the date fixed for review of the indictment. (Amended 30 Jan 1995, amended 25 July 1997)

(E) The reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 19, paragraph 1, of the Statute, whether a case exists against the suspect. (Amended 25 July 1997)

(F) The reviewing Judge may:

(i) request the Prosecutor to present additional material in support of any or all counts;
(Amended 10 July 1998, amended 2 July 1999)

(ii) confirm each count;

(iii) dismiss each count; or

(iv) adjourn the review so as to give the Prosecutor the opportunity to modify the indictment.

(Amended 25 July 1997)

(G) The indictment as confirmed by the Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Tribunal. If the accused does not understand either of the official languages of the Tribunal and if the language understood is known to the Registrar, a translation of the indictment in that language shall also be prepared, and shall be included as part of each certified copy of the indictment. (Amended 12 Nov 1997)

(H) Upon confirmation of any or all counts in the indictment,

(i) the Judge may issue an arrest warrant, in accordance with Rule 55 (A), and any orders as provided in Article 19 of the Statute, and
(Amended 1 Dec 2000, amended 13 Dec 2000)

(ii) the suspect shall have the status of an accused.

(Amended 25 July 1997)

(I) The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently bringing an amended indictment based on the acts underlying that count if supported by additional evidence. (Amended 25 July 1997)

Rule 48
Joinder of Accused
(Adopted 11 Feb 1994)

Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

Rule 49
Joinder of Crimes
(Adopted 11 Feb 1994)

Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.

Rule 50
Amendment of Indictment
(Adopted 11 Feb 1994)

(A) (i) The Prosecutor may amend an indictment:

(a) at any time before its confirmation, without leave;
(Amended 17 Nov 1999, amended 14 July 2000)

(b) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and
(Amended 10 July 1998, amended 17 Nov 1999, amended 14 July 2000)

(c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.
(Amended 17 Nov 1999, amended 14 July 2000)

(ii) Independently of any other factors relevant to the exercise of the discretion, leave to amend an indictment shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which satisfies the standard set forth in Article 19, paragraph 1, of the Statute to support the proposed amendment.
(Amended 10 July 1998, amended 17 Nov 1999, amended 14 July 2000, amended 28 July 2004)

(iii) Further confirmation is not required where an indictment is amended by leave.
(Amended 28 July 2004)

(iv) Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(Amended 18 Jan 1996, amended 3 Dec 1996, amended 12 Nov 1997, amended 10 July 1998)

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further

appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges. (Amended 18 Jan 1996)

(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence. (Amended 18 Jan 1996, amended 12 Nov 1997, amended 10 July 1998)

Rule 51
Withdrawal of Indictment
(Adopted 11 Feb 1994)

(A) The Prosecutor may withdraw an indictment:

(i) at any time before its confirmation, without leave;
(Amended 12 Dec 2002)

(ii) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and
(Amended 12 Dec 2002)

(iii) after the assignment of the case to a Trial Chamber, by motion before that Trial Chamber pursuant to Rule 73.
(Amended 12 Dec 2002)

(Amended 3 Dec 1996, amended 12 Nov 1997)

(B) The withdrawal of the indictment shall be promptly notified to the suspect or the accused and to the counsel of the suspect or accused. (Amended 12 Nov 1997)

Rule 52
Public Character of Indictment
(Adopted 11 Feb 1994)

Subject to Rule 53, upon confirmation by a Judge of a Trial Chamber, the indictment shall be made public.

Rule 53
Non-disclosure
(Adopted 11 Feb 1994)

(A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order. (Amended 25 June 1996, amended 5 July 1996)

(B) When confirming an indictment the Judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.

(C) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice. (Amended 30 Jan 1995)

(D) Notwithstanding paragraphs (A), (B) and (C), the Prosecutor may disclose an indictment or part thereof to the authorities of a State or an appropriate authority or international body where the Prosecutor deems it necessary to prevent an opportunity for securing the possible arrest of an accused from being lost. (Amended 4 Dec 1998, amended 12 Apr 2001)

Rule 53 *bis*
Service of Indictment
(Adopted 12 Nov 1997)

(A) Service of the indictment shall be effected personally on the accused at the time the accused is taken into custody or as soon as reasonably practicable thereafter.

(B) Personal service of an indictment on the accused is effected by giving the accused a copy of the indictment certified in accordance with Rule 47 (G).

Rule 54
General Rule

(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 6 Oct 1995)

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

Rule 54 *bis*
Orders Directed to States for the Production of Documents

(Adopted 17 Nov 1999)

(A) A party requesting an order under Rule 54 that a State produce documents or information shall apply in writing to the relevant Judge or Trial Chamber and shall:

(i) identify as far as possible the documents or information to which the application relates;

(ii) indicate how they are relevant to any matter in issue before the Judge or Trial Chamber and necessary for a fair determination of that matter; and

(iii) explain the steps that have been taken by the applicant to secure the State's assistance.

(B) The Judge or Trial Chamber may reject an application under paragraph (A) *in limine* if satisfied that:

(i) the documents or information are not relevant to any matter in issue in the proceedings before them or are not necessary for a fair determination of any such matter; or

(ii) no reasonable steps have been taken by the applicant to obtain the documents or information from the State.

(Amended 12 Apr 2001)

(C) (i) A decision by a Judge or a Trial Chamber under paragraph (B) or (E) shall be subject to:

(a) review under Rule 108 *bis*; or
(b) appeal.

(Amended 21 July 2005)

(ii) An appeal under paragraph (i) shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless

(a) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
(b) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

(Amended 21 July 2005)

(Amended 12 Apr 2001, amended 13 Dec 2001, amended 12 Dec 2002)

(D) (i) Except in cases where a decision has been taken pursuant to paragraph (B) or paragraph (E), the State concerned shall be given notice of the application, and not less than fifteen days' notice of the hearing of the application, at which the State shall have an opportunity to be heard. (Amended 12 Apr 2001)

(ii) Except in cases where the Judge or Trial Chamber determines otherwise, only the party making the application and the State concerned shall have the right to be heard. (Amended 13 Dec 2001)

(E) If, having regard to all circumstances, the Judge or Trial Chamber has good reasons for so doing, the Judge or Trial Chamber may make an order to which this Rule applies without giving the State concerned notice or the opportunity to be heard under paragraph (D), and the following provisions shall apply to such an order:

(i) the order shall be served on the State concerned;

(ii) subject to paragraph (iv), the order shall not have effect until fifteen days after such service;

(iii) a State may, within fifteen days of service of the order, apply by notice to the Judge or Trial Chamber to have the order set aside, on the grounds that disclosure would prejudice national security interests. Paragraph (F) shall apply to such a notice as it does to a notice of objection;
(Amended 12 Apr 2001)

(iv) where notice is given under paragraph (iii), the order shall thereupon be stayed until the decision on the application;

(v) paragraphs (F) and (G) shall apply to the determination of an application made pursuant to paragraph (iii) as they do to the determination of an application of which notice is given pursuant to paragraph (D);
(Amended 12 Apr 2001)

(vi) the State and the party who applied for the order shall, subject to any special measures made pursuant to a request under paragraphs (F) or (G), have an opportunity to be heard at the hearing of an application made pursuant to paragraph (E)(iii) of this Rule.
(Amended 12 Apr 2001)

(Amended 12 Apr 2001)

(F) The State, if it raises an objection pursuant to paragraph (D), on the grounds that disclosure would prejudice its national security interests, shall file a notice of objection not less than five days before the date fixed for the hearing, specifying the grounds of objection. In its notice of objection the State:

(i) shall identify, as far as possible, the basis upon which it claims that its national security interests will be prejudiced; and

(ii) may request the Judge or Trial Chamber to direct that appropriate protective measures be made for the hearing of the objection, including in particular:

(a) hearing the objection in camera and *ex parte*;
(b) allowing documents to be submitted in redacted form, accompanied by an affidavit signed by a senior State official explaining the reasons for the redaction;
(c) ordering that no transcripts be made of the hearing and that documents not further required by the Tribunal be returned directly to the State without being filed with the Registry or otherwise retained.

(Amended 12 Apr 2001)

(G) With regard to the procedure under paragraph (F) above, the Judge or Trial Chamber may order the following protective measures for the hearing of the objection:

(i) the designation of a single Judge from a Chamber to examine the documents or hear submissions; and/or

(ii) that the State be allowed to provide its own interpreters for the hearing and its own translations of sensitive documents.

(Amended 12 Apr 2001)

(H) Rejection of an application made under this Rule shall not preclude a subsequent application by the requesting party in respect of the same documents or information if new circumstances arise.

(I) An order under this Rule may provide for the documents or information in question to be produced by the State under appropriate arrangements to protect its interests, which may include those arrangements specified in paragraphs (F)(ii) or (G). (Amended 12 Apr 2001)

Rule 55
Execution of Arrest Warrants
(Adopted 11 Feb 1994)

(A) A warrant of arrest shall be signed by a permanent Judge. It shall include an order for the prompt transfer of the accused to the Tribunal upon the arrest of the accused. (Amended 12 Nov 1997, amended 12 Apr 2001)

(B) The original warrant shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Tribunal. (Amended 12 Nov 1997)

(C) Each certified copy shall be accompanied by a copy of the indictment certified in accordance with Rule 47 (G) and a statement of the rights of the accused set forth in Article 21 of the Statute, and in Rules 42 and 43 *mutatis mutandis*. If the accused does not understand either of the official languages of the Tribunal and if the language understood by the accused is known to the

Registrar, each certified copy of the warrant of arrest shall also be accompanied by a translation of the statement of the rights of the accused in that language. (Amended 12 Nov 1997)

(D) Subject to any order of a Judge or Chamber, the Registrar may transmit a certified copy of a warrant of arrest to the person or authorities to which it is addressed, including the national authorities of a State in whose territory or under whose jurisdiction the accused resides, or was last known to be, or is believed by the Registrar to be likely to be found. (Amended 30 Jan 1995, amended 18 Jan 1996, amended 25 July 1997, amended 12 Nov 1997)

(E) The Registrar shall instruct the person or authorities to which a warrant is transmitted that at the time of arrest the indictment and the statement of the rights of the accused be read to the accused in a language that he or she understands and that the accused be cautioned in that language that the accused has the right to remain silent, and that any statement he or she makes shall be recorded and may be used in evidence. (Amended 30 Jan 1995, amended 18 Jan 1996, amended 25 July 1997, amended 12 Nov 1997)

(F) Notwithstanding paragraph (E), if at the time of arrest the accused is served with, or with a translation of, the indictment and the statement of rights of the accused in a language that the accused understands and is able to read, these need not be read to the accused at the time of arrest. (Amended 12 Nov 1997, amended 12 Apr 2001)

(G) When an arrest warrant issued by the Tribunal is executed by the authorities of a State, or an appropriate authority or international body, a member of the Office of the Prosecutor may be present as from the time of the arrest. (Amended 12 Nov 1997)

Rule 56
Cooperation of States
(Adopted 11 Feb 1994, amended 18 Jan 1996)

The State to which a warrant of arrest or a transfer order for a witness is transmitted shall act promptly and with all due diligence to ensure proper and effective execution thereof, in accordance with Article 29 of the Statute.

Rule 57
Procedure after Arrest
(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 12 Nov 1997)

Upon arrest, the accused shall be detained by the State concerned which shall promptly notify the Registrar. The transfer of the accused to the seat of the Tribunal shall be arranged between the State authorities concerned, the authorities of the host country and the Registrar.

Rule 58
National Extradition Provisions
(Adopted 11 Feb 1994, amended 6 Oct 1995)

The obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.

Rule 59
Failure to Execute a Warrant or Transfer Order
(Adopted 11 Feb 1994, amended 18 Jan 1996)

(A) Where the State to which a warrant of arrest or transfer order has been transmitted has been unable to execute the warrant, it shall report forthwith its inability to the Registrar, and the reasons therefor.

(B) If, within a reasonable time after the warrant of arrest or transfer order has been transmitted to the State, no report is made on action taken, this shall be deemed a failure to execute the warrant of arrest or transfer order and the Tribunal, through the President, may notify the Security Council accordingly.

Rule 59 *bis*
Transmission of Arrest Warrants
(Adopted 18 Jan 1996)

(A) Notwithstanding Rules 55 to 59, on the order of a permanent Judge, the Registrar shall transmit to an appropriate authority or international body or the Prosecutor a copy of a warrant for the arrest of an accused, on such terms as the Judge may determine, together with an order for the prompt transfer of the accused to the Tribunal in the event that the accused be taken into custody

by that authority or international body or the Prosecutor. (Amended 25 June 1996, amended 5 July 1996, amended 12 Nov 1997, amended 12 Apr 2001)

(B) At the time of being taken into custody an accused shall be informed immediately, in a language the accused understands, of the charges against him or her and of the fact that he or she is being transferred to the Tribunal. Upon such transfer, the indictment and a statement of the rights of the accused shall be read to the accused and the accused shall be cautioned in such a language. (Amended 12 Nov 1997)

(C) Notwithstanding paragraph (B), the indictment and statement of rights of the accused need not be read to the accused if the accused is served with these, or with a translation of these, in a language the accused understands and is able to read. (Amended 12 Nov 1997, amended 12 Apr 2001)

Rule 60
Advertisement of Indictment
(Adopted 11 Feb 1994, amended 25 July 1997, amended 12 Nov 1997)

At the request of the Prosecutor, a form of advertisement shall be transmitted by the Registrar to the national authorities of any State or States, for publication in newspapers or for broadcast via radio and television, notifying publicly the existence of an indictment and calling upon the accused to surrender to the Tribunal and inviting any person with information as to the whereabouts of the accused to communicate that information to the Tribunal.

Rule 61
Procedure in Case of Failure to Execute a Warrant
(Adopted 11 Feb 1994)

(A) If, within a reasonable time, a warrant of arrest has not been executed, and personal service of the indictment has consequently not been effected, the Judge who confirmed the indictment shall invite the Prosecutor to report on the measures taken. When the Judge is satisfied that:

(i) the Registrar and the Prosecutor have taken all reasonable steps to secure the arrest of the accused, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to them to be; and
(Amended 18 Jan 1996, amended 12 Nov 1997)

(ii) if the whereabouts of the accused are unknown, the Prosecutor and the Registrar have taken all reasonable steps to ascertain those whereabouts, including by seeking publication of advertisements pursuant to Rule 60,
(Amended 18 Jan 1996, amended 12 Nov 1997, amended 4 Dec 1998)

the Judge shall order that the indictment be submitted by the Prosecutor to the Trial Chamber of which the Judge is a member. (Amended 3 May 1995, amended 18 Jan 1996, amended 12 Nov 1997, amended 4 Dec 1998)

(B) Upon obtaining such an order the Prosecutor shall submit the indictment to the Trial Chamber in open court, together with all the evidence that was before the Judge who initially confirmed the indictment. The Prosecutor may also call before the Trial Chamber and examine any witness whose statement has been submitted to the confirming Judge. In addition, the Trial Chamber may request the Prosecutor to call any other witness whose statement has been submitted to the confirming Judge. (Amended 30 Jan 1995, amended 25 July 1997)

(C) If the Trial Chamber is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine. The Trial Chamber shall have the relevant parts of the indictment read out by the Prosecutor together with an account of the efforts to effect service referred to in paragraph (A) above. (Amended 12 Apr 2001)

(D) The Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States. Upon request by the Prosecutor or *proprio motu*, after having heard the Prosecutor, the Trial Chamber may order a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties. (Amended 23 Apr 1996)

(E) If the Prosecutor satisfies the Trial Chamber that the failure to effect personal service was due in whole or in part to a failure or refusal of a State to cooperate with the Tribunal in accordance with Article 29 of the Statute, the Trial Chamber shall so certify. After consulting the Presiding Judges of the Chambers, the President shall notify the Security Council thereof in such manner as the President thinks fit. (Amended 18 Jan 1996)

Rule 62
Initial Appearance of Accused
(Adopted 11 Feb 1994, amended 12 July 2007)

(A) Upon transfer of an accused to the seat of the Tribunal, the President shall forthwith assign the case to a Trial Chamber. The accused shall be brought before that Trial Chamber or a Judge thereof without delay, and shall be formally charged. The Trial Chamber or the Judge shall:

(i) satisfy itself, himself or herself that the right of the accused to counsel is respected;
(Amended 17 Nov 1999)

(ii) read or have the indictment read to the accused in a language the accused understands, and satisfy itself, himself or herself that the accused understands the indictment;
(Amended 12 Nov 1997, amended 17 Nov 1999, amended 24 June 2003)

(iii) inform the accused that, within thirty days of the initial appearance, he or she will be called upon to enter a plea of guilty or not guilty on each count but that, should the accused so request, he or she may immediately enter a plea of guilty or not guilty on one or more count;
(Amended 4 Dec 1998)

(iv) if the accused fails to enter a plea at the initial or any further appearance, enter a plea of not guilty on the accused's behalf;
(Amended 15 June 1995, amended 12 Nov 1997, amended 4 Dec 1998)

(v) in case of a plea of not guilty, instruct the Registrar to set a date for trial; (Amended 30 Jan 1995)

(vi) in case of a plea of guilty:

(a) if before the Trial Chamber, act in accordance with Rule 62 *bis*, or
(Amended 17 Nov 1999)

(b) if before a Judge, refer the plea to the Trial Chamber so that it may act in accordance with Rule 62 *bis*;
(Amended 17 Nov 1999)

(Amended 30 Jan 1995, amended 12 Nov 1997)

(vii) instruct the Registrar to set such other dates as appropriate.
(Amended 30 Jan 1995)

(Amended 12 Nov 1997, amended 17 Nov 1999, amended 12 Apr 2001, amended 17 July 2003)

(B) Where the interests of justice so require, the Registrar may assign a duty counsel as within Rule 45 (C) to represent the accused at the initial appearance. Such assignments shall be treated in accordance with the relevant provisions of the Directive referred to in Rule 45 (A). (Amended 28 July 2004)

(C) Within 30 days of the initial appearance, if the accused has not retained permanent counsel or has not yet elected in writing to conduct his or her own defence in accordance with Rule 45 (F), permanent counsel shall be assigned by the Registrar. Should the Registrar be unable to appoint permanent counsel within the time-limit, he will seek an extension from the Trial Chamber. (Amended 12 July 2007)

Rule 62 *bis*
Guilty Pleas
(Adopted 12 Nov 1997)

If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that:

(i) the guilty plea has been made voluntarily;

(ii) the guilty plea is informed;
(Amended 17 Nov 1999)

(iii) the guilty plea is not equivocal; and

(iv) there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case,

the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing. (Amended 10 July 1998, amended 4 Dec 1998)

Rule 62 *ter*
Plea Agreement Procedure
(Adopted 13 Dec 2001)

(A) The Prosecutor and the defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:

(i) apply to amend the indictment accordingly;

(ii) submit that a specific sentence or sentencing range is appropriate;

(iii) not oppose a request by the accused for a particular sentence or sentencing range.

(B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A).

(C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty.

Rule 63
Questioning of Accused
(Adopted 11 Feb 1994, amended 3 Dec 1996)

(A) Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present.

(B) The questioning, including any waiver of the right to counsel, shall be audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42 (A)(iii).

Rule 64
Detention on Remand
(Adopted 11 Feb 1994, amended 25 July 1997, amended 12 Nov 1997)

Upon being transferred to the seat of the Tribunal, the accused shall be detained in facilities provided by the host country, or by another country. In exceptional circumstances, the accused may be held in facilities outside of the host country. The President may, on the application of a party, request modification of the conditions of detention of an accused.

Rule 65
Provisional Release
(Adopted 11 Feb 1994)

(A) Once detained, an accused may not be released except upon an order of a Chamber. (Amended 14 July 2000)

(B) Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person. (Amended 30 Jan 1995, amended 17 Nov 1999, amended 13 Dec 2001)

(C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others. (Amended 12 Nov 1997)

(D) Any decision rendered under this Rule by a Trial Chamber shall be subject to appeal. Subject to paragraph (F) below, an appeal shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, the appeal shall be filed within seven days of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
(Amended 10 July 1998)

(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision. (Amended 10 July 1998)

(Amended 25 July 1997, amended 12 Nov 1997, amended 10 July 1998, amended 17 Nov 1999, amended 14 July 2000, amended 1 Dec 2000, amended 13 Dec 2000, amended 21 July 2005)

(E) The Prosecutor may apply for a stay of a decision by the Trial Chamber to release an accused on the basis that the Prosecutor intends to appeal the decision, and shall make such an application at the time of filing his or her response to the initial application for provisional release by the accused. (Amended 17 Nov 1999)

(F) Where the Trial Chamber grants a stay of its decision to release an accused, the Prosecutor shall file his or her appeal not later than one day from the rendering of that decision. (Amended 17 Nov 1999)

(G) Where the Trial Chamber orders a stay of its decision to release the accused pending an appeal by the Prosecutor, the accused shall not be released until either:

(i) the time-limit for the filing of an appeal by the Prosecutor has expired, and no such appeal is filed; (Amended 21 July 2005)

(ii) the Appeals Chamber dismisses the appeal; or

(iii) the Appeals Chamber otherwise orders. (Amended 21 July 2005)

(Amended 17 Nov 1999, amended 21 July 2005)

(H) If necessary, the Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been released or is for any other reason at liberty. The provisions of Section 2 of Part Five shall apply *mutatis mutandis*. (Amended 25 July 1997)

(I) Without prejudice to the provisions of Rule 107, the Appeals Chamber may grant provisional release to convicted persons pending an appeal or for a fixed period if it is satisfied that:

(i) the appellant, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be;

(ii) the appellant, if released, will not pose a danger to any victim, witness or other person, and

(iii) special circumstances exist warranting such release.

The provisions of paragraphs (C) and (H) shall apply *mutatis mutandis*.

(Amended 14 July 2000, amended 1 Dec 2000, amended 13 Dec 2000)

Rule 65 *bis*
Status Conferences
(Adopted 25 July 1997)

(A) A Trial Chamber or a Trial Chamber Judge shall convene a status conference within one hundred and twenty days of the initial appearance of the accused and thereafter within one hundred and twenty days after the last status conference:

(i) to organize exchanges between the parties so as to ensure expeditious preparation for trial;

(ii) to review the status of his or her case and to allow the accused the opportunity to raise issues in relation thereto, including the mental and physical condition of the accused.

(Amended 4 Dec 1998, amended 17 Nov 1999, amended 12 Apr 2001, amended 17 July 2003)

(B) The Appeals Chamber or an Appeals Chamber Judge shall convene a status conference, within one hundred and twenty days of the filing of a notice of appeal and thereafter within one hundred and twenty days after the last status conference, to allow any person in custody pending appeal the opportunity to raise issues in relation thereto, including the mental and physical condition of that person. (Amended 17 Nov 1999)

(C) With the written consent of the accused, given after receiving advice from his counsel, a status conference under this Rule may be conducted

(i) in his presence, but with his counsel participating either via tele-conference or video-conference; or

(ii) in Chambers in his absence, but with his participation via tele-conference if he so wishes and/or participation of his counsel via tele-conference or video-conference.

(Amended 12 Dec 2002)

Rule 65 *ter*
Pre-Trial Judge
(Adopted 10 July 1998, amended 17 Nov 1999)

(A) The Presiding Judge of the Trial Chamber shall, no later than seven days after the initial appearance of the accused, designate from among its members a Judge responsible for the pre-trial proceedings (hereinafter "pre-trial Judge").
(Amended 17 Nov 1999, amended 12 Apr 2001, amended 17 July 2003)

(B) The pre-trial Judge shall, under the authority and supervision of the Trial Chamber seised of the case, coordinate communication between the parties during the pre-trial phase. The pre-trial Judge shall ensure that the proceedings are not unduly delayed and shall take any measure necessary to prepare the case for a fair and expeditious trial.

(C) The pre-trial Judge shall be entrusted with all of the pre-trial functions set forth in Rule 66, Rule 67, Rule 73 *bis* and Rule 73 *ter*, and with all or part of the functions set forth in Rule 73. (Amended 17 Nov 1999, amended 12 Apr 2001, amended 12 Dec 2003)

(D) (i) The pre-trial Judge may be assisted in the performance of his or her duties by one of the Senior Legal Officers assigned to Chambers.

(ii) The pre-trial Judge shall establish a work plan indicating, in general terms, the obligations that the parties are required to meet pursuant to this Rule and the dates by which these obligations must be fulfilled.

(iii) Acting under the supervision of the pre-trial Judge, the Senior Legal Officer shall oversee the implementation of the work plan and shall keep the pre-trial Judge informed of the progress of the discussions between and with the parties and, in particular, of any potential difficulty. He or she shall present the pre-trial Judge with reports as appropriate and shall communicate to the parties, without delay, any observations and decisions made by the pre-trial Judge.

(iv) The pre-trial Judge shall order the parties to meet to discuss issues related to the preparation of the case, in particular, so that the Prosecutor can meet his or her obligations pursuant to paragraphs (E) (i) to (iii) of this Rule and for the defence to meet its obligations pursuant to paragraph (G) of this Rule and of Rule 73 *ter*.

(v) Such meetings are held *inter partes* or, at his or her request, with the Senior Legal Officer and one or more of the parties. The Senior Legal Officer ensures that the obligations set out in paragraphs (E) (i) to (iii) of this Rule and, at the appropriate time, that the obligations in paragraph (G) and Rule 73 *ter*, are satisfied in accordance with the work plan set by the pre-trial Judge.

(vi) The presence of the accused is not necessary for meetings convened by the Senior Legal Officer.

(vii) The Senior Legal Officer may be assisted by a representative of the Registry in the performance of his or her duties pursuant to this Rule and may require a transcript to be made.

(Amended 12 Apr 2001)

(E) Once any existing preliminary motions filed within the time-limit provided by Rule 72 are disposed of, the pre-trial Judge shall order the Prosecutor, upon the report of the Senior Legal Officer, and within a time-limit set by the pre-trial Judge and not less than six weeks before the Pre-Trial Conference required by Rule 73 *bis*, to file the following:

(i) the final version of the Prosecutor's pre-trial brief including, for each count, a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused; this brief shall include any admissions by the parties and a statement of matters which are not in dispute; as well as a statement of contested matters of fact and law;
(Amended 12 Apr 2001)

(ii) the list of witnesses the Prosecutor intends to call with :

(a) the name or pseudonym of each witness;
(b) a summary of the facts on which each witness will testify;
(c) the points in the indictment as to which each witness will testify, including specific references to counts and relevant paragraphs in the indictment;
(Amended 12 Apr 2001)
(d) the total number of witnesses and the number of witnesses who will testify against each accused and on each count;

(Amended 12 Apr 2001)

(e) an indication of whether the witness will testify in person or pursuant to Rule 92 *bis* or Rule 92 *quater* by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal; and

(Amended 12 Apr 2001, amended 13 Sept 2006)

(f) the estimated length of time required for each witness and the total time estimated for presentation of the Prosecutor's case.

(Amended 12 Apr 2001)

(iii) the list of exhibits the Prosecutor intends to offer stating where possible whether the defence has any objection as to authenticity. The Prosecutor shall serve on the defence copies of the exhibits so listed.

(Amended 12 Apr 2001, amended 13 Dec 2001)

(Amended 17 Nov 1999, amended 12 Apr 2001, amended 12 July 2001)

(F) After the submission by the Prosecutor of the items mentioned in paragraph (E), the pre-trial Judge shall order the defence, within a time-limit set by the pre-trial Judge, and not later than three weeks before the Pre-Trial Conference, to file a pre-trial brief addressing the factual and legal issues, and including a written statement setting out:

(i) in general terms, the nature of the accused's defence;

(ii) the matters with which the accused takes issue in the Prosecutor's pre-trial brief; and

(iii) in the case of each such matter, the reason why the accused takes issue with it.

(Amended 17 Nov 1999, amended 12 Apr 2001)

(G) After the close of the Prosecutor's case and before the commencement of the defence case, the pre-trial Judge shall order the defence to file the following:

(i) a list of witnesses the defence intends to call with:

(a) the name or pseudonym of each witness;

(b) a summary of the facts on which each witness will testify;

(c) the points in the indictment as to which each witness will testify;

(Amended 12 Apr 2001)

(d) the total number of witnesses and the number of witnesses who will testify for each accused and on each count;

(Amended 12 Apr 2001)

(e) an indication of whether the witness will testify in person or pursuant to Rule 92 *bis* or Rule 92 *quater* by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal; and

(Amended 12 Apr 2001, amended 13 Sept 2006)

(f) the estimated length of time required for each witness and the total time estimated for presentation of the defence case; and

(Amended 12 Apr 2001)

(ii) a list of exhibits the defence intends to offer in its case, stating where possible whether the Prosecutor has any objection as to authenticity. The defence shall serve on the Prosecutor copies of the exhibits so listed.

(Amended 13 Dec 2001)

(Amended 17 Nov 1999)

(H) The pre-trial Judge shall record the points of agreement and disagreement on matters of law and fact. In this connection, he or she may order the parties to file written submissions with either the pre-trial Judge or the Trial Chamber.

(Amended 17 Nov 1999)

(I) In order to perform his or her functions, the pre-trial Judge may *proprio motu*, where appropriate, hear the parties without the accused being present. The pre-trial Judge may hear the parties in his or her private room, in which case minutes of the meeting shall be taken by a representative of the Registry.

(Amended 17 Nov 1999, amended 12 Apr 2001)

(J) The pre-trial Judge shall keep the Trial Chamber regularly informed, particularly where issues are in dispute and may refer such disputes to the Trial Chamber.

(K) The pre-trial Judge may set a time for the making of pre-trial motions and, if required, any hearing thereon. A motion made before trial shall be determined before trial unless the Judge, for good cause, orders that it be deferred for determination at trial. Failure by a party to raise objections or to make requests which can be made prior to trial at the time set by the Judge shall constitute waiver thereof, but the Judge for cause may grant relief from the waiver. (Amended 12 Apr 2001)

(L) (i) After the filings by the Prosecutor pursuant to paragraph (E), the pre-trial Judge shall submit to the Trial Chamber a complete file consisting of all the filings of the parties, transcripts of status conferences and minutes of meetings held in the performance of his or her functions pursuant to this Rule.

(ii) The pre-trial Judge shall submit a second file to the Trial Chamber after the defence filings pursuant to paragraph (G). (Amended 17 Nov 1999, amended 12 Apr 2001)

(M) The Trial Chamber may *proprio motu* exercise any of the functions of the pre-trial Judge. (Amended 17 Nov 1999)

(N) Upon a report of the pre-trial Judge, the Trial Chamber shall decide, should the case arise, on sanctions to be imposed on a party which fails to perform its obligations pursuant to the present Rule. Such sanctions may include the exclusion of testimonial or documentary evidence. (Amended 12 Apr 2001)

Section 4: Production of Evidence

Rule 66
Disclosure by the Prosecutor

(Adopted 11 Feb 1994)

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands

(i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused; and
(Amended 12 Nov 1997)

(ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.
(Amended 12 Nov 1997, amended 10 July 1998, amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Sept 2006)

(Amended 30 Jan 1995, amended 3 Dec 1996, amended 12 Nov 1997, amended 10 July 1998)

(B) The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused. (Amended 30 Jan 1995, amended 12 Nov 1997, amended 17 Nov 1999)

(C) Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from an obligation under the Rules to disclose that information. When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential. (Amended 30 Jan 1995, amended 10 July 1998, amended 17 Nov 1999)

Rule 67
Additional Disclosure

(Adopted 11 Feb 1994, amended 12 Dec 2003, amended 28 Feb 2008)

(A) Within the time-limit prescribed by the Trial Chamber, at a time not prior to a ruling under Rule 98 *bis*, but not less than one week prior to the commencement of the Defence case, the Defence shall:

(i) permit the Prosecutor to inspect and copy any books, documents, photographs, and tangible objects in the Defence's custody or control, which are intended for use by the Defence as evidence at trial; and

(ii) provide to the Prosecutor copies of statements, if any, of all witnesses whom the Defence intends to call to testify at trial, and copies of all written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, or Rule 92 *quater*, which the Defence intends to present at trial. Copies of the statements, if any, of additional witnesses shall be made available to the Prosecutor prior to a decision being made to call those witnesses.

(Adopted 28 Feb 2008)

(B) Within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*:

(i) the defence shall notify the Prosecutor of its intent to offer:

(a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

(b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence; and

(ii) the Prosecutor shall notify the defence of the names of the witnesses that the Prosecutor intends to call in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with paragraph (i) above.

(Amended 12 Nov 1997, amended 12 Apr 2001, amended 12 Dec 2003)

(C) Failure of the Defence to provide notice under this Rule shall not limit the right of the accused to testify on the above defences.

(D) If either party discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules, that party shall immediately disclose that evidence or material to the other party and the Trial Chamber.

(Amended 13 Dec 2001)

Rule 68
Disclosure of Exculpatory and Other Relevant Material

(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 12 July 2001, amended 12 Dec 2003, amended 28 July 2004)

Subject to the provisions of Rule 70,

(i) the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence;

(ii) without prejudice to paragraph (i), the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically;

(iii) the Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (i) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused;

(iv) the Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation under paragraph (i) to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential;

(v) notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (i) above.

Rule 68 *bis*
Failure to Comply with Disclosure Obligations

(Adopted 13 Dec 2001)

The pre-trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules.

Rule 69
Protection of Victims and Witnesses

(Adopted 11 Feb 1994)

(A) In exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal. (Amended 13 Dec 2001)

(B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Section. (Amended 15 June 1995, amended 2 July 1999, amended 13 Dec 2001)

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

Rule 70
Matters not Subject to Disclosure

(Adopted 11 Feb 1994)

(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.

(B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused. (Amended 4 Oct 1994, amended 30 Jan 1995, amended 12 Nov 1997)

(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. A Trial Chamber may not use its power to order the attendance of witnesses or to require production of documents in order to compel the production of such additional evidence. (Amended 6 Oct 1995, amended 25 July 1997)

(D) If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any question relating to the information or its origin, if the witness declines to answer on grounds of confidentiality. (Amended 6 Oct 1995, amended 25 July 1997)

(E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to the limitations contained in paragraphs (C) and (D). (Amended 6 Oct 1995, amended 12 Apr 2001)

(F) The Trial Chamber may order upon an application by the accused or defence counsel that, in the interests of justice, the provisions of this Rule shall apply *mutatis mutandis* to specific information in the possession of the accused. (Amended 25 July 1997)

(G) Nothing in paragraph (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. (Amended 6 Oct 1995, amended 12 Apr 2001)

Section 5: Depositions

Rule 71
Depositions

(Adopted 11 Feb 1994, amended 10 July 1998)

(A) Where it is in the interests of justice to do so, a Trial Chamber may order, *proprio motu* or at the request of a party, that a deposition be taken for use at trial, whether or not the person whose deposition is sought is able physically to appear before the Tribunal to give evidence. The Trial Chamber shall appoint a Presiding Officer for that purpose. (Amended 17 Nov 1999)

(B) The motion for the taking of a deposition shall indicate the name and whereabouts of the person whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined, and of the circumstances justifying the taking of the deposition. (Amended 17 Nov 1999)

(C) If the motion is granted, the party at whose request the deposition is to be taken shall give reasonable notice to the other party, who shall have the right to attend the taking of the deposition and cross-examine the person whose deposition is being taken.

(D) Deposition evidence may be taken either at or away from the seat of the Tribunal, and it may also be given by means of a video-conference. (Amended 17 Nov 1999)

(E) The Presiding Officer shall ensure that the deposition is taken in accordance with the Rules and that a record is made of the deposition, including cross-examination and objections raised by either party for decision by the Trial Chamber. The Presiding Officer shall transmit the record to the Trial Chamber.

Rule 71 *bis*
[Deleted]

(Adopted 17 Nov 1999, deleted 12 July 2007)

Section 6: Motions

Rule 72
Preliminary Motions

(Adopted 11 Feb 1994, amended 10 July 1998, amended 4 Dec 1998, amended 21 July 2005, amended 12 July 2007)

(A) Preliminary motions, being motions which

(i) challenge jurisdiction;

(ii) allege defects in the form of the indictment;

(iii) seek the severance of counts joined in one indictment under Rule 49 or seek separate trials under Rule 82 (B); or

(iv) raise objections based on the refusal of a request for assignment of counsel made under Rule 45 (C)

shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66 (A)(i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84. Subject to any order made by a Judge or the Trial Chamber, where permanent counsel has not yet been assigned to or retained by the accused, or where the accused has not yet elected in writing to conduct his or her defence in accordance with Rule 45 (F), the thirty-day time-limit under this Rule shall not run, notwithstanding the disclosure to the defence of the material and statements referred to in Rule 66 (A)(i), until permanent counsel has been assigned to the accused. (Amended 12 July 2007)

(B) Decisions on preliminary motions are without interlocutory appeal save

(i) in the case of motions challenging jurisdiction;
(Amended 25 June 1996, amended 5 July 1996, amended 23 Apr 2002)

(ii) in other cases where certification has been granted by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the

opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
(Amended 25 June 1996, amended 5 July 1996, amended 25 July 1997, amended 12 Nov 1997, amended 23 Apr 2002)

(Amended 30 Jan 1995, amended 12 Nov 1997)

(C) Appeals under paragraph (B)(i) shall be filed within fifteen days and requests for certification under paragraph (B)(ii) shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.

If certification is given, a party shall appeal to the Appeals Chamber within seven days of the filing of the decision to certify. (Amended 12 Nov 1997, amended 10 July 1998, amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000, amended 23 Apr 2002)

(D) For the purpose of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:

(i) any of the persons indicated in Articles 1, 6, 7 and 9 of the Statute;

(ii) the territories indicated in Articles 1, 8 and 9 of the Statute;

(iii) the period indicated in Articles 1, 8 and 9 of the Statute;

(iv) any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute.

(Amended 1 Dec 2000, amended 13 Dec 2000)

Rule 73
Other Motions

(Adopted 11 Feb 1994, amended 12 Nov 1997, amended 12 Apr 2001, amended 13 Dec 2001, amended 23 Apr 2002)

(A) After a case is assigned to a Trial Chamber, either party may at any time move before the Chamber by way of motion, not being a preliminary motion, for appropriate ruling or relief. Such motions may be written or oral, at the discretion of the Trial Chamber. (Amended 12 Nov 1997)

(B) Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. (Amended 12 Apr 2001, amended 23 Apr 2002)

(C) Requests for certification shall be filed within seven days of the filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

If certification is given, a party shall appeal to the Appeals Chamber within seven days of the filing of the decision to certify. (Amended 12 Nov 1997, amended 10 July 1998, amended 12 Apr 2001, amended 23 Apr 2002)

(D) Irrespective of any sanctions which may be imposed under Rule 46 (A), when a Chamber finds that a motion is frivolous or is an abuse of process, the Registrar shall withhold payment of fees associated with the production of that motion and/ or costs thereof. (Amended 8 Dec 2004)

Section 7: Conferences

Rule 73 *bis*
Pre-Trial Conference

(Adopted 10 July 1998, amended 17 Nov 1999, amended 17 July 2003)

(A) Prior to the commencement of the trial, the Trial Chamber shall hold a Pre-Trial Conference.

(B) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 *ter* (L)(i), the Trial Chamber may call upon the Prosecutor to shorten the estimated length of the examination-in-chief for some witnesses. (Amended 17 Nov 1999, amended 12 Apr 2001)

(C) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 *ter* (L)(i), the Trial Chamber, after having heard the Prosecutor, shall determine

(i) the number of witnesses the Prosecutor may call; and

(ii) the time available to the Prosecutor for presenting evidence.

(Amended 17 Nov 1999, amended 12 Apr 2001, amended 17 July 2003)

(D) After having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may invite the Prosecutor to reduce the number of counts charged in the indictment and may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged. (Amended 17 July 2003, amended 30 May 2006)

(E) Upon or after the submission by the pre-trial Judge of the complete file of the Prosecution case pursuant to paragraph (L)(i) of Rule 65 *ter*, the Trial Chamber, having heard the parties and in the interest of a fair and expeditious trial, may direct the Prosecutor to select the counts in the indictment on which to proceed. Any decision taken under this paragraph may be appealed as of right by a party. (Amended 30 May 2006)

(F) After commencement of the trial, the Prosecutor may file a motion to vary the decision as to the number of crime sites or incidents in respect of which evidence may be presented or the number of witnesses that are to be called or for additional time to present evidence and the Trial Chamber may grant the Prosecutor's request if satisfied that this is in the interests of justice. (Amended 17 Nov 1999, amended 12 Apr 2001, amended 17 July 2003)

Rule 73 *ter*
Pre-Defence Conference

(Adopted 10 July 1998, amended 17 Nov 1999)

(A) Prior to the commencement by the defence of its case the Trial Chamber may hold a Conference.

(B) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 *ter* (L)(ii), the Trial Chamber may call upon the defence to shorten the estimated length of the examination-in-chief for some witnesses. (Amended 17 Nov 1999, amended 12 Apr 2001)

(C) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 *ter* (L)(ii), the Trial Chamber, after having heard the defence, shall set the number of witnesses the defence may call. (Amended 17 Nov 1999, amended 12 Apr 2001)

(D) After commencement of the defence case, the defence may, if it considers it to be in the interests of justice, file a motion to reinstate the list of witnesses or to vary the decision as to which witnesses are to be called. (Amended 12 Apr 2001)

(E) After having heard the defence, the Trial Chamber shall determine the time available to the defence for presenting evidence. (Amended 12 Apr 2001)

(F) During a trial, the Trial Chamber may grant a defence request for additional time to present evidence if this is in the interests of justice. (Amended 12 Apr 2001)

PART SIX
PROCEEDINGS BEFORE TRIAL CHAMBERS

Section 1: General Provisions

Rule 74
Amicus Curiae
(Adopted 11 Feb 1994)

A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber.

Rule 74 *bis*
Medical Examination of the Accused
(Adopted 10 July 1998, amended 12 Apr 2001)

A Trial Chamber may, *proprio motu* or at the request of a party, order a medical, psychiatric or psychological examination of the accused. In such a case, unless the Trial Chamber otherwise orders, the Registrar shall entrust this task to one or several experts whose names appear on a list previously drawn up by the Registry and approved by the Bureau.

Rule 75
Measures for the Protection of Victims and Witnesses
(Adopted 11 Feb 1994, amended 12 July 2007, amended 28 Feb 2008)

(A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused. (Amended 15 June 1995, amended 2 July 1999)

(B) A Chamber may hold an in camera proceeding to determine whether to order:

(i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as: (Amended 12 Nov 1997)

(a) expunging names and identifying information from the Tribunal's public records; (Amended 1 Dec 2000, amended 13 Dec 2000)
(b) non-disclosure to the public of any records identifying the victim or witness; (Amended 28 Feb 2008)
(c) giving of testimony through image- or voice- altering devices or closed circuit television; and
(d) assignment of a pseudonym;

(ii) closed sessions, in accordance with Rule 79;

(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television. (Amended 30 Jan 1995)

(C) The Victims and Witnesses Section shall ensure that the witness has been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case, pursuant to Rule 75 (F). (Amended 12 Dec 2002)

(D) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.

(E) When making an order under paragraph (A) above, a Judge or Chamber shall wherever appropriate state in the order whether the transcript of those proceedings relating to the evidence of the witness to whom the measures relate shall be made available for use in other proceedings before the Tribunal or another jurisdiction. (Amended 12 July 2007)

(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:

(i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal ("second proceedings") or another jurisdiction

unless and until they are rescinded, varied, or augmented in accordance with the procedure set out in this Rule; but

(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings. (Amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Dec 2001, amended 12 July 2002, amended 12 July 2007)

(G) A party to the second proceedings seeking to rescind, vary, or augment protective measures ordered in the first proceedings must apply:

(i) to any Chamber, however constituted, remaining seised of the first proceedings; or

(ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings. (Amended 12 July 2002)

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(H) A Judge or Bench in another jurisdiction, parties in another jurisdiction authorised by an appropriate judicial authority, or a victim or witness for whom protective measures have been ordered by the Tribunal may seek to rescind, vary, or augment protective measures ordered in proceedings before the Tribunal by applying to the President of the Tribunal, who shall refer the application: (Amended 28 Feb 2008)

(i) to any Chamber, however constituted, remaining seised of the first proceedings;

(ii) if no Chamber remains seised of the first proceedings, to a Chamber seised of second proceedings; or,

(iii) if no Chamber remains seised, to a newly constituted Chamber. (Amended 12 July 2007)

(I) Before determining an application under paragraph (G)(ii), (H)(ii), or (H)(iii) above, the Chamber shall endeavour to obtain all relevant information from

the first proceedings, including from the parties to those proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal. (Amended 12 July 2002, amended 12 Dec 2002, amended 12 July 2007)

(J) The Chamber determining an application under paragraphs (G) and (H) above shall ensure through the Victims and Witnesses Section that the protected victim or witness has given consent to the rescission, variation, or augmentation of protective measures; however, on the basis of a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result, the Chamber may, in exceptional circumstances, order *proprio motu* the rescission, variation, or augmentation of protective measures in the absence of such consent. (Amended 12 July 2007, amended 28 Feb 2008)

(K) An application to a Chamber to rescind, vary, or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber, and any reference in this Rule to "a Chamber" shall include a reference to "a Judge of that Chamber". (Amended 12 July 2002)

Rule 75 *bis*
Requests for Assistance of the Tribunal in Obtaining Testimony

(Adopted 8 Dec 2010)

(A) A Judge or Bench in another jurisdiction or parties in another jurisdiction authorised by an appropriate judicial authority ("Requesting Authority") may request the assistance of the Tribunal in obtaining the testimony of a person under the authority of the Tribunal in ongoing proceedings in the jurisdiction of the Requesting Authority involving violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

(B) Requests pursuant to paragraph (A) shall be submitted to the President of the Tribunal, who shall refer the application to a specially appointed Chamber composed of three Judges of the Tribunal ("Specially Appointed Chamber").

(C) Requests under paragraph (A) shall not be granted if granting the request may prejudice ongoing investigations or proceedings before the Tribunal.

(D) The Specially Appointed Chamber, having heard the parties to the proceedings before the Tribunal, may grant a request pursuant to paragraph (A) after having verified that:

(i) granting the request will not prejudice the rights of the person under the authority of the Tribunal;

(ii) provisions and assurances are in place for observing any protective measures granted by the Tribunal to the person under its authority;

(iii) granting the request will not pose a danger or risk to any victim, witness, or other person; and

(iv) no overriding grounds oppose granting the request.

(E) The assistance will be rendered by way of video-conference link. If legal provisions in the jurisdiction of the Requesting Authority do not allow for the testimony to be received by way of video-conference link, the Specially Appointed Chamber may consider to render the assistance by way of granting the Requesting Authority access to the person to be heard on the premises of the Tribunal or the transfer of the person under Rule 75 *ter*.

(F) Upon order of the Specially Appointed Chamber, the Registrar shall co-ordinate the arrangements for the video-conference link and be present during the hearing.

(G) A Judge of the Specially Appointed Chamber shall be present during the hearing and shall ensure that Rule 75 *bis* (D)(i)–(iii) is respected.

(H) The questioning of the person to be heard shall be conducted directly by, or under the direction of, the Requesting Authority in accordance with its own laws.

(I) For purposes of this Rule, "person under the authority of the Tribunal" means an accused or convicted person detained on the premises of the detention unit of the Tribunal.

(J) No decision taken under this Rule or Rule 75 *ter* is subject to appeal.

(K) The President may in all cases request any document or additional information from the Requesting Authority.

Rule 75 *ter*
Transfer of Persons for the Purpose of Testimony in Proceedings Not Pending Before the Tribunal

(Adopted 8 Dec 2010)

(A) The Specially Appointed Chamber, considering the transfer of a person under Rule 75 *bis* (E), shall not grant such transfer unless:

(i) the person under the authority of the Tribunal has been duly summoned to testify;

(ii) the person under the authority of the Tribunal has provided his consent to the transfer;

(iii) the host country and the State to which the person under the authority of the Tribunal is to be transferred have been given the opportunity to be heard;

(iv) the State to where the person is to be transferred ("Requesting State") has provided written guarantees to the Tribunal as to the return of the transferred person within a stipulated period; the non-transfer of the person to a third State; the appropriate location of detention; and immunities from prosecution and service of process for acts, omissions, or convictions prior to the person's arrival in the territory of the Requesting State;

(v) the transfer of such person will not extend the period of the person's detention as foreseen by the Tribunal; and

(vi) there are no overriding grounds for not transferring the person to the territory of the Requesting State.

(B) The Specially Appointed Chamber may impose such conditions upon the transfer of the person under the authority of the Tribunal as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the person for trial thereafter and the protection of others.

(C) For purposes of this Rule, "person under the authority of the Tribunal" means an accused or convicted person detained on the premises of the detention unit of the Tribunal.

(D) If necessary, the Specially Appointed Chamber may issue a warrant of arrest to secure the presence of a person who has been transferred under this Rule. The provisions of Section 2 of Part Five shall apply mutatis mutandis.

(E) At any time after an order has been issued pursuant to this Rule, the Specially Appointed Chamber may revoke the order and make a formal request for the return of the transferred person.

Rule 76
Solemn Declaration by Interpreters and Translators
(Adopted 11 Feb 1994)

Before performing any duties, an interpreter or a translator shall solemnly declare to do so faithfully, independently, impartially and with full respect for the duty of confidentiality.

Rule 77
Contempt of the Tribunal
(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 25 July 1997, amended 12 Nov 1997, amended 13 Dec 2001)

(A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who

(i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;

(ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber; (Amended 4 Dec 1998)

(iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;

(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or
(Amended 4 Dec 1998, amended 13 Dec 2001)

(v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber.
(Amended 4 Dec 1998, amended 13 Dec 2001)

(Amended 10 July 1998, amended 12 Nov 1997, amended 13 Dec 2001)

(B) Any incitement or attempt to commit any of the acts punishable under paragraph (A) is punishable as contempt of the Tribunal with the same penalties. (Amended 4 Dec 1998, amended 13 Dec 2001)

(C) When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:

(i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt;

(ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or

(iii) initiate proceedings itself.

(Amended 12 Nov 1997, amended 10 July 1998, amended 4 Dec 1998, amended 13 Dec 2001)

(D) If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may:

(i) in circumstances described in paragraph (C)(i), direct the Prosecutor to prosecute the matter; or

(ii) in circumstances described in paragraph (C)(ii) or (iii), issue an order in lieu of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself.

(Amended 13 Dec 2001)

(E) The rules of procedure and evidence in Parts Four to Eight shall apply *mutatis mutandis* to proceedings under this Rule. The time limit for entering a plea

pursuant to Rule 62(A), disclosure pursuant to Rule 66(A)(i), or filing of preliminary motions pursuant to Rule 72(A) shall each not exceed ten days. (Amended 13 Dec 2001, amended 22 July 2009)

(F) Any person indicted for or charged with contempt shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45. (Amended 12 Nov 1997, amended 13 Dec 2001)

(G) The maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding seven years, or a fine not exceeding 100,000 Euros, or both. (Amended 4 Dec 1998, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Dec 2001)

(H) Payment of a fine shall be made to the Registrar to be held in a separate account.

(I) If a counsel is found guilty of contempt of the Tribunal pursuant to this Rule, the Chamber making such finding may also determine that counsel is no longer eligible to represent a suspect or accused before the Tribunal or that such conduct amounts to misconduct of counsel pursuant to Rule 46, or both. (Amended 13 Dec 2001)

(J) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

(Amended 12 Nov 1997, amended 10 July 1998, amended 4 Dec 1998, amended 1 Dec 2000, amended 13 Dec 2000)

(K) In the case of decisions under this Rule by the Appeals Chamber sitting as a Chamber of first instance, an appeal may be submitted in writing to the President within fifteen days of the filing of the impugned decision. Such appeal shall be decided by five different Judges as assigned by the President.

Where the impugned decision is rendered orally, the appeal shall be filed within fifteen days of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Appeals Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

(Amended 12 July 2002)

Rule 77 *bis*
Payment of Fines

(Adopted 2 July 1999)

(A) In imposing a fine under Rule 77 or Rule 91, a Chamber shall specify the time for its payment. (Amended 13 Dec 2001)

(B) Where a fine imposed under Rule 77 or Rule 91 is not paid within the time specified, the Chamber imposing the fine may issue an order requiring the person on whom the fine is imposed to appear before, or to respond in writing to, the Tribunal to explain why the fine has not been paid. (Amended 13 Dec 2001)

(C) After affording the person on whom the fine is imposed an opportunity to be heard, the Chamber may make a decision that appropriate measures be taken, including:

(i) extending the time for payment of the fine;

(ii) requiring the payment of the fine to be made in instalments;

(iii) in consultation with the Registrar, requiring that the moneys owed be deducted from any outstanding fees owing to the person by the Tribunal where the person is a counsel retained by the Tribunal pursuant to the Directive on the Assignment of Defence Counsel;
(Amended 17 Nov 1999)

(iv) converting the whole or part of the fine to a term of imprisonment not exceeding twelve months.

(Amended 17 Nov 1999, amended 13 Dec 2001)

(D) In addition to a decision under paragraph (C), the Chamber may find the person in contempt of the Tribunal and impose a new penalty applying Rule 77 (G), if that person was able to pay the fine within the specified time and has wilfully failed to do so. This penalty for contempt of the Tribunal shall be additional to the original fine imposed. (Amended 12 Apr 2001, amended 13 Dec 2001)

(E) The Chamber may, if necessary, issue an arrest warrant to secure the person's presence where he or she fails to appear before or respond in writing pursuant to an order under paragraph (B). A State or authority to whom such a warrant is addressed, in accordance with Article 29 of the Statute, shall act promptly and with all due diligence to ensure proper and effective execution thereof. Where an arrest warrant is issued under this Sub-rule, the provisions of Rules 45, 57, 58, 59, 59 *bis*, and 60 shall apply *mutatis mutandis*. Following the transfer of the person concerned to the Tribunal, the provisions of Rules 64, 65 and 99 shall apply *mutatis mutandis*. (Amended 12 Apr 2001, amended 13 Dec 2001)

(F) Where under this Rule a penalty of imprisonment is imposed, or a fine is converted to a term of imprisonment, the provisions of Rules 102, 103 and 104 and Part Nine shall apply *mutatis mutandis*.

(G) Any finding of contempt or penalty imposed under this Rule shall be subject to appeal as allowed for in Rule 77 (J).

Rule 78
Open Sessions
(Adopted 11 Feb 1994)

All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.

Rule 79
Closed Sessions
(Adopted 11 Feb 1994)

(A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:

(i) public order or morality;

(ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or

(iii) the protection of the interests of justice.

(B) The Trial Chamber shall make public the reasons for its order.

Rule 80
Control of Proceedings
(Adopted 11 Feb 1994)

(A) The Trial Chamber may exclude a person from the courtroom in order to protect the right of the accused to a fair and public trial, or to maintain the dignity and decorum of the proceedings.

(B) The Trial Chamber may order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct following a warning that such conduct may warrant the removal of the accused from the courtroom.

Rule 81
Records of Proceedings and Evidence
(Adopted 11 Feb 1994)

(A) The Registrar shall cause to be made and preserve a full and accurate record of all proceedings, including audio recordings, transcripts and, when deemed necessary by the Trial Chamber, video recordings.

(B) The Trial Chamber, after giving due consideration to any matters relating to witness protection, may order the disclosure of all or part of the record of

closed proceedings when the reasons for ordering its non-disclosure no longer exist. (Amended 1 Dec 2000, amended 13 Dec 2000)

(C) The Registrar shall retain and preserve all physical evidence offered during the proceedings subject to any Practice Direction or any order which a Chamber may at any time make with respect to the control or disposition of physical evidence offered during proceedings before that Chamber. (Amended 25 July 1997)

(D) Photography, video-recording or audio-recording of the trial, otherwise than by the Registrar, may be authorised at the discretion of the Trial Chamber.

Rule 81 *bis*
Proceedings by Video-Conference Link
(Adopted 12 July 2007)

At the request of a party or *proprio motu,* a Judge or a Chamber may order, if consistent with the interests of justice, that proceedings be conducted by way of video-conference link.

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Section 2: Case Presentation

Rule 82
Joint and Separate Trials
(Adopted 11 Feb 1994)

(A) In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately. (Amended 12 Nov 1997)

(B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

Rule 83
Instruments of Restraint
(Adopted 11 Feb 1994, amended 4 Dec 1998)

Instruments of restraint, such as handcuffs, shall be used only on the order of the Registrar as a precaution against escape during transfer or in order to prevent an accused from self-injury, injury to others or to prevent serious damage to property. Instruments of restraint shall be removed when the accused appears before a Chamber or a Judge.

Rule 84
Opening Statements
(Adopted 11 Feb 1994, amended 12 Nov 1997)

Before presentation of evidence by the Prosecutor, each party may make an opening statement. The defence may, however, elect to make its statement after the conclusion of the Prosecutor's presentation of evidence and before the presentation of evidence for the defence.

Rule 84 *bis*
Statement of the Accused
(Adopted 2 July 1999)

(A) After the opening statements of the parties or, if the defence elects to defer its opening statement pursuant to Rule 84, after the opening statement of the Prosecutor, if any, the accused may, if he or she so wishes, and the Trial Chamber so decides, make a statement under the control of the Trial Chamber. The accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement.

(B) The Trial Chamber shall decide on the probative value, if any, of the statement.

Rule 85
Presentation of Evidence
(Adopted 11 Feb 1994)

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

(i) evidence for the prosecution;

(ii) evidence for the defence;

(iii) prosecution evidence in rebuttal;

(iv) defence evidence in rejoinder;

(v) evidence ordered by the Trial Chamber pursuant to Rule 98; and
(Amended 10 July 1998)

(vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.
(Amended 10 July 1998)

(B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness.

(C) If the accused so desires, the accused may appear as a witness in his or her own defence.

Rule 86
Closing Arguments
(Adopted 11 Feb 1994, amended 12 Nov 1997)

(A) After the presentation of all the evidence, the Prosecutor may present a closing argument; whether or not the Prosecutor does so, the defence may make a closing argument. The Prosecutor may present a rebuttal argument to which the defence may present a rejoinder. (Amended 10 July 1998)

(B) Not later than five days prior to presenting a closing argument, a party shall file a final trial brief. (Amended 10 July 1998, amended 1 Dec 2000, amended 13 Dec 2000)

(C) The parties shall also address matters of sentencing in closing arguments. (Amended 10 July 1998)

Rule 87
Deliberations
(Adopted 11 Feb 1994)

(A) When both parties have completed their presentation of the case, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.

(B) The Trial Chamber shall vote separately on each charge contained in the indictment. If two or more accused are tried together under Rule 48, separate findings shall be made as to each accused.

(C) If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused. (Amended 10 July 1998, amended 1 Dec 2000, amended 13 Dec 2000)

Rule 88

[Deleted]

(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 12 Nov 1997, deleted 10 July 1998)

Rule 88 *bis*

[Deleted]

(Adopted 12 Nov 1997, deleted 10 July 1998)

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Section 3: Rules of Evidence

Rule 89

General Provisions

(Adopted 11 Feb 1994)

(A) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence. (Amended 1 Dec 2000, amended 13 Dec 2000)

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

(E) A Chamber may request verification of the authenticity of evidence obtained out of court.

(F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form. (Amended 1 Dec 2000, amended 13 Dec 2000)

Rule 90

Testimony of Witnesses

(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 25 July 1997, amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000)

(A) Every witness shall, before giving evidence, make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth".

(B) A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration, may be permitted to testify without that formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which the child had knowledge and understands the duty

to tell the truth. A judgement, however, cannot be based on such testimony alone. (Amended 30 Jan 1995)

(C) A witness, other than an expert, who has not yet testified shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.

(D) Notwithstanding paragraph (C), upon order of the Chamber, an investigator in charge of a party's investigation shall not be precluded from being called as a witness on the ground that he or she has been present in the courtroom during the proceedings. (Amended 25 July 1997, amended 1 Dec 2000, amended 13 Dec 2000)

(E) A witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony. (Amended 30 Jan 1995, amended 1 Dec 2000, amended 13 Dec 2000)

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(F) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to

(i) make the interrogation and presentation effective for the ascertainment of the truth; and

(ii) avoid needless consumption of time.

(Amended 10 July 1998)

(G) The Trial Chamber may refuse to hear a witness whose name does not appear on the list of witnesses compiled pursuant to Rules 73 *bis* (C) and 73 *ter* (C). (Amended 12 Apr 2001)

(H) (i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel

appears which is in contradiction of the evidence given by the witness.

(iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

(Amended 10 July 1998, amended 17 Nov 1999)

Rule 90 *bis*
Transfer of a Detained Witness

(Adopted 6 Oct 1995)

(A) Any detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the detention unit of the Tribunal, conditional on the person's return within the period decided by the Tribunal.

(B) The transfer order shall be issued by a permanent Judge or Trial Chamber only after prior verification that the following conditions have been met:

(i) the presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;

(ii) transfer of the witness does not extend the period of detention as foreseen by the requested State.

(Amended 12 Apr 2001)

(C) The Registrar shall transmit the order of transfer to the national authorities of the State on whose territory, or under whose jurisdiction or control, the witness is detained. Transfer shall be arranged by the national authorities concerned in liaison with the host country and the Registrar. (Amended 12 Nov 1997)

(D) The Registrar shall ensure the proper conduct of the transfer, including the supervision of the witness in the detention unit of the Tribunal; the Registrar shall remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the detention of the witness in the detention unit and, as promptly as possible, shall inform the relevant Judge or Chamber. (Amended 12 Nov 1997)

(E) On expiration of the period decided by the Tribunal for the temporary transfer, the detained witness shall be remanded to the authorities of the requested State, unless the State, within that period, has transmitted an order of release of the witness, which shall take effect immediately.

(F) If, by the end of the period decided by the Tribunal, the presence of the detained witness continues to be necessary, a permanent Judge or Chamber may extend the period on the same conditions as stated in paragraph (B). (Amended 12 Apr 2001)

Rule 91
False Testimony under Solemn Declaration
(Adopted 11 Feb 1994)

(A) A Chamber, *proprio motu* or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so. (Amended 25 July 1997)

(B) If a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may:

(i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony; or (Amended 13 Dec 2001)

(ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating proceedings for false testimony. (Amended 13 Dec 2001)

(C) If the Chamber considers that there are sufficient grounds to proceed against a person for giving false testimony, the Chamber may:

(i) in circumstances described in paragraph (B)(i), direct the Prosecutor to prosecute the matter; or

(ii) in circumstances described in paragraph (B)(ii), issue an order in lieu of an indictment and direct *amicus curiae* to prosecute the matter.

(Amended 13 Dec 2001)

(D) The rules of procedure and evidence in Parts Four to Eight shall apply *mutatis mutandis* to proceedings under this Rule.

(E) Any person indicted for or charged with false testimony shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45. (Amended 13 Dec 2001)

(F) No Judge who sat as a member of the Trial Chamber before which the witness appeared shall sit for the trial of the witness for false testimony.

(G) The maximum penalty for false testimony under solemn declaration shall be a fine of 100,000 Euros or a term of imprisonment of seven years, or both. The payment of any fine imposed shall be paid to the Registrar to be held in the account referred to in Rule 77 (H). (Amended 18 Jan 1996, amended 25 July 1997, amended 12 Nov 1997, amended 4 Dec 1998, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Dec 2001)

(H) Paragraphs (B) to (G) apply *mutatis mutandis* to a person who knowingly and willingly makes a false statement in a written statement taken in accordance with Rule 92 *bis* or Rule 92 *quater* which the person knows or has reason to know may be used as evidence in proceedings before the Tribunal. (Amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Dec 2001, amended 13 Sept 2006)

(I) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

(Amended 1 Dec 2000, amended 13 Dec 2000)

Rule 92
Confessions
(Adopted 11 Feb 1994)

A confession by the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 63 were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.

Rule 92 *bis*
Admission of Written Statements and Transcripts in Lieu of Oral Testimony
(Adopted 1 Dec 2000, amended 13 Dec 2000, amended 13 Sept 2006)

(A) A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

(i) Factors in favour of admitting evidence in the form of a written statement or transcript include but are not limited to circumstances in which the evidence in question:

(a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
(b) relates to relevant historical, political or military background;
(c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
(d) concerns the impact of crimes upon victims;
(e) relates to issues of the character of the accused; or
(f) relates to factors to be taken into account in determining sentence.

(ii) Factors against admitting evidence in the form of a written statement or transcript include but are not limited to whether:

(a) there is an overriding public interest in the evidence in question being presented orally;

(b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or
(c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

(B) If the Trial Chamber decides to dispense with the attendance of a witness, a written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and

(i) the declaration is witnessed by:

(a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or
(b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and

(ii) the person witnessing the declaration verifies in writing:

(a) that the person making the statement is the person identified in the said statement;
(b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;
(c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and
(d) the date and place of the declaration.

The declaration shall be attached to the written statement presented to the Trial Chamber.

(C) The Trial Chamber shall decide, after hearing the parties, whether to require the witness to appear for cross-examination; if it does so decide, the provisions of Rule 92 *ter* shall apply.

Rule 92 *ter*
Other Admission of Written Statements and Transcripts
(Adopted 13 Sept 2006)

(A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions:

(i) the witness is present in court;

(ii) the witness is available for cross-examination and any questioning by the Judges; and

(iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined.

(B) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

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Rule 92 *quater*
Unavailable Persons
(Adopted 13 Sept 2006)

(A) The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the Trial Chamber:

(i) is satisfied of the person's unavailability as set out above; and

(ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

(B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

Rule 92 *quinquies*
Admission of Statements and Transcripts of Persons Subjected to Interference
(Adopted 10 Dec 2009)

(A) A Trial Chamber may admit the evidence of a person in the form of a written statement or a transcript of evidence given by the person in proceedings before the Tribunal, where the Trial Chamber is satisfied that:

(i) the person has failed to attend as a witness or, having attended, has not given evidence at all or in a material respect;

(ii) the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, injury, bribery, or coercion;

(iii) where appropriate, reasonable efforts have been made pursuant to Rules 54 and 75 to secure the attendance of the person as a witness or, if in attendance, to secure from the witness all material facts known to the witness; and

(iv) the interests of justice are best served by doing so.

(B) For the purposes of paragraph (A):

(i) An improper interference may relate *inter alia* to the physical, economic, property, or other interests of the person or of another person;

(ii) the interests of justice include:

(a) the reliability of the statement or transcript, having regard to the circumstances in which it was made and recorded;

(b) the apparent role of a party or someone acting on behalf of a party to the proceedings in the improper interference; and

(c) whether the statement or transcript goes to proof of the acts and conduct of the accused as charged in the indictment.

(iii) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

(C) The Trial Chamber may have regard to any relevant evidence, including written evidence, for the purpose of applying this Rule.

Rule 93
Evidence of Consistent Pattern of Conduct
(Adopted 11 Feb 1994)

(A) Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice. (Amended 18 Jan 1996)

(B) Acts tending to show such a pattern of conduct shall be disclosed by the Prosecutor to the defence pursuant to Rule 66. (Amended 30 Jan 1995)

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Rule 94
Judicial Notice
(Adopted 11 Feb 1994)

(A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or of the authenticity of documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings. (Amended 10 July 1998, amended 8 Dec 2010)

Rule 94 *bis*
Testimony of Expert Witnesses
(Adopted 10 July 1998)

(A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge. (Amended 14 July 2000, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Dec 2001, amended 13 Sept 2006)

(B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:

(i) it accepts the expert witness statement and/or report; or
(Amended 13 Sept 2006)
(ii) it wishes to cross-examine the expert witness; and
(iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.
(Amended 12 Dec 2002, amended 13 Sept 2006)

(Amended 13 Dec 2001, amended 13 Sept 2006)

(C) If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.
(Amended 13 Sept 2006)

Rule 94 *ter*
[Deleted]
(Adopted 4 Dec 1998, amended 17 Nov 1999, deleted 1 Dec 2000, deleted 13 Dec 2000)

Rule 95
Exclusion of Certain Evidence
(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 12 Nov 1997)

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

Rule 96
Evidence in Cases of Sexual Assault
(Adopted 11 Feb 1994)

In cases of sexual assault:

(i) no corroboration of the victim's testimony shall be required;

(ii) consent shall not be allowed as a defence if the victim

(a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or

(b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;

(Amended 3 May 1995)

(iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;

(Amended 30 Jan 1995)

(iv) prior sexual conduct of the victim shall not be admitted in evidence.

Rule 97
Lawyer-Client Privilege
(Adopted 11 Feb 1994)

All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless:

(i) the client consents to such disclosure; or

(ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

Rule 98
Power of Chambers to Order Production of Additional Evidence
(Adopted 11 Feb 1994, amended 25 July 1997)

A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance.

Section 4: Judgement

Rule 98 *bis*
Judgement of Acquittal
(Adopted 10 July 1998, amended 17 Nov 1999, amended 8 Dec 2004)

At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.

Rule 98 *ter*
Judgement
(Adopted 10 July 1998)

(A) The judgement shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present, subject to the provisions of Rule 102 (B). (Amended 10 July 1998, amended 12 Apr 2001)

(B) If the Trial Chamber finds the accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it, it shall make a specific finding to that effect in its judgement. The Trial Chamber may order restitution as provided in Rule 105.

(C) The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

(D) A copy of the judgement and of the Judges' opinions in a language which the accused understands shall as soon as possible be served on the accused if in custody. Copies thereof in that language and in the language in which they were delivered shall also as soon as possible be provided to counsel for the accused.

Rule 99
Status of the Acquitted Person

(Adopted 11 Feb 1994, amended 12 Nov 1997)

(A) Subject to paragraph (B), in the case of an acquittal or the upholding of a challenge to jurisdiction, the accused shall be released immediately. (Amended 12 Apr 2001)

(B) If, at the time the judgement is pronounced, the Prosecutor advises the Trial Chamber in open court of the Prosecutor's intention to file notice of appeal pursuant to Rule 108, the Trial Chamber may, on application in that behalf by the Prosecutor and upon hearing the parties, in its discretion, issue an order for the continued detention of the accused, pending the determination of the appeal. (Amended 10 July 1998)

Section 5: Sentencing and Penalties

Rule 100
Sentencing Procedure on a Guilty Plea

(Adopted 11 Feb 1994, amended 10 July 1998)

(A) If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence. (Amended 25 June 1996, amended 5 July 1996)

(B) The sentence shall be pronounced in a judgement in public and in the presence of the convicted person, subject to Rule 102 (B).

Rule 101
Penalties

(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 10 July 1998, amended 1 Dec 2000, amended 13 Dec 2000)

(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life. (Amended 12 Nov 1997)

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:

(i) any aggravating circumstances;

(ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;

(iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;

(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.
(Amended 30 Jan 1995, amended 10 July 1998)

(Amended 10 July 1998)

(C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal. (Amended 30 Jan 1995)

Rule 102
Status of the Convicted Person
(Adopted 11 Feb 1994)

(A) The sentence shall begin to run from the day it is pronounced. However, as soon as notice of appeal is given, the enforcement of the judgement shall thereupon be stayed until the decision on the appeal has been delivered, the convicted person meanwhile remaining in detention, as provided in Rule 64. (Amended 10 July 1998)

(B) If, by a previous decision of the Trial Chamber, the convicted person has been released, or is for any other reason at liberty, and is not present when the judgement is pronounced, the Trial Chamber shall issue a warrant for the convicted person's arrest. On arrest, the convicted person shall be notified of the conviction and sentence, and the procedure provided in Rule 103 shall be followed. (Amended 12 Nov 1997)

Rule 103
Place of Imprisonment
(Adopted 11 Feb 1994)

(A) Imprisonment shall be served in a State designated by the President of the Tribunal from a list of States which have indicated their willingness to accept convicted persons. (Amended 10 July 1998)

(B) Transfer of the convicted person to that State shall be effected as soon as possible after the time-limit for appeal has elapsed.

(C) Pending the finalisation of arrangements for his or her transfer to the State where his or her sentence will be served, the convicted person shall remain in the custody of the Tribunal. (Amended 4 Dec 1998)

Rule 104
Supervision of Imprisonment
(Adopted 11 Feb 1994)

All sentences of imprisonment shall be supervised by the Tribunal or a body designated by it.

Rule 105
Restitution of Property
(Adopted 11 Feb 1994)

(A) After a judgement of conviction containing a specific finding as provided in Rule 98 *ter* (B), the Trial Chamber shall, at the request of the Prosecutor, or may, *proprio motu*, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate. (Amended 25 July 1997, amended 10 July 1998, amended 12 Apr 2001)

(B) The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty.

(C) Such third parties shall be summoned before the Trial Chamber and be given an opportunity to justify their claim to the property or its proceeds.

(D) Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate. (Amended 30 Jan 1995)

(E) Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine.

(F) Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate. (Amended 30 Jan 1995)

(G) The Registrar shall transmit to the competent national authorities any summonses, orders and requests issued by a Trial Chamber pursuant to paragraphs (C), (D), (E) and (F). (Amended 30 Jan 1995, amended 12 Apr 2001)

Rule 106
Compensation to Victims
(Adopted 11 Feb 1994)

(A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.

(B) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation. (Amended 12 Nov 1997)

(C) For the purposes of a claim made under paragraph (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury. (Amended 12 Apr 2001)

PART SEVEN
APPELLATE PROCEEDINGS

Rule 107
General Provision
(Adopted 11 Feb 1994)

The rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber.

Rule 108
Notice of Appeal
(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 25 July 1997, amended 12 Nov 1997, amended 10 July 1998, amended 2 July 1999, amended 17 Nov 1999, amended 13 Dec 2001)

A party seeking to appeal a judgement shall, not more than thirty days from the date on which the judgement was pronounced, file a notice of appeal, setting forth the grounds. The Appellant should also identify the order, decision or ruling challenged with specific reference to the date of its filing, and/or the transcript page, and indicate the substance of the alleged errors and the relief sought. The Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal.

Rule 108 *bis*
State Request for Review
(Adopted 25 July 1997)

(A) A State directly affected by an interlocutory decision of a Trial Chamber may, within fifteen days from the date of the decision, file a request for review of the decision by the Appeals Chamber if that decision concerns issues of general importance relating to the powers of the Tribunal. (Amended 2 July 1999)

(B) The party upon whose motion the Trial Chamber issued the impugned decision shall be heard by the Appeals Chamber. The other party may be heard if the Appeals Chamber considers that the interests of justice so require. (Amended 17 Nov 1999)

(C) The Appeals Chamber may at any stage suspend the execution of the impugned decision. (Amended 17 Nov 1999)

(D) Rule 116 *bis* shall apply *mutatis mutandis*.

Rule 109
Record on Appeal
(Adopted 11 Feb 1994, amended 12 Nov 1997, amended 1 Dec 2000, amended 13 Dec 2000)

The record on appeal shall consist of the trial record, as certified by the Registrar.

Rule 110
Copies of Record
(Adopted 11 Feb 1994)

The Registrar shall make a sufficient number of copies of the record on appeal for the use of the Judges of the Appeals Chamber and of the parties.

Rule 111
Appellant's Brief
(Adopted 11 Feb 1994, amended 12 Nov 1997, amended 10 July 1998, amended 17 Nov 1999, amended 13 Dec 2001, amended 21 July 2005)

(A) An Appellant's brief setting out all the arguments and authorities shall be filed within seventy-five days of filing of the notice of appeal pursuant to Rule 108. Where limited to sentencing, an Appellant's brief shall be filed within thirty days of filing of the notice of appeal pursuant to Rule 108.

(B) Where the Prosecutor is the Appellant, the Prosecutor shall make a declaration in the Appellant's brief that disclosure has been completed with respect to the material available to the Prosecutor at the time of filing the brief.

Rule 112
Respondent's Brief
(Adopted 11 Feb 1994, amended 17 Nov 1999, amended 13 Dec 2001, 21 July 2005)

(A) A Respondent's brief of argument and authorities shall be field within forty days of filing of the Appellant's brief. Where limited to sentencing, a Respondent's brief shall be filed within thirty days of filing of the Appellant's brief.

(B) Where the Prosecutor is the Respondent, the Prosecutor shall make a declaration in the Respondent's brief that disclosure had been completed with respect to the material available to the Prosecutor at the time of filing the brief.

Rule 113
Brief in Reply
(Adopted 11 Feb 1994, amended 21 July 2005)

An Appellant may file a brief in reply within fifteen days of filing of the Respondent's brief. Where limited to sentencing, a brief in reply shall be filed within ten days of filing of the Respondent's brief.

Rule 114
Date of Hearing
(Adopted 11 Feb 1994)

After the expiry of the time-limits for filing the briefs provided for in Rules 111, 112 and 113, the Appeals Chamber shall set the date for the hearing and the Registrar shall notify the parties.

Rule 115
Additional Evidence
(Adopted 11 Feb 1994, amended 12 July 2002)

(A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons are shown for a delay. Rebuttal material may be presented by any party affected by the motion. Parties are permitted to file supplemental briefs on the impact of the additional evidence within fifteen days of the expiry of the time limit set for the filing of rebuttal material, if no such material is filed, or if rebuttal material is filed, within fifteen days of the decision on the admissibility of that material.
(Amended 30 Sept 2002, amended 21 July 2005)

(B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 117.

(C) The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing.

(D) If several defendants are parties to the appeal, the additional evidence admitted on behalf of any one of them will be considered with respect to all of them, where relevant.

Rule 116
[Deleted]
(Adopted 11 Feb 1994, deleted 12 Nov 1997)

Rule 116 *bis*
Expedited Appeals Procedure
(Adopted 30 Jan 1995, amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000)

(A) An appeal under Rule 72 or Rule 73 or appeal from a decision rendered under Rule 11 *bis,* Rule 54 *bis*, Rule 65, Rule 73 *bis* (E), Rule 77 or Rule 91 shall be heard expeditiously on the basis of the original record of the Trial Chamber. Appeals may be determined entirely on the basis of written briefs. (Amended 12 Nov 1997, amended 17 Nov 1999, amended 14 July 2000, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Dec 2001, amended 21 July 2005, amended 30 May 2006)

(B) Rules 109 to 114 shall not apply to such appeals.

(C) The Presiding Judge, after consulting the members of the Appeals Chamber, may decide not to apply Rule 117 (D). (Amended 25 July 1997, amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000)

Rule 117
Judgement on Appeal
(Adopted 11 Feb 1994)

(A) The Appeals Chamber shall pronounce judgement on the basis of the record on appeal together with such additional evidence as has been presented to it.

(B) The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended. (Amended 30 Jan 1995)

(C) In appropriate circumstances the Appeals Chamber may order that the accused be retried according to law. (Amended 30 Jan 1995)

(D) The judgement shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present. (Amended 30 Jan 1995)

Rule 118
Status of the Accused following Appeal
(Adopted 11 Feb 1994)

(A) A sentence pronounced by the Appeals Chamber shall be enforced immediately.

(B) Where the accused is not present when the judgement is due to be delivered, either as having been acquitted on all charges or as a result of an order issued pursuant to Rule 65, or for any other reason, the Appeals Chamber may deliver its judgement in the absence of the accused and shall, unless it pronounces an acquittal, order the arrest or surrender of the accused to the Tribunal. (Amended 12 Nov 1997)

PART EIGHT
REVIEW PROCEEDINGS

Rule 119
Request for Review
(Adopted 11 Feb 1994)

(A) Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement. If, at the time of the request for review, any of the Judges who constituted the original Chamber are no longer Judges of the Tribunal, the President shall appoint a Judge or Judges in their place. (Amended 12 July 2001)

(B) Any brief in response to a request for review shall be filed within forty days of the filing of the request. (Amended 12 July 2002)

(C) Any brief in reply shall be filed within fifteen days after the filing of the response. (Amended 12 July 2002)

Rule 120
Preliminary Examination
(Adopted 11 Feb 1994, amended 12 July 2001)

If a majority of Judges of the Chamber constituted pursuant to Rule 119 agree that the new fact, if proved, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

Rule 121
Appeals
(Adopted 11 Feb 1994)

The judgement of a Trial Chamber on review may be appealed in accordance with the provisions of Part Seven.

Rule 122
Return of Case to Trial Chamber
(Adopted 11 Feb 1994)

If the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion.

PART NINE
PARDON AND COMMUTATION OF SENTENCE

Rule 123
Notification by States
(Adopted 11 Feb 1994, amended 5 May 1994, amended 12 Nov 1997)

If, according to the law of the State of imprisonment, a convicted person is eligible for pardon or commutation of sentence, the State shall, in accordance with Article 28 of the Statute, notify the Tribunal of such eligibility.

Rule 124
Determination by the President
(Adopted 11 Feb 1994, amended 12 Apr 2001, amended 11 Feb 2005)

The President shall, upon such notice, determine, in consultation with the members of the Bureau and any permanent Judges of the sentencing Chamber who remain Judges of the Tribunal, whether pardon or commutation is appropriate.

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Rule 125
General Standards for Granting Pardon or Commutation
(Adopted 11 Feb 1994)

In determining whether pardon or commutation is appropriate, the President shall take into account, inter alia, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.

PART TEN
TIME

Rule 126
General Provisions
(Adopted 12 Nov 1997, amended 13 Dec 2001)

(A) Where the time prescribed by or under these Rules for the doing of any act is to run as from the occurrence of an event, that time shall begin to run as from the date of the event.

(B) Should the last day of a time prescribed by a Rule or directed by a Chamber fall upon a day when the Registry of the Tribunal does not accept documents for filing it shall be considered as falling on the first day thereafter when the Registry does accept documents for filing. (Amended 12 July 2002)

Rule 126 *bis*
Time for Filing Responses to Motions
(Adopted 13 Dec 2001)

Unless otherwise ordered by a Chamber either generally or in the particular case, a response, if any, to a motion filed by a party shall be filed within fourteen days of the filing of the motion. A reply to the response, if any, shall be filed within seven days of the filing of the response, with the leave of the relevant Chamber.

Rule 127
Variation of Time-limits
(Adopted 12 Nov 1997)

(A) Save as provided by paragraph (C), a Trial Chamber or Pre-Trial Judge may, on good cause being shown by motion,

(i) enlarge or reduce any time prescribed by or under these Rules;

(ii) recognize as validly done any act done after the expiration of a time so prescribed on such terms, if any, as is thought just and whether or not that time has already expired.

(Amended 1 Dec 2000, amended 13 Dec 2000, amended 21 July 2005)

(B) In relation to any step falling to be taken in connection with an appeal, the Appeals Chamber or Pre-Appeal Judge may exercise the like power as is conferred by paragraph (A) and in like manner and subject to the same conditions as are therein set out. (Amended 1 Dec 2000, amended 13 Dec 2000, amended 21 July 2005)

(C) This Rule shall not apply to the times prescribed in Rules 40 *bis* and 90 *bis*.

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United Nations Security Council resolution 955 (1994) of 8 November 1994

UNITED
NATIONS

S

Security Council

Distr.
GENERAL

S/RES/955 (1994)*
8 November 1994

RESOLUTION 955 (1994)

Adopted by the Security Council at its 3453rd meeting,
on 8 November 1994

The Security Council,

Reaffirming all its previous resolutions on the situation in Rwanda,

Having considered the reports of the Secretary-General pursuant to paragraph 3 of resolution 935 (1994) of 1 July 1994 (S/1994/879 and S/1994/906), and having taken note of the reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (S/1994/1157, annex I and annex II),

Expressing appreciation for the work of the Commission of Experts established pursuant to resolution 935 (1994), in particular its preliminary report on violations of international humanitarian law in Rwanda transmitted by the Secretary-General's letter of 1 October 1994 (S/1994/1125),

Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

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* Reissued for technical reasons.

Believing that the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

Stressing also the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects,

Considering that the Commission of Experts established pursuant to resolution 935 (1994) should continue on an urgent basis the collection of information relating to evidence of grave violations of international humanitarian law committed in the territory of Rwanda and should submit its final report to the Secretary-General by 30 November 1994,

Acting under Chapter VII of the Charter of the United Nations,

1. Decides hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto;

2. Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute, and requests States to keep the Secretary-General informed of such measures;

3. Considers that the Government of Rwanda should be notified prior to the taking of decisions under articles 26 and 27 of the Statute;

4. Urges States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;

5. Requests the Secretary-General to implement this resolution urgently and in particular to make practical arrangements for the effective functioning of the International Tribunal, including recommendations to the Council as to possible locations for the seat of the International Tribunal at the earliest time and to report periodically to the Council;

6. Decides that the seat of the International Tribunal shall be determined by the Council having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy, and subject to the conclusion of appropriate arrangements between

the United Nations and the State of the seat, acceptable to the Council, having regard to the fact that the International Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions; and

decides that an office will be established and proceedings will be conducted in Rwanda, where feasible and appropriate, subject to the conclusion of similar appropriate arrangements;

7. Decides to consider increasing the number of judges and Trial Chambers of the International Tribunal if it becomes necessary;

8. Decides to remain actively seized of the matter.

Annex

Statute of the International Tribunal for Rwanda

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "the International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

Article 1

Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 2

Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

Article 3

Crimes against humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape;

(h) Persecutions on political, racial and religious grounds;

(i) Other inhumane acts.

Article 4

Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 5

Personal jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6

Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Article 7

Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

Article 8

Concurrent jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 9

Non bis in idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10

Organization of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following organs:

(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;

(b) The Prosecutor; and

(c) A Registry.

Article 11

Composition of the Chambers

The Chambers shall be composed of eleven independent judges, no two of whom may be nationals of the same State, who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers;

(b) Five judges shall serve in the Appeals Chamber.

Article 12

Qualification and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2. The members of the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal for the Former Yugoslavia") shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.

3. The judges of the Trial Chambers of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges of the Trial Chambers from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within thirty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge on the Appeals Chamber;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twelve and not more than eighteen candidates, taking due account of adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the six judges of the Trial Chambers. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-Member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

4. In the event of a vacancy in the Trial Chambers, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

5. The judges of the Trial Chambers shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election.

Article 13

Officers and members of the Chambers

1. The judges of the International Tribunal for Rwanda shall elect a President.

2. After consultation with the judges of the International Tribunal for Rwanda, the President shall assign the judges to the Trial Chambers. A judge shall serve only in the Chamber to which he or she was assigned.

3. The judges of each Trial Chamber shall elect a Presiding Judge, who shall conduct all of the proceedings of that Trial Chamber as a whole.

Article 14

Rules of procedure and evidence

The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary.

Article 15

The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Prosecutor of the International Tribunal for the Former Yugoslavia shall also serve as the Prosecutor of the International Tribunal for Rwanda. He or she shall have additional staff, including an additional Deputy Prosecutor, to assist with prosecutions before the International Tribunal for Rwanda. Such

staff shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 16

The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 17

Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as to necessary translation into and from a language he or she speaks and understands.

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 18

Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 19

Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 20

Rights of the accused

1. All persons shall be equal before the International Tribunal for Rwanda.

2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to article 21 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 21

Protection of victims and witnesses

The International Tribunal for Rwanda shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 22

Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 23

Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 24

Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) An error on a question of law invalidating the decision; or

(b) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 25

Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

Article 26

Enforcement of sentences

Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such

imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

Article 27

Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 28

Cooperation and judicial assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) The identification and location of persons;

(b) The taking of testimony and the production of evidence;

(c) The service of documents;

(d) The arrest or detention of persons;

(e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

Article 29

The status, privileges and immunities of the International Tribunal for Rwanda

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.

Article 30

Expenses of the International Tribunal for Rwanda

The expenses of the International Tribunal for Rwanda shall be expenses of the Organization in accordance with Article 17 of the Charter of the United Nations.

Article 31

Working languages

The working languages of the International Tribunal shall be English and French.

Article 32

Annual report

The President of the International Tribunal for Rwanda shall submit an annual report of the International Tribunal for Rwanda to the Security Council and to the General Assembly.

United Nations Security Council resolution 1966 (2010) of 22 December 2010

United Nations S/RES/1966 (2010)

Security Council

Distr.: General
22 December 2010

364

Resolution 1966 (2010)

Adopted by the Security Council at its 6463rd meeting, on 22 December 2010

The Security Council,

Recalling Security Council resolution 827 (1993) of 25 May 1993, which established the International Tribunal for the former Yugoslavia ("ICTY"), and resolution 955 (1994) of 8 November 1994, which established the International Criminal Tribunal for Rwanda ("ICTR"), and all subsequent relevant resolutions,

Recalling in particular Security Council resolutions 1503 (2003) of 28 August 2003 and 1534 (2004) of 26 March 2004, which called on the Tribunals to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 ("completion strategy"), and *noting* that those envisaged dates have not been met,

Acknowledging the considerable contribution the Tribunals have made to international criminal justice and accountability for serious international crimes, and the re-establishment of the rule of law in the countries of the former Yugoslavia and in Rwanda,

Recalling that the Tribunals were established in the particular circumstances of the former Yugoslavia and Rwanda as *ad hoc* measures contributing to the restoration and maintenance of peace,

Reaffirming its determination to combat impunity for those responsible for serious violations of international humanitarian law and the necessity that all persons indicted by the ICTY and ICTR are brought to justice,

Recalling the statement of the President of the Security Council of 19 December 2008 (S/PRST/2008/47), and *reaffirming* the need to establish an *ad hoc* mechanism to carry out a number of essential functions of the Tribunals, including the trial of fugitives who are among the most senior leaders suspected of being most responsible for crimes, after the closure of the Tribunals,

Emphasizing that, in view of the substantially reduced nature of the residual functions, the international residual mechanism should be a small, temporary and efficient structure, whose functions and size will diminish over time, with a small number of staff commensurate with its reduced functions,

Welcoming the Report of the Secretary-General (S/2009/258) on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* to establish the International Residual Mechanism for Criminal Tribunals ("the Mechanism") with two branches, which shall commence functioning on 1 July 2012 (branch for the ICTR) and 1 July 2013 (branch for the ICTY), respectively ("commencement dates"), and to this end *decides* to adopt the Statute of the Mechanism in Annex 1 to this resolution;

2. *Decides* that the provisions of this resolution and the Statutes of the Mechanism and of the ICTY and ICTR shall be subject to the transitional arrangements set out in Annex 2 to this resolution;

3. *Requests* the ICTY and the ICTR to take all possible measures to expeditiously complete all their remaining work as provided by this resolution no later than 31 December 2014, to prepare their closure and to ensure a smooth transition to the Mechanism, including through advance teams in each of the Tribunals;

4. *Decides* that, as of the commencement date of each branch referred to in paragraph 1, the Mechanism shall continue the jurisdiction, rights and obligations and essential functions of the ICTY and the ICTR, respectively, subject to the provisions of this resolution and the Statute of the Mechanism, and all contracts and international agreements concluded by the United Nations in relation to the ICTY and the ICTR, and still in force as of the relevant commencement date, shall continue in force *mutatis mutandis* in relation to the Mechanism;

5. *Requests* the Secretary-General to submit at the earliest possible date, but no later than 30 June 2011, draft Rules of Procedure and Evidence of the Mechanism, which shall be based on the Tribunals' Rules of Procedure and Evidence subject to the provisions of this resolution and the Statute of the Mechanism, for consideration and adoption by the judges of the Mechanism;

6. *Decides* that the Rules of Procedure and Evidence of the Mechanism and any amendments thereto shall take effect upon adoption by the judges of the Mechanism unless the Security Council decides otherwise;

7. *Decides* that the determination of the seats of the branches of the Mechanism is subject to the conclusion of appropriate arrangements between the United Nations and the host countries of the branches of the Mechanism acceptable to the Security Council;

8. *Recalls* the obligation of States to cooperate with the Tribunals, and in particular to comply without undue delay with requests for assistance in the location, arrest, detention, surrender and transfer of accused persons;

9. *Decides* that all States shall cooperate fully with the Mechanism in accordance with the present resolution and the Statute of the Mechanism and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute of the

Mechanism, including the obligation of States to comply with requests for assistance or orders issued by the Mechanism pursuant to its Statute;

10. *Urges* all States, especially States where fugitives are suspected to be at large, to further intensify cooperation with and render all necessary assistance to the Tribunals and the Mechanism, as appropriate, in particular to achieve the arrest and surrender of all remaining fugitives as soon as possible;

11. *Urges* the Tribunals and the Mechanism to actively undertake every effort to refer those cases which do not involve the most senior leaders suspected of being most responsible for crimes to competent national jurisdictions in accordance with their respective Statutes and Rules of Procedure and Evidence;

12. *Calls upon* all States to cooperate to the maximum extent possible in order to receive referred cases from the Tribunals and the Mechanism;

13. *Requests* the Secretary-General to implement the present resolution and to make practical arrangements for the effective functioning of the Mechanism from the first commencement date referred to in paragraph 1, in particular to initiate no later than 30 June 2011 the procedures for the selection of the roster of judges of the Mechanism, as provided in its Statute;

14. *Requests* the Secretary-General to prepare, in consultation with the Security Council, an information security and access regime for the archives of the Tribunals and the Mechanism prior to the first commencement date referred to in paragraph 1;

15. *Requests* the Tribunals and the Mechanism to cooperate with the countries of the former Yugoslavia and with Rwanda, as well as with interested entities to facilitate the establishment of information and documentation centres by providing access to copies of public records of the archives of the Tribunals and the Mechanism, including through their websites;

16. *Requests* the President of the Mechanism to submit an annual report to the Security Council and to the General Assembly, and the President and the Prosecutor of the Mechanism to submit six-monthly reports to the Security Council on the progress of the work of the Mechanism;

17. *Decides* that the Mechanism shall operate for an initial period of four years from the first commencement date referred to in paragraph 1, and to review the progress of the work of the Mechanism, including in completing its functions, before the end of this initial period and every two years thereafter, and further *decides* that the Mechanism shall continue to operate for subsequent periods of two years following each such review, unless the Security Council decides otherwise;

18. *Underlines* its intention to decide on the modalities for the exercise of any remaining residual functions of the Mechanism upon the completion of its operation;

19. *Decides* to remain seized of the matter.

Annex 1

Statute of the International Residual Mechanism for Criminal Tribunals

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STATUTE OF THE INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS (IRMCT)

Preamble

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations to carry out residual functions of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter "ICTY") and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter "ICTR"), the International Residual Mechanism for Criminal Tribunals (hereinafter "the Mechanism") shall function in accordance with the provisions of the present Statute,

Article 1: Competence of the Mechanism

1. The Mechanism shall continue the material, territorial, temporal and personal jurisdiction of the ICTY and the ICTR as set out in Articles 1 to 8 of the ICTY Statute and Articles 1 to 7 of the ICTR Statute,[1] as well as the rights and obligations, of the ICTY and the ICTR, subject to the provisions of the present Statute.

2. The Mechanism shall have the power to prosecute, in accordance with the provisions of the present Statute, the persons indicted by the ICTY or the ICTR who are among the most senior leaders suspected of being most responsible for the crimes covered by paragraph 1 of this Article, considering the gravity of the crimes charged and the level of responsibility of the accused.

3. The Mechanism shall have the power to prosecute, in accordance with the provisions of the present Statute, the persons indicted by the ICTY or the ICTR who are not among the most senior leaders covered by paragraph 2 of this Article, provided that the Mechanism may only, in accordance with the provisions of the present Statute, proceed to try such persons itself after it has exhausted all reasonable efforts to refer the case as provided in Article 6 of the present Statute.

4. The Mechanism shall have the power to prosecute, in accordance with the provisions of the present Statute,

(a) any person who knowingly and wilfully interferes or has interfered with the administration of justice by the Mechanism or the Tribunals, and to hold such person in contempt; or

(b) a witness who knowingly and wilfully gives or has given false testimony before the Mechanism or the Tribunals.

[1] See Articles 1 to 8 ICTY Statute (S/RES/827 (1993) and Annex to S/25704 and Add.17658 (1993)) and Articles 1 to 7 ICTR Statute (Annex to S/RES/955 (1994)).

Before proceeding to try such persons, the Mechanism shall consider referring the case to the authorities of a State in accordance with Article 6 of the present Statute, taking into account the interests of justice and expediency.

5. The Mechanism shall not have the power to issue any new indictments against persons other than those covered by this Article.

Article 2: Functions of the Mechanism

The Mechanism shall continue the functions of the ICTY and of the ICTR, as set out in the present Statute ("residual functions"), during the period of its operation.

Article 3: Structure and Seats of the Mechanism

The Mechanism shall have two branches, one branch for the ICTY and one branch for the ICTR, respectively. The branch for the ICTY shall have its seat in The Hague. The branch for the ICTR shall have its seat in Arusha.

Article 4: Organization of the Mechanism

The Mechanism shall consist of the following organs:

(a) The Chambers, comprising a Trial Chamber for each branch of the Mechanism and an Appeals Chamber common to both branches of the Mechanism;

(b) The Prosecutor common to both branches of the Mechanism;

(c) The Registry, common to both branches of the Mechanism, to provide administrative services for the Mechanism, including the Chambers and the Prosecutor.

Article 5: Concurrent Jurisdiction

1. The Mechanism and national courts shall have concurrent jurisdiction to prosecute persons covered by Article 1 of this Statute.

2. The Mechanism shall have primacy over national courts in accordance with the present Statute. At any stage of the procedure involving a person covered by Article 1 paragraph 2 of this Statute, the Mechanism may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the Mechanism.

Article 6: Referral of Cases to National Jurisdictions

1. The Mechanism shall have the power, and shall undertake every effort, to refer cases involving persons covered by paragraph 3 of Article 1 of this Statute to the authorities of a State in accordance with paragraphs 2 and 3 of this Article. The Mechanism shall have the power also to refer cases involving persons covered by paragraph 4 of Article 1 of this Statute.

2. After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Mechanism, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or

(iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

3. In determining whether to refer a case involving a person covered by paragraph 3 of Article 1 of this Statute in accordance with paragraph 2 above, the Trial Chamber shall, consistent with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused.

4. The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.

5. The Mechanism shall monitor cases referred to national courts by the ICTY, the ICTR, and those referred in accordance with this Article, with the assistance of international and regional organisations and bodies.

6. After an order referring a case has been issued by the ICTY, the ICTR or the Mechanism and before the accused is found guilty or acquitted by a national court, where it is clear that the conditions for referral of the case are no longer met and it is in the interests of justice, the Trial Chamber may, at the request of the Prosecutor or *proprio motu* and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral.

Article 7: *Non bis in Idem*

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the ICTY, the ICTR or the Mechanism.

2. A person covered by Article 1 of this Statute who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the Mechanism only if:

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Mechanism shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 8: Roster of Judges

1. The Mechanism shall have a roster of 25 independent judges ("judges of the Mechanism"), not more than two of whom may be nationals of the same State.

2. A person who for the purposes of membership of the roster could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

3. The judges of the Mechanism shall only be present at the seats of the branches of the Mechanism as necessary at the request of the President to exercise the functions requiring their presence. In so far as possible, and as decided by the President, the functions may be exercised remotely, away from the seats of the branches of the Mechanism.

4. The judges of the Mechanism shall not receive any remuneration or other benefits for being on the roster. The terms and conditions of service of the judges for each day on which they exercise their functions for the Mechanism shall be those of the judges *ad hoc* of the International Court of Justice. The terms and conditions of service of the President of the Mechanism shall be those of the judges of the International Court of Justice.

Article 9: Qualification of Judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. Particular account shall be taken of experience as judges of the ICTY or the ICTR.

2. In the composition of the Trial and Appeals Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 10: Election of Judges

1. The judges of the Mechanism shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges, preferably from among persons with experience as judges of the ICTY or the ICTR, from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in Article 9 paragraph 1 of the Statute;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than 30 candidates, taking due account of the qualifications set out in Article 9 paragraph 1 and adequate representation of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect 25 judges of the Mechanism. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should more than two candidates of the same nationality

obtain the required majority vote, the two who received the highest number of votes shall be considered elected.

2. In the event of a vacancy in the roster, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of Article 9 paragraph 1 of the Statute, for the remainder of the term of office concerned.

3. The judges of the Mechanism shall be elected for a term of four years and shall be eligible for reappointment by the Secretary-General after consultation with the Presidents of the Security Council and of the General Assembly.

4. If there are no judges remaining on the roster or if no judge on the roster is available for appointment, and if it is not possible to assign a judge currently serving at the Mechanism, and all practical alternatives having been explored, the Secretary-General may, at the request of the President of the Mechanism and after consultation with the Presidents of the Security Council and of the General Assembly, appoint a person meeting the qualifications of Article 9 paragraph 1 of the Statute, to serve as a judge of the Mechanism.

Article 11: The President

1. After consultation with the President of the Security Council and the judges of the Mechanism, the Secretary-General shall appoint a full-time President from among the judges of the Mechanism.

2. The President shall be present at either seat of the branches of the Mechanism as necessary to exercise his or her functions.

Article 12: Assignment of Judges and Composition of the Chambers

1. In the event of a trial of a case pursuant to paragraphs 2 and 3 of Article 1 of this Statute, or to consider the referral of such a case to a national jurisdiction, the President shall appoint three judges from the roster to compose a Trial Chamber and the Presiding Judge from amongst their number to oversee the work of that Trial Chamber. In all other circumstances, including trials pursuant to paragraph 4 of Article 1 of this Statute, the President shall appoint a Single Judge from the roster to deal with the matter.

2. The President may designate a duty judge from the roster for each branch of the Mechanism, who will be available at short notice, to serve as a Single Judge and to whom indictments, warrants, and other matters not assigned to a Trial Chamber, may be transmitted for decision.

3. The President of the Mechanism shall be a member of the Appeals Chamber, appoint the other members and preside over its proceedings. In the event of an appeal against a decision by a Single Judge, the Appeals Chamber shall be composed of three judges. In the event of an appeal against a decision by a Trial Chamber, the Appeals Chamber shall be composed of five judges.

4. In the event of an application for review in accordance with Article 24 of this Statute of a judgment rendered by a single Judge or by a Trial Chamber, the President shall appoint three judges to compose a Trial Chamber on review. In the event of an application for review of a judgment rendered by the Appeals Chamber, the Appeals Chamber on review shall be composed of five judges.

5. The President may appoint, from among the judges of the Mechanism, a reserve judge to be present at each stage of a trial and to replace a judge if that judge is unable to continue sitting.

Article 13: Rules of Procedure and Evidence

1. The judges of the Mechanism shall adopt Rules of Procedure and Evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

2. Amendments of the Rules of Procedure and Evidence may be decided remotely by the judges of the Mechanism by written procedure.

3. The Rules of Procedure and Evidence and any amendments thereto shall take effect upon adoption by the judges of the Mechanism unless the Security Council decides otherwise.

4. The Rules of Procedure and Evidence and amendments thereto shall be consistent with this Statute.

Article 14: The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons covered by Article 1 of this Statute.

2. The Prosecutor shall act independently as a separate organ of the Mechanism. He or she shall not seek or receive instructions from any government or from any other source.

3. The Office of the Prosecutor shall be composed of a Prosecutor, an officer in charge at the seat of each branch of the Mechanism designated by the Prosecutor, and such other qualified staff as may be required, in accordance with paragraph 5 of this Article. The Prosecutor shall be present at either seat of the branches of the Mechanism as necessary to exercise his or her functions.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

5. The Office of the Prosecutor shall retain a small number of staff commensurate with the reduced functions of the Mechanism, who shall serve at the seats of the branches of the Mechanism. The Office shall maintain a roster of qualified potential staff, preferably from among persons with experience at the ICTY or the ICTR, to enable it to recruit additional staff rapidly as may be required to perform its functions. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 15: The Registry

1. The Registry shall be responsible for the administration and servicing of the branches of the Mechanism.

2. The Registry shall consist of a Registrar, an officer in charge at the seat of each branch of the Mechanism designated by the Registrar, and such other qualified staff as may be required in accordance with paragraph 4 of this Article. The Registrar shall be present at either seat of the branches of the Mechanism as necessary to exercise his or her functions.

3. The Registrar shall be appointed by the Secretary-General for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The Registry shall retain a small number of staff commensurate with the reduced functions of the Mechanism, who shall serve at the seat of the respective branches of the Mechanism. The Registry shall maintain a roster of qualified potential staff, preferably from among persons with experience at the ICTY or the ICTR, to enable it to recruit additional staff rapidly as may be required to perform its functions. The Staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 16: Investigation and Preparation of Indictment

1. The Prosecutor shall have the power to conduct investigations against persons covered by Article 1 of this Statute. The Prosecutor shall not have the power to prepare new indictments against persons other than those covered by Article 1 of this Statute.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.

4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to the duty judge or a Single Judge designated by the President.

Article 17: Review of the Indictment

1. The indictment shall be reviewed by the duty judge or a Single Judge designated by the President. If satisfied that a *prima facie* case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 18: Commencement and Conduct of Trial Proceedings

1. The Single Judge or Trial Chambers conducting a trial shall ensure that the trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the Mechanism, be taken into custody, immediately informed of the charges against him or her and transferred to the Mechanism.

3. The Single Judge or judge of the Trial Chamber designated by the President shall read the indictment, ensure that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Single Judge or Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Single Judge or Trial Chamber decides to close the proceedings in accordance with its Rules of Procedure and Evidence.

Article 19: Rights of the Accused

1. All persons shall be equal before the Mechanism.

2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 20 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) to be tried without undue delay;

(d) to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Mechanism;

(g) not to be compelled to testify against himself or herself or to confess guilt.

Article 20: Protection of Victims and Witnesses

The Mechanism shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses in relation to the ICTY, the ICTR, and the Mechanism. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 21: Judgements

1. The Single Judge or Trial Chamber shall pronounce judgements and impose sentences and penalties on persons covered by Article 1 of this Statute who are convicted by the Mechanism.

2. All judgements shall be delivered in public and shall be accompanied by a reasoned opinion in writing. Judgements by a Chamber shall be rendered by a majority of the judges, to which separate or dissenting opinions may be appended.

Article 22: Penalties

1. The penalty imposed on persons covered by paragraphs 2 and 3 of Article 1 of this Statute shall be limited to imprisonment. The penalty imposed on persons covered by paragraph 4 of Article 1 of this Statute shall be a term of imprisonment not exceeding seven years, or a fine of an amount to be determined in the Rules of Procedure and Evidence, or both.

2. In determining the terms of imprisonment, the Single Judge or Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia and in those of Rwanda, respectively.

3. In imposing the sentences, the Single Judge or Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

4. In addition to imprisonment, the Single Judge or Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 23: Appellate Proceedings

1. The Appeals Chamber shall hear appeals from convicted persons or from the Prosecutor on the following grounds:

(a) an error on a question of law invalidating the decision; or

(b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Single Judge or Trial Chamber.

Article 24: Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Single Judge, Trial Chamber or the Appeals Chamber of the ICTY, the ICTR, or the Mechanism and which could have been a decisive factor in reaching the decision, the convicted person may submit to the Mechanism an application for review of the judgement. The Prosecutor may submit such an

application within one year from the day that the final judgement was pronounced. The Chamber shall only review the judgement if after a preliminary examination a majority of judges of the Chamber agree that the new fact, if proved, could have been a decisive factor in reaching a decision.

Article 25: Enforcement of Sentences

1. Imprisonment shall be served in a State designated by the Mechanism from a list of States with which the United Nations has agreements for this purpose. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the Mechanism.

2. The Mechanism shall have the power to supervise the enforcement of sentences pronounced by the ICTY, the ICTR or the Mechanism, including the implementation of sentence enforcement agreements entered into by the United Nations with Member States, and other agreements with international and regional organizations and other appropriate organisations and bodies.

Article 26: Pardon or Commutation of Sentences

If, pursuant to the applicable law of the State in which the person convicted by the ICTY, the ICTR, or the Mechanism is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Mechanism accordingly. There shall only be pardon or commutation of sentence if the President of the Mechanism so decides on the basis of the interests of justice and the general principles of law.

Article 27: Management of the Archives

1. Without prejudice to any prior conditions stipulated by, or arrangements with, the providers of information and documents, the archives of the ICTY, the ICTR and the Mechanism shall remain the property of the United Nations. These archives shall be inviolable wherever located pursuant to Section 4 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946.

2. The Mechanism shall be responsible for the management, including preservation and access, of these archives. The archives of the ICTY and the ICTR shall be co-located with the respective branches of the Mechanism.

3. In managing access to these archives, the Mechanism shall ensure the continued protection of confidential information, including information concerning protected witnesses, and information provided on a confidential basis. For this purpose, the Mechanism shall implement an information security and access regime, including for the classification and declassification as appropriate of the archives.

Article 28: Cooperation and Judicial Assistance

1. States shall cooperate with the Mechanism in the investigation and prosecution of persons covered by Article 1 of this Statute.

2. States shall comply without undue delay with any request for assistance or an order issued by a Single Judge or Trial Chamber in relation to cases involving persons covered by Article 1 of this Statute, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents;

(d) the arrest or detention of persons;

(e) the surrender or the transfer of the accused to the Mechanism.

3. The Mechanism shall respond to requests for assistance from national authorities in relation to investigation, prosecution and trial of those responsible for serious violations of international humanitarian law in the countries of former Yugoslavia and Rwanda, including, where appropriate, providing assistance in tracking fugitives whose cases have been referred to national authorities by the ICTY, the ICTR, or the Mechanism.

Article 29: The Status, Privileges and Immunities of the Mechanism

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the Mechanism, the archives of the ICTY, the ICTR and the Mechanism, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.

2. The President, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law. The judges of the Mechanism shall enjoy the same privileges and immunities, exemptions and facilities when engaged on the business of the Mechanism.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this Article.

4. Defence counsel, when holding a certificate that he or she has been admitted as counsel by the Mechanism and when performing their official functions, and after prior notification by the Mechanism to the receiving State of their mission, arrival and final departure, shall enjoy the same privileges and immunities as are accorded to experts on mission for the United Nations under Article VI, Section 22, paragraphs (a) to (c), and Section 23, of the Convention referred to in paragraph 1 of this Article. Without prejudice to their privileges and immunities, it is the duty of defence counsel enjoying such privileges and immunities to respect the laws and regulations of the receiving State.

5. Other persons, including the accused, required at the seats of the Mechanism, shall be accorded such treatment as is necessary for the proper functioning of the Mechanism.

Article 30: Expenses of the Mechanism

The expenses of the Mechanism shall be expenses of the Organisation in accordance with Article 17 of the Charter of the United Nations.

Article 31: Working Languages

The working languages of the Mechanism shall be English and French.

Article 32: Reports

1. The President of the Mechanism shall submit an annual report of the Mechanism to the Security Council and to the General Assembly.

2. The President and Prosecutor shall submit six-monthly reports to the Security Council on the progress of the work of the Mechanism.

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Annex 2

Transitional Arrangements

Article 1 — Trial Proceedings

1. The ICTY and ICTR shall have competence to complete all trial or referral proceedings which are pending with them as of the commencement date of the respective branch of the Mechanism.

2. If a fugitive indicted by the ICTY or ICTR is arrested more than 12 months, or if a retrial is ordered by the Appeals Chamber more than 6 months prior to the commencement date of the respective branch of the Mechanism, the ICTY or ICTR, respectively, shall have competence over such person in accordance with their respective Statutes and Rules of Procedure and Evidence to conduct, and complete, the trial of such person, or to refer the case to the authorities of a State, as appropriate.

3. If a fugitive indicted by the ICTY or ICTR is arrested 12 months or less, or if a retrial is ordered 6 months or less prior to the commencement date of the respective branch of the Mechanism, the ICTY or ICTR, respectively, shall only have competence over such person in accordance with their respective Statutes and Rules of Procedure and Evidence to prepare the trial of such person, or to refer the case to the authorities of a State, as appropriate. As of the commencement date of the respective branch of the Mechanism, the Mechanism shall have competence over such person in accordance with Article 1 of its Statute, including trial of such person or referral of the case, as appropriate.

4. If a fugitive indicted by the ICTY or ICTR is arrested or if a retrial is ordered on or after the commencement date of the respective branch of the Mechanism, the Mechanism shall have competence over such person in accordance with Article 1 of its Statute.

Article 2 — Appeals Proceedings

1. The ICTY and ICTR shall have competence to conduct, and complete, all appellate proceedings for which the notice of appeal against the judgment or sentence is filed prior to the commencement date of the respective branch of the Mechanism.

2. The Mechanism shall have competence to conduct, and complete, all appellate proceedings for which the notice of appeal against the judgment or sentence is filed on or after the commencement date of the respective branch of the Mechanism.

Article 3 — Review Proceedings

1. The ICTY and ICTR shall have competence to conduct, and complete, all review proceedings for which the application for review of the judgment is filed prior to the commencement date of the respective branch of the Mechanism.

2. The Mechanism shall have competence to conduct, and complete, all review proceedings for which the application for review of the judgment is filed on or after the commencement date of the respective branch of the Mechanism.

Article 4 — Contempt of Court and False Testimony

1. The ICTY and ICTR shall have competence to conduct, and complete, all proceedings for contempt of court and false testimony for which the indictment is

confirmed prior to the commencement date of the respective branch of the Mechanism.

2. The Mechanism shall have competence to conduct, and complete, all proceedings for contempt of court and false testimony for which the indictment is confirmed on or after the commencement date of the respective branch of the Mechanism.

Article 5 — Protection of Victims and Witnesses

1. The ICTY and ICTR shall provide for the protection of victims and witnesses, and carry out all related judicial or prosecutorial functions, in relation to all cases for which the ICTY or ICTR, respectively, has competence pursuant to Articles 1 to 4 of the present Annex.

2. The Mechanism shall provide for the protection of victims and witnesses, and carry out all related judicial or prosecutorial functions, in relation to all cases for which the Mechanism has competence pursuant to Articles 1 to 4 of the present Annex.

3. The Mechanism shall provide for the protection of victims and witnesses, and carry out all related judicial or prosecutorial functions, where a person is a victim or witness in relation to two or more cases for which the Mechanism and the ICTY or ICTR, respectively, have competence pursuant to Articles 1 to 4 of the present Annex.

4. The ICTY and ICTR, respectively, shall make the necessary arrangements to ensure as soon as possible a coordinated transition of the victims and witness protection function to the Mechanism in relation to all completed cases of the Tribunals. As of the commencement date of the respective branch of the Mechanism, the Mechanism shall carry out all related judicial or prosecutorial functions in relation to these cases.

Article 6 — Coordinated Transition of other Functions

The ICTY and ICTR, respectively, shall make the necessary arrangements to ensure, as soon as possible, a coordinated transition of the other functions of the Tribunals to the Mechanism, including the supervision of enforcement of sentences, assistance requests by national authorities, and the management of records and archives. As of the commencement date of the respective branch of the Mechanism, the Mechanism shall carry out all related judicial or prosecutorial functions.

Article 7 — Transitional Arrangements for the President, Judges, Prosecutor, Registrar and Staff

Notwithstanding the provisions of the Statutes of the Mechanism, the ICTY and ICTR,

(a) the President, Judges, Prosecutor and Registrar of the Mechanism may also hold the office of President, Judge, Prosecutor and Registrar, respectively, of the ICTY or ICTR;

(b) the staff members of the Mechanism may also be staff members of the ICTY or ICTR.

Amendments to article 8 of the Rome Statute (Resolution RC/Res.5, Assembly of States Parties to the Rome Statute of the International Criminal Court), Kampala, 10 June 2010

Resolution RC/Res.5*

Adopted at the 12th plenary meeting, on 10 June 2010, by consensus

RC/Res.5
Amendments to article 8 of the Rome Statute

The Review Conference,

Noting article 123, paragraph 1, of the Rome Statute of the International Criminal Court which requests the Secretary-General of the United Nations to convene a Review Conference to consider any amendments to the Statute seven years after its entry into force,

Noting article 121, paragraph 5, of the Statute which states that any amendment to articles 5, 6, 7 and 8 of the Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance and that in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party's nationals or on its territory, and *confirming* its understanding that in respect to this amendment the same principle that applies in respect of a State Party which has not accepted the amendment applies also in respect of States that are not parties to the Statute,

Confirming that, in light of the provision of article 40, paragraph 5, of the Vienna Convention on the Law of Treaties, States that subsequently become States Parties to the Statute will be allowed to decide whether to accept the amendment contained in this resolution at the time of ratification, acceptance or approval of, or accession to the Statute,

Noting article 9 of the Statute on the Elements of Crimes which states that such Elements shall assist the Court in the interpretation and application of the provisions of the crimes within its jurisdiction,

Taking due account of the fact that the crimes of employing poison or poisoned weapons; of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; and of employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, already fall within the jurisdiction of the Court under article 8, paragraph 2 (b), as serious violations of the laws and customs applicable in international armed conflict,

Noting the relevant elements of the crimes within the Elements of Crimes already adopted by the Assembly of States Parties on 9 September 2000,

Considering that the abovementioned relevant elements of the crimes can also help in their interpretation and application in armed conflict not of an international character, in that *inter alia* they specify that the conduct took place in the context of and was associated with an armed conflict, which consequently confirm the exclusion from the Court's jurisdiction of law enforcement situations,

Considering that the crimes referred to in article 8, paragraph 2 (e) (xiii) (employing poison or poisoned weapons) and in article 8, paragraph 2 (e) (xiv) (asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices) are serious violations of the laws and customs applicable in armed conflict not of an international character, as reflected in customary international law,

Considering that the crime referred to in article 8, paragraph 2 (e) (xv) (employing bullets which expand or flatten easily in the human body), is also a serious violation of the laws and customs applicable in armed conflict not of an international character, and *understanding* that the crime is committed only if the perpetrator employs the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law,

* See Depositary Notification C.N.651.2010 Treaties-6, dated 29 November 2010, available at http://treaties.un.org.

1. *Decides* to adopt the amendment to article 8, paragraph 2 (e), of the Rome Statute of the International Criminal Court contained in annex I to the present resolution, which is subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5, of the Statute;

2. *Decides* to adopt the relevant elements to be added to the Elements of Crimes, as contained in annex II to the present resolution.

Annex I

Amendment to article 8

Add to article 8, paragraph 2 (e), the following:

"(xiii) Employing poison or poisoned weapons;

(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions."

Annex II

Elements of Crimes

Add the following elements to the Elements of Crimes:

Article 8 (2) (e) (xiii)
War crime of employing poison or poisoned weapons

Elements

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 armed conflict not of an international character.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (xiv)
War crime of employing prohibited gases, liquids, materials or devices

Elements

1. The perpetrator employed a gas or other analogous substance or device.

2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.[1]

3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (xv)
War crime of employing prohibited bullets

Elements

1. The perpetrator employed certain bullets.

2. The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.

3. The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.

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.

[1] Nothing in this element shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to the development, production, stockpiling and use of chemical weapons.

The crime of aggression (Resolution RC/Res.6, Assembly of States Parties to the Rome Statute of the International Criminal Court), Kampala, 11 June 2010

Resolution RC/Res.6*

Adopted at the 13th plenary meeting, on 11 June 2010, by consensus

RC/Res.6
The crime of aggression

The Review Conference,

Recalling paragraph 1 of article 12 of the Rome Statute,

Recalling paragraph 2 of article 5 of the Rome Statute,

Recalling also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

Recalling further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,

Taking note of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

Resolved to activate the Court's jurisdiction over the crime of aggression as early as possible,

1. *Decides* to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: "the Statute") the amendments to the Statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5; and *notes* that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance;

2. *Also decides* to adopt the amendments to the Elements of Crimes contained in annex II of the present resolution;

3. *Also decides* to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in annex III of the present resolution;

4. *Further decides* to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction;

5. *Calls upon* all States Parties to ratify or accept the amendments contained in annex I.

* See Depositary Notification C.N.651.2010 Treaties-8, dated 29 November 2010, available at http://treaties.un.org.

Annex I

Amendments to the Rome Statute of the International Criminal Court on the crime of aggression

1. *Article 5, paragraph 2, of the Statute is deleted.*

2. *The following text is inserted after article 8 of the Statute:*

Article 8 *bis*
Crime of aggression

1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

3. *The following text is inserted after article 15 of the Statute:*

Article 15 *bis*
Exercise of jurisdiction over the crime of aggression
(State referral, *proprio motu*)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.

9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

4. *The following text is inserted after article 15 bis of the Statute:*

Article 15 *ter*
Exercise of jurisdiction over the crime of aggression
(Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

5. *The following text is inserted after article 25, paragraph 3, of the Statute:*

3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

6. *The first sentence of article 9, paragraph 1, of the Statute is replaced by the following sentence:*

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*.

7. *The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:*

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

Annex II

Amendments to the Elements of Crimes

Article 8 *bis*
Crime of aggression

Introduction

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.

2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.

3. The term "manifest" is an objective qualification.

4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the "manifest" nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.

2. The perpetrator was a person[1] in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.

4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.

5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.

6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

[1] With respect to an act of aggression, more than one person may be in a position that meets these criteria.

Annex III

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression

Referrals by the Security Council

1. It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute only with respect to crimes of aggression committed after a decision in accordance with article 15 *ter*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

Jurisdiction *ratione temporis*

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

Domestic jurisdiction over the crime of aggression

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

Other understandings

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.

Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, United Nations Transitional Administration in East Timor, UNTAET/REG/2000/15, 6 June 2000

UNITED NATIONS
United Nations Transitional Administration
in East Timor

UNTAET

NATIONS UNIES
Administration Transitoire des Nations Unies
au Timor Oriental

UNTAET/REG/2000/15
6 June 2000

REGULATION NO. 2000/15

ON THE ESTABLISHMENT OF PANELS WITH EXCLUSIVE JURISDICTION OVER SERIOUS CRIMINAL OFFENCES

The Special Representative of the Secretary-General (hereinafter: Transitional Administrator),

Pursuant to the authority given to him under United Nations Security Council resolution 1272 (1999) of 25 October 1999,

Taking into account United Nations Transitional Administration in East Timor (UNTAET) Regulation No.1999/1 of 27 November 1999 on the Authority of the Transitional Administration in East Timor (hereinafter: UNTAET Regulation No. 1999/1),

Taking into account UNTAET Regulation No. 2000/11 of 6 March 2000 on the Organisation of Courts in East Timor (hereinafter: UNTAET Regulation No. 2000/11) as amended by UNTAET Regulation No. 2000/14 of 10 May 2000 (hereinafter: UNTAET Regulation No. 2000/14),

Recalling the recommendations of the International Commission of Inquiry of East Timor in their report to the Secretary-General of January 2000,

After consultation in the National Consultative Council,

For the purpose of establishing panels with exclusive jurisdiction over serious criminal offences as referred to under Section 10.1 of UNTAET Regulation No. 2000/11,

Promulgates the following:

I. General

Section 1
Panels with Jurisdiction over Serious Criminal Offences

1.1 Pursuant to Section 10.3 of UNTAET Regulation No. 2000/11, there shall be established panels of judges (hereinafter: "panels") within the District Court in Dili with exclusive jurisdiction to deal with serious criminal offences.

1.2 Pursuant to Section 15.5 of UNTAET Regulation No. 2000/11 there shall be established panels within the Court of Appeal in Dili to hear and decide an appeal on a matter under Section 10 of UNTAET Regulation No. 2000/11, as specified in Sections 4 to 9 of the present regulation.

1.3 The panels established pursuant to Sections 10.3 and 15.5 of UNTAET Regulation No. 2000/11 and as specified under Section 1 of the present regulation, shall exercise jurisdiction in accordance with Section 10 of UNTAET Regulation No. 2000/11 and with the provisions of the present regulation with respect to the following serious criminal offences:

(a) Genocide;
(b) War Crimes;
(c) Crimes against Humanity;
(d) Murder;
(e) Sexual Offences; and
(f) Torture.

1.4 At any stage of the proceedings, in relation to cases of serious criminal offences listed under Section 10 (a) to (f) of UNTAET Regulation No. 2000/11, as specified in Sections 4 to 9 of the present regulation, a panel may have deferred to itself a case which is pending before another panel or court in East Timor.

Section 2
Jurisdiction

2.1 With regard to the serious criminal offences listed under Section 10.1 (a), (b), (c) and (f) of UNTAET Regulation No. 2000/11, as specified in Sections 4 to 7 of the present regulation, the panels shall have universal jurisdiction.

2.2 For the purposes of the present regulation, "universal jurisdiction" means jurisdiction irrespective of whether:

(a) the serious criminal offence at issue was committed within the territory of East Timor;
(b) the serious criminal offence was committed by an East Timorese citizen; or
(c) the victim of the serious criminal offence was an East Timorese citizen.

2.3 With regard to the serious criminal offences listed under Section 10.1(d) to (e) of UNTAET Regulation No. 2000/11 as specified in Sections 8 to 9 of the present regulation, the panels established within the District Court in Dili shall have exclusive jurisdiction only insofar as the offence was committed in the period between 1 January 1999 and 25 October 1999.

2.4 The panels shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the serious criminal offence is based is consistent with Section 3.1 of UNTAET Regulation No. 1999/1 or any other UNTAET Regulation.

2.5 In accordance with Section 7.3 of UNTAET Regulation No. 2000/11, the panels established by the present regulation shall have jurisdiction (*ratione loci*) throughout the entire territory of East Timor.

Section 3
Applicable Law

3.1 In exercising their jurisdiction, the panels shall apply:

(a) the law of East Timor as promulgated by Sections 2 and 3 of UNTAET Regulation No. 1999/1 and any subsequent UNTAET regulations and directives; and

(b) where appropriate, applicable treaties and recognised principles and norms of international law, including the established principles of the international law of armed conflict.

3.2 In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

II. Serious Criminal Offences

Section 4
Genocide

For the purposes of the present regulation, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Section 5
Crimes Against Humanity

5.1 For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Section 5.3 of the present regulation, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the panels;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

5.2 For the purposes of Section 5.1 of the present regulation:

(a) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(b) "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;

(c) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(d) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(e) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(f) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(g) "The crime of apartheid" means inhumane acts of a character similar to those referred to in Section 5.1, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(h) "Enforced disappearance of persons" means 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.

5.3 For the purpose of the present regulation, the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Section 6
War crimes

6.1 For the purposes of the present regulation, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Section 5.2 (e) of the present regulation, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Section 6.1 (c) of the present regulation applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Section 5.2 (e) of the present regulation, enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest,

and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Section 6.1 (e) of the present regulation applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

6.2 Nothing in Section 6.1 (c) and (e) of the present regulation shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Section 7
Torture

7.1 For the purposes of the present regulation, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession, punishing him/her for an act he/she or a third person has committed or is suspected of having committed, or humiliating, intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

7.2 This Section is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

7.3 No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Section 8
Murder

For the purposes of the present regulation, the provisions of the applicable Penal Code in East Timor shall, as appropriate, apply.

Section 9
Sexual Offences

For the purposes of the present regulation, the provisions of the applicable Penal Code in East Timor shall, as appropriate, apply.

Section 10
Penalties

10.1 A panel may impose one of the following penalties on a person convicted of a crime specified under Sections 4 to 7 of the present regulation:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 25 years. In determining the terms of imprisonment for the crimes referred to in Sections 4 to 7 of the present regulation, the panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals; for the crimes referred to in Sections 8 and 9 of the present regulation, the penalties prescribed in the respective provisions of the applicable Penal Code in East Timor, shall apply.

(b) A fine up to a maximum of US$ 500,000.

(c) A forfeiture of proceeds, property and assets derived directly or indirectly from the crime, without prejudice to the rights of *bona fide* third parties.

10.2 In imposing the sentences, the panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

10.3 In imposing a sentence of imprisonment, the panel shall deduct the time, if any, previously spent in detention due to an order of the panel or any other court in East Timor (for the same criminal conduct). The panel may deduct any time otherwise spent in detention in connection with the conduct (underlying the crime).

III. General Principles of Criminal Law

Section 11
Ne bis in idem

11.1 No person shall be tried before a panel established by the present regulation with respect to conduct (which formed the basis of crimes) for which the person has been convicted or acquitted by a panel.

11.2 No person shall be tried by another court (in East Timor) for a crime referred to in Sections 4 to 9 of the present regulation for which that person has already been convicted or acquitted by a panel.

11.3 No person who has been tried by another court for conduct also proscribed under Sections 4 to 9 of the present regulation shall be tried by a panel with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the panel; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Section 12
Nullum crimen sine lege

12.1 A person shall not be criminally responsible under the present regulation unless the conduct in question constitutes, at the time it takes place, a crime under international law or the laws of East Timor.

12.2 The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

12.3 The present Section shall not affect the characterization of any conduct as criminal under principles and rules of international law independently of the present regulation.

Section 13
Nulla poena sine lege

A person convicted by a panel may be punished only in accordance with the present regulation.

Section 14
Individual criminal responsibility

14.1 The panels shall have jurisdiction over natural persons pursuant to the present regulation.

14.2 A person who commits a crime within the jurisdiction of the panels shall be individually responsible and liable for punishment in accordance with the present regulation.

14.3 In accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person:

(a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the panels; or

(ii) be made in the knowledge of the intention of the group to commit the crime;

(e) in respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under the present regulation for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Section 15
Irrelevance of official capacity

15.1 The present regulation shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the present regulation, nor shall it, in and of itself, constitute a ground for reduction of sentence.

15.2 Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the panels from exercising its jurisdiction over such a person.

Section 16
Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under the present regulation for serious criminal offences referred to in Sections 4 to 7 of the present regulation, the fact that any of the acts referred to in the said Sections 4 to 7 was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Section 17
Statute of limitations

17.1 The serious criminal offences under Section 10.1 (a), (b), (c) and (f) of UNTAET Regulation No. 2000/11 and under Sections 4 to 7 of the present regulation shall not be subject to any statute of limitations.

17.2 The serious criminal offences under Section 10.1 (d) to (e) of UNTAET Regulation No. 2000/11 and under Sections 8 to 9 of the present regulation shall be subject to applicable law.

Section 18
Mental element

18.1 A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels only if the material elements are committed with intent and knowledge.

18.2 For the purposes of the present Section, a person has "intent" where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

18.3 For the purposes of the present Section, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Section 19
Grounds for excluding criminal responsibility

19.1 A person shall not be criminally responsible if, at the time of that person's conduct:

(a) the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) the person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the panels;

(c) the person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) the conduct which is alleged to constitute a crime within the jurisdiction of the panels has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) made by other persons; or

(ii) constituted by other circumstances beyond that person's control.

19.2 The panel shall determine the applicability of the grounds for excluding criminal responsibility provided for in the present regulation to the case before it.

19.3 At trial, the panel may consider a ground for excluding criminal responsibility other than those referred to in Section 19.1 of the present regulation where such a ground is derived from applicable law. The procedures relating to the consideration of such a ground shall be provided for in an UNTAET directive.

Section 20
Mistake of fact or mistake of law

20.1 A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

20.2 A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the panels shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in Section 21 of the present regulation.

Section 21
Superior orders and prescription of law

The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if a panel determines that justice so requires.

IV. Composition of the Panels and Procedure

Section 22
Composition of the Panels

22.1 In accordance with Sections 9 and 10.3 of UNTAET Regulation No. 2000/11 the panels in the District Court of Dili shall be composed of two international judges and one East Timorese judge.

22.2 In accordance with Section 15 of UNTAET Regulation No. 2000/11 the panels in the Court of Appeal in Dili shall be composed of two international judges and one East Timorese judge. In cases of special importance or gravity a panel of five judges composed of three international and two East Timorese judges may be established.

Section 23
Qualifications of Judges

23.1 The judges of the panels established within the District Court in Dili and the Court of Appeal in Dili shall be selected and appointed in accordance with UNTAET Regulation No. 1999/3, Section 10.3 of UNTAET Regulation No. 2000/11 and Sections 22 and 23 of the present regulation.

23.2 The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to judicial offices. In the overall composition of the panels due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

V. Other Matters

Section 24
Witness Protection

24.1 The panels shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the panels shall have regard to all relevant factors, including age, gender, health and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.

24.2 Procedures regarding the protection of witnesses shall be elaborated in an UNTAET directive.

Section 25
Trust Fund

25.1 A Trust Fund may be established by decision of the Transitional Administrator in consultation with the National Consultative Council for the benefit of victims of crimes within the jurisdiction of the panels, and of the families of such victims.

25.2 The panels may order money and other property collected through fines, forfeiture, foreign donors or other means to be transferred to the Trust Fund.

25.3 The Trust Fund shall be managed according to criteria to be determined by an UNTAET directive.

Section 26
Entry into force

The present regulation shall enter into force on 6 June 2000.

Sergio Vieira de Mello
Transitional Administrator

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute), 2002

[ENGLISH TEXT — TEXTE ANGLAIS]

AGREEMENT BETWEEN THE UNITED NATIONS AND THE GOVERNMENT OF SIERRA LEONE ON THE ESTABLISHMENT OF A SPECIAL COURT FOR SIERRA LEONE

Whereas the Security Council, in its resolution 1315 (2000) of 14 August 2000, expressed deep concern at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity;

Whereas by the said resolution, the Security Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law;

Whereas the Secretary-General of the United Nations (hereinafter "the Secretary-General") and the Government of Sierra Leone (hereinafter "the Government") have held such negotiations for the establishment of a Special Court for Sierra Leone (hereinafter "the Special Court ");

Now therefore the United Nations and the Government of Sierra Leone have agreed as follows:

Article 1. Establishment of the Special Court

1. There is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

2. The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof.

Article 2. Composition of the Special Court and appointment of judges

1. The Special Court shall be composed of a Trial Chamber and an Appeals Chamber with a second Trial Chamber to be created if, after the passage of at least six months from the commencement of the functioning of the Special Court, the Secretary-General, the Prosecutor or the President of the Special Court so request. Up to two alternate judges shall similarly be appointed after six months if the President of the Special Court so determines.

2. The Chambers shall be composed of no fewer than eight independent judges and no more than eleven such judges who shall serve as follows:

(a) Three judges shall serve in the Trial Chamber where one shall be appointed by the Government of Sierra Leone and two judges appointed by the Secretary-General, upon

nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General;

(b) In the event of the creation of a second Trial Chamber, that Chamber shall be likewise composed in the manner contained in subparagraph (a) above;

(c) Five judges shall serve in the Appeals Chamber, of whom two shall be appointed by the Government of Sierra Leone and three judges shall be appointed by the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General.

3. The Government of Sierra Leone and the Secretary-General shall consult on the appointment of judges.

4. Judges shall be appointed for a three-year term and shall be eligible for re-appointment.

5. If, at the request of the President of the Special Court, an alternate judge or judges have been appointed by the Government of Sierra Leone or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 3. Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government of Sierra Leone, shall appoint a Prosecutor for a three-year term. The Prosecutor shall be eligible for reappointment.

2. The Government of Sierra Leone, in consultation with the Secretary-General and the Prosecutor, shall appoint a Sierra Leonean Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.

3. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. The Prosecutor shall be assisted by such Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4. Appointment of a Registrar

1. The Secretary-General, in consultation with the President of the Special Court, shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Court.

2. The Registrar shall be a staff member of the United Nations. He or she shall serve a three-year term and shall be eligible for re-appointment.

Article 5. Premises

The Government shall assist in the provision of premises for the Special Court and such utilities, facilities and other services as may be necessary for its operation.

Article 6. Expenses of the Special Court

The expenses of the Court shall be borne by voluntary contributions from the international community. It is understood that the Secretary-General will commence the process of establishing the Court when he has sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations plus pledges equal to the anticipated expenses of the following 24 months of the Court's operation. It is further understood that the Secretary-General will continue to seek contributions equal to the anticipated expenses of the Court beyond its first three years of operation. Should voluntary contributions be insufficient for the Court to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Court.

Article 7. Management Committee

It is the understanding of the Parties that interested States may wish to establish a management committee to assist the Special Court in obtaining adequate funding, provide advice on matters of Court administration and be available as appropriate to consult on other non-judicial matters.

The management committee will include representatives of interested States that contribute voluntarily to the Special Court, as well as representatives of the Government of Sierra Leone and the Secretary-General.

Article 8. Inviolability of premises, archives and all other documents

1. The premises of the Special Court shall be inviolable. The competent authorities shall take whatever action may be necessary to ensure that the Special Court shall not be dispossessed of all or any part of the premises of the Court without its express consent.

2. The property, funds and assets of the Special Court, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

3. The archives of the Court, and in general all documents and materials made available, belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 9. Funds, assets and other property

1. The Special Court, its funds, assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Court has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

2. Without being restricted by financial controls, regulations or moratoriums of any kind, the Special Court:

(a) May hold and use funds, gold or negotiable instruments of any kind and maintain and operate accounts in any currency and convert any currency held by it into any other currency;

(b) Shall be free to transfer its funds, gold or currency from one country to another, or within Sierra Leone, to the United Nations or any other agency.

Article 10. Seat of the Special Court

The Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require, and subject to the conclusion of a Headquarters Agreement between the Secretary-General of the United Nations and the Government of Sierra Leone, on the one hand, and the Government of the alternative seat, on the other.

Article 11. Juridical capacity

The Special Court shall possess the juridical capacity necessary to:

(a) Contract;

(b) Acquire and dispose of movable and immovable property;

(c) Institute legal proceedings;

(d) Enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court.

Article 12. Privileges and immunities of the judges, the Prosecutor and the Registrar

1. The judges, the Prosecutor and the Registrar, together with their families forming part of their household, shall enjoy the privileges and immunities,

exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

(a) Personal inviolability, including immunity from arrest or detention;

(b) Immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

(c) Inviolability for all papers and documents;

(d) Exemption, as appropriate, from immigration restrictions and other alien registrations;

(e) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents by the Vienna Convention;

(f) Exemption from taxation in Sierra Leone on their salaries, emoluments and allowances.

2. Privileges and immunities are accorded to the judges, the Prosecutor and the Registrar in the interest of the Special Court and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity, in any case where it can be waived without prejudice to the purpose for which it is accorded, shall lie with the Secretary-General, in consultation with the President.

Article 13. Privileges and immunities of international and Sierra Leonean personnel

1. Sierra Leonean and international personnel of the Special Court shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Special Court;

(b) Immunity from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:

(a) Immunity from immigration restriction;

(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Sierra Leone.

3. The privileges and immunities are granted to the officials of the Special Court in the interest of the Court and not for their personal benefit. The right and the duty to waive the immunity in any particular case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Court.

Article 14. Counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Court shall not be subjected to any measure which may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

a. Immunity from personal arrest or detention and from seizure of personal baggage;

b. Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

c. Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused.

d. Immunity from any immigration restrictions during his or her stay as well as during his or her journey to the Court and back.

Article 15. Witnesses and experts

Witnesses and experts appearing from outside Sierra Leone on a summons or a request of the judges or the Prosecutor shall not be prosecuted, detained or subjected to any restriction on their liberty by the Sierra Leonean authorities. They shall not be subjected to any measure which may affect the free and independent exercise of their functions. The provisions of article 13, paragraph 2(a) and (d), shall apply to them.

Article 16. Security, safety and protection of persons referred to in this Agreement

Recognizing the responsibility of the Government under international law to ensure the security, safety and protection of persons referred to in this Agreement and its present incapacity to do so pending the restructuring and rebuilding of its security forces, it is agreed that the United Nations Mission in Sierra Leone shall provide the necessary security to premises and personnel of the Special Court, subject to an appropriate mandate by the Security Council and within its capabilities.

Article 17. Cooperation with the Special Court

1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:

a. Identification and location of persons;

b. Service of documents;

c. Arrest or detention of persons;

d. Transfer of an indictee to the Court.

Article 18. Working language

The official working language of the Special Court shall be English.

Article 19. Practical arrangements

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Special Court, a phased-in approach shall be adopted for its establishment in accordance with the chronological order of the legal process.

2. In the first phase of the operation of the Special Court, judges, the Prosecutor and the Registrar will be appointed along with investigative and prosecutorial staff. The process of investigations and prosecutions of those already in custody shall be initiated.

3. In the initial phase, judges of the Trial Chamber and the Appeals Chamber shall be convened on an ad hoc basis for dealing with organizational matters, and serving when required to perform their duties.

4. Judges of the Trial Chamber shall take permanent office shortly before the investigation process has been completed. Judges of the Appeals Chamber shall take permanent office when the first trial process has been completed.

Article 20. Settlement of Disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation, or by any other mutually agreed-upon mode of settlement.

Article 21. Entry into force

The present Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal requirements for entry into force have been complied with.

Article 22. Amendment

This Agreement may be amended by written agreement between the Parties.

Article 23. Termination

This Agreement shall be terminated by agreement of the Parties upon completion of the judicial activities of the Special Court.

In witness whereof, the following duly authorized representatives of the United Nations and of the Government of Sierra Leone have signed this Agreement.

Done at Freetown, on 16 January 2002 in two originals in the English language.

For the United Nations:

HANS CORELL

For the Government of Sierra Leone:

Solomon E. Berewa

STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE

Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone (hereinafter "the Special Court") shall function in accordance with the provisions of the present Statute.

Article 1. Competence of the Special Court

1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.

3. In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.

Article 2. Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;

(h) Persecution on political, racial, ethnic or religious grounds;

(i) Other inhumane acts.

Article 3. Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 4. Other serious violations of international humanitarian law

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(c) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

Article 5. Crimes under Sierra Leonean law

The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:

(a) Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):

(i) Abusing a girl under 13 years of age, contrary to section 6;

(ii) Abusing a girl between 13 and 14 years of age, contrary to section 7;

(iii) Abduction of a girl for immoral purposes, contrary to section 12.

(b) Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:

(i). Setting fire to dwelling - houses, any person being therein, contrary to section 2;

(ii) Setting fire to public buildings, contrary to sections 5 and 6;

(iii) Setting fire to other buildings, contrary to section 6.

Article 6. Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.

2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.

5. Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone.

Article 7. Jurisdiction over persons of 15 years of age

1. The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.

2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8. Concurrent jurisdiction

1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.

2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

Article 9. Non bis in idem

1. No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.

2. A person who has been tried by a national court for the acts referred to in articles 2 to 4 of the present Statute may be subsequently tried by the Special Court if:

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted. 3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10. Amnesty

An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.

Article 11. Organization of the Special Court

The Special Court shall consist of the following organs:

(a) The Chambers, comprising one or more Trial Chambers and an Appeals Chamber;

(b) The Prosecutor; and

(c) The Registry.

Article 12. Composition of the Chambers

1. The Chambers shall be composed of not less than eight (8) or more than eleven (11) independent judges, who shall serve as follows:

(a) Three judges shall serve in the Trial Chamber, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General").

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the Government of Sierra Leone, and three judges appointed by the Secretary-General.

2. Each judge shall serve only in the Chamber to which he or she has been appointed.

3. The judges of the Appeals Chamber and the judges of the Trial Chamber, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Court.

4. If, at the request of the President of the Special Court, an alternate judge or judges have been appointed by the Government of Sierra Leone or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 13. Qualification and appointment of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.

2. In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice.

3. The judges shall be appointed for a three-year period and shall be eligible for reappointment.

Article 14. Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of the legal proceedings before the Special Court.

2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.

Article 15. The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source.

2. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Sierra Leonean authorities concerned.

3. The Prosecutor shall be appointed by the Secretary-General for a three-year term and shall be eligible for re-appointment. He or she shall be of high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases.

4. The Prosecutor shall be assisted by a Sierra Leonean Deputy Prosecutor, and by such other Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently. Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.

5. In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.

Article 16. The Registry

1. The Registry shall be responsible for the administration and servicing of the Special Court.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the Special Court and shall be a staff member of the United Nations. He or she shall serve for a three-year term and be eligible for re-appointment.

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

Article 17. Rights of the accused

1. All accused shall be equal before the Special Court.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 18. Judgement

The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 19. Penalties

1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.

2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Article 20. Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:

(a) A procedural error;

(b) An error on a question of law invalidating the decision;

(c) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

Article 21. Review proceedings

1. Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgement.

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the Trial Chamber;

(b) Retain jurisdiction over the matter.

Article 22. Enforcement of sentences

1. Imprisonment shall be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States.

2. Conditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to article 23 of the present Statute.

Article 23. Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 24. Working language

The working language of the Special Court shall be English.

Article 25. Annual Report

The President of the Special Court shall submit an annual report on the operation and activities of the Court to the Secretary-General and to the Government of Sierra Leone.

United Nations Security Council resolution 1400 (2002) of 28 March 2002

United Nations S/RES/1400 (2002)

Security Council

Distr.: General
28 March 2002

Resolution 1400 (2002)

Adopted by the Security Council at its 4500th meeting, on 28 March 2002

The Security Council,

Recalling its previous resolutions and the statements of its President concerning the situation in Sierra Leone,

Affirming the commitment of all States to respect the sovereignty, political independence and territorial integrity of Sierra Leone,

Welcoming the meeting of the Mano River Union Presidents held in Rabat on 27 February 2002 at the invitation of His Majesty the King of Morocco,

Welcoming the further progress made in the peace process in Sierra Leone, including the lifting of the state of emergency, commending the positive role of the United Nations Mission in Sierra Leone (UNAMSIL) in advancing the peace process, and calling for its further consolidation,

Encouraging the Mano River Union Women's Peace Network and other civil society initiatives to continue their contribution towards regional peace,

Determining that the situation in Sierra Leone continues to constitute a threat to peace and security in this region,

Expressing its concern at the fragile situation in the Mano River region, the substantial increase in refugees and the humanitarian consequences for the civilian, refugee and internally displaced populations in the region,

Emphasizing the importance of free, fair, transparent and inclusive elections, and welcoming the progress made by the Government of Sierra Leone and the National Electoral Commission of Sierra Leone in preparing for elections, particularly with voter registration,

Reiterating the importance of the effective extension of State authority throughout the country, the reintegration of ex-combatants, voluntary and unhindered return of refugees and internally displaced persons, full respect for human rights and the rule of law, and effective action on impunity and accountability, paying special attention to the protection of women and children, and stressing continued United Nations support for the fulfilment of these objectives,

Welcoming the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, and the

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recommendations of the Planning Mission on the Establishment of the Special Court for Sierra Leone (S/2002/246) and the report of the Secretary-General of 14 March 2002 (S/2002/267) that UNAMSIL should provide administrative and related support to the Special Court,

Emphasizing the importance of the continuing support of UNAMSIL to the Government of Sierra Leone in the consolidation of peace and stability after the elections,

Having considered the report of the Secretary-General of 14 March 2002 (S/2002/267),

1. *Decides* that the mandate of UNAMSIL shall be extended for a period of six months from 30 March 2002;

2. *Expresses its appreciation* to those Member States providing troops and support elements to UNAMSIL and those who have made commitments to do so;

3. *Welcomes* the military concept of operations for UNAMSIL for 2002 outlined in paragraph 10 of the Secretary-General's report of 14 March 2002 (S/2002/267), and requests the Secretary-General to inform the Council at regular intervals on progress made by UNAMSIL in the implementation of its key aspects and in the planning of its subsequent phases;

4. *Encourages* the Government of Sierra Leone and the Revolutionary United Front (RUF) to strengthen their efforts towards full implementation of the Ceasefire Agreement signed in Abuja on 10 November 2000 (S/2000/1091) between the Government of Sierra Leone and the RUF and reaffirmed at the meeting of the Economic Community of West African States (ECOWAS), the United Nations, the Government of Sierra Leone and the RUF at Abuja on 2 May 2001;

5. *Encourages* the Government of Sierra Leone and the RUF to continue to take steps towards furthering of dialogue and national reconciliation, and, in this regard, stresses the importance of the reintegration of the RUF into Sierra Leone society and the transformation of the RUF into a political party, and demands the immediate and transparent dismantling of all non-government military structures;

6. *Welcomes* the formal completion of the disarmament process, expresses concern at the serious financial shortfall in the multi-donor Trust Fund for the disarmament, demobilization and reintegration programme, and urges the Government of Sierra Leone to seek actively the urgently needed additional resources for reintegration;

7. *Emphasizes* that the development of the administrative capacities of the Government of Sierra Leone is essential to sustainable peace and development, and to the holding of free and fair elections, and therefore urges the Government of Sierra Leone, with the assistance of UNAMSIL, in accordance with its mandate, to accelerate the restoration of civil authority and public services throughout the country, in particular in the diamond mining areas, including the deployment of key government personnel and police and the deployment of the Sierra Leone Army on border security tasks, and calls on States, international organizations and non-governmental organizations to assist in the wide range of recovery efforts;

8. *Welcomes* the establishment of the electoral component of UNAMSIL and the recruitment of 30 additional civilian police advisers to support the Government of Sierra Leone and the Sierra Leone police in preparing for elections;

9. *Welcomes* the signature on 16 January 2002 of the Agreement between the Government of Sierra Leone and the United Nations on the Establishment of a Special Court for Sierra Leone, as envisaged by resolution 1315 (2000) of 14 August 2000, urges donors urgently to disburse their pledges to the Trust Fund for the Special Court, looks forward to the Court expeditiously beginning its operations and endorses UNAMSIL's providing, without prejudice to its capabilities to perform its specified mandate, administrative and related support to the Special Court on a cost-reimbursable basis;

10. *Welcomes* progress made by the Government of Sierra Leone, together with the Secretary-General, the United Nations High Commissioner for Human Rights and other relevant international actors, in establishing the Truth and Reconciliation Commission, and urges donors urgently to commit funds to it;

11. *Welcomes* the summit meeting of the Mano River Union Presidents held in Rabat on 27 February 2002, urges the Presidents to continue dialogue and to implement their commitments to building regional peace and security, and encourages the ongoing efforts of ECOWAS towards a lasting and final settlement of the crisis in the Mano River Union region;

12. *Expresses its serious concern* at the violence, particularly sexual violence, suffered by women and children during the conflict in Sierra Leone, and emphasizes the importance of addressing these issues effectively;

13. *Expresses its serious concern* at the evidence UNAMSIL has found of human rights abuses and breaches of humanitarian law set out in paragraphs 38 to 40 of the Secretary-General's report of 14 March 2002 (S/2002/267), encourages UNAMSIL to continue its work and in this context requests the Secretary-General to provide a further assessment in his September report, particularly regarding the situation of women and children who have suffered during the conflict;

14. *Expresses its serious concern* at allegations that some United Nations personnel may have been involved in sexual abuse of women and children in camps for refugees and internally displaced people in the region, supports the Secretary-General's policy of zero tolerance for such abuse, looks forward to the Secretary-General's report on the outcome of the investigation into these allegations, and requests him to make recommendations on how to prevent any such crimes in future, while calling on States concerned to take the necessary measures to bring to justice their own nationals responsible for such crimes;

15. *Encourages* the continued support of UNAMSIL, within its capabilities and areas of deployment, for returning refugees and displaced persons, and urges all stakeholders to continue to cooperate to this end to fulfil their commitments under the Abuja Ceasefire Agreement;

16. *Welcomes* the Secretary-General's intention to keep the security, political, humanitarian and human rights situation in Sierra Leone under close review and to report to the Council, after due consultations with troop-contributing countries, with any additional recommendations, and requests in particular the Secretary-General to submit before 30 June 2002 an interim report assessing the post-electoral situation and the prospects for peace consolidation;

17. *Decides* to remain actively seized of the matter.

Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004, NS/RKM/1004/006

Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA

CHAPTER I
GENERAL PROVISIONS

Article 1:

The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

CHAPTER II
COMPETENCE

Article 2 new

Extraordinary Chambers shall be established in the existing court structure, namely- the trial court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

Senior leaders of Democratic Kampuchea and those who were most responsible for the above acts are hereinafter designated as "Suspects".

Article 3 new

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed any of these crimes set forth in the 1956 Penal Code, and which were committed during the period from 17 April 1975 to 6 January 1979:

- Homicide (Article 501, 503, 504, 505, 506, 507 and 508)
- Torture (Article 500)
- Religious Persecution (Articles 209 and 210)

The statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers.

The penalty under Articles 209, 500, 506 and 507 of the 1956 Penal Code shall be limited to a maximum of life imprisonment, in accordance with Article 32 of the Constitution of the Kingdom of Cambodia, and as further stipulated in Articles 38 and 39 of this Law.

Article 4

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and which were committed during the period from 17 April 1975 to 6 January 1979.

The acts of genocide, which have no statute of limitations, mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:

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

The following acts shall be punishable under this Article:

- attempts to commit acts of genocide;
- conspiracy to commit acts of genocide;
- participation in acts of genocide.

Article 5

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.

Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as:

- murder;
- extermination;
- enslavement;
- deportation;
- imprisonment;
- torture;

- rape;
- persecutions on political, racial, and religious grounds;
- other inhumane acts.

Article 6
The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions of 12 August 1949, such as the following acts against persons or property protected under provisions of these Conventions, and which were committed during the period 17 April 1975 to 6 January 1979:

- wilful killing;
- torture or inhumane treatment;
- wilfully causing great suffering or serious injury to body or health;
- destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;
- compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- wilfully depriving a prisoner of war or civilian the rights of fair and regular trial;
- unlawful deportation or transfer or unlawful confinement of a civilian;
- taking civilians as hostages.

Article 7
The Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979.

Article 8
The Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations, and which were committed during the period from 17 April 1975 to 6 January 1979.

CHAPTER III
COMPOSITION OF THE EXTRAORDINARY CHAMBERS

Article 9 new
The Trial Chamber shall be an Extraordinary Chamber composed of five professional judges, of whom three are Cambodian judges with one as president, and two foreign judges; and before which the Co-Prosecutors shall present their cases. The president shall appoint one or more clerks of the court to participate.

The Supreme Court Chamber, which shall serve as both appellate chamber and final instance, shall be an Extraordinary Chamber composed of seven judges, of whom four are Cambodian judges with one as president, and three foreign judges; and before which the Co-Prosecutors shall present their cases. The president shall appoint one or more clerks of the court to participate.

CHAPTER IV
APPOINTMENT OF JUDGES

Article 10 new
The judges of the Extraordinary Chambers shall be appointed from among the currently practising judges or are additionally appointed in accordance with the existing procedures for appointment of judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law, including international humanitarian law and human rights law.

Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source.

Article 11 new
The Supreme Council of the Magistracy shall appoint at least seven Cambodian judges to act as judges of the Extraordinary Chambers, and shall appoint reserve judges as needed, and shall also appoint the President of each of the Extraordinary Chambers from the above Cambodian judges so appointed, in accordance with the existing procedures for appointment of judges.

The reserve Cambodian judges shall replace the appointed Cambodian judges in case of their absence. These reserve judges may continue to perform their regular duties in their respective courts.

The Supreme Council of the Magistracy shall appoint at least five individuals of foreign nationality to act as foreign judges of the Extraordinary Chambers upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of not less than seven candidates for foreign judges to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint five sitting judges and at least two reserve judges. In addition to the foreign judges sitting in the Extraordinary Chambers and present at every stage of the proceedings, the President of each Chamber may, on a case-by-case basis, designate one or more reserve foreign judges already appointed by the Supreme Council of the Magistracy to be present at each stage of the trial, and to replace a foreign judge if that judge is unable to continue sitting.

Article 12
All judges under this law shall enjoy equal status and conditions of service according to each level of the Extraordinary Chambers.

Each judge under this law shall be appointed for the period of these proceedings.

Article 13
Judges shall be assisted by Cambodian and international staff as needed in their offices.

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In choosing staff to serve as assistants and law clerks, the Director of the Office of Administration shall interview if necessary and, with the approval of the Cambodian judges by majority vote, hire staff who shall be appointed by the Royal Government of Cambodia. The Deputy Director of the Office of Administration shall be responsible for the recruitment and administration of all international staff. The number of assistants and law clerks shall be chosen in proportion to the Cambodian judges and foreign judges.

Cambodian staff shall be selected from Cambodian civil servants or other qualified nationals of Cambodia, if necessary.

CHAPTER V
DECISIONS OF THE EXTRAORDINARY CHAMBERS

Article 14 new
1. The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply:

a. a decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least four judges;
b. a decision by the Extraordinary Chamber of the Supreme Court shall require the affirmative vote of at least five judges.

2. When there is no unanimity, the decision of the Extraordinary Chambers shall contain the opinions of the majority and the minority.

Article 15
The Presidents shall convene the appointed judges at the appropriate time to proceed with the work of the Extraordinary Chambers.

CHAPTER VI
CO-PROSECUTORS

Article 16
All indictments in the Extraordinary Chambers shall be the responsibility of two prosecutors, one Cambodian and another foreign, hereinafter referred to as Co-Prosecutors, who shall work together to prepare indictments against the Suspects in the Extraordinary Chambers.

Article 17 new
The Co-Prosecutors in the Trial Chamber shall have the right to appeal the verdict of the Extraordinary Chamber of the trial court.

Article 18 new
The Supreme Council of the Magistracy shall appoint Cambodian prosecutors and Cambodian reserve prosecutors as necessary from among the Cambodian professional judges.

The reserve prosecutors shall replace the appointed prosecutors in case of their absence. These reserve prosecutors may continue to perform their regular duties in their respective courts.

One foreign prosecutor with the competence to appear in both Extraordinary Chambers shall be appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Prosecutor to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one prosecutor and one reserve prosecutor.

Article 19
The Co-Prosecutors shall be appointed from among those individuals who are appointed in accordance with the existing procedures for selection of prosecutors who have high moral character and integrity and who are experienced in the conduct of investigations and prosecutions of criminal cases.

The Co-Prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.

Article 20 new
The Co-Prosecutors shall prosecute in accordance with existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Prosecutors may seek guidance in procedural rules established at the international level.

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In the event of disagreement between the Co-Prosecutors the following shall apply:

The prosecution shall proceed unless the Co-Prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions;

The Co-Prosecutors shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.

The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three Cambodian judges appointed by the Supreme Council of the Magistracy, one of whom shall be President, and two foreign judges appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations. The appointment of the above judges shall follow the provisions of Article 10 of this Law.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority as required for a decision, the prosecution shall proceed.

In carrying out the prosecution, the Co-Prosecutors may seek the assistance of the Royal Government of Cambodia if such assistance would be useful to the prosecution, and such assistance shall be provided.

Article 21 new
The Co-Prosecutors under this law shall enjoy equal status and conditions of service according to each level of the Extraordinary Chambers.

Each Co-Prosecutor shall be appointed for the period of these proceedings.
In the event of the absence of the foreign Co-Prosecutor, he or she shall be replaced by the reserve foreign Co-Prosecutor.

Article 22 new
Each Co-Prosecutor shall have the right to choose one or more deputy prosecutors to assist him or her with prosecution before the chambers. Deputy foreign prosecutors shall be appointed by the foreign Co-Prosecutor from a list provided by the Secretary-General.

The Co-prosecutors shall be assisted by Cambodian and international staff as needed in their offices. In choosing staff to serve as assistants, the Director of the Office of Administration shall interview, if necessary, and with the approval of the Cambodian Co-Prosecutor, hire staff who shall be appointed by the Royal Government of Cambodia. The Deputy Director of the Office of Administration shall be responsible for the recruitment and administration of all foreign staff. The number of assistants shall be chosen in proportion to the Cambodian prosecutors and foreign prosecutors.

Cambodian staff shall be selected from Cambodian civil servants and, if necessary, other qualified nationals of Cambodia.

CHAPTER VII
INVESTIGATIONS

Article 23 new
All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.

In the event of disagreement between the Co-Investigating Judges the following shall apply:

The investigation shall proceed unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions.

The Co-Investigating Judges shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.
The difference shall be settled forthwith by the Pre-Trial Chamber referred to in Article 20.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Investigating Judges. They shall immediately proceed in accordance with the decision of the Pre-Trial Chamber. If there is no majority as required for a decision, the investigation shall proceed.

The Co-Investigating Judges shall conduct investigations on the basis of information obtained from any institution, including the Government, United Nations organs, or non-governmental organizations.

The Co-Investigating Judges shall have the power to question suspects and victims, to hear witnesses, and to collect evidence, in accordance with existing procedures in force. In the event the Co-Investigating Judges consider it necessary to do so, they may issue an order requesting the Co-Prosecutors also to interrogate the witnesses.

In carrying out the investigations, the Co-Investigating Judges may seek the assistance of the Royal Government of Cambodia, if such assistance would be useful to the investigation, and such assistance shall be provided.

Article 24 new
During the investigation, Suspects shall be unconditionally entitled to assistance of counsel of their own choosing, and to have legal assistance assigned to them free of charge if they cannot afford it, as well as the right to interpretation, as necessary, into and from a language they speak and understand.

Article 25
The Co-Investigating Judges shall be appointed from among the currently practising judges or are additionally appointed in accordance with the existing procedures for appointment of judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.

Article 26
The Cambodian Co-Investigating Judge and the reserve Investigating Judges shall be appointed by the Supreme Council of the Magistracy from among the Cambodian professional judges.

The reserve Investigating Judges shall replace the appointed Investigating Judges in case of their absence. These Investigating Judges may continue to perform their regular duties in their respective courts.

The Supreme Council of the Magistracy shall appoint the foreign Co-Investigating Judge for the period of the investigation, upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Investigating Judge to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one Investigating Judge and one reserve Investigating Judge.

Article 27 new
All Investigating Judges under this law shall enjoy equal status and conditions of service.

Each Investigating Judge shall be appointed for the period of the investigation.

In the event of the absence of the foreign Co-Investigating Judge, he or she shall be replaced by the reserve foreign Co-Investigating Judge.

Article 28
The Co-Investigating Judges shall be assisted by Cambodian and international staff as needed in their offices.

In choosing staff to serve as assistants, the Co-Investigating Judges shall comply with the spirit of the provisions set forth in Article 13 of this law.

CHAPTER VIII
INDIVIDUAL RESPONSIBILITY

Article 29
Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.

The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.

The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.

CHAPTER IX
OFFICE OF ADMINISTRATION

Article 30
The staff of the judges, the investigating judges and prosecutors of the Extraordinary Chambers shall be supervised by an Office of Administration.

This Office shall have a Cambodian Director, a foreign Deputy Director and such other staff as necessary.

Article 31 new
The Director of the Office of Administration shall be appointed by the Royal Government of Cambodia for a two-year term and shall be eligible for reappointment.

The Director of the Office of Administration shall be responsible for the overall management of the Office of Administration, except in matters that are subject to United Nations rules and procedures.

The Director of the Office of Administration shall be appointed from among those with significant experience in court administration and fluency in one of the foreign languages used in the Extraordinary Chambers, and shall be a person of high moral character and integrity.

The foreign Deputy Director shall be appointed by the Secretary-General of the United Nations and assigned by the Royal Government of Cambodia, and shall be responsible for the recruitment and administration of all international staff, as required by the foreign components of the Extraordinary Chambers, the Co-Investigating Judges, the Co-Prosecutors' Office, and the Office of Administration. The Deputy Director shall administer the resources provided through the United Nations Trust Fund.

The Office of Administration shall be assisted by Cambodian and international staff as necessary. All Cambodian staff of the Office of Administration shall be appointed by the Royal Government of Cambodia at the request of the Director. Foreign staff shall be appointed by the Deputy Director.

Cambodian staff shall be selected from Cambodian civil servants and, if necessary, other qualified nationals of Cambodia.

Article 32
All staff assigned to the judges, Co-Investigating Judges, Co-Prosecutors, and Office of Administration shall enjoy the same working conditions according to each level of the Extraordinary Chambers.

CHAPTER X
TRIAL PROCEEDINGS OF THE EXTRAORDINARY CHAMBERS

Article 33 new
The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level.

The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.

Suspects who have been indicted and arrested shall be brought to the Trial Chamber according to existing procedures in force. The Royal Government of Cambodia shall guarantee the security of the Suspects who appear before the court, and is responsible for taking measures for the arrest of the Suspects prosecuted under this law. Justice police shall be assisted by other law enforcement elements of the Royal Government of Cambodia, including the armed forces, in order to ensure that accused persons are brought into custody immediately.

Conditions for the arrest and the custody of the accused shall conform to existing law in force.

The Court shall provide for the protection of victims and witnesses. Such protection measures shall include, but not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.

Article 34 new
Trials shall be public and open to representatives of foreign States, of the Secretary-General of the United Nations, of the media and of national and international non-government organizations unless in exceptional circumstances the Extraordinary Chambers decide to close the proceedings for good cause in accordance with existing procedures in force where publicity would prejudice the interests of justice.

Article 35 new
The accused shall be presumed innocent as long as the court has not given its definitive judgment.

In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights.

a. to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them;
b. to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;
c. to be tried without delay;
d. to be tried in their own presence and to defend themselves in person or with the assistance of counsel of their own choosing, to be informed of this right and to have legal assistance assigned to them free of charge if they do not have sufficient means to pay for it ;
e. to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them;
f. to have the free assistance of an interpreter if the accused cannot understand or does not speak the language used in the court;
g. not to be compelled to testify against themselves or to confess guilt.

Article 36 new
The Extraordinary Chamber of the Supreme Court shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court. In this case, the Supreme Court Chamber shall make final decisions on both issues of law and fact, and shall not return the case to the Extraordinary Chamber of the trial court.

Article 37 new
The provision of Article 33, 34 and 35 shall apply *mutatis mutandis* in respect of proceedings before the Extraordinary Chambers of the Supreme Court.

CHAPTER XI
PENALTIES

Article 38
All penalties shall be limited to imprisonment.

Article 39
Those who have committed any crime as provided in Articles 3 new, 4, 5, 6, 7 and 8 shall be sentenced to a prison term from five years to life imprisonment.

In addition to imprisonment, the Extraordinary Chamber of the trial court may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct.

The confiscated property shall be returned to the State.

CHAPTER XII
AMNESTY AND PARDONS

Article 40 new
The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers.

CHAPTER XIII
STATUS, RIGHTS, PRIVILEGES AND IMMUNITIES

Article 41
The foreign judges, the foreign Co-Investigating Judge, the foreign Co-Prosecutor and the Deputy Director of the Office of Administration, together with their families forming part of their household, shall enjoy all of the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961

Vienna Convention on Diplomatic Relations. Such officials shall enjoy exemption from taxation in Cambodia on their salaries, emoluments and allowances.

Article 42 new
1. Cambodian judges, the Co-Investigating Judge, the Co-Prosecutor, the Director of the Office of Administration and personnel shall be accorded immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration.

2. International personnel shall be accorded in addition:
   a. immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration;
   b. immunity from taxation on salaries, allowances and emoluments paid to them by the United Nations;
   c. immunity from immigration restriction;
   d. the right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Cambodia.

3. The counsel of a suspect or an accused who has been admitted as such by the Extraordinary Chambers shall not be subjected by the Government to any measure that may affect the free and independent exercise of his or her functions under the Law on the Establishment of the Extraordinary Chambers.

In particular, the counsel shall be accorded:
   a. immunity from personal arrest or detention and from seizure of personal baggage relating to his or her functions in the proceedings;
   b. inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;
   c. immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of their function as counsel of a suspect or accused.

4. The archives of the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration and in general all

documents and materials made available to, belonging to, or used by them, wherever located in the Kingdom of Cambodia and by whomsoever held, shall be inviolable for the duration of the proceedings.

CHAPTER XIV
LOCATION OF THE EXTRAORDINARY CHAMBERS

Article 43 new
The Extraordinary Chambers established in the trial court and the Supreme Court Chamber shall be located in Phnom Penh.

CHAPTER XV
EXPENSES

Article 44 new
The expenses and salaries of the Extraordinary Chambers shall be as follows:

1. The expenses and salaries of the Cambodian administrative officials and staff, the Cambodian judges and reserve judges, investigating judges and reserve investigating judges, and prosecutors and reserve prosecutors shall be borne by the Cambodian national budget;
2. The expenses of the foreign administrative officials and staff, the foreign judges, Co-investigating judge and Co-prosecutor sent by the Secretary-General of the United Nations shall be borne by the United Nations;
3. The defence counsel may receive fees for mounting the defence;
4. The Extraordinary Chambers may receive additional assistance for their expenses from other voluntary funds contributed by foreign governments, international institutions, non-governmental organizations, and other persons wishing to assist the proceedings.

CHAPTER XVI
WORKING LANGUAGES

Article 45 new
The official working languages of the Extraordinary Chambers shall be Khmer, English and French.

CHAPTER XVII
ABSENCE OF FOREIGN JUDGES, INVESTIGATING JUDGES OR PROSECUTORS

Article 46 new
In order to ensure timely and smooth implementation of this law, in the event any foreign judges or foreign investigating judges or foreign prosecutors fail or refuse to participate in the Extraordinary Chambers, the Supreme Council of the Magistracy shall appoint other judges or investigating judges or prosecutors to fill any vacancies from the lists of foreign candidates provided for in Article 11, Article 18, and Article 26. In the event those lists are exhausted, and the Secretary-General of the United Nations does not supplement the lists with new candidates, or in the event that the United Nations withdraws its support from the Extraordinary Chambers, any such vacancies shall be filled by the Supreme Council of the Magistracy from candidates recommended by the Governments of Member States of the United Nations or from among other foreign legal personalities.

If, following such procedures, there are still no foreign judges or foreign investigating judges or foreign prosecutors participating in the work of the Extraordinary Chambers and no foreign candidates have been identified to occupy the vacant positions, then the Supreme Council of the Magistracy may choose replacement Cambodian judges, investigating judges or prosecutors.

CHAPTER XVIII
EXISTENCE OF THE COURT

Article 47
The Extraordinary Chambers in the courts of Cambodia shall automatically dissolve following the definitive conclusion of these proceedings.

CHAPTER XIX
AGREEMENT BETWEEN THE UNITED NATIONS AND CAMBODIA

Article 47 bis new
Following its ratification in accordance with the relevant provisions of the law of Kingdom of Cambodia regarding competence to conclude treaties, the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crime Committed during the period of

Democratic Kampuchea, done at Phnom Penh on 6 June 2003, shall apply as law within the Kingdom of Cambodia.

FINAL PROVISION

Article 48
This law shall be proclaimed as urgent.

Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (with Statute)
(United Nations Security Council resolution 1757 (2007) of 30 May 2007, annex)

United Nations S/RES/1757 (2007)

Security Council

Distr.: General
30 May 2007

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Resolution 1757 (2007)

Adopted by the Security Council at its 5685th meeting, on 30 May 2007

The Security Council,

Recalling all its previous relevant resolutions, in particular resolutions 1595 (2005) of 7 April 2005, 1636 (2005) of 31 October 2005, 1644 (2005) of 15 December 2005, 1664 (2006) of 29 March 2006 and 1748 (2007) of 27 March 2007,

Reaffirming its strongest condemnation of the 14 February 2005 terrorist bombings as well as other attacks in Lebanon since October 2004,

Reiterating its call for the strict respect of the sovereignty, territorial integrity, unity and political independence of Lebanon under the sole and exclusive authority of the Government of Lebanon,

Recalling the letter of the Prime Minister of Lebanon to the Secretary-General of 13 December 2005 (S/2005/783) requesting inter alia the establishment of a tribunal of an international character to try all those who are found responsible for this terrorist crime, and the request by this Council for the Secretary-General to negotiate an agreement with the Government of Lebanon aimed at establishing such a Tribunal based on the highest international standards of criminal justice,

Recalling further the report of the Secretary-General on the establishment of a special tribunal for Lebanon on 15 November 2006 (S/2006/893) reporting on the conclusion of negotiations and consultations that took place between January 2006 and September 2006 at United Nations Headquarters in New York, the Hague, and Beirut between the Legal Counsel of the United Nations and authorized representatives of the Government of Lebanon, and the letter of its President to the Secretary-General of 21 November 2006 (S/2006/911) reporting that the Members of the Security Council welcomed the conclusion of the negotiations and that they were satisfied with the Agreement annexed to the Report,

Recalling that, as set out in its letter of 21 November 2006, should voluntary contributions be insufficient for the Tribunal to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Tribunal,

Recalling also that the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon was signed by the Government of Lebanon and the United Nations respectively on 23 January and 6 February 2007,

Referring to the letter of the Prime Minister of Lebanon to the Secretary-General of the United Nations (S/2007/281), which recalled that the parliamentary majority has expressed its support for the Tribunal, and asked that his request that the Special Tribunal be put into effect be presented to the Council as a matter of urgency,

Mindful of the demand of the Lebanese people that all those responsible for the terrorist bombing that killed former Lebanese Prime Minister Rafiq Hariri and others be identified and brought to justice,

Commending the Secretary-General for his continuing efforts to proceed, together with the Government of Lebanon, with the final steps for the conclusion of the Agreement as requested in the letter of its President dated 21 November 2006 and referring in this regard to the briefing by the Legal Counsel on 2 May 2007, in which he noted that the establishment of the Tribunal through the Constitutional process is facing serious obstacles, but noting also that all parties concerned reaffirmed their agreement in principle to the establishment of the Tribunal,

Commending also the recent efforts of parties in the region to overcome these obstacles,

Willing to continue to assist Lebanon in the search for the truth and in holding all those involved in the terrorist attack accountable and reaffirming its determination to support Lebanon in its efforts to bring to justice perpetrators, organizers and sponsors of this and other assassinations,

Reaffirming its determination that this terrorist act and its implications constitute a threat to international peace and security,

1. *Decides*, acting under Chapter VII of the Charter of the United Nations, that:

(a) The provisions of the annexed document, including its attachment, on the establishment of a Special Tribunal for Lebanon shall enter into force on 10 June 2007, unless the Government of Lebanon has provided notification under Article 19 (1) of the annexed document before that date;

(b) If the Secretary-General reports that the Headquarters Agreement has not been concluded as envisioned under Article 8 of the annexed document, the location of the seat of the Tribunal shall be determined in consultation with the Government of Lebanon and be subject to the conclusion of a Headquarters Agreement between the United Nations and the State that hosts the Tribunal;

(c) If the Secretary-General reports that contributions from the Government of Lebanon are not sufficient to bear the expenses described in Article 5 (b) of the annexed document, he may accept or use voluntary contributions from States to cover any shortfall;

2. *Notes* that, pursuant to Article 19 (2) of the annexed document, the Special Tribunal shall commence functioning on a date to be determined by the Secretary-General in consultation with the Government of Lebanon, taking into account the progress of the work of the International Independent Investigation Commission;

3. *Requests* the Secretary-General, in coordination, when appropriate, with the Government of Lebanon, to undertake the steps and measures necessary to establish the Special Tribunal in a timely manner and to report to the Council within 90 days and thereafter periodically on the implementation of this resolution;

4. *Decides* to remain actively seized of the matter.

Annex

Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon

Whereas the Security Council, in its resolution 1664 (2006) of 29 March 2006, which responded to the request of the Government of Lebanon to establish a tribunal of an international character to try all those who are found responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others, recalled all its previous resolutions, in particular resolutions 1595 (2005) of 7 April 2005, 1636 (2005) of 31 October 2005 and 1644 (2005) of 15 December 2005,

Whereas the Security Council has requested the Secretary-General of the United Nations (hereinafter "the Secretary-General") "to negotiate an agreement with the Government of Lebanon aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice", taking into account the recommendations of the Secretary-General's report of 21 March 2006 (S/2006/176) and the views that have been expressed by Council members,

Whereas the Secretary-General and the Government of the Lebanese Republic (hereinafter "the Government") have conducted negotiations for the establishment of a Special Tribunal for Lebanon (hereinafter "the Special Tribunal" or "the Tribunal"),

Now therefore the United Nations and the Lebanese Republic (hereinafter referred to jointly as the "Parties") have agreed as follows:

Article 1
Establishment of the Special Tribunal

1. There is hereby established a Special Tribunal for Lebanon to prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.

2. The Special Tribunal shall function in accordance with the Statute of the Special Tribunal for Lebanon. The Statute is attached to this Agreement and forms an integral part thereof.

Article 2
Composition of the Special Tribunal and appointment of judges

1. The Special Tribunal shall consist of the following organs: the Chambers, the Prosecutor, the Registry and the Defence Office.

2. The Chambers shall be composed of a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber, with a second Trial Chamber to be created if, after the passage of at least six months from the commencement of the functioning of the Special Tribunal, the Secretary-General or the President of the Special Tribunal so requests.

3. The Chambers shall be composed of no fewer than eleven independent judges and no more than fourteen such judges, who shall serve as follows:

(a) A single international judge shall serve as a Pre-Trial Judge;

(b) Three judges shall serve in the Trial Chamber, of whom one shall be a Lebanese judge and two shall be international judges;

(c) In the event of the creation of a second Trial Chamber, that Chamber shall be likewise composed in the manner contained in subparagraph (b) above;

(d) Five judges shall serve in the Appeals Chamber, of whom two shall be Lebanese judges and three shall be international judges; and

(e) Two alternate judges, of whom one shall be a Lebanese judge and one shall be an international judge.

4. The judges of the Tribunal shall be persons of high moral character, impartiality and integrity, with extensive judicial experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

5. (a) Lebanese judges shall be appointed by the Secretary-General to serve in the Trial Chamber or the Appeals Chamber or as an alternate judge from a list of twelve persons presented by the Government upon the proposal of the Lebanese Supreme Council of the Judiciary;

(b) International judges shall be appointed by the Secretary-General to serve as Pre-Trial Judge, a Trial Chamber Judge, an Appeals Chamber Judge or an alternate judge, upon nominations forwarded by States at the invitation of the Secretary-General, as well as by competent persons;

(c) The Government and the Secretary-General shall consult on the appointment of judges;

(d) The Secretary-General shall appoint judges, upon the recommendation of a selection panel he has established after indicating his intentions to the Security Council. The selection panel shall be composed of two judges, currently sitting on or retired from an international tribunal, and the representative of the Secretary-General.

6. At the request of the presiding judge of a Trial Chamber, the President of the Special Tribunal may, in the interest of justice, assign alternate judges to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

7. Judges shall be appointed for a three-year period and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

8. Lebanese judges appointed to serve in the Special Tribunal shall be given full credit for their period of service with the Tribunal on their return to the Lebanese national judiciaries from which they were released and shall be reintegrated at a level at least comparable to that of their former position.

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government, shall appoint a Prosecutor for a three-year term. The Prosecutor may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

2. The Secretary-General shall appoint the Prosecutor, upon the recommendation of a selection panel he has established after indicating his intentions to the Security Council. The selection panel shall be composed of two judges, currently sitting on or retired from an international tribunal, and the representative of the Secretary-General.

3. The Government, in consultation with the Secretary-General and the Prosecutor, shall appoint a Lebanese Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.

4. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

5. The Prosecutor shall be assisted by such Lebanese and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4
Appointment of a Registrar

1. The Secretary-General shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Tribunal.

2. The Registrar shall be a staff member of the United Nations. He or she shall serve a three-year term and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

Article 5
Financing of the Special Tribunal

1. The expenses of the Special Tribunal shall be borne in the following manner:

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(a) Fifty-one per cent of the expenses of the Tribunal shall be borne by voluntary contributions from States;

(b) Forty-nine per cent of the expenses of the Tribunal shall be borne by the Government of Lebanon.

2. It is understood that the Secretary-General will commence the process of establishing the Tribunal when he has sufficient contributions in hand to finance the establishment of the Tribunal and twelve months of its operations plus pledges equal to the anticipated expenses of the following 24 months of the Tribunal's operation. Should voluntary contributions be insufficient for the Tribunal to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Tribunal.

Article 6
Management Committee

The parties shall consult concerning the establishment of a Management Committee.

Article 7
Juridical capacity

The Special Tribunal shall possess the juridical capacity necessary:

(a) To contract;

(b) To acquire and dispose of movable and immovable property;

(c) To institute legal proceedings;

(d) To enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Tribunal.

Article 8
Seat of the Special Tribunal

1. The Special Tribunal shall have its seat outside Lebanon. The location of the seat shall be determined having due regard to considerations of justice and fairness as well as security and administrative efficiency, including the rights of victims and access to witnesses, and subject to the conclusion of a headquarters agreement between the United Nations, the Government and the State that hosts the Tribunal.

2. The Special Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions.

3. An Office of the Special Tribunal for the conduct of investigations shall be established in Lebanon subject to the conclusion of appropriate arrangements with the Government.

Article 9
Inviolability of premises, archives and all other documents

1. The Office of the Special Tribunal in Lebanon shall be inviolable. The competent authorities shall take appropriate action that may be necessary to ensure

that the Tribunal shall not be dispossessed of all or any part of the premises of the Tribunal without its express consent.

2. The property, funds and assets of the Office of the Special Tribunal in Lebanon, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

3. The archives of the Office of the Special Tribunal in Lebanon, and in general all documents and materials made available, belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 10
Funds, assets and other property

The Office of the Special Tribunal, its funds, assets and other property in Lebanon, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Tribunal has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

Article 11
Privileges and immunities of the judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Head of the Defence Office

1. The judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Head of the Defence Office, while in Lebanon, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the Vienna Convention on Diplomatic Relations of 1961.

2. Privileges and immunities are accorded to the judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Head of the Defence Office in the interest of the Special Tribunal and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity in any case where it can be waived without prejudice to the purposes for which it is accorded shall lie with the Secretary-General, in consultation with the President of the Tribunal.

Article 12
Privileges and immunities of international and Lebanese personnel

1. Lebanese and international personnel of the Office of the Special Tribunal, while in Lebanon, shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Office of the Special Tribunal;

(b) Exemption from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:

(a) Immunity from immigration restriction;

(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Lebanon.

3. The privileges and immunities are granted to the officials of the Office of the Special Tribunal in the interest of the Tribunal and not for their personal benefit. The right and the duty to waive the immunity in any case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Tribunal.

Article 13
Defence counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Tribunal shall not be subjected, while in Lebanon, to any measure that may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused;

(d) Immunity from any immigration restrictions during his or her stay as well as during his or her journey to the Tribunal and back.

Article 14
Security, safety and protection of persons referred to in this Agreement

The Government shall take effective and adequate measures to ensure the appropriate security, safety and protection of personnel of the Office of the Special Tribunal and other persons referred to in this Agreement, while in Lebanon. It shall take all appropriate steps, within its capabilities, to protect the equipment and premises of the Office of the Special Tribunal from attack or any action that prevents the Tribunal from discharging its mandate.

Article 15
Cooperation with the Special Tribunal

1. The Government shall cooperate with all organs of the Special Tribunal, in particular with the Prosecutor and defence counsel, at all stages of the proceedings. It shall facilitate access of the Prosecutor and defence counsel to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Tribunal or an order issued by the Chambers, including, but not limited to:

(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Tribunal.

Article 16
Amnesty

The Government undertakes not to grant amnesty to any person for any crime falling within the jurisdiction of the Special Tribunal. An amnesty already granted in respect of any such persons and crimes shall not be a bar to prosecution.

Article 17
Practical arrangements

With a view to achieving efficiency and cost-effectiveness in the operation of the Special Tribunal:

(a) Appropriate arrangements shall be made to ensure that there is a coordinated transition from the activities of the International Independent Investigation Commission, established by the Security Council in its resolution 1595 (2005), to the activities of the Office of the Prosecutor;

(b) Judges of the Trial Chamber and the Appeals Chamber shall take office on a date to be determined by the Secretary-General in consultation with the President of the Special Tribunal. Pending such a determination, judges of both Chambers shall be convened on an ad hoc basis to deal with organizational matters and serving, when required, to perform their duties.

Article 18
Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation or by any other mutually agreed upon mode of settlement.

Article 19
Entry into force and commencement of the functioning of the Special Tribunal

1. This Agreement shall enter into force on the day after the Government has notified the United Nations in writing that the legal requirements for entry into force have been complied with.

2. The Special Tribunal shall commence functioning on a date to be determined by the Secretary-General in consultation with the Government, taking into account the progress of the work of the International Independent Investigation Commission.

Article 20
Amendment

This Agreement may be amended by written agreement between the Parties.

Article 21
Duration of the Agreement

1. This Agreement shall remain in force for a period of three years from the date of the commencement of the functioning of the Special Tribunal.

2. Three years after the commencement of the functioning of the Special Tribunal the Parties shall, in consultation with the Security Council, review the progress of the work of the Special Tribunal. If at the end of this period of three years the activities of the Tribunal have not been completed, the Agreement shall be extended to allow the Tribunal to complete its work, for a further period(s) to be determined by the Secretary-General in consultation with the Government and the Security Council.

3. The provisions relating to the inviolability of the funds, assets, archives and documents of the Office of the Special Tribunal in Lebanon, the privileges and immunities of those referred to in this Agreement, as well as provisions relating to defence counsel and the protection of victims and witnesses, shall survive termination of this Agreement.

In witness whereof, the following duly authorized representatives of the United Nations and of the Lebanese Republic have signed this Agreement.

Done at _____ on _____ 2006, in three originals in the Arabic, French and English languages, all texts being equally authentic.

For the United Nations:

_____

For the Lebanese Republic:

_____

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Attachment
Statute of the Special Tribunal for Lebanon

Having been established by an Agreement between the United Nations and the Lebanese Republic (hereinafter "the Agreement") pursuant to Security Council resolution 1664 (2006) of 29 March 2006, which responded to the request of the Government of Lebanon to establish a tribunal of an international character to try all those who are found responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others, the Special Tribunal for Lebanon (hereinafter "the Special Tribunal") shall function in accordance with the provisions of this Statute.

Section I
Jurisdiction and applicable law

Article 1
Jurisdiction of the Special Tribunal

The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.

Article 2
Applicable criminal law

The following shall be applicable to the prosecution and punishment of the crimes referred to in article 1, subject to the provisions of this Statute:

(a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and

(b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle".

Article 3
Individual criminal responsibility

1. A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person:

(a) Committed, participated as accomplice, organized or directed others to commit the crime set forth in article 2 of this Statute; or

(b) Contributed in any other way to the commission of the crime set forth in article 2 of this Statute by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime.

2. With respect to superior and subordinate relationships, a superior shall be criminally responsible for any of the crimes set forth in article 2 of this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

3. The fact that the person acted pursuant to an order of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Tribunal determines that justice so requires.

Article 4
Concurrent jurisdiction

1. The Special Tribunal and the national courts of Lebanon shall have concurrent jurisdiction. Within its jurisdiction, the Tribunal shall have primacy over the national courts of Lebanon.

2. Upon the assumption of office of the Prosecutor, as determined by the Secretary-General, and no later than two months thereafter, the Special Tribunal shall request the national judicial authority seized with the case of the attack against Prime Minister Rafiq Hariri and others to defer to its competence. The Lebanese judicial authority shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any. Persons detained in connection with the investigation shall be transferred to the custody of the Tribunal.

3. (a) At the request of the Special Tribunal, the national judicial authority seized with any of the other crimes committed between 1 October 2004 and 12 December 2005, or a later date decided pursuant to article 1, shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any, for review by the Prosecutor;

(b) At the further request of the Tribunal, the national authority in question shall defer to the competence of the Tribunal. It shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any, and persons detained in connection with any such case shall be transferred to the custody of the Tribunal;

(c) The national judicial authorities shall regularly inform the Tribunal of the progress of their investigation. At any stage of the proceedings, the Tribunal may formally request a national judicial authority to defer to its competence.

Article 5
Non bis in idem

1. No person shall be tried before a national court of Lebanon for acts for which he or she has already been tried by the Special Tribunal.

2. A person who has been tried by a national court may be subsequently tried by the Special Tribunal if the national court proceedings were not impartial or independent, were designed to shield the accused from criminal responsibility for crimes within the jurisdiction of the Tribunal or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under this Statute, the Special Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 6
Amnesty

An amnesty granted to any person for any crime falling within the jurisdiction of the Special Tribunal shall not be a bar to prosecution.

Section II
Organization of the Special Tribunal

Article 7
Organs of the Special Tribunal

The Special Tribunal shall consist of the following organs:

(a) The Chambers, comprising a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber;

(b) The Prosecutor;

(c) The Registry; and

(d) The Defence Office.

Article 8
Composition of the Chambers

1. The Chambers shall be composed as follows:

(a) One international Pre-Trial Judge;

(b) Three judges who shall serve in the Trial Chamber, of whom one shall be a Lebanese judge and two shall be international judges;

(c) Five judges who shall serve in the Appeals Chamber, of whom two shall be Lebanese judges and three shall be international judges;

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(d) Two alternate judges, one of whom shall be a Lebanese judge and one shall be an international judge.

2. The judges of the Appeals Chamber and the judges of the Trial Chamber, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Tribunal.

3. At the request of the presiding judge of the Trial Chamber, the President of the Special Tribunal may, in the interest of justice, assign the alternate judges to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 9
Qualification and appointment of judges

1. The judges shall be persons of high moral character, impartiality and integrity, with extensive judicial experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

2. In the overall composition of the Chambers, due account shall be taken of the established competence of the judges in criminal law and procedure and international law.

3. The judges shall be appointed by the Secretary-General, as set forth in article 2 of the Agreement, for a three-year period and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

Article 10
Powers of the President of the Special Tribunal

1. The President of the Special Tribunal, in addition to his or her judicial functions, shall represent the Tribunal and be responsible for its effective functioning and the good administration of justice.

2. The President of the Special Tribunal shall submit an annual report on the operation and activities of the Tribunal to the Secretary-General and to the Government of Lebanon.

Article 11
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for the crimes falling within the jurisdiction of the Special Tribunal. In the interest of proper administration of justice, he or she may decide to charge jointly persons accused of the same or different crimes committed in the course of the same transaction.

2. The Prosecutor shall act independently as a separate organ of the Special Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Prosecutor shall be appointed, as set forth in article 3 of the Agreement, by the Secretary-General for a three-year term and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government. He or she shall be of high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases.

4. The Prosecutor shall be assisted by a Lebanese Deputy Prosecutor and by such other Lebanese and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

5. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Lebanese authorities concerned.

Article 12
The Registry

1. Under the authority of the President of the Special Tribunal, the Registry shall be responsible for the administration and servicing of the Tribunal.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General and shall be a staff member of the United Nations. He or she shall serve for a three-year term and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, and such other appropriate assistance for witnesses who appear before the Special Tribunal and others who are at risk on account of testimony given by such witnesses.

Article 13
The Defence Office

1. The Secretary-General, in consultation with the President of the Special Tribunal, shall appoint an independent Head of the Defence Office, who shall be responsible for the appointment of the Office staff and the drawing up of a list of defence counsel.

2. The Defence Office, which may also include one or more public defenders, shall protect the rights of the defence, provide support and assistance to defence counsel and to the persons entitled to legal assistance, including, where appropriate, legal research, collection of evidence and advice, and appearing before the Pre-Trial Judge or a Chamber in respect of specific issues.

Article 14
Official and working languages

The official languages of the Special Tribunal shall be Arabic, French and English. In any given case proceedings, the Pre-Trial Judge or a Chamber may decide that one or two of the languages may be used as working languages as appropriate.

Section III
Rights of defendants and victims

Article 15
Rights of suspects during investigation

A suspect who is to be questioned by the Prosecutor shall not be compelled to incriminate himself or herself or to confess guilt. He or she shall have the following rights of which he or she shall be informed by the Prosecutor prior to questioning, in a language he or she speaks and understands:

(a) The right to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Special Tribunal;

(b) The right to remain silent, without such silence being considered in the determination of guilt or innocence, and to be cautioned that any statement he or she makes shall be recorded and may be used in evidence;

(c) The right to have legal assistance of his or her own choosing, including the right to have legal assistance provided by the Defence Office where the interests of justice so require and where the suspect does not have sufficient means to pay for it;

(d) The right to have the free assistance of an interpreter if he or she cannot understand or speak the language used for questioning;

(e) The right to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 16
Rights of the accused

1. All accused shall be equal before the Special Tribunal.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Tribunal for the protection of victims and witnesses.

3. (a) The accused shall be presumed innocent until proved guilty according to the provisions of this Statute;

(b) The onus is on the Prosecutor to prove the guilt of the accused;

(c) In order to convict the accused, the relevant Chamber must be convinced of the guilt of the accused beyond reasonable doubt.

4. In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate without hindrance with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) Subject to the provisions of article 22, to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To examine all evidence to be used against him or her during the trial in accordance with the Rules of Procedure and Evidence of the Special Tribunal;

(g) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Tribunal;

(h) Not to be compelled to testify against himself or herself or to confess guilt.

5. The accused may make statements in court at any stage of the proceedings, provided such statements are relevant to the case at issue. The Chambers shall decide on the probative value, if any, of such statements.

Article 17
Rights of victims

Where the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Pre-Trial Judge or the Chamber considers it appropriate.

Section IV
Conduct of proceedings

Article 18
Pre-Trial proceedings

1. The Pre-Trial Judge shall review the indictment. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If he or she is not so satisfied, the indictment shall be dismissed.

2. The Pre-Trial Judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest or transfer of persons, and any other orders as may be required for the conduct of the investigation and for the preparation of a fair and expeditious trial.

Article 19
Evidence collected prior to the establishment of the Special Tribunal

Evidence collected with regard to cases subject to the consideration of the Special Tribunal, prior to the establishment of the Tribunal, by the national authorities of Lebanon or by the International Independent Investigation Commission in accordance with its mandate as set out in Security Council resolution 1595 (2005) and subsequent resolutions, shall be received by the Tribunal. Its admissibility shall be decided by the Chambers pursuant to international standards on collection of evidence. The weight to be given to any such evidence shall be determined by the Chambers.

Article 20
Commencement and conduct of trial proceedings

1. The Trial Chamber shall read the indictment to the accused, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment and instruct the accused to enter a plea.

2. Unless otherwise decided by the Trial Chamber in the interests of justice, examination of witnesses shall commence with questions posed by the presiding judge, followed by questions posed by other members of the Trial Chamber, the Prosecutor and the Defence.

3. Upon request or *proprio motu*, the Trial Chamber may at any stage of the trial decide to call additional witnesses and/or order the production of additional evidence.

4. The hearings shall be public unless the Trial Chamber decides to hold the proceedings in camera in accordance with the Rules of Procedure and Evidence.

Article 21
Powers of the Chambers

1. The Special Tribunal shall confine the trial, appellate and review proceedings strictly to an expeditious hearing of the issues raised by the charges, or the grounds for appeal or review, respectively. It shall take strict measures to prevent any action that may cause unreasonable delay.

2. A Chamber may admit any relevant evidence that it deems to have probative value and exclude such evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

3. A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.

4. In cases not otherwise provided for in the Rules of Procedure and Evidence, a Chamber shall apply rules of evidence that will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

Article 22
Trials in absentia

1. The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she:

(a) Has expressly and in writing waived his or her right to be present;

(b) Has not been handed over to the Tribunal by the State authorities concerned;

(c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.

2. When hearings are conducted in the absence of the accused, the Special Tribunal shall ensure that:

(a) The accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality;

(b) The accused has designated a defence counsel of his or her own choosing, to be remunerated either by the accused or, if the accused is proved to be indigent, by the Tribunal;

(c) Whenever the accused refuses or fails to appoint a defence counsel, such counsel has been assigned by the Defence Office of the Tribunal with a view to ensuring full representation of the interests and rights of the accused.

3. In case of conviction in absentia, the accused, if he or she had not designated a defence counsel of his or her choosing, shall have the right to be retried in his or her presence before the Special Tribunal, unless he or she accepts the judgement.

Article 23
Judgement

The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which any separate or dissenting opinions shall be appended.

Article 24
Penalties

1. The Trial Chamber shall impose upon a convicted person imprisonment for life or for a specified number of years. In determining the terms of imprisonment for the crimes provided for in this Statute, the Trial Chamber shall, as appropriate, have recourse to international practice regarding prison sentences and to the practice of the national courts of Lebanon.

2. In imposing sentence, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

Article 25
Compensation to victims

1. The Special Tribunal may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal.

2. The Registrar shall transmit to the competent authorities of the State concerned the judgement finding the accused guilty of a crime that has caused harm to a victim.

3. Based on the decision of the Special Tribunal and pursuant to the relevant national legislation, a victim or persons claiming through the victim, whether or not such victim had been identified as such by the Tribunal under paragraph 1 of this article, may bring an action in a national court or other competent body to obtain compensation.

4. For the purposes of a claim made under paragraph 3 of this article, the judgement of the Special Tribunal shall be final and binding as to the criminal responsibility of the convicted person.

Article 26
Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:

(a) An error on a question of law invalidating the decision;

(b) An error of fact that has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

Article 27
Review proceedings

1. Where a new fact has been discovered that was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and that could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgement.

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the Trial Chamber;

(b) Retain jurisdiction over the matter.

Article 28
Rules of Procedure and Evidence

1. The judges of the Special Tribunal shall, as soon as practicable after taking office, adopt Rules of Procedure and Evidence for the conduct of the pre-trial, trial and appellate proceedings, the admission of evidence, the participation of victims, the protection of victims and witnesses and other appropriate matters and may amend them, as appropriate.

2. In so doing, the judges shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial.

Article 29
Enforcement of sentences

1. Imprisonment shall be served in a State designated by the President of the Special Tribunal from a list of States that have indicated their willingness to accept persons convicted by the Tribunal.

2. Conditions of imprisonment shall be governed by the law of the State of enforcement subject to the supervision of the Special Tribunal. The State of enforcement shall be bound by the duration of the sentence, subject to article 30 of this Statute.

Article 30
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Tribunal accordingly. There shall only be pardon or commutation of sentence if the President of the Tribunal, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

International Criminal Tribunal for the former Yugoslavia

Prosecutor *v.* Duško Tadić
Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction

Appeals Chamber, 2 October 1995

Before:
Judge Cassese, Presiding
Judge Li
Judge Deschênes
Judge Abi-Saab Judge Sidhwa

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
2 octobre 1995

PROSECUTOR

v.

DUSKO TADIC a/k/a "DULE"

DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:

Mr. Richard Goldstone, Prosecutor
Mr. Grant Niemann
Mr. Alan Tieger
Mr. Michael Keegan
Ms. Brenda Hollis

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Milan Vujin
Mr. Krstan Simic

I. INTRODUCTION

A. The Judgement Under Appeal

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (hereinafter "International Tribunal") is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August 1995. By that judgement, Appellant's motion challenging the

jurisdiction of the International Tribunal was denied.

2. Before the Trial Chamber, Appellant had launched a three-pronged attack:

a) illegal foundation of the International Tribunal;
b) wrongful primacy of the International Tribunal over national courts;
c) lack of jurisdiction *ratione materiae*.

The judgement under appeal denied the relief sought by Appellant; in its essential provisions, it reads as follows:

> "THE TRIAL CHAMBER [. . .]HEREBY DISMISSES the motion insofar as it relates to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 and otherwise decides it to be incompetent insofar as it challenges the establishment of the International Tribunal
> HEREBY DENIES the relief sought by the Defence in its Motion on the Jurisdiction of the Tribunal."
> (Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, 10 August 1995 (Case No. IT-94-1-T), at 33 (hereinafter *Decision at Trial*).)

Appellant now alleges error of law on the part of the Trial Chamber.

3. As can readily be seen from the operative part of the judgement, the Trial Chamber took a different approach to the first ground of contestation, on which it refused to rule, from the route it followed with respect to the last two grounds, which it dismissed. This distinction ought to be observed and will be referred to below.
From the development of the proceedings, however, it now appears that the question of jurisdiction has acquired, before this Chamber, a two-tier dimension:

a) the jurisdiction of the Appeals Chamber to hear this appeal;
b) the jurisdiction of the International Tribunal to hear this case on the merits.

Before anything more is said on the merits, consideration must be given to the preliminary question: whether the Appeals Chamber is endowed with the jurisdiction to hear this appeal at all.

B. Jurisdiction Of The Appeals Chamber

4. Article 25 of the Statute of the International Tribunal (Statute of the International Tribunal (originally published as annex to *the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)* (U.N. Doc. S/25704) and adopted pursuant to Security Council resolution 827 (25 May 1993) (hereinafter *Statute of the International Tribunal*)) adopted by the United Nations Security Council opens up the possibility of appellate proceedings within the International Tribunal. This provision stands in conformity with the International Covenant on Civil and Political Rights which insists upon a right of appeal (International Covenant on Civil and Political Rights, 19 December 1966, art. 14, para. 5, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) (hereinafter *ICCPR*)).

As the Prosecutor of the International Tribunal has acknowledged at the hearing of 7 and 8 September 1995, the Statute is general in nature and the Security Council surely expected that it would be supplemented, where advisable, by the rules which the Judges were mandated to adopt, especially for "*Trials and Appeals*" (Art.15). The Judges did indeed adopt such rules: Part Seven of the Rules of Procedure and Evidence (Rules of Procedure and Evidence, 107-08 (adopted on 11 February 1994 pursuant to Article 15 of the Statute of the International Tribunal, as amended (IT/32/Rev. 5))(hereinafter *Rules of Procedure*)).

5. However, Rule 73 had already provided for "*Preliminary Motions by Accused*", including five headings. The first one is: "objections based on lack of jurisdiction." Rule 72 (B) then provides:

> "The Trial Chamber shall dispose of preliminary motions *in limine litis* and without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction." (Rules of Procedure, Rule 72 (B).)

This is easily understandable and the Prosecutor put it clearly in his argument:

> "I would submit, firstly, that clearly within the four corners of the Statute the Judges must be free to comment, to supplement, to make rules not inconsistent and, to the extent I mentioned yesterday, it would also entitle the Judges to question the Statute and to assure themselves that they can do justice in the international context operating under the Statute. There is no question about that.
>
> Rule 72 goes no further, in my submission, than providing a useful vehicle for achieving - really it is a provision which achieves justice because but for it, one could go through, as Mr. Orie mentioned in a diffèrent context, admittedly, yesterday, one could have the unfortunate position of having months of trial, of the Tribunal hearing witnesses only to find out at the appeal stage that, in fact, there should not have been a trial at all because of some lack of jurisdiction for whatever reason.
>
> So it is really a rule of fairness for both sides in a way, but particularly in favour of the accused in order that somebody should not be put to the terrible inconvenience of having to sit through a trial which should not take place. So, it is really like many of the rules that Your Honours and your colleagues made with regard to rules of evidence and procedure. It is to an extent supplementing the Statute, but that is what was intended when the Security Council gave to the Judges the power to make rules. They did it knowing that there were spaces in the Statute that would need to be filled by having rules of procedure and evidence.
>
> [. . .]
>
> So, it is really a rule of convenience and, if I may say so, a sensible rule in the interests of justice, in the interests of both sides and in the interests of the Tribunal as a whole." (Transcript of the Hearing of the Interlocutory Appeal on Jurisdiction, 8 September 1995, at 4 (hereinafter *Appeal Transcript*).)

The question has, however, been put whether the three grounds relied upon by Appellant really go to the jurisdiction of the International Tribunal, in which case only, could they form the basis of an interlocutory appeal. More specifically, can the legality of the foundation of the International Tribunal and its primacy be used as the building bricks of such an appeal?

In his Brief in appeal, at page 2, the Prosecutor has argued in support of a negative answer, based on the distinction between the validity of the creation of the International Tribunal and its jurisdiction. The second aspect alone would be appealable whilst the legality and primacy of the International Tribunal could not be challenged in appeal. (Response to the Motion of the Defence on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 7 July 1995 (Case No. IT-94-1-T), at 4 (hereinafter *Prosecutor Trial Brief*).)

6. This narrow interpretation of the concept of jurisdiction, which has been advocated by the Prosecutor and one *amicus curiae*, falls foul of a modern vision of the administration of justice. Such a fundamental matter as the

jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction? And what body is legally authorized to pass on that issue, if not the Appeals Chamber of the International Tribunal? Indeed - this is by no means conclusive, but interesting nevertheless: were not those questions to be dealt with *in limine litis*, they could obviously be raised on an appeal on the merits. Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial. After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected. In the present case, the jurisdiction of this Chamber to hear and dispose of Appellant's interlocutory appeal is indisputable.

C. Grounds Of Appeal

7. The Appeals Chamber has accordingly heard the parties on all points raised in the written pleadings. It has also read the *amicus curiae* briefs submitted by *Juristes sans Frontières* and the Government of the United States of America, to whom it expresses its gratitude.

8. Appellant has submitted two successive Briefs in appeal. The second Brief was late but, in the absence of any objection by the Prosecutor, the Appeals Chamber granted the extension of time requested by Appellant under Rule 116.
The second Brief tends essentially to bolster the arguments developed by Appellant in his original Brief. They are offered under the following headings:

a) unlawful establishment of the International Tribunal;
b) unjustified primacy of the International Tribunal over competent domestic courts;
c) lack of subject-matter jurisdiction.

The Appeals Chamber proposes to examine each of the grounds of appeal in the order in which they are raised by Appellant.

II. UNLAWFUL ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL

9. The first ground of appeal attacks the validity of the establishment of the International Tribunal.

A. Meaning Of Jurisdiction

10. In discussing the Defence plea to the jurisdiction of the International Tribunal on grounds of invalidity of its establishment by the Security Council, the Trial Chamber declared:

> "There are clearly enough matters of jurisdiction which are open to determination by the International Tribunal, questions of time, place and nature of an offence charged. These are properly described as jurisdictional, whereas the validity of the creation of the International Tribunal is not truly a matter of jurisdiction but rather the lawfulness of its creation [. . .]" (Decision at Trial, at para. 4.)

There is a *petitio principii* underlying this affirmation and it fails to explain the criteria by which it the Trial Chamber disqualifies the plea of invalidity of the establishment of the International Tribunal as a plea to jurisdiction. What is more important, that proposition implies a narrow concept of jurisdiction reduced to pleas

based on the limits of its scope in time and space and as to persons and subject-matter (*ratione temporis, loci, personae and materiae*). But jurisdiction is not merely an ambit or sphere (better described in this case as "competence"); it is basically - as is visible from the Latin origin of the word itself, *jurisdictio* - a legal power, hence necessarily a legitimate power, "to state the law" (*dire le droit*) within this ambit, in an authoritative and final manner.

This is the meaning which it carries in all legal systems. Thus, historically, in common law, the **Termes de la ley** provide the following definition:

> "jurisdiction' is a dignity which a man hath by a power to do justice in causes of complaint made before him." (Stroud's Judicial Dictionary, 1379 (5th ed. 1986).)

The same concept is found even in current dictionary definitions:

> "[Jurisdiction] is the power of a court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties." Black's Law Dictionary, 712 (6th ed. 1990) (citing Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633).)

11. A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its "judicial character", as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.

12. In sum, if the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter. The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all the other pleas concerning the scope of jurisdiction. This issue is a preliminary to and conditions all other aspects of jurisdiction.

B. Admissibility Of Plea Based On The Invalidity Of The Establishment Of The International Tribunal

13. Before the Trial Chamber, the Prosecutor maintained that:

> (1) the International Tribunal lacks authority to review its establishment by the Security Council (Prosecutor Trial Brief, at 10-12); and that in any case
> (2) the question whether the Security Council in establishing the International Tribunal complied with the United Nations Charter raises "political questions" which are "non-justiciable" (id. at 12-14).

The Trial Chamber approved this line of argument.
This position comprises two arguments: one relating to the power of the International Tribunal to consider such a plea; and another relating to the classification of the subject-matter of the plea as a "political question" and, as

such, "non-justiciable", i.e.", regardless of whether or not it falls within its jurisdiction.

1. Does The International Tribunal Have Jurisdiction?

14. In its decision, the Trial Chamber declares:

> "[I]t is one thing for the Security Council to have taken every care to ensure that a structure appropriate to the conduct of fair trials has been created; it is an entirely different thing in any way to infer from that careful structuring that it was intended that the International Tribunal be empowered to question the legality of the law which established it. The competence of the International Tribunal is precise and narrowly defined; as described in Article 1 of its Statute, it is to prosecute persons responsible for serious violations of international humanitarian law, subject to spatial and temporal limits, and to do so in accordance with the Statute. That is the full extent of the competence of the International Tribunal." (Decision at Trial, at para. 8.)

Both the first and the last sentences of this quotation need qualification. The first sentence assumes a subjective stance, considering that jurisdiction can be determined exclusively by reference to or inference from the intention of the Security Council, thus totally ignoring any residual powers which may derive from the requirements of the "judicial function" itself. That is also the qualification that needs to be added to the last sentence.

Indeed, the jurisdiction of the International Tribunal, which is defined in the middle sentence and described in the last sentence as "the full extent of the competence of the International Tribunal", is not, in fact, so. It is what is termed in international law "original" or "primary" and sometimes "substantive" jurisdiction. But it does not include the "incidental" or "inherent" jurisdiction which derives automatically from the exercise of the judicial function.

15. To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council "intended" to entrust it with, is to envisage the International Tribunal exclusively as a "subsidiary organ" of the Security Council (see United Nations Charter, Arts. 7(2) & 29), a "creation" totally fashioned to the smallest detail by its "creator" and remaining totally in its power and at its mercy. But the Security Council not only decided to establish a subsidiary organ (the only legal means available to it for setting up such a body), it also clearly intended to establish a special kind of "subsidiary organ": a tribunal.

16. In treating a similar case in its advisory opinion on the *Effect of Awards of the United Nations Administrative Tribunal*, the International Court of Justice declared:

> "[T]he view has been put forward that the Administrative Tribunal is a subsidiary, subordinate, or secondary organ; and that, accordingly, the Tribunal's judgements cannot bind the General Assembly which established it.
>
> [. . .]
>
> The question cannot be determined on the basis of the description of the relationship between the General Assembly and the Tribunal, that is, by considering whether the Tribunal is to be regarded as a subsidiary, a subordinate, or a secondary organ, or on the basis of the fact that it was established by the General Assembly. It depends on the intention of the General Assembly in establishing the Tribunal and on the nature of the functions conferred upon it by its Statute. An examination of the language of the Statute of the Administrative Tribunal has shown that the General Assembly intended to establish a judicial body."

(Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. Reports 47, at 60-1 (Advisory Opinion of 13 July) (hereinafter *Effect of Awards*).)

17. Earlier, the Court had derived the judicial nature of the United Nations Administrative Tribunal ("UNAT") from the use of certain terms and language in the Statute and its possession of certain attributes. Prominent among these attributes of the judicial function figures the power provided for in Article 2, paragraph 3, of the Statute of UNAT:

"In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal." (Id. at 51-2, *quoting* Statute of the United Nations Administrative Tribunal, art. 2, para. 3.)

18. This power, known as the principle of "*Kompetenz-Kompetenz*" in German or "*la compétence de la compétence*" in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its "jurisdiction to determine its own jurisdiction." It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done (see, e.g., Statute of the International Court of Justice, Art. 36, para. 6). But in the words of the International Court of Justice:

"[T]his principle, which is accepted by the general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal [. . .] but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation." (Nottebohm Case (Liech. v. Guat.), 1953 I.C.J. Reports 7, 119 (21 March).)

This is not merely a power in the hands of the tribunal. In international law, where there is no integrated judicial system and where every judicial or arbitral organ needs a specific constitutive instrument defining its jurisdiction, "the first obligation of the Court - as of any other judicial body - is to ascertain its own competence." (Judge Cordova, dissenting opinion, advisory opinion on Judgements of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., 1956 I.C.J. Reports, 77, 163 (Advisory Opinion of 23 October) (Cordova, J., dissenting).)

19. It is true that this power can be limited by an express provision in the arbitration agreement or in the constitutive instruments of standing tribunals, though the latter possibility is controversial, particularly where the limitation risks undermining the judicial character or the independence of the Tribunal. But it is absolutely clear that such a limitation, to the extent to which it is admissible, cannot be inferred without an express provision allowing the waiver or the shrinking of such a well-entrenched principle of general international law.
As no such limitative text appears in the Statute of the International Tribunal, the International Tribunal can and indeed has to exercise its "*compétence de la compétence*" and examine the jurisdictional plea of the Defence, in order to ascertain its jurisdiction to hear the case on the merits.

20. It has been argued by the Prosecutor, and held by the Trial Chamber that:

"[T]his International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council." (Decision at Trial, at para. 5; *see also* paras. 7, 8, 9, 17, 24, *passim*)

There is no question, of course, of the International Tribunal acting as a constitutional tribunal, reviewing the acts of the other organs of the United Nations, particularly those of the Security Council, its own "creator." It was not established for that purpose, as is clear from the definition of the ambit of its "primary" or "substantive" jurisdiction in Articles 1 to 5 of its Statute.

But this is beside the point. The question before the Appeals Chamber is whether the International Tribunal, in exercising this "incidental" jurisdiction, can examine the legality of its establishment by the Security Council, solely for the purpose of ascertaining its own "primary" jurisdiction over the case before it.

21. The Trial Chamber has sought support for its position in some dicta of the International Court of Justice or its individual Judges, (see Decision at Trial, at paras. 10 - 13), to the effect that:

"Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned." (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Reports 16, at para. 89 (Advisory Opinion of 21 June) (hereafter the *Namibia Advisory Opinion*).)

All these dicta, however, address the hypothesis of the Court exercising such judicial review as a matter of "primary" jurisdiction. They do not address at all the hypothesis of examination of the legality of the decisions of other organs as a matter of "incidental" jurisdiction, in order to ascertain and be able to exercise its "primary" jurisdiction over the matter before it. Indeed, in the *Namibia Advisory Opinion*, immediately after the dictum reproduced above and quoted by the Trial Chamber (concerning its "primary" jurisdiction), the International Court of Justice proceeded to exercise the very same "incidental" jurisdiction discussed here:

"[T]he question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions." (Id. at para. 89.)

The same sort of examination was undertaken by the International Court of Justice, *inter alia,* in its advisory opinion on the *Effect of Awards Case*:

"[T]he legal power of the General Assembly to establish a tribunal competent to render judgements binding on the United Nations has been challenged. Accordingly, it is necessary to consider whether the General Assembly has been given this power by the Charter." (Effect of Awards, at 56.)

Obviously, the wider the discretion of the Security Council under the Charter of the United Nations, the narrower the scope for the International Tribunal to review its actions, even as a matter of incidental jurisdiction. Nevertheless, this does not mean that the power disappears altogether, particularly in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter.

22. In conclusion, the Appeals Chamber finds that the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council.

2. Is The Question At Issue Political And As Such Non-Justiciable?

23. The Trial Chamber accepted this argument and classification. (See Decision at Trial, at para. 24.)

24. The doctrines of "political questions" and "non-justiciable disputes" are remnants of the reservations of "sovereignty", "national honour", etc. in very old arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the "political question" argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well.

The Court has consistently rejected this argument as a bar to examining a case. It considered it unfounded in law. As long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, the Court considers that it is duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue. On this question, the International Court of Justice declared in its advisory opinion on *Certain Expenses of the United Nations:*

> "[I]t has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision." (Certain Expenses of the United Nations, 1962 I.C.J. Reports 151, at 155 (Advisory Opinion of 20 July).)

This dictum applies almost literally to the present case.

25. The Appeals Chamber does not consider that the International Tribunal is barred from examination of the Defence jurisdictional plea by the so-called "political" or "non-justiciable" nature of the issue it raises.

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C. The Issue Of Constitutionality

26. Many arguments have been put forward by Appellant in support of the contention that the establishment of the International Tribunal is invalid under the Charter of the United Nations or that it was not duly established by law. Many of these arguments were presented orally and in written submissions before the Trial Chamber. Appellant has asked this Chamber to incorporate into the argument before the Appeals Chamber all the points made at trial. (See Appeal Transcript, 7 September 1995, at 7.) Apart from the issues specifically dealt with below, the Appeals Chamber is content to allow the treatment of these issues by the Trial Chamber to stand.

27. The Trial Chamber summarized the claims of the Appellant as follows:

> "It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former

> Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what its creation of the International Tribunal did; that there existed and exists no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of ad hoc tribunals to try particular types of offences and, finally, that to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong." (Decision at Trial, at para. 2.)

These arguments raise a series of constitutional issues which all turn on the limits of the power of the Security Council under Chapter VII of the Charter of the United Nations and determining what action or measures can be taken under this Chapter, particularly the establishment of an international criminal tribunal. Put in the interrogative, they can be formulated as follows:

> 1. was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal?
> 2. assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in Articles 41 and 42 (and possibly Article 40 as well)?
> 3. in the latter case, how can the establishment of an international criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?

1. The Power Of The Security Council To Invoke Chapter VII

28. Article 39 opens Chapter VII of the Charter of the United Nations and determines the conditions of application of this Chapter. It provides:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, 26 June 1945, Art. 39.)

It is clear from this text that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).

In particular, Article 24, after declaring, in paragraph 1, that the Members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security", imposes on it, in paragraph 3, the obligation to report annually (or more frequently) to the General Assembly, and provides, more importantly, in paragraph 2, that:

> "In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these

duties are laid down in Chapters VI, VII, VIII, and XII." (Id., Art. 24(2).)

The Charter thus speaks the language of specific powers, not of absolute fiat.

29. What is the extent of the powers of the Security Council under Article 39 and the limits thereon, if any?

The Security Council plays the central role in the application of both parts of the Article. It is the Security Council that makes the **determination** that there exists one of the situations justifying the use of the "exceptional powers" of Chapter VII. And it is also the Security Council that chooses the reaction to such a situation: it either makes **recommendations** (**i.e.,** opts not to use the exceptional powers but to continue to operate under Chapter VI) or decides to use the exceptional powers by ordering measures to be taken in accordance with Articles 41 and 42 with a view to maintaining or restoring international peace and security.
The situations justifying resort to the powers provided for in Chapter VII are a "threat to the peace", a "breach of the peace" or an "act of aggression." While the "act of aggression" is more amenable to a legal determination, the "threat to the peace" is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.

30. It is not necessary for the purposes of the present decision to examine any further the question of the limits of the discretion of the Security Council in determining the existence of a "threat to the peace", for two reasons.

The first is that an armed conflict (or a series of armed conflicts) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security Council to establish this International Tribunal. If it is considered an international armed conflict, there is no doubt that it falls within the literal sense of the words "breach of the peace" (between the parties or, at the very least, would be a as a "threat to the peace" of others).

But even if it were considered merely as an "internal armed conflict", it would still constitute a "threat to the peace" according to the settled practice of the Security Council and the common understanding of the United Nations membership in general. Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a "threat to the peace" and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the "subsequent practice" of the membership of the United Nations at large, that the "threat to the peace" of Article 39 may include, as one of its species, internal armed conflicts.

The second reason, which is more particular to the case at hand, is that Appellant has amended his position from that contained in the Brief submitted to the Trial Chamber. Appellant no longer contests the Security Council's power to determine whether the situation in the former Yugoslavia constituted a threat to the peace, nor the determination itself. He further acknowledges that the Security Council "has the power to address to such threats [. . .] by appropriate measures." [Defence] Brief to Support the Notice of (Interlocutory) Appeal, 25 August 1995 (Case No. IT-94-1-AR72), at para. 5.4 (hereinafter *Defence Appeal Brief*).) But he continues to contest the legality and appropriateness of the measures chosen by the Security Council to that end.

2. The Range of Measures Envisaged Under Chapter VII

31. Once the Security Council determines that a particular situation poses a threat to the peace or that there exists a breach of the peace or an act of aggression, it enjoys a wide margin of discretion in choosing the course

of action: as noted above (see para. 29) it can either continue, in spite of its determination, to act via recommendations, i.e., as if it were still within Chapter VI ("*Pacific Settlement of Disputes*") or it can exercise its exceptional powers under Chapter VII. In the words of Article 39, it would then "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, art. 39.)

A question arises in this respect as to whether the choice of the Security Council is limited to the measures provided for in Articles 41 and 42 of the Charter (as the language of Article 39 suggests), or whether it has even larger discretion in the form of general powers to maintain and restore international peace and security under Chapter VII at large. In the latter case, one of course does not have to locate every measure decided by the Security Council under Chapter VII within the confines of Articles 41 and 42, or possibly Article 40. In any case, under both interpretations, the Security Council has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken. The language of Article 39 is quite clear as to the channelling of the very broad and exceptional powers of the Security Council under Chapter VII through Articles 41 and 42. These two Articles leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds, for even wider and more general powers than those already expressly provided for in the Charter.

These powers are **coercive** *vis-à-vis* the culprit State or entity. But they are also **mandatory** *vis-à-vis* the other Member States, who are under an obligation to cooperate with the Organization (Article 2, paragraph 5, Articles 25, 48) and with one another (Articles 49), in the implementation of the action or measures decided by the Security Council.

3. The Establishment Of The International Tribunal As A Measure Under Chapter VII

32. As with the determination of the existence of a threat to the peace, a breach of the peace or an act of aggression, the Security Council has a very wide margin of discretion under Article 39 to choose the appropriate course of action and to evaluate the suitability of the measures chosen, as well as their potential contribution to the restoration or maintenance of peace. But here again, this discretion is not unfettered; moreover, it is limited to the measures provided for in Articles 41 and 42. Indeed, in the case at hand, this last point serves as a basis for the Appellant's contention of invalidity of the establishment of the International Tribunal.

In its resolution 827, the Security Council considers that "in the particular circumstances of the former Yugoslavia", the establishment of the International Tribunal "would contribute to the restoration and maintenance of peace" and indicates that, in establishing it, the Security Council was acting under Chapter VII (S.C. Res. 827, U.N. Doc. S/RES/827 (1993)). However, it did not specify a particular Article as a basis for this action.

Appellant has attacked the legality of this decision at different stages before the Trial Chamber as well as before this Chamber on at least three grounds:

> a) that the establishment of such a tribunal was never contemplated by the framers of the Charter as one of the measures to be taken under Chapter VII; as witnessed by the fact that it figures nowhere in the provisions of that Chapter, and more particularly in Articles 41 and 42 which detail these measures;
>
> b) that the Security Council is constitutionally or inherently incapable of creating a judicial organ, as it is conceived in the Charter as an executive organ, hence not possessed of judicial powers which can be exercised through a subsidiary organ;

c) that the establishment of the International Tribunal has neither promoted, nor was capable of promoting, international peace, as demonstrated by the current situation in the former Yugoslavia.

(a) What Article of Chapter VII Serves As A Basis For The Establishment Of A Tribunal?

33. The establishment of an international criminal tribunal is not expressly mentioned among the enforcement measures provided for in Chapter VII, and more particularly in Articles 41 and 42.

Obviously, the establishment of the International Tribunal is not a measure under Article 42, as these are measures of a military nature, implying the use of armed force. Nor can it be considered a "provisional measure" under Article 40. These measures, as their denomination indicates, are intended to act as a "holding operation", producing a "stand-still" or a "cooling-off" effect, "without prejudice to the rights, claims or position of the parties concerned." (United Nations Charter, art. 40.) They are akin to emergency police action rather than to the activity of a judicial organ dispensing justice according to law. Moreover, not being enforcement action, according to the language of Article 40 itself ("before making the recommendations or deciding upon the measures provided for in Article 39"), such provisional measures are subject to the Charter limitation of Article 2, paragraph 7, and the question of their mandatory or recommendatory character is subject to great controversy; all of which renders inappropriate the classification of the International Tribunal under these measures.

34. *Prima facie*, the International Tribunal matches perfectly the description in Article 41 of "measures not involving the use of force." Appellant, however, has argued before both the Trial Chamber and this Appeals Chamber, that:"

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> ...[I]t is clear that the establishment of a war crimes tribunal was not intended. The examples mentioned in this article focus upon economic and political measures and do not in any way suggest judicial measures." (Brief to Support the Motion [of the Defence] on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 23 June 1995 (Case No. IT-94-1-T), at para. 3.2.1 (hereinafter *Defence Trial Brief*).)

It has also been argued that the measures contemplated under Article 41 are all measures to be undertaken by Member States, which is not the case with the establishment of the International Tribunal.

35. The first argument does not stand by its own language. Article 41 reads as follows:"

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." (United Nations Charter, art. 41.)

It is evident that the measures set out in Article 41 are merely illustrative **examples** which obviously do not exclude other measures. All the Article requires is that they do not involve "the use of force." It is a negative definition.

That the examples do not suggest judicial measures goes some way towards the other argument that the Article does not contemplate institutional measures implemented directly by the United Nations through one of its organs

but, as the given examples suggest, only action by Member States, such as economic sanctions (though possibly coordinated through an organ of the Organization). However, as mentioned above, nothing in the Article suggests the limitation of the measures to those implemented by States. The Article only prescribes what these measures cannot be. Beyond that it does not say or suggest what they have to be.

Moreover, even a simple literal analysis of the Article shows that the first phrase of the first sentence carries a very general prescription which can accommodate both institutional and Member State action. The second phrase can be read as referring particularly to one species of this very large category of measures referred to in the first phrase, but not necessarily the only one, namely, measures undertaken directly by States. It is also clear that the second sentence, starting with "These [measures]" not "Those [measures]", refers to the species mentioned in the second phrase rather than to the "genus" referred to in the first phrase of this sentence.

36. Logically, if the Organization can undertake measures which have to be implemented through the intermediary of its Members, it can a fortiori undertake measures which it can implement directly via its organs, if it happens to have the resources to do so. It is only for want of such resources that the United Nations has to act through its Members. But it is of the essence of "collective measures" that they are collectively undertaken. Action by Member States on behalf of the Organization is but a poor substitute *faute de mieux*, or a "second best" for want of the first. This is also the pattern of Article 42 on measures involving the use of armed force.

In sum, the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41.

(b) Can The Security Council Establish A Subsidiary Organ With Judicial Powers?

37. The argument that the Security Council, not being endowed with judicial powers, cannot establish a subsidiary organ possessed of such powers is untenable: it results from a fundamental misunderstanding of the constitutional set-up of the Charter.

Plainly, the Security Council is not a judicial organ and is not provided with judicial powers (though it may incidentally perform certain quasi-judicial activities such as effecting determinations or findings). The principal function of the Security Council is the maintenance of international peace and security, in the discharge of which the Security Council exercises both decision-making and executive powers.

38. The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.

The General Assembly did not need to have military and police functions and powers in order to be able to establish the United Nations Emergency Force in the Middle East ("UNEF") in 1956. Nor did the General Assembly have to be a judicial organ possessed of judicial functions and powers in order to be able to establish UNAT. In its advisory opinion in the *Effect of Awards,* the International Court of Justice, in addressing practically the same objection, declared:

"[T]he Charter does not confer judicial functions on the General Assembly [. . .] By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations." (Effect of Awards, at 61.)

(c) Was The Establishment Of The International Tribunal An Appropriate Measure?

39. The third argument is directed against the discretionary power of the Security Council in evaluating the appropriateness of the chosen measure and its effectiveness in achieving its objective, the restoration of peace.

Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations.

It would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures *ex post fact*o by their success or failure to achieve their ends (in the present case, the restoration of peace in the former Yugoslavia, in quest of which the establishment of the International Tribunal is but one of many measures adopted by the Security Council).

40. For the aforementioned reasons, the Appeals Chamber considers that the International Tribunal has been lawfully established as a measure under Chapter VII of the Charter.

4. Was The Establishment Of The International Tribunal Contrary To The General Principle Whereby Courts Must Be "Established By Law"?

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41. Appellant challenges the establishment of the International Tribunal by contending that it has not been established by law. The entitlement of an individual to have a criminal charge against him determined by a tribunal which has been established by law is provided in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. It provides: "

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." (ICCPR, art. 14, para. 1.)

Similar provisions can be found in Article 6(1) of the European Convention on Human Rights, which states: "

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [. . .]"(European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, art. 6, para. 1, 213 U.N.T.S. 222 (hereinafter ECHR))

and in Article 8(1) of the American Convention on Human Rights, which provides: "

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law." (American Convention on Human Rights, 22 November 1969, art. 8, para. 1, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. rev. 2 (hereinafter ACHR).)"

Appellant argues that the right to have a criminal charge determined by a tribunal established by law is one which forms part of international law as a "general principle of law recognized by civilized nations", one of the sources of international law in Article 38 of the Statute of the International Court of Justice. In support of this assertion, Appellant emphasises the fundamental nature of the "fair trial" or "due process" guarantees afforded in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. Appellant asserts that they are minimum requirements in international law for the administration of criminal justice.

42. For the reasons outlined below, Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law. This does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be "established by law."

43. Indeed, there are three possible interpretations of the term "established by law." First, as Appellant argues, "established by law" could mean established by a legislature. Appellant claims that the International Tribunal is the product of a "mere executive order" and not of a "decision making process under democratic control, necessary to create a judicial organisation in a democratic society." Therefore Appellant maintains that the International Tribunal not been "established by law." (Defence Appeal Brief, at para. 5.4.)

The case law applying the words "established by law" in the European Convention on Human Rights has favoured this interpretation of the expression. This case law bears out the view that the relevant provision is intended to ensure that tribunals in a democratic society must not depend on the discretion of the executive; rather they should be regulated by law emanating from Parliament. (See Zand v. Austria, App. No. 7360/76, 15 Eur. Comm'n H.R. Dec. & Rep. 70, at 80 (1979); Piersack v. Belgium, App. No. 8692/79, 47 Eur. Ct. H.R. (ser. B) at 12 (1981); Crociani, Palmiotti, Tanassi and D'Ovidio v. Italy, App. Nos. 8603/79, 8722/79, 8723/79 & 8729/79 (joined) 22 Eur. Comm'n H.R. Dec. & Rep. 147, at 219 (1981).)

Or, put another way, the guarantee is intended to ensure that the administration of justice is not a matter of executive discretion, but is regulated by laws made by the legislature.

It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the "principal judicial organ" (*see* United Nations Charter, art. 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.

It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist

in the national law of States. Indeed, Appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be "established by law" finds no application in an international law setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems.

44. A second possible interpretation is that the words "established by law" refer to establishment of international courts by a body which, though not a Parliament, has a limited power to take binding decisions. In our view, one such body is the Security Council when, acting under Chapter VII of the United Nations Charter, it makes decisions binding by virtue of Article 25 of the Charter.

According to Appellant, however, there must be something more for a tribunal to be "established by law." Appellant takes the position that, given the differences between the United Nations system and national division of powers, discussed above, the conclusion must be that the United Nations system is not capable of creating the International Tribunal unless there is an amendment to the United Nations Charter. We disagree. It does not follow from the fact that the United Nations has no legislature that the Security Council is not empowered to set up this International Tribunal if it is acting pursuant to an authority found within its constitution, the United Nations Charter. As set out above (paras. 28-40) we are of the view that the Security Council was endowed with the power to create this International Tribunal as a measure under Chapter VII in the light of its determination that there exists a threat to the peace.

In addition, the establishment of the International Tribunal has been repeatedly approved and endorsed by the "representative" organ of the United Nations, the General Assembly: this body not only participated in its setting up, by electing the Judges and approving the budget, but also expressed its satisfaction with, and encouragement of the activities of the International Tribunal in various resolutions. (See G.A. Res. 48/88 (20 December 1993) and G.A. Res. 48/143 (20 December 1993), G.A. Res. 49/10 (8 November 1994) and G.A. Res. 49/205 (23 December 1994).)

45. The third possible interpretation of the requirement that the International Tribunal be "established by law" is that its establishment must be in accordance with the rule of law. This appears to be the most sensible and most likely meaning of the term in the context of international law. For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.

This interpretation of the guarantee that a tribunal be "established by law" is borne out by an analysis of the International Covenant on Civil and Political Rights. As noted by the Trial Chamber, at the time Article 14 of the International Covenant on Civil and Political Rights was being drafted, it was sought, unsuccessfully, to amend it to require that tribunals should be "pre-established" by law and not merely "established by law" (Decision at Trial, at para. 34). Two similar proposals to this effect were made (one by the representative of Lebanon and one by the representative of Chile); if adopted, their effect would have been to prevent all *ad hoc* tribunals. In response, the delegate from the Philippines noted the disadvantages of using the language of "pre-established by law":

> "If [the Chilean or Lebanese proposal was approved], a country would never be able to reorganize its tribunals. Similarly it could be claimed that the Nürnberg tribunal was not in existence at the time the war criminals had committed their crimes." (*See* E/CN.4/SR 109. United Nations Economic and Social Council, Commission on Human Rights, 5th Sess., Sum. Rec. 8 June 1949, U.N. Doc. 6.)

As noted by the Trial Chamber in its Decision, there is wide agreement that, in most respects, the International Military Tribunals at Nuremberg and Tokyo gave the accused a fair trial in a procedural sense (Decision at Trial, at para. 34). The important consideration in determining whether a tribunal has been "established by law" is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and should that it observes the requirements of procedural fairness.

This concern about *ad hoc* tribunals that function in such a way as not to afford the individual before them basic fair trial guarantees also underlies United Nations Human Rights Committee's interpretation of the phrase "established by law" contained in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. While the Human Rights Committee has not determined that "extraordinary" tribunals or "special" courts are incompatible with the requirement that tribunals be established by law, it has taken the position that the provision is intended to ensure that any court, be it "extraordinary" or not, should genuinely afford the accused the full guarantees of fair trial set out in Article 14 of the International Covenant on Civil and Political Rights. (See General Comment on Article 14, H.R. Comm. 43rd Sess., Supp. No. 40, at para. 4, U.N. Doc. A/43/40 (1988), Cariboni v. Uruguay H.R.Comm. 159/83. 39th Sess. Supp. No. 40 U.N. Doc. A/39/40.) A similar approach has been taken by the Inter-American Commission. (*See*, e.g., Inter-Am C.H.R., Annual Report 1972, OEA/Ser. P, AG/doc. 305/73 rev. 1, 14 March 1973, at 1; Inter-Am C.H.R., Annual Report 1973, OEA/Ser. P, AG/doc. 409/174, 5 March 1974, at 2-4.) The practice of the Human Rights Committee with respect to State reporting obligations indicates its tendency to scrutinise closely "special" or "extraordinary" criminal courts in order to ascertain whether they ensure compliance with the fair trial requirements of Article 14.

46. An examination of the Statute of the International Tribunal, and of the Rules of Procedure and Evidence adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the rule of law. The fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in Article 21 of the Statute. Other fair trial guarantees appear in the Statute and the Rules of Procedure and Evidence. For example, Article 13, paragraph 1, of the Statute ensures the high moral character, impartiality, integrity and competence of the Judges of the International Tribunal, while various other provisions in the Rules ensure equality of arms and fair trial.

47. In conclusion, the Appeals Chamber finds that the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter and provides all the necessary safeguards of a fair trial. It is thus "established by law."

48. The first ground of Appeal: unlawful establishment of the International Tribunal, is accordingly dismissed.

III. UNJUSTIFIED PRIMACY OF THE INTERNATIONAL TRIBUNAL OVER COMPETENT DOMESTIC COURTS

49. The second ground of appeal attacks the primacy of the International Tribunal over national courts.

50. This primacy is established by Article 9 of the Statute of the International Tribunal, which provides:

"Concurrent jurisdiction

> 1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia

since 1 January 1991.

2. *The International Tribunal shall have primacy over national courts.* At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal." (Emphasis added.)

Appellant's submission is material to the issue, inasmuch as Appellant is expected to stand trial before this International Tribunal as a consequence of a request for deferral which the International Tribunal submitted to the Government of the Federal Republic of Germany on 8 November 1994 and which this Government, as it was bound to do, agreed to honour by surrendering Appellant to the International Tribunal. (United Nations Charter, art. 25, 48 & 49; Statute of the Tribunal, art. 29.2(e); Rules of Procedure, Rule 10.)

In relevant part, Appellant's motion alleges: " [The International Tribunal's] primacy over domestic courts constitutes an infringement upon the sovereignty of the States directly affected." ([Defence] Motion on the Jurisdiction of the Tribunal, 23 June 1995 (Case No. IT-94-1-T), at para. 2.)

Appellant's Brief in support of the motion before the Trial Chamber went into further details which he set down under three headings:

(a) domestic jurisdiction;

(b) sovereignty of States;

(c) *jus de non evocando.*

The Prosecutor has contested each of the propositions put forward by Appellant. So have two of the *amicus curiae*, one before the Trial Chamber, the other in appeal.

The Trial Chamber has analysed Appellant's submissions and has concluded that they cannot be entertained.

51. Before this Chamber, Appellant has somewhat shifted the focus of his approach to the question of primacy. It seems fair to quote here Appellant's Brief in appeal:

> "The defence submits that the Trial Chamber should have denied it's [sic] competence to exercise primary jurisdiction while the accused was at trial in the Federal Republic of Germany and the German judicial authorities were adequately meeting their obligations under international law." (Defence Appeal Brief, at para. 7.5.)

However, the three points raised in first instance were discussed at length by the Trial Chamber and, even though not specifically called in aid by Appellant here, are nevertheless intimately intermingled when the issue of primacy is considered. The Appeals Chamber therefore proposes to address those three points but not before having dealt with an apparent confusion which has found its way into Appellant's brief.

52. In paragraph 7.4 of his Brief, Appellant states that "the accused was diligently prosecuted by the German judicial authorities"(*id.*, at para 7.4 (Emphasis added)). In paragraph 7.5 Appellant returns to the period "while the accused was at trial." (*id.*, at para 7.5 (Emphasis added.)
These statements are not in agreement with the findings of the Trial Chamber I in its decision on deferral of 8

November 1994:

> "The Prosecutor asserts, and it is not disputed by the Government of the Federal Republic of Germany, nor by the Counsel for Du{ko Tadic, that the said Du{ko Tadic is the subject of an *investigation* instituted by the national courts of the Federal Republic of Germany in respect of the matters listed in paragraph 2 hereof." (Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Tribunal in the Matter of Du{ko Tadic, 8 November 1994 (Case No. IT-94-1-D), at 8 (Emphasis added).)

There is a distinct difference between an investigation and a trial. The argument of Appellant, based erroneously on the existence of an actual trial in Germany, cannot be heard in support of his challenge to jurisdiction when the matter has not yet passed the stage of investigation.

But there is more to it. Appellant insists repeatedly (*see* Defence Appeal Brief, at paras. 7.2 & 7.4) on impartial and independent proceedings diligently pursued and not designed to shield the accused from international criminal responsibility. One recognises at once that this vocabulary is borrowed from Article 10, paragraph 2, of the Statute. This provision has nothing to do with the present case. This is not an instance of an accused being tried anew by this International Tribunal, under the exceptional circumstances described in Article 10 of the Statute. Actually, the proceedings against Appellant were deferred to the International Tribunal on the strength of Article 9 of the Statute which provides that a request for deferral may be made "at any stage of the procedure" (Statute of the International Tribunal, art. 9, para. 2). The Prosecutor has never sought to bring Appellant before the International Tribunal for a new trial for the reason that one or the other of the conditions enumerated in Article 10 would have vitiated his trial in Germany. Deferral of the proceedings against Appellant was requested in accordance with the procedure set down in Rule 9 (iii):

> "What is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal [. . .]" (Rules of Procedure, Rule 9 (iii).)

After the Trial Chamber had found that that condition was satisfied, the request for deferral followed automatically. The conditions alleged by Appellant in his Brief were irrelevant.

Once this approach is rectified, Appellant's contentions lose all merit.

53. As pointed out above, however, three specific arguments were advanced before the Trial Chamber, which are clearly referred to in Appellant's Brief in appeal. It would not be advisable to leave this ground of appeal based on primacy without giving those questions the consideration they deserve.

The Chamber now proposes to examine those three points in the order in which they have been raised by Appellant.

A. Domestic Jurisdiction

54. Appellant argued in first instance that:

> "From the moment Bosnia-Herzegovina was recognised as an independent state, it had the competence to establish jurisdiction to try crimes that have been committed on its territory." (Defence Trial Brief, at para.

5.)

Appellant added that:

> "As a matter of fact the state of Bosnia-Herzegovina does exercise its jurisdiction, not only in matters of ordinary criminal law, but also in matters of alleged violations of crimes against humanity, as for example is the case with the prosecution of Mr Karadzic et al."(Id. at para. 5.2.)

This first point is not contested and the Prosecutor has conceded as much. But it does not, by itself, settle the question of the primacy of the International Tribunal. Appellant also seems so to realise. Appellant therefore explores the matter further and raises the question of State sovereignty.

B. Sovereignty Of States

55. Article 2 of the United Nations Charter provides in paragraph 1: "The Organization is based on the principle of the sovereign equality of all its Members."

In Appellant's view, no State can assume jurisdiction to prosecute crimes committed on the territory of another State, barring a universal interest "justified by a treaty or customary international law or an *opinio juris* on the issue." (Defence Trial Brief, at para. 6.2.)

Based on this proposition, Appellant argues that the same requirements should underpin the establishment of an international tribunal destined to invade an area essentially within the domestic jurisdiction of States. In the present instance, the principle of State sovereignty would have been violated. The Trial Chamber has rejected this plea, holding among other reasons:

> "In any event, the accused not being a State lacks the *locus standi* to raise the issue of primacy, which involves a plea that the sovereignty of a State has been violated, a plea only a sovereign State may raise or waive and a right clearly the accused cannot take over from the State." (Decision at Trial, para. 41.)

The Trial Chamber relied on the judgement of the District Court of Jerusalem in *Israel v. Eichmann:*

> "The right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State." (36 **International Law Reports** 5, 62 (1961), affirmed by Supreme Court of Israel, 36 **International Law Reports** 277 (1962).)

Consistently with a long line of cases, a similar principle was upheld more recently in the United States of America in the matter of *United States v. Noriega:*

> "As a general principle of international law, individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereign involved." (746 F. Supp. 1506, 1533 (S.D. Fla. 1990).)

Authoritative as they may be, those pronouncements do not carry, in the field of international law, the weight which they may bring to bear upon national judiciaries. Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights.

Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber

Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty. To bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of State sovereignty. Such a startling conclusion would imply a contradiction in terms which this Chamber feels it is its duty to refute and lay to rest.

56. That Appellant be recognised the right to plead State sovereignty does not mean, of course, that his plea must be favourably received. He has to discharge successfully the test of the burden of demonstration. Appellant's plea faces several obstacles, each of which may be fatal, as the Trial Chamber has actually determined.

Appellant can call in aid Article 2, paragraph 7, of the United Nations Charter: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State [. . .]." However, one should not forget the commanding restriction at the end of the same paragraph: "but this principle shall not prejudice the application of enforcement measures under Chapter VII." (United Nations Charter, art. 2, para. 7.)

Those are precisely the provisions under which the International Tribunal has been established. Even without these provisions, matters can be taken out of the jurisdiction of a State. In the present case, the Republic of Bosnia and Herzegovina not only has not contested the jurisdiction of the International Tribunal but has actually approved, and collaborated with, the International Tribunal, as witnessed by:

> a) Letter dated 10 August 1992 from the President of the Republic of Bosnia and Herzegovina addressed to the Secretary-General of the United Nations (U.N. Doc. E/CN.4/1992/S-1/5 (1992));
>
> b) Decree with Force of Law on Deferral upon Request by the International Tribunal 12 Official Gazette of the Republic of Bosnia and Herzegovina 317 (10 April 1995) (translation);
>
> c) Letter from Vasvija Vidovic, Liaison Officer of the Republic of Bosnia and Herzegovina, to the International Tribunal (4 July 1995).

As to the Federal Republic of Germany, its cooperation with the International Tribunal is public and has been previously noted.

The Trial Chamber was therefore fully justified to write, on this particular issue:

> "[I]t is pertinent to note that the challenge to the primacy of the International Tribunal has been made against the express intent of the two States most closely affected by the indictment against the accused - Bosnia and Herzegovina and the Federal Republic of Germany. The former, on the territory of which the crimes were allegedly committed, and the latter where the accused resided at the time of his arrest, have unconditionally accepted the jurisdiction of the International Tribunal and the accused cannot claim the rights that have been specifically waived by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction." (Decision at Trial, at para. 41.)

57. This is all the more so in view of the nature of the offences alleged against Appellant, offences which, if

proven, do not affect the interests of one State alone but shock the conscience of mankind.

As early as 1950, in the case of General Wagener, the Supreme Military Tribunal of Italy held:

> "These norms [concerning crimes against laws and customs of war], due to their highly ethical and moral content, have a universal character, not a territorial one.
>
> [. . .]
>
> The solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognise borders, punishing criminals wherever they may be.
>
> [. . .]
>
> Crimes against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular State, nor a political right of a particular citizen. They are, instead, crimes of *lèse-humanité (reati di lesa umanità)* and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one. Such crimes, therefore, due to their very subject matter and particular nature are precisely of a différent and opposite kind from political offences. The latter generally, concern only the States against whom they are committed; the former concern all civilised States, and are to be opposed and punished, in the same way as the crimes of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed (articles 537 and 604 of the penal code)." (13 March 1950, in **Rivista Penale** 753, 757 (Sup. Mil. Trib., Italy 1950; unofficial translation).1

Twelve years later the Supreme Court of Israel in the *Eichmann* case could draw a similar picture:

> "[T]hese crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct. [. . .]
>
> Those crimes entail individual criminal responsibility because they challenge the foundations of international society and affront the conscience of civilised nations.
>
> [. . .]
>
> [T]hey involve the perpetration of an international crime which all the nations of the world are interested in preventing."(Israel v. Eichmann, 36 **International Law Reports** 277, 291-93 (Isr. S. Ct. 1962).)

58. The public revulsion against similar offences in the 1990s brought about a reaction on the part of the community of nations: hence, among other remedies, the establishment of an international judicial body by an organ of an organization representing the community of nations: the Security Council. This organ is empowered and mandated, by definition, to deal with trans-boundary matters or matters which, though domestic in nature, may affect "international peace and security" (United Nations Charter, art 2. (1), 2.(7), 24, & 37). It would be a

travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity. In the Barbie case, the Court of Cassation of France has quoted with approval the following statement of the Court of Appeal:

> "[. . .]by reason of their nature, the crimes against humanity [. . .] do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign. *(Fédération Nationale de Déportés et Internés Résistants et Patriotes And Others v. Barbie,* 78 *International Law Reports* 125, 130 (Cass. crim.1983).)2

Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as "ordinary crimes" (Statute of the International Tribunal, art. 10, para. 2(a)), or proceedings being "designed to shield the accused", or cases not being diligently prosecuted (Statute of the International Tribunal, art. 10, para. 2(b)).

If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.

59. The principle of primacy of this International Tribunal over national courts must be affirmed; the more so since it is confined within the strict limits of Articles 9 and 10 of the Statute and Rules 9 and 10 of the Rules of Procedure of the International Tribunal.

The Trial Chamber was fully justified in writing:

> "Before leaving this question relating to the violation of the sovereignty of States, it should be noted that the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community." (Decision at Trial, at para. 42.)

60. The plea of State sovereignty must therefore be dismissed.

C. *Jus De Non Evocando*

61. Appellant argues that he has a right to be tried by his national courts under his national laws.

No one has questioned that right of Appellant. The problem is elsewhere: is that right exclusive? Does it prevent Appellant from being tried - and having an equally fair trial (see Statute of the International Tribunal, art. 21) - before an international tribunal?

Appellant contends that such an exclusive right has received universal acceptance: yet one cannot find it expressed either in the Universal Declaration of Human Rights or in the International Covenant on Civil and Political Rights, unless one is prepared to stretch to breaking point the interpretation of their provisions.

In support of this stand, Appellant has quoted seven national Constitutions (Article 17 of the Constitution of the Netherlands, Article 101 of the Constitution of Germany (unified), Article 13 of the Constitution of Belgium, Article 25 of the Constitution of Italy, Article 24 of the Constitution of Spain, Article 10 of the Constitution of Surinam and Article 30 of the Constitution of Venezuela). However, on examination, these provisions do not support Appellant's argument. For instance, the Constitution of Belgium (being the first in time) provides:

> "**Art. 13**: No person may be withdrawn from the judge assigned to him by the law, save with his consent." (Blaustein & Flanz, Constitutions of the Countries of the World, (1991).)

The other constitutional provisions cited are either similar in substance, requiring only that no person be removed from his or her "natural judge" established by law, or are irrelevant to Appellant's argument.

62. As a matter of fact - and of law - the principle advocated by Appellant aims at one very specific goal: to avoid the creation of special or extraordinary courts designed to try political offences in times of social unrest without guarantees of a fair trial.

This principle is not breached by the transfer of jurisdiction to an international tribunal created by the Security Council acting on behalf of the community of nations. No rights of accused are thereby infringed or threatened; quite to the contrary, they are all specifically spelt out and protected under the Statute of the International Tribunal. No accused can complain. True, he will be removed from his "natural" national forum; but he will be brought before a tribunal at least equally fair, more distanced from the facts of the case and taking a broader view of the matter.

Furthermore, one cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes, a person suspected of such offences may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming, as it happens here, from all continents of the world.

63. The objection founded on the theory of jus de non evocando was considered by the Trial Chamber which disposed of it in the following terms:

> "Reference was also made to the *jus de non evocando*, a feature of a number of national constitutions. But that principle, if it requires that an accused be tried by the regularly established courts and not by some special tribunal set up for that particular purpose, has no application when what is in issue is the exercise by the Security Council, acting under Chapter VII, of the powers conferred upon it by the Charter of the United Nations. Of course, this involves some surrender of sovereignty by the member nations of the United Nations but that is precisely what was achieved by the adoption of the Charter." (Decision at Trial, at para. 37.)

No new objections were raised before the Appeals Chamber, which is satisfied with concurring, on this particular point, with the views expressed by the Trial Chamber.

64. For these reasons the Appeals Chamber concludes that Appellant's second ground of appeal, contesting the primacy of the International Tribunal, is ill-founded and must be dismissed.

IV. LACK OF SUBJECT-MATTER JURISDICTION

65. Appellant's third ground of appeal is the claim that the International Tribunal lacks subject-matter jurisdiction over the crimes alleged. The basis for this allegation is Appellant's claim that the subject-matter jurisdiction under Articles 2, 3 and 5 of the Statute of the International Tribunal is limited to crimes committed in the context of an international armed conflict. Before the Trial Chamber, Appellant claimed that the alleged crimes, even if proven, were committed in the context of an internal armed conflict. On appeal an additional alternative claim is asserted to the effect that there was no armed conflict at all in the region where the crimes were allegedly committed.

Before the Trial Chamber, the Prosecutor responded with alternative arguments that: (a) the conflicts in the former Yugoslavia should be characterized as an international armed conflict; and (b) even if the conflicts were characterized as internal, the International Tribunal has jurisdiction under Articles 3 and 5 to adjudicate the crimes alleged. On appeal, the Prosecutor maintains that, upon adoption of the Statute, the Security Council determined that the conflicts in the former Yugoslavia were international and that, by dint of that determination, the International Tribunal has jurisdiction over this case.

The Trial Chamber denied Appellant's motion, concluding that the notion of international armed conflict was not a jurisdictional criterion of Article 2 and that Articles 3 and 5 each apply to both internal and international armed conflicts. The Trial Chamber concluded therefore that it had jurisdiction, regardless of the nature of the conflict, and that it need not determine whether the conflict is internal or international.

A. Preliminary Issue: The Existence Of An Armed Conflict

66. Appellant now asserts the new position that there did not exist a legally cognizable armed conflict - either internal or international - at the time and place that the alleged offences were committed. Appellant's argument is based on a concept of armed conflict covering only the precise time and place of actual hostilities. Appellant claims that the conflict in the Prijedor region (where the alleged crimes are said to have taken place) was limited to a political assumption of power by the Bosnian Serbs and did not involve armed combat (though movements of tanks are admitted). This argument presents a preliminary issue to which we turn first.

67. International humanitarian law governs the conduct of both internal and international armed conflicts. Appellant correctly points out that for there to be a violation of this body of law, there must be an armed conflict. The definition of "armed conflict" varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated. (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, art. 5, 75 U.N.T.S. 970 (hereinafter *Geneva Convention I*); Convention relative to the Treatment of Prisoners of War, 12 August 1949, art. 5, 75 U.N.T.S. 972 (hereinafter *Geneva Convention III*); *see also* Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 6, 75 U.N.T.S. 973 (hereinafter *Geneva Convention IV*).)

68. Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the

Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties. This construction is implicit in Article 6, paragraph 2, of the Convention, which stipulates that:

> "[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations." (Geneva Convention IV, art. 6, para. 2 (Emphasis added).)

Article 3(b) of Protocol I to the Geneva Conventions contains similar language. (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, art. 3(b), 1125 U.N.T.S. 3 (hereinafter *Protocol I*).) In addition to these textual references, the very nature of the Conventions - particularly Conventions III and IV - dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose.

69. The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. Similarly, certain language in Protocol II to the Geneva Conventions (a treaty which, as we shall see in paragraphs 88 and 114 below, may be regarded as applicable to some aspects of the conflicts in the former Yugoslavia) also suggests a broad scope. First, like common Article 3, it explicitly protects "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities." (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, art. 4, para.1, 1125 U.N.T.S. 609 (hereinafter Protocol II). Article 2, paragraph 1, provides:

> "[t]his Protocol shall be applied [. . .] to all persons *affected* by an armed conflict as defined in Article 1." (Id. at art. 2, para. 1 (Emphasis added).)

The same provision specifies in paragraph 2 that:

"[A]t the end of the conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty."(*Id.* at art. 2, para. 2.)

Under this last provision, the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the relatively loose nature of the language "for reasons related to such conflict", suggests a broad geographical scope as well. The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.

70. On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or

between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts. There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed - a factual issue on which the Appeals Chamber does not pronounce - international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. There is no doubt that the allegations at issue here bear the required relationship. The indictment states that in 1992 Bosnian Serbs took control of the Opstina of Prijedor and established a prison camp in Omarska. It further alleges that crimes were committed against civilians inside and outside the Omarska prison camp as part of the Bosnian Serb take-over and consolidation of power in the Prijedor region, which was, in turn, part of the larger Bosnian Serb military campaign to obtain control over Bosnian territory. Appellant offers no contrary evidence but has admitted in oral argument that in the Prijedor region there were detention camps run not by the central authorities of Bosnia-Herzegovina but by Bosnian Serbs (Appeal Transcript; 8 September 1995, at 36-7). In light of the foregoing, we conclude that, for the purposes of applying international humanitarian law, the crimes alleged were committed in the context of an armed conflict.

B. Does The Statute Refer Only To International Armed Conflicts?

1. Literal Interpretation Of The Statute

71. On the face of it, some provisions of the Statute are unclear as to whether they apply to offences occurring in international armed conflicts only, or to those perpetrated in internal armed conflicts as well. Article 2 refers to "grave breaches" of the Geneva Conventions of 1949, which are widely understood to be committed only in international armed conflicts, so the reference in Article 2 would seem to suggest that the Article is limited to international armed conflicts. Article 3 also lacks any express reference to the nature of the underlying conflict required. A literal reading of this provision standing alone may lead one to believe that it applies to both kinds of conflict. By contrast, Article 5 explicitly confers jurisdiction over crimes committed in either internal or international armed conflicts. An argument *a contrario* based on the absence of a similar provision in Article 3 might suggest that Article 3 applies only to one class of conflict rather than to both of them. In order better to ascertain the meaning and scope of these provisions, the Appeals Chamber will therefore consider the object and purpose behind the enactment of the Statute.

2. Teleological Interpretation Of The Statute

72. In adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the

former Yugoslavia, thereby deterring future violations and contributing to the re-establishment of peace and security in the region. The context in which the Security Council acted indicates that it intended to achieve this purpose without reference to whether the conflicts in the former Yugoslavia were internal or international.

As the members of the Security Council well knew, in 1993, when the Statute was drafted, the conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof. The conflict in the former Yugoslavia had been rendered international by the involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army ("JNA") in hostilities in Croatia, as well as in Bosnia-Herzegovina at least until its formal withdrawal on 19 May 1992. To the extent that the conflicts had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven). It is notable that the parties to this case also agree that the conflicts in the former Yugoslavia since 1991 have had both internal and international aspects. (*See* Transcript of the Hearing on the Motion on Jurisdiction, 26 July 1995, at 47, 111.)

73. The varying nature of the conflicts is evidenced by the agreements reached by various parties to abide by certain rules of humanitarian law. Reflecting the international aspects of the conflicts, on 27 November 1991 representatives of the Federal Republic of Yugoslavia, the Yugoslavia Peoples' Army, the Republic of Croatia, and the Republic of Serbia entered into an agreement on the implementation of the Geneva Conventions of 1949 and the 1977 Additional Protocol I to those Conventions. (See Memorandum of Understanding, 27 November 1991.) Significantly, the parties refrained from making any mention of common Article 3 of the Geneva Conventions, concerning non-international armed conflicts.

By contrast, an agreement reached on 22 May 1992 between the various factions of the conflict within the Republic of Bosnia and Herzegovina reflects the internal aspects of the conflicts. The agreement was based on common Article 3 of the Geneva Conventions which, in addition to setting forth rules governing internal conflicts, provides in paragraph 3 that the parties to such conflicts may agree to bring into force provisions of the Geneva Conventions that are generally applicable only in international armed conflicts. In the Agreement, the representatives of Mr. Alija Izetbegovic (President of the Republic of Bosnia and Herzegovina and the Party of Democratic Action), Mr. Radovan Karadzic (President of the Serbian Democratic Party), and Mr. Miljenko Brkic (President of the Croatian Democratic Community) committed the parties to abide by the substantive rules of internal armed conflict contained in common Article 3 and in addition agreed, on the strength of common Article 3, paragraph 3, to apply certain provisions of the Geneva Conventions concerning international conflicts. (Agreement No. 1, 22 May 1992, art. 2, paras. 1-6 (hereinafter **Agreement No. 1)**.) Clearly, this Agreement shows that the parties concerned regarded the armed conflicts in which they were involved as internal but, in view of their magnitude, they agreed to extend to them the application of some provisions of the Geneva Conventions that are normally applicable in international armed conflicts only. The same position was implicitly taken by the International Committee of the Red Cross ("ICRC"), at whose invitation and under whose auspices the agreement was reached. In this connection it should be noted that, had the ICRC not believed that the conflicts governed by the agreement at issue were **internal**, it would have acted blatantly contrary to a common provision of the four Geneva Conventions (Article 6/6/6/7). This is a provision formally banning any agreement designed to restrict the application of the Geneva Conventions in case of international armed conflicts. ("No special agreement shall adversely affect the situation of [the protected persons] as defined by the present

Convention, nor restrict the rights which it confers upon them." (Geneva Convention I, art. 6; Geneva Convention II, art. 6; Geneva Convention III, art. 6; Geneva Convention IV, art. 7.) If the conflicts were, in fact, viewed as international, for the ICRC to accept that they would be governed only by common Article 3, plus the provisions contained in Article 2, paragraphs 1 to 6, of Agreement No. 1, would have constituted clear disregard of the aforementioned Geneva provisions. On account of the unanimously recognized authority, competence and impartiality of the ICRC, as well as its statutory mission to promote and supervise respect for international humanitarian law, it is inconceivable that, even if there were some doubt as to the nature of the conflict, the ICRC would promote and endorse an agreement contrary to a basic provision of the Geneva Conventions. The conclusion is therefore warranted that the ICRC regarded the conflicts governed by the agreement in question as internal.

Taken together, the agreements reached between the various parties to the conflict(s) in the former Yugoslavia bear out the proposition that, when the Security Council adopted the Statute of the International Tribunal in 1993, it did so with reference to situations that the parties themselves considered at different times and places as either internal or international armed conflicts, or as a mixed internal-international conflict.

74. The Security Council's many statements leading up to the establishment of the International Tribunal reflect an awareness of the mixed character of the conflicts. On the one hand, prior to creating the International Tribunal, the Security Council adopted several resolutions condemning the presence of JNA forces in Bosnia-Herzegovina and Croatia as a violation of the sovereignty of these latter States. See, e.g., S.C. Res. 752 (15 May 1992); S.C.Res. 757 (30 May 1992); S.C. Res. 779 (6 Oct. 1992); S.C. Res. 787 (16 Nov. 1992). On the other hand, in none of these many resolutions did the Security Council explicitly state that the conflicts were international.

In each of its successive resolutions, the Security Council focused on the practices with which it was concerned, without reference to the nature of the conflict. For example, in resolution 771 of 13 August 1992, the Security Council expressed "grave alarm" at the

> "[c]ontinuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property." (S.C. Res. 771 (13 August 1992).)

As with every other Security Council statement on the subject, this resolution makes no mention of the nature of the armed conflict at issue. The Security Council was clearly preoccupied with bringing to justice those responsible for these specifically condemned acts, regardless of context. The Prosecutor makes much of the Security Council's repeated reference to the grave breaches provisions of the Geneva Conventions, which are generally deemed applicable only to international armed conflicts. This argument ignores, however, that, as often as the Security Council has invoked the grave breaches provisions, it has also referred generally to "other violations of international humanitarian law," an expression which covers the law applicable in internal armed conflicts as well.

75. The intent of the Security Council to promote a peaceful solution of the conflict without pronouncing upon the question of its international or internal nature is reflected by the Report of the Secretary-General of 3 May 1993 and by statements of Security Council members regarding their interpretation of the Statute. The Report of the

and by statements of Security Council members regarding their interpretation of the Statute. The Report of the Secretary-General explicitly states that the clause of the Statute concerning the temporal jurisdiction of the International Tribunal was

> "clearly intended to convey the notion that no judgement as to the international or internal character of the conflict was being exercised." (Report of the Secretary-General, at para. 62, U.N. Doc. S/25704 (3 May 1993) (hereinafter *Report of the Secretary-General*).)

In a similar vein, at the meeting at which the Security Council adopted the Statute, three members indicated their understanding that the jurisdiction of the International Tribunal under Article 3, with respect to laws or customs of war, included any humanitarian law agreement in force in the former Yugoslavia. (See statements by representatives of France, the United States, and the United Kingdom, Provisional Verbatim Record of the 3217th Meeting, at 11, 15, & 19, U.N. Doc. S/PV.3217 (25 May 1993).) As an example of such supplementary agreements, the United States cited the rules on internal armed conflict contained in Article 3 of the Geneva Conventions as well as "the 1977 Additional Protocols to these [Geneva] Conventions [of 1949]." (*Id.* at 15). This reference clearly embraces Additional Protocol II of 1977, relating to internal armed conflict. No other State contradicted this interpretation, which clearly reflects an understanding of the conflict as both internal and international (it should be emphasized that the United States representative, before setting out the American views on the interpretation of the Statute of the International Tribunal, pointed out: "[W]e understand that other members of the [Security] Council share our view regarding the following clarifications related to the Statute."(*id.*)).

76. That the Security Council purposely refrained from classifying the armed conflicts in the former Yugoslavia as either international or internal and, in particular, did not intend to bind the International Tribunal by a classification of the conflicts as international, is borne out by a *reductio ad absurdum* argument. If the Security Council had categorized the conflict as exclusively international and, in addition, had decided to bind the International Tribunal thereby, it would follow that the International Tribunal would have to consider the conflict between Bosnian Serbs and the central authorities of Bosnia-Herzegovina as international. Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as "grave breaches", because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as "protected persons" under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as "grave breaches", because such civilians would be "protected persons" under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage *vis-à-vis* the central authorities of Bosnia-Herzegovina. This absurdity bears out the fallacy of the argument advanced by the Prosecutor before the Appeals Chamber.

77. On the basis of the foregoing, we conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.

78. With the exception of Article 5 dealing with crimes against humanity, none of the statutory provisions makes explicit reference to the type of conflict as an element of the crime; and, as will be shown below, the reference in Article 5 is made to distinguish the nexus required by the Statute from the nexus required by Article 6 of the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg. Since customary international law no longer requires any nexus between crimes against humanity and armed conflict (*see below*, paras. 140 and 141), Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal. As previously noted, although Article 2 does not explicitly refer to the nature of the conflicts, its reference to the grave breaches provisions suggest that it is limited to international armed conflicts. It would however defeat the Security Council's purpose to read a similar international armed conflict requirement into the remaining jurisdictional provisions of the Statute. Contrary to the drafters' apparent indifference to the nature of the underlying conflicts, such an interpretation would authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict. To illustrate, the Security Council has repeatedly condemned the wanton devastation and destruction of property, which is explicitly punishable only under Articles 2 and 3 of the Statute. Appellant maintains that these Articles apply only to international armed conflicts. However, it would have been illogical for the drafters of the Statute to confer on the International Tribunal the competence to adjudicate the very conduct about which they were concerned, only in the event that the context was an international conflict, when they knew that the conflicts at issue in the former Yugoslavia could have been classified, at varying times and places, as internal, international, or both.

Thus, the Security Council's object in enacting the Statute - to prosecute and punish persons responsible for certain condemned acts being committed in a conflict understood to contain both internal and international aspects - suggests that the Security Council intended that, to the extent possible, the subject-matter jurisdiction of the International Tribunal should extend to both internal and international armed conflicts.

In light of this understanding of the Security Council's purpose in creating the International Tribunal, we turn below to discussion of Appellant's specific arguments regarding the scope of the jurisdiction of the International Tribunal under Articles 2, 3 and 5 of the Statute.

3. Logical And Systematic Interpretation Of The Statute

(a) Article 2

79. Article 2 of the Statute of the International Tribunal provides:

> "The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> (a) wilful killing;
>
> (b) torture or inhuman treatment, including biological experiments;
>
> (c) wilfully causing great suffering or serious injury to body or health;
>
> (d) extensive destruction and appropriation of property, not justified by military necessity and carried out

unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages."

By its explicit terms, and as confirmed in the Report of the Secretary-General, this Article of the Statute is based on the Geneva Conventions of 1949 and, more specifically, the provisions of those Conventions relating to "grave breaches" of the Conventions. Each of the four Geneva Conventions of 1949 contains a "grave breaches" provision, specifying particular breaches of the Convention for which the High Contracting Parties have a duty to prosecute those responsible. In other words, for these specific acts, the Conventions create universal mandatory criminal jurisdiction among contracting States. Although the language of the Conventions might appear to be ambiguous and the question is open to some debate (see, e.g.,[*Amicus Curiae*] Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadic*, 17 July 1995, (Case No. IT-94-1-T), at 35-6 (hereinafter, *U.S. Amicus Curiae Brief*), it is widely contended that the grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts. Appellant argues that, as the grave breaches enforcement system only applies to international armed conflicts, reference in Article 2 of the Statute to the grave breaches provisions of the Geneva Conventions limits the International Tribunal's jurisdiction under that Article to acts committed in the context of an international armed conflict. The Trial Chamber has held that Article 2:

> "[H]as been so drafted as to be self-contained rather than referential, save for the identification of the victims of enumerated acts; that identification and that alone involves going to the Conventions themselves for the definition of 'persons or property protected'."
>
> [. . .]
>
> [T]he requirement of international conflict does not appear on the face of Article 2. Certainly, nothing in the words of the Article expressly require its existence; once one of the specified acts is allegedly committed upon a protected person the power of the International Tribunal to prosecute arises if the spatial and temporal requirements of Article 1 are met.
>
> [. . .]
>
> [T]here is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including the reference in common Article 2 of the Geneva Convention [sic] to international conflicts. As stated, Article 2 of the Statute is on its face, self-contained, save in relation to the definition of protected persons and things." (Decision at Trial, at paras. 49-51.)

80. With all due respect, the Trial Chamber's reasoning is based on a misconception of the grave breaches provisions and the extent of their incorporation into the Statute of the International Tribunal. The grave breaches system of the Geneva Conventions establishes a twofold system: there is on the one hand an enumeration of offences that are regarded so serious as to constitute "grave breaches"; closely bound up with this enumeration a

mandatory enforcement mechanism is set up, based on the concept of a duty and a right of all Contracting States to search for and try or extradite persons allegedly responsible for "grave breaches." The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts - at least not the mandatory universal jurisdiction involved in the grave breaches system.

81. The Trial Chamber is right in implying that the enforcement mechanism has of course not been imported into the Statute of the International Tribunal, for the obvious reason that the International Tribunal itself constitutes a mechanism for the prosecution and punishment of the perpetrators of "grave breaches." However, the Trial Chamber has misinterpreted the reference to the Geneva Conventions contained in the sentence of Article 2: "persons or property protected under the provisions of the relevant Geneva Conventions." (Statute of the Tribunal, art. 2.) For the reasons set out above, this reference is clearly intended to indicate that the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as "protected" by the Geneva Conventions under the strict conditions set out by the Conventions themselves. This reference in Article 2 to the notion of "protected persons or property" must perforce cover the persons mentioned in Articles 13, 24, 25 and 26 (protected persons) and 19 and 33 to 35 (protected objects) of Geneva Convention I; in Articles 13, 36, 37 (protected persons) and 22, 24, 25 and 27 (protected objects) of Convention II; in Article 4 of Convention III on prisoners of war; and in Articles 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57 etc. (protected property) of Convention IV on civilians. Clearly, these provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict. By contrast, those provisions do not include persons or property coming within the purview of common Article 3 of the four Geneva Conventions.

82. The above interpretation is borne out by what could be considered as part of the preparatory works of the Statute of the International Tribunal, namely the Report of the Secretary-General. There, in introducing and explaining the meaning and purport of Article 2 and having regard to the "grave breaches" system of the Geneva Conventions, reference is made to "international armed conflicts" (Report of the Secretary-General at para. 37).

83. We find that our interpretation of Article 2 is the only one warranted by the text of the Statute and the relevant provisions of the Geneva Conventions, as well as by a logical construction of their interplay as dictated by Article 2. However, we are aware that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights - which, as pointed out below (see paras. 97-127), tend to blur in many respects the traditional dichotomy between international wars and civil strife. In this connection the Chamber notes with satisfaction the statement in the *amicus curiae* brief submitted by the Government of the United States, where it is contended that:

> "the 'grave breaches' provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character." (U.S. *Amicus Curiae* Brief, at 35.)

This statement, unsupported by any authority, does not seem to be warranted as to the interpretation of Article 2 of the Statute. Nevertheless, seen from another viewpoint, there is no gainsaying its significance: that statement

articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the "grave breaches" system might gradually materialize. Other elements pointing in the same direction can be found in the provision of the German Military Manual mentioned below (para. 131), whereby grave breaches of international humanitarian law include some violations of common Article 3. In addition, attention can be drawn to the Agreement of 1 October 1992 entered into by the conflicting parties in Bosnia-Herzegovina. Articles 3 and 4 of this Agreement implicitly provide for the prosecution and punishment of those responsible for grave breaches of the Geneva Conventions and Additional Protocol I. As the Agreement was clearly concluded within a framework of an internal armed conflict (*see above*, para. 73), it may be taken as an important indication of the present trend to extend the grave breaches provisions to such category of conflicts. One can also mention a recent judgement by a Danish court. On 25 November 1994 the Third Chamber of the Eastern Division of the Danish High Court delivered a judgement on a person accused of crimes committed together with a number of Croatian military police on 5 August 1993 in the Croatian prison camp of Dretelj in Bosnia (The Prosecution v. Refik Saric, unpublished (Den.H. Ct. 1994)). The Court explicitly acted on the basis of the "grave breaches" provisions of the Geneva Conventions, more specifically Articles 129 and 130 of Convention III and Articles 146 and 147 of Convention IV (The Prosecution v. Refik Saric, Transcript, at 1 (25 Nov. 1994)), without however raising the preliminary question of whether the alleged offences had occurred within the framework of an international rather than an internal armed conflict (in the event the Court convicted the accused on the basis of those provisions and the relevant penal provisions of the Danish Penal Code, (see id. at 7-8)). This judgement indicates that some national courts are also taking the view that the "grave breaches" system may operate regardless of whether the armed conflict is international or internal.

84. Notwithstanding the foregoing, the Appeals Chamber must conclude that, in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts.

85. Before the Trial Chamber, the Prosecutor asserted an alternative argument whereby the provisions on grave breaches of the Geneva Conventions could be applied to internal conflicts on the strength of some agreements entered into by the conflicting parties. For the reasons stated below, in Section IV C (para. 144), we find it unnecessary to resolve this issue at this time.

(b) Article 3

86. Article 3 of the Statute declares the International Tribunal competent to adjudicate violations of the laws or customs of war. The provision states:

> "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
>
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
>
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and

> education, the arts and sciences, historic monuments and works of art and science;
>
> (e) plunder of public or private property."

As explained by the Secretary-General in his Report on the Statute, this provision is based on the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, the Regulations annexed to that Convention, and the Nuremberg Tribunal's interpretation of those Regulations. Appellant argues that the Hague Regulations were adopted to regulate interstate armed conflict, while the conflict in the former Yugoslavia is *in casu* an internal armed conflict; therefore, to the extent that the jurisdiction of the International Tribunal under Article 3 is based on the Hague Regulations, it lacks jurisdiction under Article 3 to adjudicate alleged violations in the former Yugoslavia. Appellant's argument does not bear close scrutiny, for it is based on an unnecessarily narrow reading of the Statute.

(i) The Interpretation of Article 3

87. A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all "violations of the laws or customs of war"; and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.

To identify the content of the class of offences falling under Article 3, attention should be drawn to an important fact. The expression "violations of the laws or customs of war" is a traditional term of art used in the past, when the concepts of "war" and "laws of warfare" still prevailed, before they were largely replaced by two broader notions: (i) that of "armed conflict", essentially introduced by the 1949 Geneva Conventions; and (ii) the correlative notion of "international law of armed conflict", or the more recent and comprehensive notion of "international humanitarian law", which has emerged as a result of the influence of human rights doctrines on the law of armed conflict. As stated above, it is clear from the Report of the Secretary-General that the old-fashioned expression referred to above was used in Article 3 of the Statute primarily to make reference to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto (Report of the Secretary-General, at para. 41). However, as the Report indicates, the Hague Convention, considered *qua* customary law, constitutes an important area of humanitarian international law. (*Id.*) In other words, the Secretary-General himself concedes that the traditional laws of warfare are now more correctly termed "international humanitarian law" and that the so-called "Hague Regulations" constitute an important segment of such law. Furthermore, the Secretary-General has also correctly admitted that the Hague Regulations have a broader scope than the Geneva Conventions, in that they cover not only the protection of victims of armed violence (civilians) or of those who no longer take part in hostilities (prisoners of war), the wounded and the sick) but also the conduct of hostilities; in the words of the Report: "The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions." (Id., at para. 43.) These comments suggest that Article 3 is intended to cover both Geneva and Hague rules law. On the other hand, the Secretary-General's subsequent comments indicate that the violations explicitly listed in Article 3 relate to Hague law not contained in the Geneva Conventions (*id.*, at paras. 43-4). As pointed out above, this list is, however, merely illustrative: indeed, Article 3, before enumerating the violations provides that they "shall include but not be limited to" the list of offences. Considering this list in the general context of the Secretary-General's discussion of the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law. The only limitation is that such infringements must not be already covered by Article 2 (lest this latter provision should become superfluous). Article 3 may be taken to cover **all violations** of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations

covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap).

88. That Article 3 does not confine itself to covering violations of Hague law, but is intended also to refer to all violations of international humanitarian law (subject to the limitations just stated), is borne out by the debates in the Security Council that followed the adoption of the resolution establishing the International Tribunal. As mentioned above, three Member States of the Council, namely France, the United States and the United Kingdom, expressly stated that Article 3 of the Statute also covers obligations stemming from agreements in force between the conflicting parties, that is Article 3 common to the Geneva Conventions and the two Additional Protocols, as well as other agreements entered into by the conflicting parties. The French delegate stated that:

> "[T]he expression 'laws or customs of war' used in Article 3 of the Statute covers specifically, in the opinion of France, all the obligations that flow from the humanitarian law agreements in force on the territory of the former Yugoslavia at the time when the offences were committed." (Provisional Verbatim Record of the 3217th Meeting, at 11, U.N. Doc. S/PV.3217 (25 May 1993).)

The American delegate stated the following:

> "[W]e understand that other members of the Council share our view regarding the following clarifications related to the Statute:
>
> Firstly, it is understood that the 'laws or customs of war' referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions." (Id., at p. 15.)

The British delegate stated:

> "[I]t would be our view that the reference to the laws or customs of war in Article 3 is broad enough to include applicable international conventions." (*Id.*, at p. 19.)

It should be added that the representative of Hungary stressed:

> "the importance of the fact that the jurisdiction of the International Tribunal covers the whole range of international humanitarian law and the entire duration of the conflict throughout the territory of the former Yugoslavia." (*Id.*, at p. 20.)

Since no delegate contested these declarations, they can be regarded as providing an authoritative interpretation of Article 3 to the effect that its scope is much broader than the enumerated violations of Hague law.

89. In light of the above remarks, it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e., agreements which have not turned into customary international law (on this point *see below,* para. 143).

90. The Appeals Chamber would like to add that, in interpreting the meaning and purport of the expressions "violations of the laws or customs of war" or "violations of international humanitarian law", one must take account of the context of the Statute as a whole. A systematic construction of the Statute emphasises the fact that various provisions, in spelling out the purpose and tasks of the International Tribunal or in defining its functions, refer to "**serious violations**" of international humanitarian law" (*See* Statute of the International Tribunal, Preamble, arts. 1, 9(1), 10(1)-(2), 23(1), 29(1) (Emphasis added.)). It is therefore appropriate to take the expression "violations of the laws or customs of war" to cover serious violations of international humanitarian law.

91. Article 3 thus confers on the International Tribunal jurisdiction over **any** serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.

92. This construction of Article 3 is also corroborated by the object and purpose of the provision. When it decided to establish the International Tribunal, the Security Council did so to put a stop to all serious violations of international humanitarian law occurring in the former Yugoslavia and not only special classes of them, namely "grave breaches" of the Geneva Conventions or violations of the "Hague law." Thus, if correctly interpreted, Article 3 fully realizes the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed.

93. The above interpretation is further confirmed if Article 3 is viewed in its more general perspective, that is to say, is appraised in its historical context. As the International Court of Justice stated in the *Nicaragua* case, Article 1 of the four Geneva Conventions, whereby the contracting parties "undertake to respect and ensure respect" for the Conventions "in all circumstances", has become a "general principle [. . .] of humanitarian law to which the Conventions merely give specific expression." (Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (Merits), 1986 I.C.J. Reports 14, at para. 220 (27 June) (hereinafter *Nicaragua Case*). This general principle lays down an obligation that is incumbent, not only on States, but also on other international entities including the United Nations. It was with this obligation in mind that, in 1977, the States drafting the two Additional Protocols to the Geneva Conventions agreed upon Article 89 of Protocol I, whereby:

> "In situations of **serious violations** of the Conventions or of this Protocol, the High Contracting Parties **undertake to act, jointly or individually, in co-operation with the United Nations** and in conformity with the United Nations Charter." (Protocol I, at art. 89 (Emphasis added).)

Article 3 is intended to realise that undertaking by endowing the International Tribunal with the power to prosecute all "serious violations" of international humanitarian law.

(ii) **The Conditions That Must Be Fulfilled For A Violation Of International Humanitarian Law To Be Subject To Article 3**

94. The Appeals Chamber deems it fitting to specify the conditions to be fulfilled for Article 3 to become applicable. The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3:

(i) the violation must constitute an infringement of a rule of international humanitarian law;

(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met (see below, para. 143);

(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory;

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

It follows that it does not matter whether the "serious violation" has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.

95. The Appeals Chamber deems it necessary to consider now two of the requirements set out above, namely: (i) the existence of customary international rules governing internal strife: and (ii) the question of whether the violation of such rules may entail individual criminal responsibility. The Appeals Chamber focuses on these two requirements because before the Trial Chamber the Defence argued that they had not been met in the case at issue. This examination is also appropriate because of the paucity of authoritative judicial pronouncements and legal literature on this matter.

(iii) **Customary Rules of International Humanitarian Law Governing Internal Armed Conflicts**

a. **General**

96. Whenever armed violence erupted in the international community, in traditional international law the legal response was based on a stark dichotomy: belligerency or insurgency. The former category applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the latter applied to armed violence breaking out in the territory of a sovereign State. Correspondingly, international law treated the two classes of conflict in a markedly different way: interstate wars were regulated by a whole body of international legal rules, governing both the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed violence (civilians, the wounded, the sick, shipwrecked, prisoners of war). By contrast, there were very few international rules governing civil commotion, for States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.

97. Since the 1930s, however, the aforementioned distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. There exist various reasons for this development. First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on

technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension, whether ideological, inter-ethnic or economic; as a consequence the international community can no longer turn a blind eye to the legal regime of such wars. Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur: the all-out resort to armed violence has taken on such a magnitude that the difference with international wars has increasingly dwindled (suffice to think of the Spanish civil war, in 1936-39, of the civil war in the Congo, in 1960-1968, the Biafran conflict in Nigeria, 1967-70, the civil strife in Nicaragua, in 1981-1990 or El Salvador, 1980-1993). Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects. Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

98. The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (Nicaragua Case, at para. 218), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and, as we shall show below (para. 117), to the core of Additional Protocol II of 1977.

99. Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting To ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official

pronouncements of States, military manuals and judicial decisions.

b. **Principal Rules**

100. The first rules that evolved in this area were aimed at protecting the civilian population from the hostilities. As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars. The Spanish Civil War had elements of both an internal and an international armed conflict. Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions when attacking military objectives. Thus, for example, on 23 March 1938, Prime Minister Chamberlain explained the British protest against the bombing of Barcelona as follows:

> "The rules of international law as to what constitutes a military objective are undefined and pending the conclusion of the examination of this question [. . .] I am not in a position to make any statement on the subject. The one definite rule of international law, however, is that the direct and deliberate bombing of non-combatants is in all circumstances illegal, and His Majesty's Government's protest was based on information which led them to the conclusion that the bombardment of Barcelona, carried on apparently at random and without special aim at military objectives, was in fact of this nature." (333 House of Commons Debates, col. 1177 (23 March 1938).)

More generally, replying to questions by Member of Parliament Noel-Baker concerning the civil war in Spain, on 21 June 1938 the Prime Minister stated the following:

> "I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighbourhood is not bombed." (337 House of Commons Debates, cols. 937-38 (21 June 1938).)

101. Such views were reaffirmed in a number of contemporaneous resolutions by the Assembly of the League of Nations, and in the declarations and agreements of the warring parties. For example, on 30 September 1938, the Assembly of the League of Nations unanimously adopted a resolution concerning both the Spanish conflict and the Chinese-Japanese war. After stating that "on numerous occasions public opinion has expressed through the most authoritative channels its horror of the bombing of civilian populations" and that "this practice, for which there is no military necessity and which, as experience shows, only causes needless suffering, is condemned under recognised principles of international law", the Assembly expressed the hope that an agreement could be adopted on the matter and went on to state that it

> "[r]ecognize[d] the following principles as a necessary basis for any subsequent regulations:
>
> (1) The intentional bombing of civilian populations is illegal;

> (2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
>
> (3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence." (**League of Nations, O.J. Spec. Supp. 183**, at 135-36 (1938).)

102. Subsequent State practice indicates that the Spanish Civil War was not exceptional in bringing about the extension of some general principles of the laws of warfare to internal armed conflict. While the rules that evolved as a result of the Spanish Civil War were intended to protect civilians finding themselves in the theatre of hostilities, rules designed to protect those who do not (or no longer) take part in hostilities emerged after World War II. In 1947, instructions were issued to the Chinese "peoples' liberation army" by Mao Tse-Tung who instructed them not to "kill or humiliate any of Chiang Kai-Shek's army officers and men who lay down their arms." (*Manifesto of the Chinese People's Liberation Army,* in Mao Tse-Tung, 4 Selected Works (1961) 147, at 151.) He also instructed the insurgents, among other things, not to "ill-treat captives", "damage crops" or "take liberties with women." (*On the Reissue of the Three Main Rules of Discipline and the Eight Points for Attention - Instruction of the General Headquarters of the Chinese People's Liberation Army,* in *id.*, 155.)

In an important subsequent development, States specified certain minimum mandatory rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949. The International Court of Justice has confirmed that these rules reflect "elementary considerations of humanity" applicable under customary international law to any armed conflict, whether it is of an internal or international character. (Nicaragua Case, at para. 218). Therefore, at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.

103. Common Article 3 contains not only the substantive rules governing internal armed conflict but also a procedural mechanism inviting parties to internal conflicts to agree to abide by the rest of the Geneva Conventions. As in the current conflicts in the former Yugoslavia, parties to a number of internal armed conflicts have availed themselves of this procedure to bring the law of international armed conflicts into force with respect to their internal hostilities. For example, in the 1967 conflict in Yemen, both the Royalists and the President of the Republic agreed to abide by the essential rules of the Geneva Conventions. Such undertakings reflect an understanding that certain fundamental rules should apply regardless of the nature of the conflict.

104. Agreements made pursuant to common Article 3 are not the only vehicle through which international humanitarian law has been brought to bear on internal armed conflicts. In several cases reflecting customary adherence to basic principles in internal conflicts, the warring parties have unilaterally committed to abide by international humanitarian law.

105. As a notable example, we cite the conduct of the Democratic Republic of the Congo in its civil war. In a public statement issued on 21 October 1964, the Prime Minister made the following commitment regarding the conduct of hostilities:

> "For humanitarian reasons, and with a view to reassuring, in so far as necessary, the civilian population which might fear that it is in danger, the Congolese Government wishes to state that the Congolese Air Force will limit its action to military objectives.
>
> In this matter, the Congolese Government desires not only to protect human lives but also to respect the Geneva Convention [sic]. It also expects the rebels - and makes an urgent appeal to them to that effect - to act in the same manner.

> As a practical measure, the Congolese Government suggests that International Red Cross observers come
>
> to check on the extent to which the Geneva Convention [sic] is being respected, particularly in the matter of the treatment of prisoners and the ban against taking hostages." (Public Statement of Prime Minister of the Democratic Republic of the Congo (21 Oct. 1964), *reprinted* in **American Journal of International Law** (1965) 614, at 616.)

This statement indicates acceptance of rules regarding the conduct of internal hostilities, and, in particular, the principle that civilians must not be attacked. Like State practice in the Spanish Civil War, the Congolese Prime Minister's statement confirms the status of this rule as part of the customary law of internal armed conflicts. Indeed, this statement must not be read as an offer or a promise to undertake obligations previously not binding; rather, it aimed at reaffirming the existence of such obligations and spelled out the notion that the Congolese Government would fully comply with them.

106. A further confirmation can be found in the "Operational Code of Conduct for Nigerian Armed Forces", issued in July 1967 by the Head of the Federal Military Government, Major General Y. Gowon, to regulate the conduct of military operations of the Federal Army against the rebels. In this "Operational Code of Conduct", it was stated that, to repress the rebellion in Biafra, the Federal troops were duty-bound to respect the rules of the Geneva Conventions and in addition were to abide by a set of rules protecting civilians and civilian objects in the theatre of military operations. (See A.H.M. Kirk-Greene, **1 Crisis and Conflict in Nigeria, A Documentary Sourcebook 1966-1969**, 455-57 (1971).) This "Operational Code of Conduct" shows that in a large-scale and protracted civil war the central authorities, while refusing to grant recognition of belligerency, deemed it necessary to apply not only the provisions of the Geneva Conventions designed to protect civilians in the hands of the enemy and captured combatants, but also general rules on the conduct of hostilities that are normally applicable in international conflicts. It should be noted that the code was actually applied by the Nigerian authorities. Thus, for instance, it is reported that on 27 June 1968, two officers of the Nigerian Army were publicly executed by a firing squad in Benin City in Mid-Western Nigeria for the murder of four civilians near Asaba, (see New Nigerian, 28 June 1968, at 1). In addition, reportedly on 3 September 1968, a Nigerian Lieutenant was court-martialled, sentenced to death and executed by a firing squad at Port-Harcourt for killing a rebel Biafran soldier who had surrendered to Federal troops near Aba. (See Daily Times - Nigeria, 3 September 1968, at 1; Daily Times, - Nigeria, 4 September 1968, at 1.)

This attitude of the Nigerian authorities confirms the trend initiated with the Spanish Civil War and referred to above (see paras. 101-102), whereby the central authorities of a State where civil strife has broken out prefer to withhold recognition of belligerency but, at the same time, extend to the conflict the bulk of the body of legal rules concerning conflicts between States.

107. A more recent instance of this tendency can be found in the stand taken in 1988 by the rebels (the FMLN) in El Salvador, when it became clear that the Government was not ready to apply the Additional Protocol II it had previously ratified. The FMLN undertook to respect both common Article 3 and Protocol II:

> "The FMLN shall ensure that its combat methods comply with the provisions of common Article 3 of the Geneva Conventions and Additional Protocol II, take into consideration the needs of the majority of the population, and defend their fundamental freedoms." (FMLN, *La legitimidad de nuestros metodos de lucha,* Secretaria de promocion y proteccion de lo Derechos Humanos del FMLN, El Salvador, 10 Octobre 1988, at 89; unofficial translation.)3

108. In addition to the behaviour of belligerent States, Governments and insurgents, other factors have been instrumental in bringing about the formation of the customary rules at issue. The Appeals Chamber will mention in particular the action of the ICRC, two resolutions adopted by the United Nations General Assembly, some declarations made by member States of the European Community (now European Union), as well as Additional Protocol II of 1977 and some military manuals.

109. As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.

110. The application of certain rules of war in both internal and international armed conflicts is corroborated by two General Assembly resolutions on "Respect of human rights in armed conflict." The first one, resolution 2444, was unanimously4 adopted in 1968 by the General Assembly: "[r]ecognizing the necessity of applying basic humanitarian principles in all armed conflicts," the General Assembly "affirm[ed]"

> "the following principles for observance by all governmental and other authorities responsible for action in armed conflict: (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) That it is prohibited to launch attacks against the civilian populations as such; (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible." (G.A. Res. 2444, U.N. GAOR., 23rd Session, Supp. No. 18 U.N. Doc. A/7218 (1968).)

It should be noted that, before the adoption of the resolution, the United States representative stated in the Third Committee that the principles proclaimed in the resolution "constituted a reaffirmation of existing international law" (U.N. GAOR, 3rd Comm., 23rd Sess., 1634th Mtg., at 2, U.N. Doc. A/C.3/SR.1634 (1968)). This view was reiterated in 1972, when the United States Department of Defence pointed out that the resolution was "declaratory of existing customary international law" or, in other words, "a correct restatement" of "principles of customary international law." (See 67 **American Journal of International Law** (1973), at 122, 124.)

111. Elaborating on the principles laid down in resolution 2444, in 1970 the General Assembly unanimously5 adopted resolution 2675 on "Basic principles for the protection of civilian populations in armed conflicts." In introducing this resolution, which it co-sponsored, to the Third Committee, Norway explained that as used in the resolution, "the term 'armed conflicts' was meant to cover armed conflicts of all kinds, an important point, since the provisions of the Geneva Conventions and the Hague Regulations did not extend to all conflicts." (U.N. GAOR, 3rd Comm., 25th Sess., 1785th Mtg., at 281, U.N. Doc. A/C.3/SR.1785 (1970); *see also* U.N. GAOR, 25th Sess., 1922nd Mtg., at 3, U.N. Doc. A/PV.1922 (1970) (statement of the representative of Cuba during the Plenary discussion of resolution 2675).)The resolution stated the following:

"Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [. . . the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict:

1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.

2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.

3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.

4. Civilian populations as such should not be the object of military operations.

5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations.

6. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.

7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.

8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application." (G.A. Res. 2675, U.N. GAOR., 25th Sess., Supp. No. 28 U.N. Doc. A/8028 (1970).)

112. Together, these resolutions played a twofold role: they were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind and, at the same time, were intended to promote the adoption of treaties on the matter, designed to specify and elaborate upon such principles.

113. That international humanitarian law includes principles or general rules protecting civilians from hostilities in the course of internal armed conflicts has also been stated on a number of occasions by groups of States. For instance, with regard to Liberia, the (then) twelve Member States of the European Community, in a declaration of 2 August 1990, stated:

"In particular, the Community and its Member States call upon the parties in the conflict, in conformity with international law and the most basic humanitarian principles, to safeguard from violence the embassies and places of refuge such as churches, hospitals, etc., where defenceless civilians have sought shelter." (6

European Political Cooperation Documentation Bulletin, at 295 (1990).)

114. A similar, albeit more general, appeal was made by the Security Council in its resolution 788 (in operative paragraph 5 it called upon "all parties to the conflict and all others concerned to respect strictly the provisions of international humanitarian law") (S.C. Res. 788 (19 November 1992)), an appeal reiterated in resolution 972 (S.C. Res. 972 (13 January 1995)) and in resolution 1001 (S.C. Res. 1001 (30 June 1995)).

Appeals to the parties to a civil war to respect the principles of international humanitarian law were also made by the Security Council in the case of Somalia and Georgia. As for Somalia, mention can be made of resolution 794 in which the Security Council in particular condemned, as a breach of international humanitarian law, "the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population") (S.C. Res. 794 (3 December 1992)) and resolution 814 (S.C. Res. 814 (26 March 1993)). As for Georgia, see Resolution 993, (in which the Security Council reaffirmed "the need for the parties to comply with international humanitarian law") (S.C. Res. 993 (12 May 1993)).

115. Similarly, the now fifteen Member States of the European Union recently insisted on respect for international humanitarian law in the civil war in Chechnya. On 17 January 1995 the Presidency of the European Union issued a declaration stating:

"The European Union is following the continuing fighting in Chechnya with the greatest concern. The promised cease-fires are not having any effect on the ground. Serious violations of human rights and international humanitarian law are continuing. The European Union strongly deplores the large number of victims and the suffering being inflicted on the civilian population." (Council of the European Union - General Secretariat, Press Release 4215/95 (Presse II-G), at 1 (17 January 1995).)

The appeal was reiterated on 23 January 1995, when the European Union made the following declaration:

"It deplores the serious violations of human rights and international humanitarian law which are still occurring [in Chechnya]. It calls for an immediate cessation of the fighting and for the opening of negotiations to allow a political solution to the conflict to be found. It demands that freedom of access to Chechnya and the proper convoying of humanitarian aid to the population be guaranteed." (Council of the European Union-General Secretariat, Press Release 4385/95 (Presse 24), at 1 (23 January 1995).)

116. It must be stressed that, in the statements and resolutions referred to above, the European Union and the United Nations Security Council did not mention common Article 3 of the Geneva Conventions, but adverted to "international humanitarian law", thus clearly articulating the view that there exists a **corpus** of general principles and norms on internal armed conflict embracing common Article 3 but having a much greater scope.

117. Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.

This proposition is confirmed by the views expressed by a number of States. Thus, for example, mention can be made of the stand taken in 1987 by El Salvador (a State party to Protocol II). After having been repeatedly invited by the General Assembly to comply with humanitarian law in the civil war raging on its territory (*see*, e.g., G.A. Res. 41/157 (1986)), the Salvadorian Government declared that, strictly speaking, Protocol II did not apply to that civil war (although an objective evaluation prompted some Governments to conclude that all the

conditions for such applications were met, (see, e.g., 43 **Annuaire Suisse de Droit International**, (1987) at 185-87). Nevertheless, the Salvadorian Government undertook to comply with the provisions of the Protocol,

for it considered that such provisions "developed and supplemented" common Article 3, "which in turn constitute[d] the minimum protection due to every human being at any time and place"(6) (*See Informe de la Fuerza Armata de El Salvador sobre el respeto y la vigencia de las normas del Derecho Internacional Humanitario durante el periodo de Septiembre de 1986 a Agosto de 1987,* at 3 (31 August 1987) (forwarded by Ministry of Defence and Security of El Salvador to Special Representative of the United Nations Human Rights Commission (2 October 1987),; (unofficial translation). Similarly, in 1987, Mr. M.J. Matheson, speaking in his capacity as Deputy Legal Adviser of the United States State Department, stated that:

> "[T]he basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process" (Humanitarian Law Conference, Remarks of Michael J. Matheson, (2) **American University Journal of International Law and Policy** (1987) 419, at 430-31).

118. That at present there exist general principles governing the conduct of hostilities (the so-called "Hague Law") applicable to international and internal armed conflicts is also borne out by national military manuals. Thus, for instance, the German Military Manual of 1992 provides that:

> Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts." (Humanitäres Völkerrecht in bewaffneten Konflikten - Handbuch, August 1992, DSK AV207320065, at para. 211 in fine; unofficial translation.)(7)

119. So far we have pointed to the formation of general rules or principles designed to protect **civilians or civilian objects** from the hostilities or, more generally, to protect **those who do not (or no longer) take active part in hostilities**. We shall now briefly show how the gradual extension to internal armed conflict of rules and principles concerning international wars has also occurred as regards **means and methods of warfare**. As the Appeals Chamber has pointed out above (see para. 110), a general principle has evolved limiting the right of the parties to conflicts "to adopt means of injuring the enemy." The same holds true for a more general principle, laid down in the so-called Turku Declaration of Minimum Humanitarian Standards of 1990, and revised in 1994, namely Article 5, paragraph 3, whereby "[w]eapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances." (*Declaration of Minimum Humanitarian Standards, reprinted in, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session,* Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995).) It should be noted that this Declaration, emanating from a group of distinguished experts in human rights and humanitarian law, has been indirectly endorsed by the Conference on Security and Cooperation in Europe in its Budapest Document of 1994 (Conference on Security and Cooperation in Europe, Budapest Document 1994: Towards Genuine Partnership in a New Era, para. 34 (1994)) and in 1995 by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (*Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session,* Commission on Human Rights, 51st Sess., Agenda Item 19, at 1, U.N. Doc. E/CN.4/1995/L.33 (1995)).

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by

weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars,

cannot but be inhumane and inadmissible in civil strife.

120. This fundamental concept has brought about the gradual formation of general rules concerning specific weapons, rules which extend to civil strife the sweeping prohibitions relating to international armed conflicts. By way of illustration, we will mention chemical weapons. Recently a number of States have stated that the use of chemical weapons by the central authorities of a State against its own population is contrary to international law. On 7 September 1988 the [then] twelve Member States of the European Community made a declaration whereby:

> "The Twelve are greatly concerned at reports of the alleged use of chemical weapons against the Kurds [by the Iraqi authorities]. They confirm their previous positions, condemning any use of these weapons. They call for respect of international humanitarian law, including the Geneva Protocol of 1925, and Resolutions 612 and 620 of the United Nations Security Council [concerning the use of chemical weapons in the Iraq-Iran war]." (4 European Political Cooperation Documentation Bulletin, (1988) at 92.)

This statement was reiterated by the Greek representative, on behalf of the Twelve, on many occasions. (See U.N. GAOR, 1st Comm., 43rd Sess., 4th Mtg., at 47, U.N. Doc. A/C.1/43/PV.4 (1988)(statement of 18 October 1988 in the First Committee of the General Assembly); U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtg., at 23, U.N. Doc. A/C.1/43/PV.31 (statement of 9 November 1988 in meeting of First Committee of the General Assembly to the effect inter alia that "The Twelve [. . .] call for respect for the Geneva Protocol of 1925 and other relevant rules of customary international law"); U.N. GAOR, 1st Comm., 43rd Sess., 49th Mtg., at 16, U.N. Doc. A/C.3/43/SR.49 (summary of statement of 22 November 1988 in Third Committee of the General Assembly); *see also Report on European Union [EPC Aspects*], 4 European Political Cooperation Documentation Bulletin (1988), 325, at 330; *Question No 362/88 by Mr. Arbeloa Muru (S-E) Concerning the Poisoning of Opposition Members in Iraq*, 4 European Political Cooperation Documentation Bulletin (1988), 187 (statement of the Presidency in response to a question of a member of the European Parliament).)

121. A firm position to the same effect was taken by the British authorities: in 1988 the Foreign Office stated that the Iraqi use of chemical weapons against the civilian population of the town of Halabja represented "a serious and grave violation of the 1925 Geneva Protocol and international humanitarian law. The U.K. condemns unreservedly this and all other uses of chemical weapons." (59 **British Yearbook of International Law** (1988) at 579; *see also* id. at 579-80.) A similar stand was taken by the German authorities. On 27 October 1988 the German Parliament passed a resolution whereby it "resolutely rejected the view that the use of poison gas was allowed on one's own territory and in clashes akin to civil wars, assertedly because it was not expressly prohibited by the Geneva Protocol of 1925"(8) . (50 **Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht** (1990), at 382-83; unofficial translation.) Subsequently the German representative in the General Assembly expressed Germany's alarm "about reports of the use of chemical weapons against the Kurdish population" and referred to "breaches of the Geneva Protocol of 1925 and other norms of international law." (U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtng., at 16, U.N. Doc. A/C.1/43/PV.31 (1988).)

122. A clear position on the matter was also taken by the United States Government. In a "press guidance" statement issued by the State Department on 9 September 1988 it was stated that:

> Questions have been raised as to whether the prohibition in the 1925 Geneva Protocol against [chemical weapon] use 'in war' applies to [chemical weapon] use in internal conflicts. However, it is clear that such

> use against the civilian population would be contrary to the customary international law that is applicable to internal armed conflicts, as well as other international agreements." (United States, Department of State, Press Guidance (9 September 1988).)

On 13 September 1988, Secretary of State George Schultz, in a hearing before the United States Senate Judiciary Committee strongly condemned as "completely unacceptable" the use of chemical weapons by Iraq. (*Hearing on Refugee Consultation with Witness Secretary of State George Shultz*, 100th Cong., 2d Sess., (13 September 1988) (Statement of Secretary of State Shultz).) On 13 October of the same year, Ambassador R.W. Murphy, Assistant Secretary for Near Eastern and South Asian Affairs, before the Sub-Committee on Europe and the Middle East of the House of Representatives Foreign Affairs Committee did the same, branding that use as "illegal." (See **Department of State Bulletin** (December 1988) 41, at 43-4.)

123. It is interesting to note that, reportedly, the Iraqi Government "flatly denied the poison gas charges." (New York Times, 16 September 1988, at A 11.) Furthermore, it agreed to respect and abide by the relevant international norms on chemical weapons. In the aforementioned statement, Ambassador Murphy said:

> "On September 17, Iraq reaffirmed its adherence to international law, including the 1925 Geneva Protocol on chemical weapons as well as other international humanitarian law. We welcomed this statement as a positive step and asked for confirmation that Iraq means by this to renounce the use of chemical weapons inside Iraq as well as against foreign enemies. On October 3, the Iraqi Foreign Minister confirmed this directly to Secretary Schultz." (*Id.* at 44.)

This information had already been provided on 20 September 1988 in a press conference by the State Department spokesman Mr Redman. (See State Department Daily Briefing, 20 September 1988, Transcript ID: 390807, p. 8.) It should also be stressed that a number of countries (Turkey, Saudi Arabia, Egypt, Jordan, Bahrain, Kuwait) as well as the Arab League in a meeting of Foreign Ministers at Tunis on 12 September 1988, strongly disagreed with United States' assertions that Iraq had used chemical weapons against its Kurdish nationals. However, this disagreement did not turn on the legality of the use of chemical weapons; rather, those countries accused the United States of "conducting a smear media campaign against Iraq." (See New York Times, 15 September 1988, at A 13; Washington Post, 20 September 1988, at A 21.)

124. It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals - a matter on which this Chamber obviously cannot and does not express any opinion - there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts.

125. State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare. In addition to what has been stated above, with regard to the ban on attacks on civilians in the theatre of hostilities, mention can be made of the prohibition of perfidy. Thus, for instance, in a case brought before Nigerian courts, the Supreme Court of Nigeria held that rebels must not feign civilian status while engaging in military operations. (*See* Pius Nwaoga v. The State, 52 **International Law Reports**, 494, at 496-97 (Nig. S. Ct. 1972).)

126. The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those

rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts. (On these and other limitations of international humanitarian law governing civil strife, see the important message of the Swiss Federal Council to the Swiss Chambers on the ratification of the two 1977 Additional Protocols (38 **Annuaire Suisse de Droit International** (1982) 137 at 145-49.))

127. Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.

(iv) **Individual Criminal Responsibility In Internal Armed Conflict**

128. Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such prohibitions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts; these provisions cannot, therefore, fall within the scope of the International Tribunal's jurisdiction. It is true that, for example, common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. (See The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Part 22, at 445, 467 (1950).) The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals (id., at 445-47, 467). Where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded:

> [c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." (*id.*, at 447.)

129. Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.

130. Furthermore, many elements of international practice show that States intend to criminalize serious breaches of customary rules and principles on internal conflicts. As mentioned above, during the Nigerian Civil War, both members of the Federal Army and rebels were brought before Nigerian courts and tried for violations of principles of international humanitarian law (see paras. 106 and 125).

131. Breaches of common Article 3 are clearly, and beyond any doubt, regarded as punishable by the Military Manual of Germany (**Humanitäres Völkerrecht in bewaffneten Konflikten** - Handbuch, August 1992, DSK

AV2073200065, at para. 1209)(unofficial translation), which includes among the "grave breaches of international humanitarian law", "criminal offences" against persons protected by common Article 3, such as

"wilful killing, mutilation, torture or inhumane treatment including biological experiments, wilfully causing great suffering, serious injury to body or health, taking of hostages", as well as "the fact of impeding a fair and regular trial"(9) . (Interestingly, a previous edition of the German Military Manual did not contain any such provision. See Kriegsvölkerrecht - Allgemeine Bestimmungen des Kriegführungsrechts und Landkriegsrecht, ZDv 15-10, March 1961, para. 12; Kriegsvölkerrecht - Allgemeine Bestimmungen des Humanitätsrechts, ZDv 15/5, August 1959, paras. 15-16, 30-2). Furthermore, the "Interim Law of Armed Conflict Manual" of New Zealand, of 1992, provides that "while non-application [i.e. breaches of common Article 3] would appear to render those responsible liable to trial for 'war crimes', trials would be held under national criminal law, since no 'war' would be in existence" (New Zealand Defence Force Directorate of Legal Services, DM (1992) at 112, Interim Law of Armed Conflict Manual, para. 1807, 8). The relevant provisions of the manual of the United States (Department of the Army, The Law of Land Warfare, Department of the Army Field Manual, FM 27-10, (1956), at paras. 11 & 499) may also lend themselves to the interpretation that "war crimes", **i.e.,** "every violation of the law of war", include infringement of common Article 3. A similar interpretation might be placed on the British Manual of 1958 (War Office, The Law of War on Land, Being Part III of the Manual of Military Law (1958), at para. 626).

132. Attention should also be drawn to national legislation designed to implement the Geneva Conventions, some of which go so far as to make it possible for national courts to try persons responsible for violations of rules concerning internal armed conflicts. This holds true for the Criminal Code of the Socialist Federal Republic of Yugoslavia, of 1990, as amended for the purpose of making the 1949 Geneva Conventions applicable at the national criminal level. Article 142 (on war crimes against the civilian population) and Article 143 (on war crimes against the wounded and the sick) expressly apply "at the time of war, armed conflict or occupation"; this would seem to imply that they also apply to internal armed conflicts. (Socialist Federal Republic of Yugoslavia, Federal Criminal Code, arts. 142-43 (1990).) (It should be noted that by a decree having force of law, of 11 April 1992, the Republic of Bosnia and Herzegovina has adopted that Criminal Code, subject to some amendments.) (2 Official Gazette of the Republic of Bosnia and Herzegovina 98 (11 April 1992)(translation).) Furthermore, on 26 December 1978 a law was passed by the Yugoslav Parliament to implement the two Additional Protocols of 1977 (Socialist Federal Republic of Yugoslavia, Law of Ratification of the Geneva Protocols, Medunarodni Ugovori, at 1083 (26 December 1978).) as a result, by virtue of Article 210 of the Yugoslav Constitution, those two Protocols are "directly applicable" by the courts of Yugoslavia. (Constitution of the Socialist Federal Republic of Yugoslavia, art. 210.) Without any ambiguity, a Belgian law enacted on 16 June 1993 for the implementation of the 1949 Geneva Conventions and the two Additional Protocols provides that Belgian courts have jurisdiction to adjudicate breaches of Additional Protocol II to the Geneva Conventions relating to victims of non-international armed conflicts. Article 1 of this law provides that a series of "grave breaches" (***infractions graves***) of the four Geneva Conventions and the two Additional Protocols, listed in the same Article 1, "constitute international law crimes" (***[c]onstituent des crimes de droit international***) within the jurisdiction of Belgian criminal courts (Article 7). (*Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions,* Moniteur Belge, (5 August 1993).)

133. Of great relevance to the formation of *opinio juris* to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council. Thus, for instance, in two resolutions on Somalia, where a civil strife was under way, the Security Council unanimously condemned

breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held "individually responsible" for them. (See S.C. Res. 794 (3 December 1992); S.C. Res. 814 (26 March 1993).)

134. All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.

135. It should be added that, in so far as it applies to offences committed in the former Yugoslavia, the notion that serious violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility is also fully warranted from the point of view of substantive justice and equity. As pointed out above (*see* para. 132) such violations were punishable under the Criminal Code of the Socialist Federal Republic of Yugoslavia and the law implementing the two Additional Protocols of 1977. The same violations have been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992. Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.

136. It is also fitting to point out that the parties to certain of the agreements concerning the conflict in Bosnia-Herzegovina, made under the auspices of the ICRC, clearly undertook to punish those responsible for violations of international humanitarian law. Thus, Article 5, paragraph 2, of the aforementioned Agreement of 22 May 1992 provides that:

> "Each party undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence **and to punish those responsible in accordance with the law in force.**"
> (Agreement No. 1, art. 5, para. 2 (Emphasis added).)

Furthermore, the Agreement of 1st October 1992 provides in Article 3, paragraph 1, that

> "All prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law as defined in Article 50 of the First, Article 51 of the Second, Article 130 of the Third and Article 147 of the Fourth Geneva Convention, as well as in Article 85 of Additional Protocol I, will be unilaterally and unconditionally released." (Agreement No. 2, 1 October 1992, art. 3, para. 1.)

This provision, which is supplemented by Article 4, paragraphs 1 and 2 of the Agreement, implies that all those responsible for offences contrary to the Geneva provisions referred to in that Article must be brought to trial. As both Agreements referred to in the above paragraphs were clearly intended to apply in the context of an internal armed conflict, the conclusion is warranted that the conflicting parties in Bosnia-Herzegovina had clearly agreed at the level of treaty law to make punishable breaches of international humanitarian law occurring within the framework of that conflict.

(v) **Conclusion**

137. In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 as

well as customary international law, the Appeals Chamber concludes that, under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an

internal or an international armed conflict. Thus, to the extent that Appellant's challenge to jurisdiction under Article 3 is based on the nature of the underlying conflict, the motion must be denied.

(c) Article 5

138. Article 5 of the Statute confers jurisdiction over crimes against humanity. More specifically, the Article provides:

> "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a) murder;
>
> (b) extermination;
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> (c) enslavement;
>
> (d) deportation;
>
> (e) imprisonment;
>
> (f) torture;
>
> (g) rape;
>
> (h) persecutions on political, racial and religious grounds;
>
> (i) other inhumane acts."

As noted by the Secretary-General in his Report on the Statute, crimes against humanity were first recognized in the trials of war criminals following World War II. (Report of the Secretary-General, at para. 47.) The offence was defined in Article 6, paragraph 2(c) of the Nuremberg Charter and subsequently affirmed in the 1948 General Assembly Resolution affirming the Nuremberg principles.

139. Before the Trial Chamber, Counsel for Defence emphasized that both of these formulations of the crime limited it to those acts committed "in the execution of or in connection with any crime against peace or any war crime." He argued that this limitation persists in contemporary international law and constitutes a requirement that crimes against humanity be committed in the context of an international armed conflict (which assertedly was missing in the instant case). According to Counsel for Defence, jurisdiction under Article 5 over crimes against humanity "committed in armed conflict, whether international or internal in character" constitutes an ex post facto law violating the principle of *nullum crimen sine lege*. Although before the Appeals Chamber the Appellant has forgone this argument (*see* Appeal Transcript, 8 September 1995, at 45), in view of the importance of the matter this Chamber deems it fitting to comment briefly on the scope of Article 5.

140. As the Prosecutor observed before the Trial Chamber, the nexus between crimes against humanity and

either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Nuremberg Tribunal. Although the nexus requirement in the Nuremberg Charter was carried over to the

1948 General Assembly resolution affirming the Nuremberg principles, there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity. Most notably, the nexus requirement was eliminated from the definition of crimes against humanity contained in Article II(1)(c) of Control Council Law No. 10 of 20 December 1945. (Control Council Law No. 10, Control Council for Germany, Official Gazette, 31 January 1946, at p. 50.). The obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict. (Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, art. 1, 78 U.N.T.S. 277, Article 1 (providing that genocide, "whether committed in time of peace or in time of war, is a crime under international law"); International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 U.N.T.S. 243, arts. 1-2Article . I(1)).

141. It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of *nullum crimen sine lege*.

142. We conclude, therefore, that Article 5 may be invoked as a basis of jurisdiction over crimes committed in either internal or international armed conflicts. In addition, for the reasons stated above, in Section IV A, (paras. 66-70), we conclude that in this case there was an armed conflict. Therefore, the Appellant's challenge to the jurisdiction of the International Tribunal under Article 5 must be dismissed.

C. May The International Tribunal Also Apply International Agreements Binding Upon The Conflicting Parties?

143. Before both the Trial Chamber and the Appeals Chamber, Defence and Prosecution have argued the application of certain agreements entered into by the conflicting parties. It is therefore fitting for this Chamber to pronounce on this. It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty. (Report of the Secretary-General, at para. 34.) It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law. This analysis of the jurisdiction of the International Tribunal is borne out by the statements made in the Security Council at the time the Statute was adopted. As already mentioned above (paras. 75 and 88), representatives of the United States, the United Kingdom and France all agreed that Article 3 of the Statute did not exclude application of international agreements binding on the parties. (Provisional Verbatim Record, of the U.N.SCOR, 3217th Meeting., at 11, 15, 19, U.N. Doc. S/PV.3217 (25 May 1993).).

144. We conclude that, in general, such agreements fall within our jurisdiction under Article 3 of the Statute. As

the defendant in this case has not been charged with any violations of any specific agreement, we find it unnecessary to determine whether any specific agreement gives the International Tribunal jurisdiction over the

alleged crimes.

145. For the reasons stated above, the third ground of appeal, based on lack of subject-matter jurisdiction, must be dismissed.

V. DISPOSITION

146. For the reasons hereinabove expressed
and
Acting under Article 25 of the Statute and Rules 72, 116 bis and 117 of the Rules of Procedure and Evidence,

The Appeals Chamber

(1) By 4 votes to 1,

Decides that the International Tribunal is empowered to pronounce upon the plea challenging the legality of the establishment of the International Tribunal.

IN FAVOUR: *President* Cassese, *Judges* Deschênes, Abi-Saab and Sidhwa

AGAINST: *Judge* Li

(2) Unanimously

Decides that the aforementioned plea is dismissed.

(3) Unanimously

Decides that the challenge to the primacy of the International Tribunal over national courts is dismissed.

(4) By 4 votes to 1

Decides that the International Tribunal has subject-matter jurisdiction over the current case.

IN FAVOUR: *President* Cassese, *Judges* Li, Deschênes, Abi-Saab

AGAINST: *Judge* Sidhwa

ACCORDINGLY, THE DECISION OF THE TRIAL CHAMBER OF 10 AUGUST 1995 STANDS REVISED, THE JURISDICTION OF THE INTERNATIONAL TRIBUNAL IS AFFIRMED AND THE APPEAL IS DISMISSED.

Done in English, this text being authoritative.*

(Signed) Antonio Cassese,

President

Judges Li, Abi-Saab and Sidhwa append separate opinions to the Decision of the Appeals Chamber

Judge Deschênes appends a Declaration.

(Initialled) A. C.

Dated this second day of October 1995
The Hague
The Netherlands

[Seal of the Tribunal]

* French translation to follow

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1 "Trattasi di norme [concernenti i reati contro le leggi e gli usi della guerra] che, per il loro contenuto altamente etico e umanitario, hanno carattere non territoriale, ma universale... Dalla solidarietà delle varie nazioni, intesa a lenire nel miglior modo possibile gli orrori della guerra, scaturisce la necessità di dettare disposizioni che non conoscano barriere, colpendo chi delinque, dovunque esso si trovi....
..[I] reati contro le leggi e gli usi della guerra non possono essere considerati delitti politici, poichè non offendono un interesse politico di uno Stato determinato ovvero un diritto politico di un suo cittadino. Essi invece sono reati di lesa umanità, e, come si è precedentemente dimostrato, le norme relative hanno carattere universale, e non semplicemente territoriale. Tali reati sono, di conseguenza, per il loro oggetto giuridico e per la loro particolare natura, proprio di specie opposta e diversa da quella dei delitti politici. Questi, di norma, interessano solo lo Stato a danno del quale sono stati commessi, quelli invece interessano tutti gli Stati civili, e vanno combattuti e repressi, come sono combattuti e repressi il reato di pirateria, la tratta delle donne e dei minori, la riduzione in schiavitù, dovunque siano stati commessi." (art. 537 e 604 c. p.).
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2 ."..[E]n raison de leur nature, les crimes contre l'humanité (...) ne relèvent pas seulement du droit interne français, mais encore d'un ordre répressif international auquel la notion de frontière et les règles extraditionnelles qui en découlent sont fondamentalement étrangères." (6 octobre 1983, 88 Revue Générale de Droit international public, 1984, p. 509.)

3 "El FMLN procura que sus métodos de lucha cumplan con lo estipulado per el art'culo 3 comun a los Convenios de Ginebra y su Protocolo II Adicional, tomen en consideración las necesidades de la mayor'a de la población y estén orientados a defender sus libertades fundamentales."

4 The recorded vote on the resolution was 111 in favour and 0 against. After the vote was taken, however, Gabon represented that it had intended to vote against the resolution. (U.N. GAOR, 23rd Sess., 1748th Mtg., at 7, 12, U.N.Doc. A/PV.1748 (1968)).

5 The recorded vote on the resolution was 109 in favour and 0 against, with 8 members abstaining. (U.N. GAOR, 1922nd Mtg., at 12, U.N.Doc. A/PV.1922 (1970).)

6 "Dentro de esta l'nea de conducta, su mayor preocupación [de la Fuerza Armada] ha sido el mantenerse apegada estrictamente al cumplimiento de las disposiciones contenidas en los Convenios de Ginebra y en El Protocolo II de dichos Convenios, ya que a&uacuten no siendo el mismo aplicable a la situación que confronta actualmente el país, el Gobierno de El Salvador acata y cumple las disposiciones contenidas endicho instrumento, por considerar que ellas constituyen el desarrollo y la complementación del Art. 3, comœn a los Convenios de Ginebra del 12 de agosto de 1949, que a su vez representa la protección mínima que se debe al ser humano encualquier tiempo y lugar."
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7 "Ebenso wie ihre Verbündeten beachten Soldaten der Bundeswehr die Regeln des humanitären Völkerrechts bei militärischen

Operationen in allen bewaffneten Konflikten, gleichgültig welcher Art."
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8 "Der Deutsche Bundestag befürchtet, dass Berichte zutreffend sein könnten, dass die irakischen Streitkräfte auf dem Territorium des Iraks nunmehr im Kampf mit kurdischen Aufständischen Giftgas eingesetzt haben. Er weist mit Entschiedenheit die Auffassung zurück, dass der Einsatz von Giftgas im Innern und bei bürgerkriegsähnlichen Auseinandersetzungen zulässig sei, weil er durch das Genfer Protokoll von 1925 nicht ausdrücklich verboten werde..."
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9 "1209. Schwere Verletzungen des humanitären Völkerrechts sind insbesondere; -Straftaten gegen geschützte Personen (Verwundete, Kranke, Sanitätspersonal, Militärgeistliche, Kriegsgefangene, Bewohner besetzter Gebiete, andere Zivilpersonen), wie vorsätzliche Tötung, Verstümmelung, Folterung oder unmenschliche Behandlung einschliesslich biologischer Versuche, vorsätzliche Verursachung grosser Leiden, schwere Beeinträchtigung der körperlichen Integrität oder Gesundheit, Geiselnahme (1 3, 49-51; 2 3, 50, 51; 3 3, 129, 130; 4 3, 146, 147; 5 11 Abs. 2, 85 Abs. 3 Buchst. a)
[. . .]
-Verhinderung eines unparteiischen ordentlichen Gerichtsverfahrens (1 3 Abs. 3 Buchst. d; 3 3 Abs. 1d; 5 85 Abs. 4 Buschst. e)."
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International Criminal Tribunal for Rwanda

Prosecutor *v.* Jean-Paul Akayesu
Judgement (summary)

Trial Chamber, 2 September 1998

ICTR - Jean-Paul Akayesu, summary of the Judgement

Source: ICTR-96-4-T Delivered on 2 September 1998

1. Trial Chamber 1 is sitting on this day, 2 September 1998, to deliver its judgment in the case " The Prosecutor versus Jean-Paul Akayesu", case no. ICTR-96-4-T.

2. The Judgment, which is already available in French and English, the two official languages of the Tribunal, is a voluminous document of almost three hundred pages. The Chamber therefore considers that it would be appropriate to limit its delivery to a summary of the content of its Judgment and its Verdict as regards the guilt of Jean-Paul Akayesu on each count with which he is charged.

3. In its Judgment, the Chamber first presents a brief profile of the International Criminal Tribunal for Rwanda, which was established by the United Nations Security Council for the purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994. The proceedings before the Tribunal are governed by its Statute annexed to Resolution 955 of the Security Council and its Rules of Procedure and Evidence .The ratione materiae jurisdiction of the Tribunal is to prosecute persons charged with genocide, crimes against humanity and serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of Victims in Times of War and of Additional Protocol II thereto of 8 June 1977.

4. The Chamber then summarizes the proceedings of the case. It is shown that Jean-Paul Akayesu was arrested in Zambia on 10 October 1995. On 16 February 1996, Judge William Sekule confirmed the Indictment submitted by the Prosecutor against Jean-Paul Akayesu. In all, the said Indictment covers 13 counts relating to genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions of 1949 and of Additional Protocol II of 1977.

5. At the time he confirmed the Indictment, Judge William Sekule also issued a warrant of arrest, accompanied by an order for the continued detention of the Accused. Pursuant to this order, Akayesu was transferred from Zambia to Arusha on 26 May 1996, to be detained at the Detention Facility of the Tribunal.

6. Jean-Paul Akayesu made his initial appearance before this Chamber on 30 May 1996. At that time, he pleaded not guilty to each of the counts charged. The trial on the merits opened on 9 January 1997. During the trial, the Chamber heard forty-two witnesses called by the parties. The proceedings generated more than 4000 pages of transcripts and 125 documents entered in evidence.

7. In the course of the trial on 17 June 1997, the Chamber granted the Prosecutor leave to amend the Indictment in order to add three new counts relating to allegations of rape and sexual violence, to which several witnesses had testified earlier during their appearance before the Chamber. Jean-Paul Akayesu also pleaded not guilty to the counts of rape and other inhumane acts constituting crimes against humanity and other outrages upon personal dignity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto.

8. In its Judgment, the Chamber then gives a profile of the Accused, the responsibilities he had in Taba and the line of defence that he adopted during his trial.

9. Jean-Paul Akayesu, a Rwandan national, was born in 1953. He is married, with five children. Prior to becoming bourgmestre of Taba commune, in the prefecture of Gitarama, in Rwanda, he was a teacher, then an inspector of schools. Akayesu entered politics in 1991, during the establishment of the Mouvement Démocratique Républicain (MDR), of which he is one of the founding members. He was Chairman of the local wing of the MDR in Taba commune, which a vast majority of the population joined. In April 1993, Akayesu, whose candidacy was supported by several key figures and influential groups in the commune, was elected bourgmestre of Taba. He held that position until June 1994, when he fled Rwanda.

10. Based on the evidence submitted to it, the Chamber notes that, in Rwanda, the bourgmestre was traditionally treated with a lot of deference by the people and that he had extensive powers. Akayesu appears to have discharged his various responsibilities relatively well until the period of the events described in the Indictment and to have been a respected bourgmestre.

11. In the opinion of the Chamber, the Defence case, in essence, is that he did not commit , order to be committed or in any way aid and facilitate the acts with which he is charged in the Indictment. Akayesu concedes, nonetheless, that massacres aimed mainly at the Tutsi took place in Taba commune in 1994. The Defence argues that Jean-Paul Akayesu was helpless to prevent the commission of such acts, because the balance of force in the commune was in favour of the Interahamwe, who were under the strict authority of one Silas Kubwimana. The Defence argues further that the Accused was allegedly so harassed by the Interahamwe that he himself had to flee Taba temporarily. It submits that as soon as the massacres became widespread, the Accused was stripped of all authority and lacked the means to stop the killings. The Defence stated further that Jean-Paul Akayesu could not be required to be a hero, to lay down his life in futile attempt to prevent the massacres. As concerns acts of sexual violence and rape which were allegedly committed in Taba, Jean-Paul Akayesu maintains that he never heard of them and considers that they never even took place.

12. Before rendering its findings on the acts with which Akayesu is charged and the applicable law, the Chamber is of the opinion that it would be appropriate, for a better understanding of the events alleged in the Indictment, to briefly summarise the history of Rwanda. To this end, it recalled the most important events in the country's history, from the pre-colonial period up to 1994, reviewing the colonial period and the "Revolution" of 1959 by Grégoire Kayibanda. The Chamber most particularly highlighted the military and political conflict between the Rwandan Armed Forces (RAF) and the Rwandan Patriotic

Front(RPF) and its armed wing, from 1990. This conflict led to the signing of the Arusha Peace Accords and the deployment of a United Nations peacekeeping force, UNAMIR.

13. The Chamber then considered whether the events that took place in Rwanda in 1994 occurred solely within the context of the conflict between the RAF and the RPF, as some maintain, or whether the massacres that occurred between April and July 1994 constituted genocide. To that end, and even if the Chamber later goes back on its definition of genocide, it should be noted that genocide means, as defined in the Convention for the Prevention and Punishment of the Crime of Genocide, as the act of committing certain crimes, including the killing of members of the group or causing serious physical or mental harm to members of the group with the intent to destroy, in in whole or in part, a national, ethnical, racial or religious group, as such.

14. Even though the number of victims is yet to be known with accuracy, no one can reasonably refute the fact that widespread killings took place during this period throughout the country. Dr. Zachariah, who appeared as an expert witness before this Tribunal, described the piles of bodies he saw everywhere, on the roads, on the footpaths and in rivers and, particularly, the manner in which all these people had been killed. He saw many wounded people who, according to him, were mostly Tutsi and who, apparently, had sustained wounds inflicted with machetes to the face, the neck, the ankle and also to the Achilles' tendon to prevent them from fleeing. Similarly, the testimony of Major-General Dallaire, former Commander of UNAMIR, before the Chamber indicated that, from 6 April 1994, the date of the crash that claimed the life of President Habyarimana, members of FAR and the Presidential Guard were going into houses in Kigali that had been previously identified in order to kill. Another witness, the British camer
aman, Simon Cox, took photographs of bodies in various localities in Rwanda, and mentioned identity cards strewn on the ground, all of which were marked "Tutsi".

15. Consequently, in view of these widespread killings the victims of which were mainly Tutsi, the Trial Chamber is of the opinion that the first requirement for there to be genocide has been met, to wit, killing and causing serious bodily harm to members of a group. The second requirement is that these killings and serious bodily harm be committed with the intent to destroy, in whole or in part, a particular group targeted as such.

16. In the opinion of the Chamber, many facts show that the intention of the perpetrators of these killings was to cause the complete disappearance of the Tutsi people. In this connection, Alison DesForges, a specialist historian on Rwanda, who appeared as an expert witness, stated as follows: " on the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that- as they said on certain occasions- their children , later on , should not know what a Tutsi looked like , unless they referred to history books". This testimony given by Dr. DesForges was confirmed by two prosecution witnesses, who testified separately before the Tribunal that one Silas Kubwimana said during a public meeting chaired by the Accused himself that all the Tutsi had to be killed so that someday Hutu children would not know what a Tutsi looked like. Dr. Zachariah also testified
that the Achilles' tendons of many wounded persons were cut to prevent them from fleeing. In the opinion of the Chamber, this demonstrates the resolve of the perpetrators of these massacres not to spare any Tutsi. Their plan called for doing whatever was possible to prevent any Tutsi from escaping and, thus, to destroy the whole group. Dr. Alison DesForges stated that numerous Tutsi corpses were systematically thrown into the River Nyabarongo, a tributary of the Nile, as seen, incidentally, in several photographs shown in court throughout the trial. She explained that the intent in that gesture was "to send the Tutsi back to their origin", to make them "return to Abyssinia", in accordance with the notion that the Tutsi are a "foreign" group in Rwanda, believed to have come from the Nilotic regions.

17. Other testimonies heard, especially that of Major-General Dallaire, also show that there was an intention to wipe out the Tutsi group in its entirety, since even newborn babies were not spared. Many testimonies given before the Chamber concur on the fact that it was the Tutsi as members of an ethnic group who were targeted in the massacres. General Dallaire, Doctor Zachariah and, particularly, the Accused himself, unanimously stated so before the Chamber.

18. Numerous witnesses testified before the Chamber that the systematic checking of identity cards, on which the ethnic group was mentioned, made it possible to separate the Hutu from the Tutsi, with the latter being immediately arrested and often killed, sometimes on the spot, at the roadblocks which were erected in Kigali soon after the crash of the plane of President Habyarimana, and thereafter everywhere in the country.

19. Based on the evidence submitted to the Chamber, it is clear that the massacres which occurred in Rwanda in 1994 had a specific objective, namely the extermination of the Tutsi, who were targeted especially because of their Tutsi origin and not because they were RPF fighters. In any case, the Tutsi children and pregnant women would, naturally, not have been among the fighters. The Chamber concludes that, alongside the conflict between the RAF and the RPF, genocide was committed in Rwanda in 1994 against the Tutsi as a group. The execution of this genocide was probably facilitated by the conflict, in the sense that the conflict with the RPF forces served as a pretext for the propaganda inciting genocide against the Tutsi, by branding RPF fighters and Tutsi civilians together through the notion widely disseminated, particularly by Radio Television Libre des Mille Collines (RTLM), to the effect that every Tutsi was allegedly an accomplice of the RPF soldiers or "Inkotanyi". However, the fact that the genocide
occurred while the RAF were in conflict with the RPF, obviously, cannot serve as a mitigating circumstance for the genocide.

20. Consequently, the Chamber concludes from all the foregoing that it was, indeed, genocide that was committed in Rwanda in 1994, against the Tutsi as a group. The Chamber is of the opinion that the genocide appears to have been meticulously organized. In fact, Dr. Alison Desforges testifying before the Chamber on 24 May 1997, talked of "centrally organized and supervised massacres". Some evidence supports this view that the genocide had been planned. First, the existence of lists of Tutsi to be eliminated is corroborated by many testimonies. In this respect, Dr. Zachariah mentioned the case of patients and nurses killed in a hospital because a soldier had a list including their names.

21. The Chamber holds that the genocide was organized and planned not only by members of the RAF, but also by the political forces who were behind the "Hutu-power", that it was executed essentially by civilians including the armed militia and even ordinary citizens, and above all, that the majority of the Tutsi victims were non-combatants, including thousands of women and children.

22. Having said that, the Chamber then recalled that the fact that genocide was, indeed, committed in Rwanda in 1994, and more particularly in Taba, cannot influence it in its findings in the present matter. It is the Chamber's responsibility alone to assess the individual criminal responsibility of the Accused, Jean-Paul Akayesu, for the crimes alleged against him, including genocide, for which the Prosecution has to show proof. Despite the indisputable atrociousness of the crimes and the emotions evoked in the international community, the judges have examined the facts adduced in a most dispassionate manner, bearing in mind that the accused is presumed innocent.

23. The Chamber then turned to the question of assessment of evidence. The evidence produced by the parties to the case was mainly testimonial. Yet, human testimony often has the shortcoming of being eminently fragile and fallible. The Chamber considered the credibility of the testimonies, all the more so as three problems were posed: firstly, the fact that most of the witnesses directly experienced the terrible events they were narrating, and that such trauma could have an impact on their testimonies; secondly, the impact of cultural and social factors on communication with the witnesses; and thirdly, the difficulties in interpreting the statements made by the witnesses, most of whom spoke in Kinyarwanda. Despite the difficulties experienced, the Chamber wishes, in this regard, to thank each witness, once again, for his/her deposition at the hearing and commends the strength and courage of survivors, who have narrated the extremely traumatic experiences they had, sometimes rekindling extremely painful emotio
ns. Their testimonies were invaluable to the Tribunal in its search for the truth on the events that happened in Taba commune in 1994.

24. The Chamber then ruled on the admissibility of some evidence. It concluded, in essence, in accordance with the Statute and Rules of Procedure and Evidence, that the Chamber applies the rules which in its view best favour a fair determination of the matter before it and are consonant with the spirit and general principles of law. It noted, in particular that when only one testimony is presented on a fact, it is not bound to apply the adage Unus Testis, Nullus Testis) whereby corroboration of evidence is required if it is to be admitted. The Chamber determined to freely assess the probative value of all relevant evidence. The Chamber had thus determined that in accordance with Rule 89, any relevant evidence having probative value may be admitted into evidence, subject to it being in accordance with the requisites of a fair trial. The Chamber also found that hearsay evidence is not inadmissible per se, but that such evidence should be considered with caution.

25. Having made all these preliminary remarks, the Chamber dealt with the specific facts of the case. It rendered its detailed factual conclusions, by scrupulously analyzing, for each fact, all the related prosecution and defence testimonies, including that of the accused himself. It emerges that for each of the events described in paragraphs 12 to 23 of the Indictment, the Chamber is convinced beyond a reasonable doubt of the following:

26. The Chamber finds that, as pertains to the acts alleged in paragraph 12, it has been established that, throughout the period covered in the Indictment, Akayesu, in his capacity as bourgmestre, was responsible for maintaining law and public order in the commune of Taba and that he had effective authority over the communal police. Moreover, as "leader" of Taba commune, of which he was one of the most prominent figures, the inhabitants respected him and followed his orders. Akayesu himself admitted before the Chamber that he had the power to assemble the population and that they obeyed his instructions. It has also been proven that a very large number of Tutsi were killed in Taba between 7 April and the end of June 1994, while Akayesu was bourgmestre of the Commune. Knowing of such killings, he opposed them and attempted to prevent them only until 18 April 1994, date after which he not only stopped trying to maintain law and order in his commune, but was also present during the acts of violence and killings,
and sometimes even gave orders himself for bodily or mental harm to be caused to certain Tutsi, and endorsed and even ordered the killing of several Tutsi.

27. With regard to the acts alleged in paragraphs 12 (A) and 12 (B) of the Indictment, the Prosecutor has shown beyond a reasonable doubt that between 7 April and the end of June 1994, numerous Tutsi who sought refuge at the Taba Bureau communal were frequently beaten by members of the Interahamwe on or near the premises of the Bureau communal. Some of them were killed. Numerous Tutsi women were forced to endure acts of sexual violence, mutilations and rape, often repeatedly, often publicly and often by more than one assailant. Tutsi women were systematically raped, as one female victim testified to by saying that "each time that you met assailants, they raped you". Numerous incidents of such rape and sexual violence against Tutsi women occurred inside or near the Bureau communal. It has been proven that some communal policemen armed with guns and the accused himself were present while some of these rapes and sexual violence were being committed. Furthermore, it is proven that on several occasions, by his pre
sence, his attitude and his utterances, Akayesu encouraged such acts, one particular witness testifying that Akayesu, addressed the Interahamwe who were committing the rapes and said that "never ask me again what a Tutsi woman tastes like" "Ntihazagire umbaza uko umututsikazi yari ameze, ngo kandi mumenye ko ejo ngo nibabica nta kintu muzambaza.". In the opinion of the Chamber, this constitutes tacit encouragement to the rapes that were being committed.

28. Regarding the facts alleged in paragraph 13 of the Indictment, the Prosecutor failed to demonstrate that they are established.

29. As regards the facts alleged in paragraphs 14 and 15 of the Indictment, it is established that in the early hours of 19 April 1994, Akayesu joined a gathering in Gishyeshye and took this opportunity to address the public; he led the meeting and conducted the proceedings. He then called on the population to unite in order to eliminate what he referred to as the sole enemy: the accomplices of the Inkotanyi; and the population understood that he was thus urging them to kill the Tutsi. Indeed, Akayesu himself knew of the impact of his statements on the crowd and of the fact that his call to

fight against the accomplices of the Inkotanyi would be understood as exhortations to kill the Tutsi in general. Akayesu who had received from the Interahamwe documents containing lists of names did, in the course of the said gathering, summarize the contents of the same to the crowd by pointing out in particular that the names were those of RPF accomplices. He specifically indicated to the participants that Ephrem Karangw a's name was on one of the lists. Akayesu admitted before the Chamber that during the period in question, that to publicly label someone as an accomplice of the RPF would put such a person in danger. The statements thus made by Akayesu at that gathering immediately led to widespread killings of Tutsi in Taba.

30. With respect to the allegations in paragraph 16 of the Indictment, it is also established that on 19 April 1994, Akayesu on two occasions threatened to kill victim U, a Tutsi woman, while she was being interrogated. He detained her for several hours at the Bureau communal, before allowing her to leave. In the evening of 20 April 1994, during a search conducted in the home of victim V, a Hutu man, Akayesu directly threatened to kill the latter. Victim V was thereafter beaten with a stick and the butt of a rifle by a communal policeman called Mugenzi and one Francois, a member of the Interahamwe militia, in the presence of the accused. One of victim V's ribs was broken as a result of the beating.

31. Regarding the acts alleged in paragraph 17, proof has not been provided by the Prosecutor to establish them.

32. As for the allegations made in paragraph 18 of the Indictment, it is established that on or about 19 April 1994, Akayesu and a group of men under his control were looking for Ephrem Karangwa and destroyed his house and that of his mother . They then went to search the house of Ephrem Karangwa's brother- in- law, in Musambira commune and found his three brothers there. When the three brothers, namely Simon Mutijima, Thaddee Uwanyiligira and Jean-Chrysostome Gakuba, tried to escape, Akayesu ordered that they be captured, and ordered that they be killed, and participated in their killing.

33. Regarding the allegations in paragraph 19, the Chamber is satisfied that it has been established that on or about 19 April 1994, Akayesu took from Taba communal prison eight refugees from Runda commune, handed them over to Interahamwe militiamen and ordered that they be killed. They were killed by the Interahamwe using various traditional weapons, including machetes and small axes, in front of the Bureau communal and in the presence of Akayesu who told the killers "do it quickly". The refugees were killed because they were Tutsi.

34. The Prosecutor has proved that, as alleged in paragraph 20 of the Indictment, on that same day, Akayesu ordered the local people to kill intellectuals and to look for one Samuel, a professor who was then brought to the Bureau communal and killed with a machete blow to the neck. Teachers in Taba commune were killed later, on Akayesu's instructions. The victims included the following: Tharcisse Twizeyumuremye, Theogene, Phoebe Uwineze and her fiancé whose name is unknown. They were killed on the road in front of the Bureau communal by the local people and the Interahamwe with machetes and agricultural tools. Akayesu personally witnessed the killing of Tharcisse.

35. The Chamber finds that the acts alleged in paragraph 21 have been proven. It has been established that on the evening of 20 April 1994, Akayesu, and two Interahamwe militiamen and a communal policeman, one Mugenzi, who was armed at the time of the events in question, went to the house of Victim Y, a 69 year old Hutu woman, to interrogate her on the whereabouts of Alexia, the wife of Ntereye, the teacher. During the questioning which took place in the presence of Akayesu, the victim was hit and beaten several times. In particular, she was hit with the barrel of a rifle on the head by the communal policeman. She was forcibly taken away and ordered by Akayesu to lie on the ground. Akayesu himself beat her on her back with a stick. Later on, he had her lie down in front of a vehicle and threatened to drive over her if she failed to give the information he sought.

36. Furthermore, as regards the allegations in paragraphs 22 and 23 of the Indictment, it has been established that on the evening of 20 April 1994, in the course of an interrogation, Akayesu forced victim W to lay down in front of a vehicle and threatened to drive over her . That same evening, Akayesu, accompanied by Mugenzi, a communal policeman, and one Francois, an Interahamwe militiaman, interrogated victims Z and Y. The Accused put his foot on the face of victim Z, causing the said victim to bleed, while the police officer and the militiaman beat the victim with the butt of their rifles. The militiaman forced victim Z to beat victim Y with a stick. The two victims were tied together. Victim Z was also beaten on the back with the blade of a machete.

37. Having made its factual findings, the Chamber analysed the legal definitions proposed by the Prosecutor for each of the facts. It thus considered the applicable law for each of the three crimes under its jurisdiction, which is all the more important since this is the very first Judgement on the legal definitions of genocide on the one hand, and of serious violations of Additional Protocol II of the Geneva Conventions, on the other. Moreover, the Chamber also had to define certain crimes which constitute offences under its jurisdiction, in particular, rape, because to date, there is no commonly accepted definition of this term in international law.

38. In the opinion of the Chamber, rape is a form of aggression the central elements of which cannot be captured in a mechanical description of objects and body parts. The Chamber also notes the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of the sexual violence they endured. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, including rape, is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The Chamber notes in this context that coercive 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.

39. The Chamber reviewed Article 6 (1) of its Statute, on the individual criminal responsibility of the accused for the three crimes constituting ratione materiae of the

Chamber. Article 6(1)enunciates the basic principles of individual criminal liability which are probably common to most national criminal jurisdictions. Article 6(3), by contrast, constitutes something of an exception to the principles articulated in Article 6(1), an exception which derives from military law, particularly the principle of the liability of a commander for the acts of his subordinates or "command responsibility". Article 6(3) does not necessarily require the superior to have had knowledge of such to render him criminally liable. The only requirement is that he had reason to know that his subordinates were about to commit or had committed and failed to take the necessary or reasonable measures to prevent such acts or punish the perpetrators thereof.

40. The Chamber then expressed its opinion that with respect to the crimes under its jurisdiction, it should adhere to the concept of notional plurality of offences (cumulative charges)which would render multiple convictions permissible for the same act. As a result, a particular act may constitute both genocide and a crime against humanity.

41. On the crime of genocide, the Chamber recalls that the definition given by Article 2 of the Statute is echoed exactly by the Convention for the Prevention and Repression of the Crime of Genocide. The Chamber notes that Rwanda acceded, by legislative decree, to the Convention on Genocide on 12 February 1975. Thus, punishment of the crime of genocide did exist in Rwanda in 1994, at the time of the acts alleged in the Indictment, and the perpetrator was liable to be brought before the competent courts of Rwanda to answer for this crime.

42. Contrary to popular belief, the crime of genocide does not imply the actual extermination of a group in its entirety, but is understood as such once any one of the acts mentioned in Article 2 of the Statute is committed with the specific intent to destroy "in whole or in part" a national, ethnical, racial or religious group. Genocide is distinct from other crimes inasmuch as it embodies a special intent or dolus specialis. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which requires that the perpetrator clearly seek to produce the act charged. The special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

43. Specifically, for any of the acts charged under Article 2(2) of the Statute to be a constitutive element of genocide, the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, targeted as such; hence, the victim of the crime of genocide is the group itself and not the individual alone.

44. On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the Accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.

45. Apart from the crime of genocide, Jean-Paul Akayesu is charged with complicity in genocide and direct and public incitement to commit genocide.

46. In the opinion of the Chamber, an Accused is an accomplice in genocide if he knowingly aided and abetted or provoked a person or persons to commit genocide, knowing that this person or persons were committing genocide, even if the Accused himself lacked the specific intent of destroying in whole or in part, the national, ethnical, racial or religious group, as such.

47. Regarding the crime of direct and public incitement to commit genocide, the Chamber defines it mainly on the basis of Article 91 of the Rwandan Penal Code, as directly provoking another to commit genocide, either through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings or through the public display of placards or posters, or by any other means of audiovisual communication. The moral element of this crime lies in the intent to directly encourage or provoke another to commit genocide. It presupposes the desire of the guilty to create, by his actions, within the person or persons whom he is addressing, the state of mind which is appropriate to the commission of a crime. In other words, the person who is inciting to commit genocide must have the specific intent of genocide: that of destroying in whole or in part, a national, ethnical, rac
ial or religious group, as such. The Chamber believes that incitement is a formal offence, for which the mere method used is culpable. In other words, the offence is considered to have been completed once the incitement has taken place and that it is direct and public, whether or not it was successful.

48. The second crime which comes within the jurisdiction of the Tribunal and of which Jean-Paul Akayesu is charged is that of crimes against humanity. On the law applicable to this crime, the Chamber reviewed the case law on this crime, from the judgements rendered by the Nuremberg and Tokyo Tribunals to more recent cases, including the Touvier and Papon cases in France notably, and the Eichmann trial in Israel. It indicated the circumstances under which the charge of crimes against humanity would be leveled, as provided for by Article 3 of the Statute, under which the act must be committed as part of a widespread or systematic attack directed against a civilian population on discriminatory grounds.

49. The third crime on which the Chamber rendered its conclusions is that for which it has competence pursuant to article 4 of the Statute, which provides that the Tribunal is

empowered to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the protection of War Victims, and of the Additional Protocol II thereto of June 8 1977. The said Article 3 common to the Geneva Conventions extends a minimum threshold of humanitarian protection as well to all persons affected by a non-international conflict, a protection which was further developed and enhanced in the 1977 Additional Protocol II. The Chamber decided to analyse separately, the respective conditions of applicability of Article 3 Common to the Geneva Conventions and the Additional Protocol II thereto. It then analysed the conflict which took place in Rwanda in 1994 in the light of those conditions and concluded that each of the two legal instruments was applicable in this case. Furthermore, the Chamber is of the opinion that all the norms set forth under article 4 of its Statute constitute a part of customary International Law. It finally recalled that the violation of the norms defined in article 4 of the Statute, may, in principle, commit criminal responsibility of civilians and that, the Accused belongs to the category of individuals who could be held responsible for serious infringement of international humanitarian law, particularly for serious violations of article 3 common to the Geneva Conventions and the Additional Protocol II thereto.

50. On the basis of the factual findings just shown, the Chamber delivered the following legal findings.

51. With regard to count one on genocide, the Chamber having regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims See above, the findings of the Trial Chamber on the Chapter relating to the law applicable to the crime of genocide, in particular, the definition of the constituent elements of genocide. and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed s
olely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

52. The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped because her ethnic background was unknown. As part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi, the Tutsi women were presented as sexual objects. Indeed, the Chamber was told, for an example, that before being raped and killed, Alexia, who was the wife of the Professor, Ntereye, and her two nieces, were forced by the Interahamwe to undress and ordered to run and do exercises "in order to display the thighs of Tutsi women". The Interahamwe who raped Alexia said, as he threw her on the ground and got on top of her, "let us now see what the vagina of a Tutsi woman tastes like". As stated above, Akayesu himself, speaking to the Interahamwe who were committing the rapes, said to them: "don't ever ask again what a Tutsi woman tastes like".

53. On the basis of the substantial testimonies brought before it, the Chamber finds that in most cases, the rapes of Tutsi women in Taba, were accompanied with the intent to kill those women. Many rapes were perpetrated near mass graves where the women were taken to be killed. A victim testified that Tutsi women caught could be taken away by peasants and men with the promise that they would be collected later to be executed. Following an act of gang rape, a witness heard Akayesu say "tomorrow they will be killed" and they were actually killed. In this respect, it appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process.

54. The Chamber has already established that genocide was committed against the Tutsi group in Rwanda in 1994, throughout the period covering the events alleged in the Indictment2 See above, the findings of the Trial Chamber on the occurrence of genocide against the Tutsi group in Rwanda in 1994.. Owing to the very high number of atrocities committed against the Tutsi, their widespread nature not only in the commune of Taba, but also throughout Rwanda, and to the fact that the victims were systematically and deliberately selected because they belonged to the Tutsi group, with persons belonging to other groups being excluded, the Chamber is also able to infer, beyond reasonable doubt, the genocidal intent of the accused in the commission of the above-mentioned crimes; to the extent that the actions and words of Akayesu during the period of the facts alleged in the Indictment, the Chamber is convinced beyond reasonable doubt, on the basis of evidence adduced before it during the hearing, that he repeatedly made statements more or less explicitly calling for the commission of genocide. Yet, according to the Chamber, he who incites another to commit genocide must have the specific intent to commit genocide: that of destroying in whole or in part, a national, ethnical, racial, or religious group, as such.

55. In conclusion, regarding Count One on genocide, the Chamber is satisfied beyond reasonable doubt that these various acts were committed by Akayesu with the specific intent to destroy the Tutsi group, as such. Consequently, the Chamber is of the opinion that the acts alleged in paragraphs 12, 12A, 12B, 16, 18, 19, 20, 22 and 23 of the Indictment, constitute the crimes of killing members of the Tutsi group and causing serious bodily and mental harm to members of the Tutsi group. Furthermore, the Chamber is satisfied beyond reasonable doubt that in committing the various acts alleged, Akayesu had the specific intent of destroying the Tutsi group as such.

56. Regarding Count Two, on the crime of complicity in genocide, the Chamber indicated supra that, in its opinion, the crime of genocide and that of complicity in genocide were two

distinct crimes, and that the same person could certainly not be both the principal perpetrator of, and accomplice to, the same offence. Given that genocide and complicity in genocide are mutually exclusive by definition, the accused cannot obviously be found guilty of both these crimes for the same act. However, since the Prosecutor has charged the accused with both genocide and complicity in genocide for each of the alleged acts, the Chamber deems it necessary, in the instant case, to rule on Counts 1 and 2 simultaneously, so as to determine, as far as each proven fact is concerned, whether it constituted genocide or complicity in genocide.

57. Count 3 of the Indictment on crimes against humanity, extermination, the Chamber concludes that the murder of the eight refugees described in paragraph 19 of the Indictment as well as the killing of Simon Mutijima, Thaddée Uwanyiligra and Jean Chrysostome Gakuba, Samuel, Tharcisse, Théogène, Phoebe Uwineze and her fiancé, facts described in paragraph 20 of the Indictment, constitute, beyond reasonable doubt, a crime of extermination, perpetrated during a widespread and systematic attack against a civilian population on ethnic grounds and, as such, constitutes a crime against humanity for which Akayesu is individually criminally responsible.

58. Regarding Count Four, on the basis of the facts described in paragraphs 14 and 15 of the Indictment and which it believes are well founded, the Chamber is satisfied beyond reasonable doubt that by the speeches made in public, Akayesu had the intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group as such. Accordingly, the Chamber finds that the said acts constitute the crime of direct and public incitement to commit genocide. In addition, the Chamber finds that the direct and public incitement to commit genocide engaged in by Akayesu, was indeed successful and did lead to the destruction of a great number of Tutsi in the commune of Taba.

59. On Count five of the Indictment, the Accused is charged of crimes against humanity(murder) for the acts alleged in paragraphs 15 and 18 of the Indictment. The Chamber finds beyond a reasonable doubt that the killing of Simon Mutijima, Thaddée Uwanyiligra and Jean Chrysostome, was committed as part of a widespread and systematic attack against a civilian population of Rwanda on ethnic grounds, and therefore, a crime against humanity. Akayesu thereby incurs individual criminal responsibility for having ordered and participated in the commission of this crime.

60. On Count seven of the Indictment, crimes against humanity (murder) for the acts alleged in paragraph 19 of the Indictment, the Chamber finds beyond reasonable doubt that the killing of the eight refugees constitutes murder committed as part of a widespread or systematic attack on civilian population on ethnic grounds and as such constitutes a crime against humanity. Accordingly, the Chamber concludes that the Accused, having ordered the said killings, has incurred individual criminal responsibility as charged in Count Seven of the Indictment.

61. On Count Nine of the Indictment the Accused is charged with a crime against humanity (murder), pursuant to Article 3(a) of the Statute for the acts alleged in paragraph 20 of the Indictment. The Chamber finds beyond a reasonable doubt that the killing of the five individuals does indeed constitute murder as part of a widespread or systematic attack against a civilian population of Rwanda on ethnic grounds and as such constitutes a crime against humanity. Accordingly Akayesu has incurred individual criminal responsibility for having ordered, aided and abetted the planning and execution of the crime.

62. Under Count 11, Akayesu is charged with crimes against humanity (torture), acts alleged in paragraphs 16, 17, 21, 22 and 23 of the indictment. Based on the above factual findings, the Chamber is satisfied beyond reasonable doubt that the acts described in those paragraphs constitute torture. Having being committed as part of a wide spread and systematic attack against a civilian popuation on ethnic grounds, they constitute crimes against humanity and render Akayesu criminally liable for having ordered, aided and abetted in their commission.

63. With regard to Counts 13 and 14, relating to the acts described in paragraphs 12A and 12B of the indictment and which it considers proven, the Chamber is also satisfied beyond a reasonable doubt that they constitute acts of rape and other inhumane acts, committed as part of a widespread and systematic attack against a civilian population on ethnic grounds and therefore constitute a crime against humanity. Consequently, the Chamber finds the Accused individually criminally liable for the said acts described in counts 13 and 14 and for having through his presence tacitly abetted their commission.

64. With respect to Counts 6, 8, 10, 12 and 15, Akayesu is charged with violations of Common Article 3 of the Geneva Conventions of 1949 in counts 6, 8, 10 and 12, and with violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II thereto of 1977 under count 15. The Chamber finds that it has been established beyond reasonable doubt that there was an armed conflict not of an international character between the Government of Rwanda and the RPF at the time of the facts alleged in the Indictment, and that the said conflict was well within the provisions of Common Article 3 and of the Additional Protocol II. The Chamber however finds that the Prosecution has failed to show beyond reasonable doubt that Akayesu was a member of the armed forces and that he was duly mandated and expected, in his capacity as a public official or agent or person otherwise vested with public authority or a de facto representative of the Government, to support and carry out the war effort.

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments, THE CHAMBER unanimously finds as follows:

Count 1: Guilty of Genocide

Count 2: Not guilty of Complicity in Genocide

Count 3: Guilty of Crime against Humanity (Extermination)

Count 4: Guilty of Direct and Public Incitement to Commit Genocide

Count 5: Guilty of Crime against Humanity (Murder)

Count 6: Not guilty of Violation of Article 3 common to the Geneva Conventions (Murder)

Count 7: Guilty of Crime against Humanity (Murder)

Count 8: Not guilty of Violation of Article 3 common to the Geneva Conventions (Murder)

Count 9: Guilty of Crime against Humanity (Murder)

Count 10: Not guilty of Violation of Article 3 common to the Geneva Conventions (Murder)

Count 11: Guilty of Crime against Humanity (Torture)

Count 12: Not guilty of Violation of Article 3 common to the Geneva Conventions (Cruel Treatment)

Count 13: Guilty of Crime against Humanity (Rape)

Count 14: Guilty of Crime against Humanity (Other Inhumane Acts)

Count 15: Not guilty of Violation of Article 3 common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol II (Outrage upon personal dignity, in particular Rape, Degrading and Humiliating Treatment and Indecent Assault)

Done in English and French,

Signed in Arusha, 2 September 1998,

Laïty Kama Lennart Aspegren Navanethem Pillay

International Criminal Tribunal for the former Yugoslavia

Prosecutor *v.* Zejnil Delalić et al. ("Čelebići")
Judgement (summary)

Trial Chamber, 16 November 1998

United Nations
Nations Unies

International
Criminal Tribunal
for the former
Yugoslavia

Tribunal Pénal
International pour
l'ex-Yougoslavie

JUDGEMENT SUMMARY

CHAMBERS

(Exclusively for the use of the media. Not an official document)

The Hague, 16 November 1998

STATEMENT OF THE TRIAL CHAMBER AT THE JUDGEMENT HEARING

The Prosecutor v. Delalic et al. ("Celebici")
16 November 1998

This morning the Trial Chamber pronounces its Judgement in this case - which has become known as the Celebici case - the second Judgement upon trial to be rendered by the International Tribunal and the first to be completed involving more than one accused person. The trial of the four accused commenced on 10 March 1997 and covered a period of some nineteen months. The Trial Chamber has been presented with a great quantity of evidence on the part of both the Prosecution and the Defence, including the testimony of numerous witnesses and many hundreds of pages of documents, which it has considered carefully, along with the arguments of the parties.

The crimes alleged in the Indictment of the four accused are serious violations of international humanitarian law and, as such, merit the most careful consideration, for they involve many complex issues of fact and law previously unaddressed by any international judicial body. In addition, the trial has raised many procedural and evidentiary matters which an International Tribunal must perforce resolve, and the Trial Chamber has given all of these due attention, always bearing in mind the rights of the accused and the need for a fair and expeditious trial.

The written Judgement of the Trial Chamber is thus a lengthy document, constituting almost 500 pages, which it is not possible to read out this morning in its entirety. Instead, we will briefly describe how the Judgement is laid out and give a summary of its content. After doing this, the Judgement in relation to each of the accused and each count of the Indictment, will be announced.

The Judgement is divided into six sections, each constituting an integral part of the whole. Section I is the introductory part, which introduces the Indictment and sets out the procedural history of the case. Section II discusses the background and preliminary factual findings as to the conflict in the relevant area of Bosnia and Herzegovina, the political structure of, and military forces present in the municipality of Konjic – the municipality with which the present case is concerned - and the existence of the Celebici prison-camp. Section III provides an analysis of the law applicable to the case, being Articles 2, 3 and 7 of the Statute of the International Tribunal, and sets out the elements of each of the offences with which the accused are charged.

Section IV contains the Trial Chamber's analysis of the facts of the case and the evidence before it, as well as its findings in relation to each of the counts of the Indictment. Section V then addresses the matter of sentencing, in general and as applicable to each of the accused. Finally, Section VI presents the Judgement of the Trial Chamber on the guilt or innocence of each of the accused in relation to each of the charges against them and the sentence for each accused in relation to those counts of which they are found guilty is imposed. In addition, annexed to the Judgement are various documents, including the Indictment, a glossary of abbreviations used, a map and a plan and various photographs of the Celebici prison-camp.

The Trial Chamber now wishes to highlight certain aspects of the Judgement in each of these sections.

In Section I, the Judgement contains a description of the charges in the Indictment, which are various counts of violations of Article 2 of the Statute – grave breaches of the Geneva Conventions – and Article 3 of the Statute – violations of the laws or customs of war – alleged to have been committed within the Celebici prison-camp in the Konjic municipality in central Bosnia and Herzegovina over a period of months in 1992.

The fourth accused, Esad Landzo, is thus charged pursuant to Article 7(1) of the Statute, with wilful killing and murder, torture and cruel treatment and wilfully causing great suffering or serious injury to body or health. The third accused, Hazim Delic, is similarly charged under Article 7(1) with wilful killing and murder, torture – including rape - and cruel treatment, inhuman treatment, wilfully causing great suffering or serious injury to body or health, the unlawful confinement of civilians, and plunder of private property. Hazim Delic is also charged pursuant to Article 7(3) of the Statute with responsibility as a superior for the crimes which occurred in the Celebici prison-camp at this time.

The second accused, Zdravko Mucic, is also charged pursuant to Article 7(3) with responsibility as a superior for the crimes alleged in the Indictment, due to his position as commander of the Celebici prison-camp at the relevant time. Mr. Mucic is further charged as a direct participant in the unlawful confinement of civilians, the plunder of private property and the wilful causing of great suffering or serious injury to body or health and cruel treatment for the inhumane conditions which existed in the Celebici prison-camp. The first accused, Zejnil Delalic, is charged pursuant to Article 7(3) with responsibility as a superior for the crimes alleged in the Indictment, due to his overall command over the Celebici prison-camp at the relevant time. Mr. Delalic is also charged as a direct participant in the unlawful confinement of civilians.

The introductory section also describes the procedure which was followed for the indictment, arrest and transfer of the accused, as well as the many pre-trial matters which were raised and resolved and the motions which were brought and decided during the trial itself. The Trial Chamber wishes to note the quantity and diversity of such issues raised, including many of important substance and others of less consequence.

In Section II, the Judgement places the crimes alleged in the Indictment in context. It gives an overview of the background to the disintegration of the Socialist Federal Republic of Yugoslavia and the conflicts which developed in Slovenia, Croatia and Bosnia and Herzegovina. It discusses in more depth the military forces which were involved in Bosnia and Herzegovina and then focuses more particularly on the Konjic municipality. The fighting which occurred in Konjic in April, May and June of 1992 is described, including those operations which resulted in the establishment of a detention facility in a former JNA barracks at the village of Celebici to house those Bosnian Serbs arrested by the forces of the Bosnian government. The various buildings and other structures in the Celebici prison-camp which are relevant to the present case are also described.

Section III starts the discussion of the applicable law with an examination of Article 1 of the Statute. Most importantly, it is found that, in the period relevant to the Indictment, a situation of armed conflict existed in Bosnia and Herzegovina, which incorporated the municipality of Konjic. In Konjic, this armed conflict involved the forces of the Bosnian government – the territorial defence forces and the Ministry of Interior forces (MUP), for a time acting jointly with the Croatian Defence Council (HVO) – engaging the Bosnian Serb forces – initially the

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JNA and then the Bosnian Serb army (VRS), joined by local volunteers and militia. It is, furthermore, found that there is a clear nexus between the acts of the accused alleged in the Indictment and this armed conflict.

Section III discusses at length the provisions of Article 2 of the Statute and the requirements which must be satisfied in order for a "grave breach of the Geneva Conventions of 1949" to have been committed. In particular, the Judgement focuses on the question of whether the armed conflict with which we are concerned may be characterised as "international" as well as whether the victims of the alleged crimes were "persons protected" by the Geneva Conventions of 1949. The Trial Chamber considers these issues to be fundamentally important, first to the resolution of the present case and, secondly, to establishing the correct legal classification of the conflict in Bosnia and Herzegovina and the extent of legal protection to be afforded to the population of that State, which found itself caught up in the horrors of a brutal war.

The Trial Chamber finds that the conflict in Bosnia and Herzegovina must be regarded as an international armed conflict throughout 1992. There can be no question that forces external to Bosnia and Herzegovina, particularly the forces of the Yugoslav People's Army (JNA), participated in hostilities in that State. In mid-May 1992, there was an attempt by the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro) to create the appearance that they were no longer involved in Bosnia and Herzegovina, by the division of the JNA into the Bosnian Serb army (VRS) and the Yugoslav army (VJ). The Trial Chamber finds, however, that this was a deliberate attempt to mask the continued involvement of the FRY, whose government remained the controlling force behind the Bosnian Serbs.

The Trial Chamber also finds that, at all relevant times, the persons detained in the Celebici prison-camp, being the victims of the crimes alleged in the Indictment, were persons protected by the Fourth Geneva Convention concerning civilian populations. In particular, it is the firm belief of the Trial Chamber that civilians caught up in an international armed conflict resulting from the dissolution of a State cannot be denied the full protection of the Fourth Geneva Convention solely on the basis of their citizenship status under domestic law.

Section III also contains a discussion of Article 3 of the Statute, concerning violations of the laws or customs of war. This discussion particularly relates to the incorporation of common article 3 of the Geneva Conventions into Article 3 of the Statute and the finding is made that common article 3 is a provision of customary international law which, if violated, entails the individual criminal responsibility of the perpetrator.

After briefly addressing the nature of individual criminal responsibility pursuant to Article 7(1) of the Statute, Section III contains a detailed discussion of the concept of command responsibility under customary international law and as incorporated in Article 7(3). This is the first elucidation of the concept of command responsibility by an international judicial body since the cases decided in the wake of the Second World War. Most importantly, it is found that not only military commanders, but also civilians holding positions of authority, are encompassed by the doctrine. Furthermore, for the attribution of criminal responsibility, not only persons in *de jure* positions of superiority, but also those in such position *de facto*, may be held criminally responsible if they knew or had reason to know that offences had been or were about to be committed by their subordinates and failed to take the necessary and reasonable measures to prevent or punish such offences.

Section III continues with a description of the elements of each of the offences charged in the Indictment, being wilful killing and murder, torture, wilfully causing great suffering or serious injury to body or health, inhuman treatment, cruel treatment, unlawful confinement of civilians and plunder. In this context, the Trial Chamber wishes to note that there can be no question that acts of rape may constitute torture under customary international law.

In Section IV, the law as interpreted in the previous section is applied to the facts of the case. Thus, the position of Zejnil Delalic in relation to the Celebici prison-camp is examined in depth, the discussion being divided between the time periods when he was "co-ordinator" in the Konjic municipality and when he was the commander of Tactical Group 1 of the Bosnian armed forces. A finding is then made on whether he can be considered to have exercised superior authority over the Celebici prison-camp at the relevant time and thus whether he can be held responsible as a commander for the offences alleged to have been committed there. Similarly, the position of Zdravko Mucic is addressed and a finding made on whether, as commander of the Celebici prison-camp, he had superior authority over the guards in the prison-camp, knew or had reason to know of the offences which were being committed there and, further, whether he took all necessary and reasonable measures to prevent or punish such offences. Once again, this examination is engaged in and findings made with respect to Hazim Delic, as deputy commander of the Celebici prison-camp.

Section IV contains an analysis of the evidence before the Trial Chamber in relation to each of the counts of the Indictment and the responsibility of each of the accused is assessed and adjudged. To conclude this Section, there is a discussion of the special defence of diminished responsibility, raised by Esad Landzo.

Pursuant to sub-Rule 85(A)(vi) of the Rules of Procedure and Evidence, the Trial Chamber heard the oral submissions of the Prosecution and the Defence on sentencing, commencing on 12 October 1998. The Trial Chamber also considered the written briefs on sentencing submitted by the parties and, pursuant to sub-Rule 87(C), sets out its discussion and findings in this regard in Section V of the Judgement. It thus takes into consideration various aggravating and mitigating factors, as well as the sentencing practices of the courts of the former Yugoslavia, in relation to those crimes for which each accused is found guilty.

For the foregoing reasons, having considered all of the evidence, the arguments of the parties and the Statute and Rules, the Trial Chamber finds, and imposes sentences as follows:

With respect to the first accused, Zejnil Delalic:

Counts 13 and 14: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (wilful killings) and a Violation of the Laws or Customs of War (murders).
Counts 33 and 34: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (torture) and a Violation of the Laws or Customs of War (torture).

Count 35: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

Counts 38 and 39: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

Counts 44 and 45: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (inhuman treatment) and a Violation of the Laws or Customs of War (cruel treatment).

Counts 46 and 47: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

Count 48: NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (unlawful confinement of civilians).

With respect to the second accused, Zdravko Mucic:

Counts 13 and 14: Superior Responsibility for Murders

GUILTY of a Grave Breach of Geneva Convention IV (wilful killings) and a Violation of the Laws or Customs of War (murders) in respect of Zeljko Cecez, Petko Gligorevic, Gojko Miljanic, Miroslav Vujicic, Pero Mrkajic, Scepo Gotovac, Zeljko Milosevic, Simo Jovanovic and Bosko Samoukovic.

NOT GUILTY in respect of Milorad Kuljanin, Slobodan Babic and Zeljko Klimenta.

NOT GUILTY of a Grave Breach of Geneva Convention IV (wilful killing) and a Violation of the Laws or Customs of War (murder) in respect of Slavko Susic.

GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment) in respect of Slavko Susic.

For wilful killings, and wilfully causing great suffering or serious injury to body or health, as Grave Breaches of Geneva Convention IV, the Trial Chamber sentences Zdravko Mucic to SEVEN years' imprisonment.

For murders and cruel treatment as Violations of the Laws or Customs of War, the Trial Chamber sentences Zdravko Mucic to SEVEN years' imprisonment.

Counts 33 and 34: Superior Responsibility for Acts of Torture

GUILTY of a Grave Breach of Geneva Convention IV (torture) and a Violation of the Laws or Customs of War (torture) in respect of Milovan Kuljanin, Momir Kuljanin, Grozdana Cecez, Milojka Antic, Spasoje Miljevic and Mirko Dordic.

NOT GUILTY in respect of Mirko Babic.

For torture as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Zdravko Mucic to SEVEN years' imprisonment.

For torture as a Violation of the Laws or Customs of War, the Trial Chamber sentences Zdravko Mucic to SEVEN years' imprisonment.

Count 35: A Violation of the Laws or Customs of War (cruel treatment), is DISMISSED.

Counts 38 and 39: Superior responsibility for causing great suffering or serious injury

GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment) in respect of Dragan Kuljanin, Vukasin Mrkajic and Nedeljko Draganic.

NOT GUILTY in respect of Dusko Bendo.

NOT GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) in respect of Mirko Kuljanin.

GUILTY of a Grave Breach of Geneva Convention IV (inhuman treatment) and a Violation of the Laws or Customs of War (cruel treatment) in respect of Mirko Kuljanin.

For wilfully causing great suffering or serious injury to body or health, and inhuman treatment, as Grave Breaches of Geneva Convention IV, the Trial Chamber sentences Zdravko Mucic to SEVEN years' imprisonment.

For cruel treatment as a Violation of the Laws or Customs of War, the Trial Chamber sentences Zdravko Mucic to SEVEN years' imprisonment.

Counts 44 and 45: Superior responsibility for inhumane acts

GUILTY of a Grave Breach of Geneva Convention IV (inhuman treatment) and a Violation of the Laws or Customs of War (cruel treatment) in respect of Milenko Kuljanin, Novica Dordic, Vaso Dordic, Veseljko Dordic, Danilo Kuljanin and Miso Kuljanin.

For inhuman treatment as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Zdravko Mucic to SEVEN years' imprisonment.

For cruel treatment as a Violation of the Laws or Customs of War, the Trial Chamber sentences Zdravko Mucic to SEVEN years' imprisonment.

Counts 46 and 47: Inhumane conditions

GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

For wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Zdravko Mucic to SEVEN years' imprisonment.

For cruel treatment as a Violation of the Laws or Customs of War, the Trial Chamber sentences Zdravko Mucic to SEVEN years' imprisonment.

Count 48: Unlawful confinement of civilians

GUILTY of a Grave Breach of Geneva Convention IV (unlawful confinement of civilians).

For unlawful confinement of civilians as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Zdravko Mucic to SEVEN years' imprisonment.

Count 49: A Violation of the Laws or Customs of War (plunder), is DISMISSED.

In imposing sentence for each count under which Zdravko Mucic has been found guilty, the Trial Chamber has taken into account a number of factors. We wish to emphasise the duty of a commander of any detention facility during an armed conflict to ensure the proper treatment of the prisoners contained therein. Mr. Mucic was clearly derelict in this duty and allowed those under his authority to commit the most heinous of offences, without taking any disciplinary action. Furthermore, as commander of the Celebici prison-camp, he was the person with the primary responsibility for the conditions in which the prisoners were kept. As discussed in some depth in our written Judgement, the Trial Chamber is appalled by the inadequacy of the food and water supplies, and medical and sleeping facilities that were provided for the detainees, as well as the atmosphere of terror which reigned in the Celebici prison-camp.

The Trial Chamber has also noted Mr. Mucic's demeanour and general attitude throughout the trial and wishes to emphasise that these are the most solemn of judicial proceedings, involving the most serious of charges, and he has often displayed a lack of appropriate respect as well as a seeming lack of awareness of the gravity of the charges against him.

The Trial Chamber has further considered the factors which stand in Mr. Mucic's favour. We have been made aware of the circumstances prevailing in the Konjic municipality at the relevant time, as well as in the Celebici prison-camp. We have also heard evidence that he attempted to help some of the detainees in the prison-camp, while at the same time not demonstrating such concern in relation to all. It appears that his interest in self-preservation was the dominant consideration guiding his actions.

The Trial Chamber wishes to emphasise the importance during an armed conflict of the obligation on all individuals to act morally and responsibly, despite the surrounding chaos and social breakdown.

With respect to the third accused, Hazim Delic:
Counts 1 and 2: Killing of Scepo Gotovac

GUILTY of a Grave Breach of Geneva Convention IV (wilful killing) and a Violation of the Laws or Customs of War (murder).

For wilful killing as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Hazim Delic to TWENTY years' imprisonment.

For murder as a Violation of the Laws or Customs of War, the Trial Chamber sentences Hazim Delic to TWENTY years' imprisonment.

Counts 3 and 4: Killing of Zeljko Milosevic

GUILTY of a Grave Breach of Geneva Convention IV (wilful killing) and a Violation of the Laws or Customs of War (murder).

For wilful killing as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Hazim Delic to TWENTY years' imprisonment.

For murder as a Violation of the Laws or Customs of War, the Trial Chamber sentences Hazim Delic to TWENTY years' imprisonment.

Counts 5 and 6: Killing of Simo Jovanovic

NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (wilful killing) and a Violation of the Laws or Customs of War (murder).

Counts 11 and 12: Killing of Slavko Susic

NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (wilful killing) and a Violation of the Laws or Customs of War (murder).

GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

For wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Hazim Delic to SEVEN years' imprisonment.

For cruel treatment as a Violation of the Laws or Customs of War, the Trial Chamber sentences Hazim Delic to SEVEN years' imprisonment.

Counts 13 and 14: Superior responsibility for murders

NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (wilful killings) and a Violation of the Laws or Customs of War (murders).

Counts 15 and 16: Torture of Momir Kuljanin

NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (torture) and a Violation of the Laws or Customs of War (torture).

Count 17: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

Counts 18 and 19: Torture and rape of Grozdana Cecez

GUILTY of a Grave Breach of Geneva Convention IV (rape as torture) and a Violation of the Laws or Customs of War (rape as torture).

For torture as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Hazim Delic to FIFTEEN years' imprisonment.

For torture as a Violation of the Laws or Customs of War, the Trial Chamber sentences Hazim Delic to FIFTEEN years' imprisonment.

Count 20: A Violation of the Laws or Customs of War (cruel treatment), is DISMISSED.

Counts 21 and 22: Torture and Rape of Milojka Antic

GUILTY of a Grave Breach of Geneva Convention IV (rape as torture) and a Violation of the Laws or Customs of War (rape as torture).

For torture as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Hazim Delic to FIFTEEN years' imprisonment.

For torture as a Violation of the Laws or Customs of War, the Trial Chamber sentences Hazim Delic, to FIFTEEN years' imprisonment.

Count 23: A Violation of the Laws or Customs of War (cruel treatment), is DISMISSED.

Counts 24 and 25: Torture of Spasoje Miljevic

NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (torture) and a Violation of the Laws or Customs of War (torture).

Count 26: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

Counts 27 and 28: Torture of Mirko Babic

NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (torture) and a Violation of the Laws or Customs of War (torture).

Count 29: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

Counts 33 and 34: Superior responsibility for acts of torture

NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (torture) and a Violation of the Laws or Customs of War (torture).

Count 35: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

Counts 38 and 39: Superior responsibility for causing great suffering or serious injury

NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

Counts 42 and 43: Inhumane acts involving the use of an electrical device

GUILTY of a Grave Breach of Geneva Convention IV (inhuman treatment) and a Violation of the Laws or Customs of War (cruel treatment).

For inhuman treatment as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Hazim Delic to TEN years' imprisonment.

For cruel treatment as a Violation of the Laws or Customs of War, the Trial Chamber sentences Hazim Delic to TEN years' imprisonment.

Counts 44 and 45: Superior responsibility for inhumane acts

NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (inhuman treatment) and a Violation of the Laws or Customs of War (cruel treatment).

Counts 46 and 47: Inhumane conditions

GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

For wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Hazim Delic to SEVEN years' imprisonment.

For cruel treatment as a Violation of the Laws or Customs of War, the Trial Chamber sentences Hazim Delic to SEVEN years' imprisonment.

Count 48: Unlawful confinement of civilians

NOT GUILTY of a Grave Breach of Geneva Convention IV (unlawful confinement of civilians).

Count 49: A Violation of the Laws or Customs of War (plunder), is DISMISSED.

In imposing sentence for each count under which Hazim Delic has been found guilty, the Trial Chamber has primarily taken into account the gravity of these offences and their effects on the victims involved. We have been appalled by the details of Mr. Delic's criminal actions, as recounted by many victims and witnesses. He displayed a singular brutality in causing the deaths of two men detained in the Celebici prison-camp and a calculated cruelty in the torture and mistreatment of many others. He raped two defenceless women on several occasions, seeking to exert his power over them and instil absolute fear in them. The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. As well as showing no mercy to his chosen victims, he has displayed no remorse before this Trial Chamber.

Throughout Mr. Delic's tenure as deputy commander in the Celebici prison-camp he was instrumental in creating an atmosphere of terror by his actions and his threats to and humiliation of the detainees. It appears that he took a sadistic pleasure in causing the detainees pain and suffering, most clearly illustrated by his frequent use of a device to inflict electrical shocks. Mr. Delic abused his position of authority and trust as deputy commander and, although he has been found not to have command responsibility for the offences of others within the prison-camp, by his actions he encouraged others among the camp guards to engage in their own forms of mistreatment of the detainees.

Once again, the Trial Chamber would emphasise that the breakdown of society and the mechanisms which ordinarily sanction crimes, during times of armed conflict, must not be used in avoidance of the responsibility on all individuals to conduct themselves appropriately and exercise moral choice.

With respect to the fourth accused, Esad Landzo:
Counts 1 and 2: Killing of Scepo Gotovac

GUILTY of a Grave Breach of Geneva Convention IV (wilful killing) and a Violation of the Laws or Customs of War (murder).

For wilful killing as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landzo to FIFTEEN years' imprisonment.

For murder as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landzo to FIFTEEN years' imprisonment.

Counts 5 and 6: Killing of Simo Jovanovic

GUILTY of a Grave Breach of Geneva Convention IV (wilful killing) and a Violation of the Laws or Customs of War (murder).

For wilful killing as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landzo to FIFTEEN years' imprisonment.

For murder as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landzo to FIFTEEN years' imprisonment.

Counts 7 and 8: Killing of Bosko Samoukovic

GUILTY of a Grave Breach of Geneva Convention IV (wilful killing) and a Violation of the Laws or Customs of War (murder).

For wilful killing as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landzo to FIFTEEN years' imprisonment.

For murder as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landzo to FIFTEEN years' imprisonment.

Counts 11 and 12: Killing of Slavko Susic

NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (wilful killing) and a Violation of the Laws or Customs of War (murder).

GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

For wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landzo to FIVE years imprisonment.

For cruel treatment as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landzo to FIVE years' imprisonment.

Counts 15 and 16: Torture of Momir Kuljanin

GUILTY of a Grave Breach of Geneva Convention IV (torture) and a Violation of the Laws or Customs of War (torture).

For torture as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landzo to SEVEN years' imprisonment.

For torture as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landzo to SEVEN years' imprisonment.

Count 17: A Violation of the Laws or Customs of War (cruel treatment), is DISMISSED.

Counts 24 and 25: Torture of Spasoje Miljevic

GUILTY of a Grave Breach of Geneva Convention IV (torture) and a Violation of the Laws or Customs of War (torture).

For torture as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landzo to SEVEN years' imprisonment.

For torture as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landzo to SEVEN years' imprisonment.

Count 26: A Violation of the Laws or Customs of War (cruel treatment), is DISMISSED.

Counts 27 and 28: Torture of Mirko Babic

NOT GUILTY of a Grave Breach of the Geneva Conventions of 1949 (torture) and a Violation of the Laws or Customs of War (torture).

Count 29: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

Counts 30 and 31: Torture of Mirko Dordic

GUILTY of a Grave Breach of Geneva Convention IV (torture) and a Violation of the Laws or Customs of War (torture).

For torture as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landzo to SEVEN years' imprisonment.

For torture as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landzo to SEVEN years' imprisonment.

Count 32: A Violation of the Laws or Customs of War (cruel treatment), is DISMISSED.

Counts 36 and 37: Causing great suffering or serious injury to Nedeljko Draganic

GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

For wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landzo to FIVE years imprisonment.

For cruel treatment as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landzo to FIVE years' imprisonment.

Counts 46 and 47: Inhumane conditions

GUILTY of a Grave Breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a Violation of the Laws or Customs of War (cruel treatment).

For wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV, the Trial Chamber sentences Esad Landzo to FIVE years imprisonment.

For cruel treatment as a Violation of the Laws or Customs of War, the Trial Chamber sentences Esad Landzo to FIVE years' imprisonment.

The Trial Chamber has carefully considered carefully all of the evidence concerning Esad Landzo's state of mind at the time of commission of his offences. While we have dismissed his defence of diminished responsibility, we have noted his young age at the relevant time and his impressionability and immaturity, as well as his particular personality traits and the effect that the armed conflict in his home town had upon him. It is these factors which have led us to impose a less severe sentence than the seriousness and cruelty of his crimes would ordinarily require.

The Trial Chamber does not, however, accept that Mr. Landzo was the mere instrument of his superiors, lacking the ability to exercise independent will. The nature of his crimes is suggestive of significant imagination and a perverse pleasure in the infliction of pain and suffering. It is most disturbing to see such propensity for violence and disregard for human life and dignity in one so young.

In relation to each of the accused thus found guilty and sentenced accordingly, the sentences are to be served concurrently, *inter se*.

In addition, according to sub-Rule 101(D) of the Rules of Procedure and Evidence, Zdravko Mucic, Hazim Delic and Esad Landzo are entitled to credit for time spent in detention pending surrender to the International Tribunal and pending trial. Thus, Zdravko Mucic is entitled to credit for two years, seven months and twenty-nine days in relation to the sentence imposed by the Trial Chamber, as at the date of this Judgement, together with such additional time as may be served pending the determination of any appeal. Hazim Delic and Esad Landzo are each entitled to credit for two years, six months and fourteen days in relation to the sentences imposed by the Trial Chamber, as at the date of this Judgement, together with such additional time as may be served pending any appeal.

Pursuant to Article 27 of the Statute and Rule 103, imprisonment shall be served in a State designated by the President of the Tribunal from a list of States which have indicated their willingness to accept convicted persons. The transfer of Zdravko Mucic, Hazim Delic and Esad Landzo to such State or States shall be effected as soon as possible after the time-limit for appeal has elapsed. In the event that notice of appeal is given, the transfer of the person or persons in respect of whom such notice of appeal is given shall instead be effected as soon as possible after the Appeals Chamber has made its determination. Until that time, in accordance with the provisions of Rule 102, Zdravko Mucic, Hazim Delic and Esad Landzo are to remain in the custody of the International Tribunal.

Pursuant to Rule 99 of the Rules, Zejnil Delalic is entitled to be released immediately from the United Nations Detention Unit, unless the Trial Chamber orders otherwise pursuant to sub-Rule 99(B).

International Criminal Tribunal for the Former Yugoslavia

Prosecutor *v.* Anto Furundžija
Judgement (summary)

Trial Chamber, 10 December 1998

United Nations
Nations Unies

International Criminal Tribunal for the former Yugoslavia

Tribunal Pénal International pour l'ex-Yougoslavie

JUDGEMENT SUMMARY

CHAMBERS

(Exclusively for the use of the media. Not an official document)

The Hague, 10 December 1998

STATEMENT OF THE TRIAL CHAMBER AT THE JUDGEMENT HEARING

The Prosecutor v. Anto Furundzija
10 December 1998

Good afternoon ladies and gentleman.

Would the Registrar please call the case?

Mr. Furundzija, are you able to hear me in a language which you understand?

May we have the appearances for the Prosecution and the Defence please?

Thank you.

This afternoon, Trial Chamber II delivers its Judgement in this case, *Prosecutor v. Anto Furundzija*. The trial of Mr. Furundzija commenced on 8 June 1998 and the proceedings continued until 22 June 1998, at which time the hearing was closed with judgement reserved to a later date. Subsequently, upon a motion filed by the Defence, the Trial Chamber ordered that the proceedings be reopened. The reopened proceedings covered a period of four days and the hearing was finally closed on 12 November 1998.

The accused, Anto Furundzija, stands charged with serious violations of international humanitarian law namely, torture as a Violation of the Laws or Customs of War, and outrages upon personal dignity, including rape, as a Violation of the Laws or Customs of War. The Amended Indictment alleges that the accused was the local commander of a special unit of the military police of the HVO known as the "Jokers", in which capacity he, and another soldier, Accused B, interrogated Witness A. During the questioning, Witness A had a knife rubbed against her inner thigh and lower stomach, and the perpetrator threatened to put his knife inside her vagina should she not tell the truth. The Amended Indictment further alleges that the accused continued to interrogate Witness A and Victim B while they were beaten on the feet with a baton and further, that the accused stood by, failing to intervene in any way, while Witness A was forced to have oral and vaginal sexual intercourse with Accused B.

The Judgement of the Trial Chamber in this case is some one hundred pages in length. Accordingly, instead of presenting the Judgement in its entirety, we will provide a brief summary of the Trial Chamber's findings as to the charges against the accused before delivering the disposition.

The Judgement comprises nine sections, including the disposition. We shall briefly address each of these in turn, emphasising the main theme characterising each section and the pertinent findings therein.

Section I contains a detailed description of the procedural history of the case, including the nature of the accused's arrest, surrender to the International Tribunal and initial appearance before the Trial Chamber, as well as a discussion of the more substantial procedural issues that arose over the course of these proceedings.

Section II contains a summary of the submissions of the parties in relation to the charges against the accused in the Amended Indictment and the underlying facts.

Section III addresses the jurisdictional prerequisites for the application of Article 3, namely the existence of an armed conflict. In this context, the Trial Chamber finds that the test formulated by the Appeals Chamber of the International Tribunal in *Tadic* is the correct test to apply in determining the existence of an armed conflict. Based on the evidence submitted by both parties, the Trial Chamber finds that, at the material time, a state of armed conflict existed in central Bosnia and Herzegovina between the Croatian Defence Council (the "HVO") and the Army of Bosnia and Herzegovina (the "AbiH"). In Section IV, the Trial Chamber finds a nexus between this armed conflict and the acts underlying the charges against the accused.

Section V addresses the evidence relating to the charges in the Amended Indictment. This section begins with an overview of the relevant evidence and the arguments of the parties relating thereto, then proceeds to examine the background and circumstances leading up to the critical events alleged to have occurred at the Bungalow and the Holiday Cottage in Nadioci. The evidence relating to those acts giving rise to individual criminal liability of the accused, including the evidence identifying Anto Furundzija as one of the persons involved in those criminal acts, is then discussed. The following sub-section places the re-opening proceedings in procedural context and examines the evidence relating to the central issue of those proceedings, namely the extent to which the reliability of Witness A's evidence may have been affected by any psychological disorder arising out of her traumatic ordeal. In this respect, the Trial Chamber examines the evidence presented through expert witnesses for both the Prosecution and the Defence, on the issue of post-traumatic stress disorder (PTSD) and its potential effect on memory. It is found that Witness A's memory regarding material aspects of the events through which she suffered has not been affected by any disorder she may have had. The Trial Chamber notes that the expert evidence demonstrates that even when a person is suffering from PTSD she or he may still be a reliable witness, and accepts Witness A's testimony that she has sufficiently recollected the material aspects of the relevant events. The Trial Chamber then examines the inconsistencies in Witness A's testimony and makes a finding as to its general reliability. Section V concludes with the Trial Chamber's factual findings in relation to the events alleged in the Amended Indictment.

In Section VI, the Trial Chamber commences a discussion of the elements of each of the offences charged in the Amended Indictment. This section contains a comprehensive analysis of the nature and status of the prohibition against torture under conventional and customary international law, as well as providing a definition of torture under international humanitarian law. In this regard, the Trial Chamber finds that the prohibition against torture has attained the status of *jus cogens*. Further, the requisite elements of the offence of torture are found to be as follows:

The intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, for the purpose of obtaining information or a confession or of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating on any ground against the victim or a third person. For such an act to constitute torture, one of the parties thereto must be a public official or must, at any rate, act in a non-private capacity, e.g. as a *de facto* organ of a State or any other authority wielding entity.

This section continues with a discussion of the prohibition against rape and other serious sexual assaults under international law. The Trial Chamber finds it is indisputable that rape and other serious sexual assaults in situations of armed conflict entail criminal liability of the perpetrators. In this context, the Trial Chamber upholds the recent finding by Trial Chamber II

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of the ICTY in *Prosecutor v. Delali} et al.,* that in certain circumstances, rape may amount to torture under international law. However, this Trial Chamber has seen fit to expand the definition of rape first formulated by Trial Chamber I of the ICTR in *Akayesu* and followed in the *Delali}* Judgement. Thus, the Trial Chamber finds that the following comprise what may be accepted as the requisite elements of the offence of rape under international criminal law:

The sexual penetration, however slight, either of the vagina or anus of the victim by the penis of the perpetrator, or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator, where such penetration is effected by coercion or force or threat of force against the victim or a third person.

In Section VI(B), the Trial Chamber turns its attention to analysing the content of the various heads under which individual criminal liability may be incurred pursuant to Article 7(1) of the Statute of the International Tribunal. In this regard, the Trial Chamber finds the necessary elements of aiding and abetting under international criminal law to comprise: an *actus reus* requiring practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime and a complementary *mens rea* requiring knowledge that such acts assist the commission of the offence.

The Trial Chamber further elaborates the principles of individual criminal responsibility in the context of torture by finding that an accused, who would otherwise be liable as an aidor and abettor to torture under the foregoing standard, will be held responsible as a co-perpetrator of torture, where the accused participates in an integral part of the torture and partakes of the prohibited purpose behind the torture, i.e. the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person.

Section VII of the Judgement sets forth the legal findings of the Trial Chamber with respect to each of the charges against the accused in the Amended Indictment.

Mr. Furundzija, will you please stand to receive the Judgement of this Trial Chamber.

For the foregoing reasons, having considered all of the evidence, the submissions of the parties and the Statute and Rules by which it is bound, the Trial Chamber finds as follows with respect to the accused, Anto Furundzija:

Count 13: As a co-perpetrator, GUILTY of a Violation of the Laws or Customs of War (torture).
Count 14: For aiding and abetting, GUILTY of a Violation of the Laws or Customs of War (outrages upon personal dignity, including rape).

Pursuant to sub-Rule 85(A)(vi) of the Rules of Procedure and Evidence, the Trial Chamber heard the oral submissions of the Prosecution and the Defence on sentencing in this case, on 22 June 1998. It sets out its discussion and findings in this regard in Section VIII of the Judgement. The Trial Chamber considers that the imposition of sentence must take account of various mitigating and aggravating factors as well as the sentencing practices of the courts of the former Yugoslavia.

The Trial Chamber imposes sentence as follows:

Count 13: For torture as a Violation of the Laws or Customs of War, the Trial Chamber sentences you, Anto Furundzija, to ten years' imprisonment.

Count 14: For outrages upon personal dignity, including rape, as a Violation of the Laws or Customs of War, the Trial Chamber sentences you, Anto Furundzija, to eight years' imprisonment.

The Trial Chamber has determined that the foregoing sentences are to be served concurrently, *inter se*. In addition, pursuant to sub-Rule 101(D) of the Rules of Procedure and Evidence, persons convicted by the International Tribunal are entitled to credit for time spent in custody pending surrender to the Tribunal and time spent in detention pending trial or appeal. Accordingly, eleven months and twenty-two days shall be deducted from the sentence today imposed on Anto Furundzija, together with such additional time as he may serve pending the determination of any appeal. In accordance with Rule 102 of the Rules of Procedure and Evidence, Anto Furundzija's sentence, subject to the above mentioned deduction, shall begin to run from today.

Pursuant to Article 27 of the Statute and Rule 103 of the Rules, Anto Furundzija shall serve his sentence in a State designated by the President of the International Tribunal. The transfer of Anto Furundzija to the designated State shall be effected as soon as possible after the time-limit for appeal has elapsed. In the event that notice of appeal is given, the transfer of the accused, Anto Furundzija, if compelled by the outcome of such an appeal, shall be effected as soon as possible after the determination of the appeal by the Appeals Chamber. Until such time as his transfer is effected, Anto Furundzija shall remain in the custody of the International Tribunal, in accordance with Rule 102.

This concludes the Judgement of the Trial Chamber.

Thank you. The Trial Chamber now stands adjourned.

International Criminal Tribunal for the Former Yugoslavia

Prosecutor *v.* Zejnil Delalić et al. ("Čelebići")
Judgement (summary)

Appeals Chamber, 20 February 2001

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APPEALS CHAMBER
CHAMBRE D'APPEL
The Hague, 20 February 2001
JL/P.I.S./564-e

APPEAL JUDGEMENT IN THE *ČELEBIĆI* CASE

- **Acquittal of Zejnil Delalić affirmed**
- **Dismissal for cumulative convictions of all counts charging Zdravko Mucić, Hazim Delić and Esad Landžo with violations of the laws or customs of war**
- **Remaining sentences of the convicted accused to be reconsidered by a Trial Chamber for possible adjustment**

Please find below the full text of the summary of the conclusions of the Appeals Chamber, read out by presiding Judge David Hunt at today's Judgement hearing

"The Appeals Chamber is sitting today to deliver judgment in the appeal from a judgment of a Trial Chamber, given in a case which has been known as the *Čelebići* Case. The Trial Chamber was constituted by Judge Karibi-Whyte, who presided, Judge Odio Benito and Judge Jan.

The trial

The trial related to events which took place in 1992 in a prison camp near the town of Čelebići, in central Bosnia and Herzegovina. The four accused in this case, Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, were charged with numerous counts of grave breaches of the Geneva Conventions of 1949 under Article 2 of the Tribunal's Statute and of violations of the laws or customs of war under Article 3. The victims were the Bosnian Serb detainees in the Čelebići camp.

Delalić was alleged to have co-ordinated the activities of the Bosnian Muslim and Bosnian Croat forces in the area and later to have been the Commander of the First Tactical Group of the Bosnian Army. He was alleged in that capacity to have had authority over the Čelebići camp. The Trial Chamber found him not guilty on all counts, on the basis that he did not have sufficient command and control over the Čelebići camp and its guards to found his criminal responsibility as a superior for the crimes which they committed in the camp.

Mucić was found by the Trial Chamber to be the Commander of the Čelebići camp, and he was found guilty under the principles of superior responsibility for crimes committed by his subordinates, including murder, torture and inhuman treatment. He was also found guilty of personal responsibility for the unlawful confinement of civilians. Mucić was given a total sentence of seven years.

Delić was found by the Trial Chamber to have acted as the Deputy Commander of the camp, and he was found guilty on the basis of personal responsibility for crimes including murder, torture and inhuman treatment. He was given a total sentence of twenty years.

Landžo was found by the Trial Chamber to have been a guard at the camp, and he was found guilty of committing offences including murder, torture and cruel treatment. He was given a total sentence of fifteen years imprisonment.

The appeal

The three convicted accused, Mucić, Delić and Landžo, filed appeals against the Trial Chamber's judgment. The prosecution also filed an appeal against the judgment on a number of grounds, including grounds of appeal relating to the acquittal of Delalić. The four appellants between them filed a total of forty-eight grounds of appeal. Certain of the grounds of appeal of the three convicted appellants related to the same subject matter, and they were therefore dealt with together in the hearing of oral submissions and in the written judgment delivered today.

For the purposes of this hearing, I propose to summarise briefly the conclusions of the Appeals Chamber on the various grounds of appeal, grouped in the same order as they are dealt with in the judgment. I emphasise that this is a *summary* only, and that it forms no part of the judgment which is delivered. The only authoritative account of the Appeals Chamber's conclusions, and of its reasons for those conclusions, is to be found in the written judgment, copies of which will be made available to the parties at the conclusion of this hearing.

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Article 2 of the Statute

The convicted appellants raised three issues in relation to the legal conditions for the application of Article 2 of the Statute, which gives to the Tribunal jurisdiction over grave breaches of the Geneva Conventions of 1949.

- It is established in the Tribunal's jurisprudence that the prosecution must prove the existence of an international armed conflict in relation to any offences charged under Article 2. The Trial Chamber found that the armed conflict in Bosnia and Herzegovina at the relevant time was international, as the Bosnian Serb forces fighting in Bosnia and Herzegovina were under the control of the Federal Republic of Yugoslavia. The Appeals Chamber has re-affirmed its *Tadić* Conviction Appeal Judgment, which had been followed in its *Aleksovski* Appeal Judgment, and which held that what must be established by the prosecution is that the foreign intervening party was in "*overall* control" of the local forces.

The Appeals Chamber has reiterated that it will follow the *ratio decidendi* of its previous decisions unless there are "cogent reasons in the interests of justice to depart from them." It considers that there is no reason to depart from the decision in its *Tadić* Conviction Appeal Judgment as to the relevant standard of control for this purpose. The Appeals Chamber has expressed additional reasons as to why that interpretation was correct, and it is satisfied that the Trial Chamber's factual determination on this issue was consistent with the overall control standard which had been stated.

- The appellants also challenged the Trial Chamber's finding that, for the purposes of Article 2 of the Statute, the victims were persons protected under the relevant Geneva Convention. In the Tadić Conviction Appeal Judgment, the Appeals Chamber held that "a person may be accorded protected person status, notwithstanding the fact that he is of the same nationality as his captors", a ruling subsequently endorsed by the Appeals Chamber in Aleksovski. The Appeals Chamber has concluded that there is no reason to depart from this interpretation, and it has confirmed that "the nationality of the victims for the purpose of the application of Geneva Convention IV should not be determined on the basis of formal national characterisations", but that the nationality should take into account the differing ethnicities of the victims and the perpetrators and their bonds with a foreign intervening State. The Appeals Chamber is satisfied that the Trial Chamber's findings were consistent with this interpretation.

- Delić also challenged the Tribunal's jurisdiction to prosecute grave breaches of the Geneva Conventions because, it was submitted, Bosnia and Herzegovina was not a party to the Conventions until after the relevant events, having acceded to them subsequently. The Appeals Chamber has held that Bosnia and Herzegovina succeeded to the Geneva Conventions, with the effect that it is considered to be a party to the treaty from the date of its succession or independence, which was prior to the relevant events. The Appeals Chamber has also stated that, even without a formal act of succession, Bosnia and Herzegovina would automatically have succeeded to the Geneva Conventions, as they are treaties of a universal multilateral character relating to fundamental human rights.

Common Article 3 and Article 3 of the Statute

The appellants also challenged the jurisdiction of the Tribunal to prosecute violations of Article 3 common to the Geneva Conventions under Article 3 of the Statute. The Appeals Chamber has concluded that there is no reason to depart from its *Tadić* Jurisdiction Decision, which held that the violations of the laws or customs of war which may fall within Article 3 of the Statute of the Tribunal include violations of common Article 3, that these violations give rise to individual criminal responsibility, and that they may be prosecuted whether committed in internal or international conflicts. It has expressed additional reasons as to why that decision was correct.

Command responsibility

- Mucić was convicted under Article 7.1 for his superior authority as commander of the Čelebići camp for the crimes committed there. He argued that command responsibility is limited to de jure commanders, or those superiors with control over subordinates equivalent to such de jure authority. The Appeals Chamber has rejected that argument, accepting that a position of de facto command may be sufficient to establish the necessary superior-subordinate relationship, as long as the relevant degree of control over subordinates is established. The relevant superior-subordinate relationship is established where the superior has effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent or punish the commission of these offences.

- Mucić also challenged the sufficiency of the evidence to establish that he was a de facto commander. The Appeals Chamber has held that, on the evidence before the Trial Chamber, it was open to a reasonable tribunal of fact to find that Mucić exercised powers of control sufficient to constitute the exercise of de facto

authority over the camp, and therefore that no basis for reviewing the Trial Chamber's findings of fact had been made out.

• The prosecution appealed against the Trial Chamber's interpretation of the requirement, in Article 7.3, that a superior "knew or had reason to know" that a subordinate is about to commit crimes or had done so. The Appeals Chamber has concluded that the phrase "reason to know" in Article 7.3 means that a superior will be charged with knowledge of subordinates' offences if information of a general nature was available to him which would have put him on notice of those offences. The Appeals Chamber is satisfied that the Trial Chamber's conclusions on this issue were consistent with that interpretation.

• The prosecution also contended that the ability of an accused to exercise forms of influence should suffice to establish the relevant superior-subordinate relationship. The Appeals Chamber has concluded that, whilst indirect as well as direct relationships of subordination will suffice, the relevant standard of effective control over subordinates must be established, and that any forms of influence which fall short of such control would not suffice. The Appeals Chamber is satisfied that, on the evidence before the Trial Chamber, it was open to a reasonable tribunal of fact to acquit Delalić on the basis that he was not a superior in relation to the Čelebići camp and those working there.

Unlawful confinement of civilians

• Both Mucić and the prosecution filed grounds of appeal relating to the charges of unlawful confinement of civilians. Mucić challenged his conviction for that offence, and the prosecution challenged the acquittal of Delalić and Delić of those offences.

The Trial Chamber concluded that the offence of unlawful confinement of civilians is committed:
- first, when civilians are involuntarily confined in breach of Article 42 of Geneva Convention IV, which provides that civilians may only be detained where there are reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary, and
- secondly, when civilians are detained without compliance with Article 43 of the Geneva Convention, which provides that their detention must be reviewed by an appropriate court or administrative board.

The Appeals Chamber has confirmed the Trial Chamber's definition of the offence, and it has accepted that, on the evidence before the Trial Chamber, it was open to a reasonable tribunal of fact to find that the detainees in the Čelebići camp were unlawfully detained.

• The Appeals Chamber has also confirmed that the prosecution does not have to establish that a person is in a position of superior authority before he can be found guilty of direct responsibility for this offence under Article 7.1 of the Statute, but that a prison guard with no authority to release prisoners will not be guilty of the offence by virtue only of his failure to take unauthorised steps to release them.

• The Appeals Chamber has dismissed the prosecution appeal against the acquittal of Delalić and Delić on this charge, on the basis that the prosecution has failed to identify any evidence before the Trial Chamber which demonstrated that a finding of guilty was the only reasonable conclusion to be drawn. As to the appeal by Mucić against his conviction on this charge, the Appeals Chamber has held that, on the evidence before the Trial Chamber, it was open to a reasonable tribunal of fact to find that he had some authority to release prisoners, that he had failed to release those civilians whom he knew to be unlawfully detained because they had not received the necessary procedural review of their detention, and that he was therefore guilty of this offence.

Cumulative convictions

• Delić and Mucić challenged their convictions upon charges based upon the same conduct and alleging both grave breaches of the Geneva Conventions under Article 2 of the Statute and violations of the laws or customs of war under Article 3. This was the first time that the issue of cumulative convictions has arisen for the express consideration of the Appeals Chamber.

The Appeals Chamber has concluded that reasons of fairness to the accused, and the consideration that only distinct crimes justify cumulative convictions, require that cumulative convictions are permissible only if each statutory provision involved has a materially distinct element not contained in the other. The Appeals Chamber has concluded, by majority, that this assessment of the elements of the offences must take into account all of the elements of the offences, including the *chapeaux* (or legal pre-requisite elements) of each Article of the Statute.

Where this test is not met, a decision must be made in relation to which offence it will enter a conviction, on the basis that the conviction must be for the offence containing the more specific provision. Where, as in the present case, the evidence establishes the guilt of an accused based upon the same conduct under both Article 2 and Article 3 of the Statute, the conviction must be entered for the offence under Article 2.

The challenge by Delić and Mucić has therefore been upheld, and the charges against them under Article 3 have been dismissed. As Landžo similarly received cumulative convictions under Articles 2 and 3, the charges against him under Article 3 have also been dismissed, notwithstanding that he did not challenge them.

• In a separate and dissenting opinion, Judge Hunt and Judge Bennouna have agreed with the majority that cumulative convictions should be permissible only where each offence has a materially different element not contained in the other, but they have proposed different tests for determining whether this was so in the particular case and, where cumulative convictions are not permissible, for determining which offence should carry the conviction. These tests would in some cases have produced a different result.

• As the sentencing outcome in respect of each of the three convicted accused may have been different had the Trial Chamber not imposed multiple convictions, the issue of re-sentencing has been remitted to a new Trial Chamber to be designated by the President of the Tribunal.

Delić – factual issues

Delić challenged his convictions upon ten of the counts against him, involving five separate incidents, on the basis that the Trial Chamber had erred in its relevant factual findings.

In relation to the murder of Šćepo Gotovac, one of the detainees in the Čelebići camp, the Appeals Chamber has concluded that the Trial Chamber's conclusion that Delić participated in the beating which was responsible for Mr Gotovac's death was not open on the evidence before it. The convictions relating to this incident have been quashed, and verdicts of not guilty entered. In relation to the other four incidents, the Appeals Chamber has concluded that, on the evidence before the Trial Chamber, it was open to a reasonable tribunal of fact to find him guilty of the offences charged.

The prosecution interviews with Mucić

Mucić challenged the admission into evidence of interviews conducted with him by investigators from the Office of the Prosecutor following his arrest. He submitted that the Trial Chamber should have found that he had not voluntarily waived his right to counsel under the Tribunal's Statute and Rules, and that it should therefore have excluded the evidence obtained as a result of the interviews. Mucić also claimed that the Trial Chamber erred in refusing to issue a subpoena to the interpreter present at these interviews to give evidence of any conversation between the investigators and himself which took place before the interviews started and which may have led to the waiver.

The Appeals Chamber is not satisfied that any error has been demonstrated in the Trial Chamber's refusal to issue a subpoena to the interpreter to give evidence. It has stated that a *voir dire* procedure could be of assistance, in appropriate cases, in determining any factual issues relating to the admissibility of evidence such as these, but that the Trial Chamber committed no error in the exercise of its discretion in not adopting that procedure in the absence of any clear indication that the accused would give evidence in relation to those issues.

The Appeals Chamber is satisfied that, on the evidence before the Trial Chamber, it was open to a reasonable tribunal of fact to find that Mucić had expressed the wish to be interviewed without counsel, and that the Trial Chamber had accordingly not erred in the exercise of its discretion to allow the evidence to be tendered on that basis.

Diminished mental responsibility

Before the trial, Landžo gave notice under the Tribunal's Rules of Procedure and Evidence that he would be relying upon the "special defence" of diminished mental responsibility, and he submitted that such a defence amounted to a complete defence to the offences with which he had been charged, leading to an acquittal.

Landžo argued that the Trial Chamber erred by refusing to define the "special defence" in advance of evidence being given in support of it. The Appeals Chamber has held that it is no part of a Trial Chamber's obligation to define such issues in advance, and that in any event no prejudice had been established as resulting from that refusal.

Landžo also challenged the Trial Chamber's rejection of the "special defence" as having been "inconsistent with the great weight of the evidence". The Appeals Chamber has held that an accused's diminished mental responsibility is relevant to the sentence to be imposed, but it is not a defence to offences charged under the Tribunal's Statute. Rule 67(A)(ii)(b) must therefore be interpreted as referring to diminished mental responsibility where it is raised by the defendant as a matter in mitigation of sentence. The Appeals Chamber has also held that, in any event, on the evidence before the Trial Chamber it was open to a reasonable tribunal of fact to reject the evidence of Landžo as to his state of mind upon which his psychiatrist witnesses

relied, and therefore – as the Trial Chamber did – to reject their opinion that he had suffered from a diminished mental responsibility.

Selective prosecution

Landžo challenged his conviction upon the basis that he was the victim of selective prosecution based on discriminatory grounds.

In 1998, the Office of the Prosecutor withdrew indictments against a number of low ranking accused as a result of a changed prosecutorial strategy. Landžo alleged that the continued maintenance of the charges against him was discriminatory, as he was a young Muslim camp guard and the others against whom indictments had been withdrawn were all non-Muslims of Serb ethnicity. He contends that he was prosecuted as a "representative" of the Bosnian Muslims.

The Appeals Chamber has held that, whilst the Prosecutor has a wide discretion in relation to prosecutorial strategy, this discretion is not unlimited. However, Landžo has not discharged his burden of establishing any abuse of the prosecutorial discretion. He has not demonstrated that his prosecution was continued for any impermissible motive, or that other accused, similarly situated to himself, were not prosecuted. At the time of the dismissal of the indictments against other accused, none of whom was in the custody of the Tribunal, Landžo's trial was well underway. The continuation of the proceedings against him was consistent with the policy of the Prosecutor to prosecute not only those holding higher levels of responsibility, but also those "personally responsible for exceptionally brutal or otherwise extremely serious offences".

Judge Karibi-Whyte

Landžo challenged the fairness of his trial upon the basis that the Presiding Judge, Judge Karibi-Whyte, had been "asleep during substantial portions of the trial". At a late stage of the appellate proceedings, Delić and Mucić adopted this ground of appeal. The burden of the argument, however, was left to Landžo. The parties agreed that the relevant principle was that proof that a judge slept through part of the proceedings, or was otherwise not completely attentive to them, is a matter which, if it causes actual prejudice to a party, may affect the fairness of the proceedings to such a degree as to give rise to a right to a new trial or other adequate remedy.

Both Landžo and the prosecution selected, from the audio-visual records of the trial produced by the courtroom cameras generally focussed on the judges' bench, those portions of the records upon which they relied in support of this ground of appeal, and in opposition to it. The written submissions filed by Landžo contained extensive and detailed descriptions of what was said to be seen and heard on the videotapes. Before the oral hearing, the Appeals Chamber viewed those portions upon which the parties relied. The Appeals Chamber has concluded that the descriptions given were both highly coloured and gravely exaggerated, and that they appeared to have been given with a reckless indifference to the truth.

The Appeals Chamber has found that the appellants have manifestly failed to establish the allegation that Judge Karibi-Whyte was "asleep during substantial portions of the trial", but that the portions of the videotapes relied upon by Landžo nevertheless demonstrated a recurring pattern of behaviour where the judge appears not to have been fully conscious of the proceedings for short periods of time. These periods were usually five to ten seconds long, and sometimes up to thirty seconds – but they were repeated over extended periods of ten to fifteen minutes. On one occasion only, the judge appeared to be asleep for approximately thirty minutes. The Appeals Chamber has proceeded to consider whether, notwithstanding their failure to establish the factual basis of these grounds of appeal, the appellants nevertheless have a valid cause for complaint as to the fairness of the trial.

The Appeals Chamber has stated, firmly, that Judge Karibi-Whyte's conduct cannot be accepted as appropriate conduct for a judge. It has also said that, if a judge suffers from some condition which prevents him or her from giving full attention during the trial, then it is the duty of that judge to seek medical assistance and, if that does not help, to withdraw from the case. However, before a judgment will be quashed upon this basis, it must be established that some identifiable prejudice was caused by that conduct to the appellant, and the failure of counsel to object at the trial to the conduct in question is relevant to whether such prejudice has been established. The requirement that the issue be raised during the proceedings is not simply an application of a formal doctrine of waiver, but a matter indispensable to the grant of fair and appropriate relief.

The Appeals Chamber has not been satisfied that any specific prejudice was suffered by Landžo or the other appellants. In the absence of any actual prejudice, the Appeals Chamber has rejected the ground of appeal.

Judge Odio Benito and Vice-Presidency of Costa Rica

During the course of the trial, Judge Odio Benito was elected Vice-President of Costa Rica, and she took an oath of office as such. All three convicted accused challenged her qualifications to remain as a judge of

the Tribunal during the rest of the trial, and they alleged that, in any event, she should have disqualified herself as a judge by reason of those facts because she was no longer independent.

The Appeals Chamber has held that, because the judges of the Tribunal must necessarily come from a wide variety of legal systems, the requirement of Article 13 in the Tribunal's Statute (as it was at the relevant time) that the judges of the Tribunal "possess the qualifications required in their respective countries for appointment to the highest judicial offices" was intended to ensure that the *essential* qualifications did not differ from judge to judge, and that it was not intended to include within the required *legal* qualifications any constitutional disqualifications peculiar to a particular country. The Appeals Chamber has in any event rejected the argument that, by virtue of her election as Vice-President of Costa Rica, Judge Odio Benito was constitutionally disqualified for election as a magistrate of the Supreme Court of Justice under the constitution of that country.

The Appeals Chamber has also rejected the argument that Judge Odio Benito should nevertheless have disqualified herself as a judge because she was no longer independent. The Appeals Chamber has not accepted that the judge exercised any executive functions in Costa Rica during the time she was also a judge of the Tribunal. The appellants have failed to establish that the reaction of the hypothetical observer (with sufficient knowledge of the circumstances to make a reasonable judgment) would be that she might not bring an impartial and unprejudiced mind to the issues arising in the *Čelebići* case.

Judge Odio Benito and the Victims of Torture

All three convicted accused also alleged that Judge Odio Benito was automatically disqualified as a judge of the Tribunal because she was, at the time this case was heard, a member of the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture. They contended that, since the indictment in this case included allegations of torture, there was a strong appearance of bias on the part of the judge against those accused who were the subject of those allegations.

The Appeals Chamber has held that the same hypothetical observer would be aware that the objects of this fund are solely focussed on fundraising to enable material assistance to be given to the victims of torture – through the receipt and redistribution of donations for humanitarian, legal and financial aid to victims of torture and their relatives – and would not expect judges to be morally neutral about torture. Rather, such an observer would expect judges to hold the view that persons *responsible* for torture should be punished. It has accepted the statement that "it is […] important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour".

Sentencing

All of the parties, with the exception of Delalić, filed grounds of appeal in relation to sentencing. The **Prosecution** challenged the sentences imposed on Mucić of seven years, to be served concurrently, as "manifestly inadequate". **Mucić** challenged his sentence as too long in all the circumstances.

The Appeals Chamber has concluded that the Trial Chamber failed to take adequate account of the gravity of offences for which Mucić was convicted and that, in a number of respects, it failed to take into account, or gave inadequate weight to, various matters in aggravation. The Appeals Chamber has rejected one complaint by the prosecution, that the Trial Chamber erred when it did not take into account criminal conduct which was not specifically alleged in the indictment and in relation to which the prosecution had not requested the Trial Chamber to make specific findings. The Appeals Chamber has accepted one complaint by Mucić, that the Trial Chamber erred in making an adverse reference in its sentencing considerations to the fact that Mucić had declined to give oral testimony at the trial, but it has otherwise rejected his complaints.

The Appeals Chamber has indicated that, taking into account the various considerations relating to the gravity of his offences, all the aggravating circumstances, the mitigating circumstances to which the Trial Chamber referred, and the "double jeopardy" element involved in re-sentencing, it would have imposed on Mucić a heavier sentence, of a total of around ten years' imprisonment. This is a figure to which the new Trial Chamber to consider sentencing issues may have regard in its own determination.

Delić challenged his sentence on the basis that the Trial Chamber contravened the principles of legality, by imposing sentences on him which were greater than the sentences which would have been permitted at the relevant time under the sentencing laws and practice of the former Yugoslavia. The Appeals Chamber has rejected that challenge. It has also stated that, whilst Trial Chambers must, as required by Article 24.1 of the Statute, have *recourse to* the general practice regarding sentencing in the courts of the former Yugoslavia, they are not *bound* by that practice. The Appeals Chamber has also concluded that the sentences imposed on Delić have not been shown to be excessive or in any way outside of the Trial Chamber's sentencing discretion.

Landžo challenged his sentence on the basis that it was manifestly excessive. He sought to show a disparity between his sentence and sentences imposed on persons convicted in other cases before the Tribunal. The Appeals Chamber has not accepted that the comparisons made by him are valid. It has also concluded that the Trial Chamber adequately considered the mitigating factors applicable to Landžo.

Disposition

The formal orders made by the Appeals Chamber in the Disposition section of the judgment are as follows:

1. In relation to Counts 1 and 2 of the Indictment, the Appeals Chamber ALLOWS the ninth and tenth grounds of appeal filed by Hazim Delić, it QUASHES the verdict of the Trial Chamber accordingly, and it enters a verdict that Hazim Delić is NOT GUILTY upon those counts.
2. In relation to the grounds of appeal relating to cumulative convictions, the Appeals Chamber ALLOWS the twenty-first ground of appeal filed by Hazim Delić and the seventh ground of appeal filed by Zdravko Mucić; it DISMISSES Counts 14, 34, 39, 45 and 47 against Zdravko Mucić; it DISMISSES Counts 4, 12, 19, 22, 43 and 47 against Hazim Delić, and it DISMISSES Counts 2, 6, 8, 12, 16, 25, 31, 37, and 47 against Esad Landžo. It REMITS to a Trial Chamber to be nominated by the President of the Tribunal[1] the issue of what adjustment, if any, should be made to the sentences imposed on Hazim Delić, Zdravko Mucić, and Esad Landžo to take account of the dismissal of these counts.
3. In relation to the eleventh ground of appeal filed by Zdravko Mucić, the Appeals Chamber FINDS that the Trial Chamber erred in making adverse reference when imposing sentence to the fact that he had not given oral evidence in the trial, and it DIRECTS the Reconstituted Trial Chamber to consider the effect, if any, of that error on the sentence to be imposed on Mucić.
4. The Appeals Chamber ALLOWS the fourth ground of appeal filed by the Prosecution alleging that the sentence of seven years imposed on Zdravko Mucić was inadequate, and it REMITS the matter of the imposition of an appropriate revised sentence for Zdravko Mucić to the Reconstituted Trial Chamber, with the indication that, had it not been necessary to take into account a possible adjustment in sentence because of the dismissal of the counts referred to, it would have imposed a sentence of around ten years.
5. *The Appeals Chamber DISMISSES each of the remaining grounds of appeal filed by each of the appellants.*

The Appeals Chamber's reasons for these orders are now published.

The accused are to remain in custody in the Detention Unit until further order".

[1] Hereafter, "Reconstituted Trial Chamber".

International Criminal Tribunal for the former Yugoslavia

Prosecutor *v.* Dario Kordić and Mario Čerkez
Judgement (summary)

Trial Chamber, 26 February 2001

United Nations
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International Criminal Tribunal for the former Yugoslavia

Tribunal Pénal International pour l'ex-Yougoslavie

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Press Release . Communiqué de presse
(Exclusively for the use of the media. Not an official document)

TRIAL CHAMBER
CHAMBRE DE 1ère INSTANCE
The Hague, 26 February 2001
JL/P.I.S./567-e

JUDGEMENT OF TRIAL CHAMBER III IN THE KORDIĆ AND ČERKEZ CASE

DARIO KORDIĆ SENTENCED TO 25 YEARS
MARIO ČERKEZ SENTENCED TO 15 YEARS

- **Croatia's intervention in the armed conflict in Central Bosnia established**
- **HVO attacks " followed a common design or plan … to ethnically cleanse the (Lašva) valley of Muslims"**
- **Dario Kordić " was a regional leader and lent himself enthusiastically to the common design of persecution by planning, preparing and ordering those parts of the campaign which fell within his sphere of authority"**
- **Mario Čerkez "as commander of the Viteška Brigade, participated in the attacks on Vitez, Stari Vitez and Večeriska … and failed to take the necessary measures to prevent those attacks, failed to punish those who were responsible for them"**

Please find below the full text of the summary of the Judgement of Trial Chamber III, read out by presiding Judge Richard May at today's Judgement hearing:

"This hearing is for the Trial Chamber to deliver its Judgement. This is the fifth case to be heard by the International Tribunal concerning events in the Lašva Valley in 1992 and 1993. However, it is the first involving a high ranking politician.

The background is the conflict between the Bosnian Muslims and Bosnian Croats which took place during those years in Central Bosnia. The accused both played prominent parts in that conflict. Dario Kordić was a politician, described as the most important in the area. Mario Čerkez was a military man, Commander of a Brigade in the Bosnian Croat armed forces. The charges against them arise from events during the conflict.

The Indictment contains 44 Counts; and charges each accused with eight grave breaches of the Geneva Conventions, ten violations of the laws or customs of war and four crimes against humanity. The first two Counts charge the accused with persecution, a crime against humanity. The other Counts charge offences relating to murder, inhuman treatment, detention and destruction. The Indictment alleges that the accused participated in a widespread or systematic campaign of persecution of the Bosnian Muslims in that region culminating in a series of attacks over a two year period on towns and villages in the Lašva Valley and surroundings. Many Muslim civilians were killed, seriously wounded or detained. Meanwhile, their homes were burned, their towns, villages and places of worship destroyed, and their property plundered.

The defence case for both accused amounts to a complete denial of the prosecution case. Not only is the responsibility of the accused for the crimes alleged against them disputed, there is an issue whether the crimes were committed at all. The Trial Chamber, therefore, has had to determine whether these crimes were committed; and, if so, whether the accused were guilty of those charged against them.

The result has been an extremely long trial lasting 20 months in which a great deal of evidence was put before the court. In all, 241 witnesses gave evidence and over 4,500 exhibits were produced. The transcript runs to 28,000 pages.

What follows is a summary of the written Judgement and forms no part of it. That Judgement is available today.

First, some matters of law. The Trial Chamber finds that there was a general state of armed conflict in Central Bosnia at the relevant time. It also finds that there is a clear connection between this conflict and the alleged crimes set out in the Indictment. The Trial Chamber finds that due to the intervention of the Republic of Croatia, this conflict was international.

The Trial Chamber also finds that persecution may include conduct not specifically listed as a crime against humanity in Article 5 of the Statute of the International Tribunal. However, such conduct must reach the same level of gravity as the other crimes listed in the Article. In this case, the Trial Chamber finds that two alleged acts do not rise to that level of gravity, namely, persecution in the form of encouraging and promoting hatred, by propaganda and otherwise, and persecution in employment.

Turning now to the facts. The relevant history begins with the founding in 1990 of a Bosnian Croat political party, the Croatian Democratic Union of Bosnia and Herzegovina, or "HDZ-BiH". This was an offshoot of its Croatian parent, the nationalist HDZ party. In late 1991 the HDZ-BiH set up a separate Croat community within Bosnia, the HZ H-B, which the Trial Chamber finds was established with the intention that it should, in due course, become part of the Republic of Croatia. The HZ H-B thereafter created another body, the Croatian Defence Council, "the HVO", as the executive and defence authority of the Bosnian Croat community. Local municipal HVOs were then set up as the executive and military power in the municipalities.

Meanwhile, Dario Kordić rose rapidly in the HDZ-BiH political party, becoming its President in his home-town, Busovača; President of his Regional Community; and Vice-President of the HZ H-B. Mario Čerkez for his part was one of the founders of the HVO in Vitez and Commander of its local Brigade, known as the Viteška Brigade.

In 1992 the HVO began taking over all power in the municipalities in Central Bosnia, in particular in Busovača, Vitez and Kiseljak. They met little armed resistance except in Novi Travnik and the village of Ahmići. In these incidents Dario Kordić demonstrated both his political and military authority; and the Trial Chamber finds that by the end of 1992, on the eve of the conflict, Dario Kordić combined both forms of authority. His military authority did not involve a formal rank but was a position which he had won for himself. Accordingly, a precise position in the chain of command cannot be ascribed to him; it is not suggested that he had power to discipline or punish troops, and the Trial Chamber finds that he has no liability under Article 7(3) of the Statute concerning command responsibility.

We come now to the most important year in the conflict, 1993. That year began with peace talks and the Vance-Owen Peace Plan. However, the situation soon degenerated into conflict, first in Gornji Vakuf and thereafter in Busovača. The HVO attacked the latter municipality in January 1993, using artillery and infantry on civilian targets, and setting a pattern for subsequent attacks on towns and villages. The evidence shows that Dario Kordić was implicated in this attack.

In April 1993 it was the turn of Vitez and the Muslim villages of the Lašva Valley to come under attack. The Trial Chamber finds that the evidence points to a well-organised and planned HVO attack upon these locations, in particular the village of Ahmići where the attack early in the morning of 16 April resulted in a massacre in which more than 100 people were murdered, including 32 women and 11 children, and the village was destroyed. There were similar attacks on the villages up and down the Lašva Valley and on the town of Vitez. The Trial Chamber finds that these attacks followed a common design or plan conceived and executed by the Bosnian Croat leadership to ethnically cleanse the valley of Muslims.

Dario Kordić, as the local political leader was part of this design or plan, his principal role being that of a planner and instigator. In addition, the Trial Chamber finds that Dario Kordić was present at a meeting of politicians in the headquarters of Colonel Blaškić on the 15 April when the attacks on Ahmići and the other villages were authorised; that Mario Čerkez was present at a subsequent military meeting when plans were drawn up; and also that Dario Kordić was associated with an order given by Colonel Blaškić to kill all the military-aged men, expel the civilians and set fire to the houses in Ahmići.

As for Mario Čerkez's role on 16 April, the Trial Chamber finds that during this period the Viteška Brigade was in the thick of the fighting and that Mario Čerkez was in command of the Brigade. As Commander, he participated in the attacks on Vitez, Stari Vitez and Večeriska. However, in spite of his presence at the military meeting on 15 April, the Trial Chamber is not satisfied beyond reasonable doubt that Mario Čerkez bears any responsibility for the attack on Ahmići. This attack was the responsibility of the 4th Battalion Military Police, which was not under his command.

The fighting around Vitez continued after 16 April. On 18 April a truck bomb exploded near the mosque in Stari Vitez, killing at least 6 people and injuring 50 others. The Trial Chamber finds that this was an act of pure terrorism committed by elements within the HVO in Vitez but that there is no evidence to connect either of the accused with this action.

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On 18 April the HVO attacked the villages in the Kiseljak municipality. These attacks were part of the general offensive launched by the HVO against the Muslims in this area and Dario Kordić as the local political leader was associated with them.

On 19 April the market-place in Zenica was shelled, killing 15 people and injuring many others. The Trial Chamber finds that the HVO was responsible but that this was not consistent with the pattern of the other attacks and thus falls outside the common design or plan. No political connection has been demonstrated and consequently the Trial Chamber cannot draw the inference that Dario Kordić was implicated in this unlawful attack.

By the end of April there was a cease-fire in place, but in June further fighting broke out in Central Bosnia. The HVO launched another series of attacks: this time on villages in the Kiseljak municipality, including the village of Tulica where 12 people were killed and the village destroyed. The Trial Chamber finds that these offensives were another manifestation of the HVO design to subjugate the Muslims of Central Bosnia. As with the offensives against the villages in April, the Trial Chamber finds that the attacks would not have been launched without the approval of the local political leadership in the person of Dario Kordić.

In October 1993, events moved to Vareš municipality. The village of Stupni Do is located about a kilometre south of the town of Vareš. On 23 October the village was attacked and 38 people lost their lives. It was not disputed that Ivica Rajić and his troops from Kiseljak were responsible for this massacre. Some defence was offered in the village but there can be no justification for what happened. However, the Trial Chamber finds that Dario Kordić's influence and authority which were concentrated in the Lašva Valley did not extend to Stupni Do, which was thus outside his sphere of authority, and the attack on the village was not part of any common plan or design to which he was a party.

During the HVO offensives many hundreds of Bosnian Muslim civilians were rounded up and detained in makeshift camps where conditions varied from camp to camp but were generally inhuman. The Trial Chamber finds that the detainees were subject to arbitrary and unlawful imprisonment (which was part of the common design or plan) and that they were forced without justification to dig trenches and were used as hostages and human shields. The Trial Chamber also finds that as Commander of the Viteška Brigade Mario Čerkez was responsible for the unlawful imprisonment and inhuman treatment of the detainees in the Vitez detention facilities, and that Dario Kordić was responsible for the unlawful imprisonment of detainees in the areas for which he had authority. However, the camps were run by the military and the evidence is not such as to allow an inference to be safely drawn that Dario Kordić was connected with the way in which the detainees were treated or that the treatment was part of the common plan or design.

The Trial Chamber finds that there was a pattern of destruction and plunder in all the places attacked by the HVO and that the HVO deliberately targeted mosques and other religious and educational institutions. All this was part of the common plan and the accused were implicated in the offences where they have been found to be responsible for attacks.

In relation to those Counts alleging persecution the Trial Chamber finds on overwhelming evidence, that there was a campaign of persecution aimed at the Bosnian Muslims throughout the Indictment period in Central Bosnia. It took the form of the most extreme expression of persecution, *i.e.* attacking towns and villages with the concomitant destruction and plunder, killing, injury and detention. The purpose of the campaign was the subjugation of the Bosnian Muslim population. Thus, the Trial Chamber rejects the defence case that these events amounted to a civil war and that the Bosnian Croats were on the defensive and themselves subject to persecution. For these purposes, the fact that individual atrocities were committed against Bosnian Croats is irrelevant although they may be the subject of other criminal proceedings.

The Trial Chamber makes the following findings about the participation of the accused in the campaign of persecution. Whatever positions he may have held, the evidence does not support the contention that Dario Kordić was in the very highest echelons of the Bosnian Croat leadership or that he conceived the campaign of persecution. He was a regional leader and lent himself enthusiastically to the common design of persecution by planning, preparing and ordering those parts of the campaign which fell within his sphere of authority.

As already noted, the Trial Chamber finds that Mario Čerkez, as the Commander of the Viteška Brigade, participated in the attacks on Vitez, Stari Vitez and Večeriska. This was a high point of the campaign of persecution. The accused played his part in that campaign by commanding the troops involved in some of the incidents; as such he was a co-perpetrator.

We turn now to the allegation that the accused are also guilty by reason of their superior responsibility and failure to prevent these crimes and to punish the perpetrators. The Trial Chamber notes that such responsibility may attach to civilians once it is established that the requisite power to prevent and punish exists.

However, as already noted, the Trial Chamber finds that Dario Kordić did not possess the authority either to prevent the crimes or to punish the perpetrators and cannot therefore be liable under Article 7(3) of the Statute. On the other hand, Mario Čerkez knew of the impending attacks on Vitez, Stari Vitez and Večeriska by the troops under his command. He failed to take the necessary measures to prevent those attacks, failed to punish those who were responsible for them, and is therefore liable under Article 7(3) in respect of the offences arising from attacks on those three locations.

Finally, the Trial Chamber applies the practice approved by the Appeals Chamber recently in relation to cumulative convictions. As a result the accused will be acquitted of those Counts for which a cumulative conviction would be inappropriate.

The Trial Chamber's findings on the Counts of the Indictment are as follows.

Counts 1 and 2: crimes against humanity: persecutions
Count 1: Dario Kordić - GUILTY
Count 2: Mario Čerkez - GUILTY

Counts 3 - 6: violations of the laws or customs of war (unlawful attack on civilians).
Counts 3 and 4: Dario Kordić – GUILTY
Counts 5 and 6: Mario Čerkez – GUILTY

Counts 7 - 20: crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws or customs of war (murder, wilful killing, inhumane acts, wilfully causing great suffering or serious injury, inhuman treatment).
Dario Kordić:
Counts 7, 8, 10 and 12: - GUILTY
Counts 9, 11, 13: – NOT GUILTY
Mario Čerkez:
Counts 14, 15, 17 and 19: - GUILTY
Counts 16, 18 and 20: - NOT GUILTY

Counts 21 and 22: a crime against humanity and a grave breach of the Geneva Conventions (imprisonment, unlawful confinement).
Dario Kordić – GUILTY

Counts 23 - 28: grave breaches of the Geneva Conventions and violations of the laws or customs of war (inhuman treatment, use of human shields, taking of hostages).
Dario Kordić – NOT GUILTY

Counts 29 - 31: a crime against humanity and grave breaches of the Geneva Conventions (imprisonment, unlawful confinement, inhuman treatment).
Mario Čerkez - GUILTY

Counts 32 - 36: violations of the laws or customs of war and grave breaches of the Geneva Conventions (cruel treatment, taking of hostages, inhuman treatment).
Mario Čerkez:
Counts 32, 34 and 36: – NOT GUILTY
Counts 33 and 35: – GUILTY

Counts 37 - 42: grave breaches of the Geneva Conventions; violations of the laws or customs of war (extensive destruction of property, wanton destruction, plunder).
Count 37: Dario Kordić – NOT GUILTY
Counts 38 and 39: Dario Kordić – GUILTY
Count 40: Mario Čerkez – NOT GUILTY
Counts 41 and 42: Mario Čerkez - GUILTY

Counts 43 and 44: violations of the laws or customs of war (destruction or damage to religious or educational institutions).
Count 43: Dario Kordić – GUILTY
Count 44: Mario Čerkez - GUILTY

Turning now to the question of sentence, the Trial Chamber makes some general points. The Trial Chamber will consider the appropriate sentences in the case of the accused, emphasising that the sentences

reflect the evidence in this case and the role of these accused as found by this Trial Chamber. Both accused have been convicted of numerous offences. They all arise from the same common design which led to the persecution and the "ethnic cleansing" of the Bosnian Muslims of the Lašva Valley and surroundings. The resulting sustained campaign involved a succession of attacks on villages and towns which were characterised by a ruthlessness and savagery and in which no distinction was made as to the age of its victims: young and old were either murdered or expelled and their houses were burned. The total number of dead may never be known, but it runs into hundreds, with thousands expelled. Offences of this level of barbarity could not be more grave and those who participate in them must expect sentences of commensurate severity to mark the outrage of the international community.

Dario Kordić: Your role in the offences was an important one. As a regional political leader in Central Bosnia, with particular authority in the Lašva Valley, you were the effective political commander in the area where the majority of the offences were committed. As already noted, the Trial Chamber has not accepted the full extent of the Prosecution case and has not found that you were in the highest echelons of the leadership of the campaign of persecution. Likewise, you have been acquitted of some of the offences arising from individual acts of terror and the massacre at Stupni Do. Therefore, you are not to be sentenced as an architect of the persecution or the prime mover in it. Nonetheless, you joined the campaign enthusiastically and played an instrumental part in the Lašva Valley offensives in 1993, in particular in ordering the attack of Ahmići and the other villages in April 1993. For your part in that dreadful episode you deserve appropriate punishment. The fact that you were a politician and took no part in the actual execution of the crimes makes no difference; you played your part as surely as the men who fired the guns. Indeed, the fact that you were a leader aggravates the offences. You have offered no mitigation and there is none. The Trial Chamber considers that your overall criminality can be best reflected in a single sentence. Dario Kordić, you are sentenced to **25** years imprisonment.

Mario Čerkez: Your position is different from that of your co-accused. You were a soldier and a middle-ranking HVO commander. The Trial Chamber notes that you have no previous experience of command and that nothing in your earlier life could have prepared you for it. However, you were the Commander of the Viteška Brigade during the time of the terrible events in the Lašva Valley and led it in the assaults which resulted in civilian death and destruction. While the Trial Chamber has found that your troops were not involved in the massacre at Ahmići, you played your part in the campaign of persecution, aggravated because of your role as a commander. While there was positive testimony as to your character and personality, none of the matters submitted as mitigating circumstances amount to mitigation of these international crimes. The Trial Chamber considers that your overall criminality can be best reflected in a single sentence. Mario Čerkez, you are sentenced to **15** years imprisonment.

The period of time the accused have spent in custody of the International Tribunal, that is the period from 6 October 1997 to the date of this Judgement, shall be deducted from the sentences".

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International Criminal Tribunal for the former Yugoslavia

Prosecutor *v.* Enver Hadžihasanović and Amir Kubura
Judgement (summary)

Appeals Chamber, 22 April 2008

United Nations
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International Criminal Tribunal for the former Yugoslavia

Tribunal Pénal International pour l'ex-Yougoslavie

APPEALS JUDGEMENT SUMMARY

APPEALS CHAMBER

(Exclusively for the use of the media. Not an official document)

The Hague, 22 April 2008

APPEALS JUDGEMENT SUMMARY FOR THE CASE OF HADŽIHASANOVIĆ AND KUBURA.

Please find below the summary of the appeals judgement today read out by Judge Pocar:

BACKGROUND OF THE CASE

This case concerns certain events that unfolded in Central Bosnia in 1993, particularly in the municipalities of Bugojno, Vareš and Zenica. During the period relevant for the Indictment, the Appellant Enver Hadžihasanović was Commander of the 3rd Corps of the Army of Bosnia and Herzegovina. The Appellant Amir Kubura was Commander of the 3rd Corps 7th Muslim Mountain Brigade. On 15 March 2006, the Trial Chamber found Hadžihasanović guilty, pursuant to Articles 3 and 7(3) of the Statute, for having failed in his duty as a superior to prevent or punish the murder by his subordinates of Mladen Havranek at the *Slavonija* Furniture Salon in the Bugojno Municipality (Count 3); the murder by his subordinates of Dragan Popović at the Orašac Camp (Count 3); and the cruel treatment by his subordinates at the Zenica Music School, at the Orašac Camp and at various detention centres in Bugojno (Count 4). The Trial Chamber acquitted Hadžihasanović on all other counts of the Indictment. Kubura was found guilty, pursuant to Articles 3 and 7(3) of the Statute, for having failed in his duty as a superior to prevent or punish the plunder by his subordinates in the Ovnak area and in Vareš (Count 6). The Trial Chamber acquitted Kubura on all other counts of the Indictment. Hadžihasanović was sentenced to five years of imprisonment; Kubura was sentenced to two years and six months of imprisonment. Hadžihasanović appealed on 18 April 2006, seeking the reversal of the convictions against him. Kubura appealed on 13 April 2006, challenging both his conviction and the sentence imposed on him. The Prosecution appealed the sentence imposed on Hadžihasanović but not the acquittals. The Prosecution appealed Kubura's acquittal under Count 5 of the Indictment, regarding wanton destruction in the town of Vareš in November 1993, and the sentence imposed on him. The Appeals Chamber heard oral submissions of the Parties regarding these appeals on 4 and 5 December 2007.

Following the practice of the International Tribunal, I will not read out the text of the Judgement except for the Disposition. Instead, I will summarise the issues on appeal and the findings of the Appeals Chamber. I emphasise that this summary is not part of the written Judgement, which is the only authoritative account of the Appeals Chamber's rulings and reasons. Copies of the written Judgement will be made available to the Parties at the conclusion of this hearing.

GROUNDS OF APPEAL

I will now address the Parties' grounds of appeal. First, I will address Hadžihasanović's arguments regarding the alleged infringement on his right to a fair trial. Second, I will address the Parties' arguments concerning Hadžihasanović's individual criminal responsibility as a superior. Third, I will address the Parties' arguments concerning Kubura's individual criminal responsibility as a superior. Finally, I will turn to the Parties' arguments regarding the sentences imposed on Hadžihasanović and Kubura.

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A. Hadžihasanović's appeal concerning the fairness of the trial and evidentiary issues

In his first, second, and as part of his third and sixth grounds of appeal, Hadžihasanović submits that the Trial Chamber committed numerous errors infringing upon his right to a fair trial under Article 21 of the Statute.

For the reasons set out in the Judgement, the Appeals Chamber finds that Hadžihasanović failed to demonstrate that the Trial Chamber erred in law or in fact and that his right to a fair trial was infringed.

B. Appeal concerning Hadžihasanović's individual criminal responsibility as a superior

I now turn to Hadžihasanović's individual criminal responsibility as a superior. **Under his third ground of appeal,** Hadžihasanović argues that the Trial Chamber erred by finding that he failed to take the adequate measures required to punish those responsible for the murder of Mladen Havranek and the cruel treatment of six prisoners at the *Slavonija* Furniture Salon on 5 August 1993, as well as to prevent similar crimes in the other detention facilities in Bugojno.

The Appeals Chamber concurs with the Trial Chamber's finding that the evidence before it provided a sufficient basis to conclude that the perpetrators of the 5 August 1993 *Slavonija* Furniture Salon crimes were held responsible for breaches of military discipline by the military disciplinary organ in Bugojno and that no criminal report was filed with the District Military Prosecutor's Office regarding the matter. The Appeals Chamber agrees with the Trial Chamber that, given the gravity of the offences for which the perpetrators were being punished – murder and cruel treatment – Hadžihasanović could not consider as acceptable punishment the disciplinary sanction of a period of detention not exceeding 60 days.

The Appeals Chamber however finds that no reasonable trier of fact could have found beyond reasonable doubt that the 3rd Corps failed to initiate an investigation or criminal proceedings against the perpetrators of the murder and cruel treatment by filing a report with the Bugojno municipal public prosecutor. The report of 20 August 1993 from the chief of the civilian police in Bugojno regarding alleged war crimes committed against Croats, which establishes that the Bugojno municipal public prosecutor met with European Community observers to discuss alleged war crimes committed against Croats, including the murder of Mladen Havranek, indeed raises a reasonable doubt as to whether the 307th Brigade, subordinated to the 3rd Corps headed by Hadžihasanović, filed a criminal report regarding the 5 August 1993 *Slavonija* Furniture Salon crimes with the Bugojno municipal public prosecutor.

The Appeals Chamber recalls that a superior need not dispense punishment personally and may discharge his duty by reporting the matter to the competent authority. In the present case, the Appeals Chamber finds that the reporting of the 5 August 1993 *Slavonija* Furniture Salon crimes to the Bugojno municipal public prosecutor, in conjunction with the disciplinary sanctions imposed by the military disciplinary organ, constituted necessary and reasonable measures to punish the perpetrators.

For the reasons set out in the Judgement, the Appeals Chamber reverses Hadžihasanović's convictions for having failed to take the adequate measures required to punish those responsible for the murder of Mladen Havranek and the cruel treatment of six prisoners at the *Slavonija* Furniture Salon on 5 August 1993.

Under his third ground of appeal, Hadžihasanović also contends that the Trial Chamber erred in finding that he had reason to know of the acts of mistreatment committed in the Bugojno Detention Facilities as of 18 August 1993.

To reach this conclusion, the Trial Chamber mainly relied on its previous finding that Hadžihasanović had failed to take adequate measures to punish the perpetrators of the 5

August 1993 crimes. However, the Appeals Chamber found that this latter finding was in error. Considering that none of the Trial Chamber's remaining findings, whether taken individually or collectively, sufficiently supports the Trial Chamber's conclusion that Hadžihasanović had reason to know of the acts of cruel treatment in the Bugojno Detention Facilities as of 18 August 1993, the Appeals Chamber finds that no reasonable trier of fact could have concluded, given the evidence, that Hadžihasanović possessed the requisite knowledge under Article 7(3) of the Statute, which would trigger his responsibility to prevent or punish such acts.

For the reasons set out in the Judgement, the Appeals Chamber reverses Hadžihasanović's convictions for having failed to take adequate measures to prevent or punish the acts of mistreatment in the Bugojno Detention Facilities as of 18 August 1993.

Under his fourth ground of appeal concerning the cruel treatment at the Zenica Music School from May to September 1993, Hadžihasanović argues that the Trial Chamber erred by finding that he failed to take the reasonable measures necessary to punish the perpetrators and prevent such acts.

First, Hadžihasanović argues that the Trial Chamber failed to properly consider the evidence provided by Witness Džemal Merdan – his Deputy-Commander – and Witness HF – a senior officer of the 3rd Corps Command – that measures were taken by the 3rd Corps to investigate allegations of mistreatment at the Zenica Music School. The Appeals Chamber notes that the Trial Chamber did not ignore the testimony of these two witnesses but, after reviewing the totality of the evidence before it, decided to accord greater weight to other evidence. The Trial Chamber found, based on the many accounts by former prisoners at the Music School, that the Zenica Music School's basement consistently housed between ten and thirty detainees from 18 April 1993 until 20 August 1993. The Trial Chamber further found that Hadžihasanović received alarming information from other sources, which established the need for further inquiry based on allegations of mistreatment. Thus, the Trial Chamber's finding that an investigation of the allegations of cruel treatment would have enabled Hadžihasanović to identify the persons responsible for the violence does not turn solely on the truthfulness of Witnesses Džemal Merdan and HF.

Second, Hadžihasanović argues that the Trial Chamber failed to properly consider evidence that the arrest, detention and alleged mistreatment of detainees at the Music School was concealed by some members of the 7th Brigade. The Appeals Chamber finds that the Trial Chamber noted that there was an intention on the part of the soldiers present at the School to conceal the mistreatment inflicted on the detainees but concluded that this had no bearing on Hadžihasanović's criminal responsibility. Indeed, the Trial Chamber found that Hadžihasanović had received information that his subordinates were committing mistreatment at the Zenica Music School from sources outside the 7th Brigade, such that any attempted concealment by members of the 7th Brigade was rendered secondary.

Third, Hadžihasanović submits that the measures he took with respect to the Zenica Music School were necessary and reasonable. The Trial Chamber considered Hadžihasanović's arguments that he had taken preventive measures to ensure that civilians and prisoners of war were treated in accordance with international humanitarian law and that he took steps to investigate allegations of mistreatment. The Trial Chamber nevertheless concluded that Hadžihasanović did not make genuine efforts to initiate an appropriate investigation into the allegations of cruel treatment whereas such an investigation would have enabled him to discover the identity of the persons responsible for the violence.

For the reasons set out in the Judgement, the Appeals Chamber finds that Hadžihasanović failed to demonstrate that no reasonable trier of fact could have concluded that, given the evidence, he failed to take necessary and reasonable measures to punish the perpetrators of the cruel treatment at the Zenica Music School and prevent further mistreatment.

I now turn to Hadžihasanović's arguments under his fifth ground of appeal concerning the murder and cruel treatment in Orašac in October 1993.

Hadžihasanović submits that the Trial Chamber erred by finding that he failed to take necessary and reasonable measures to prevent the murder of Dragan Popović and the cruel treatment committed by the *El Mujahedin* detachment in the Orašac Camp against five civilians abducted on 19 October 1993. He argues that the Trial Chamber erred in finding that he had *de jure* authority over the members of the *El Mujahedin* detachment and in finding that he exercised effective control over the *El Mujahedin* detachment. Since *de jure* authority is only one factor that helps to establish effective control, and because the question is resolvable on the basis of effective control alone, the Appeals Chamber declines to address whether Hadžihasanović had *de jure* authority over the *El Mujahedin* detachment.

The Trial Chamber found that Hadžihasanović exercised effective control over the *El Mujahedin* detachment on the basis that the evidence before it showed that three types of indicia of effective control were satisfied, namely: the power to give orders to the *El Mujahedin* detachment and have them executed, the conduct of combat operations involving the *El Mujahedin* detachment, and the absence of any other authority over the *El Mujahedin* detachment.

First, the Appeals Chamber recognises that the power to give orders and have them executed can serve as an indicium of effective control. In the present case, the Trial Chamber took certain orders of re-subordination into account, though to varying degrees, as indicia of effective control. However, for the reasons set out in the Judgement, the Appeals Chamber finds that none of the re-subordination orders, either individually or collectively, is sufficient to establish the existence of effective control.

Second, the Appeals Chamber finds that while the findings relied upon by the Trial Chamber confirm that the *El Mujahedin* detachment took part in several combat operations in September and October 1993 and that this occurred within the framework established by the Operational Group *Bosanska Krajina* and the 3rd Corps, they do not necessarily provide sufficient support for the conclusion that Hadžihasanović had effective control over the *El Mujahedin* detachment in the sense of having the material ability to prevent or punish its members should they commit crimes. Notably, several findings of the Trial Chamber demonstrate that the *El Mujahedin* detachment maintained a significant degree of independence from the units it fought alongside on various issues, which belies the Trial Chamber's conclusion that the *El Mujahedin* detachment was under the effective control of the 3rd Corps. The Trial Chamber found, for example, that the detachment members were anxious to maintain their independence and reserved the right to decide whether they would take part in combat operations.

Thus, while these Trial Chamber's findings indicate that the 3rd Corps cooperated with the *El Mujahedin* detachment, they are insufficient to establish the existence of a relationship of effective control between the 3rd Corps and the *El Mujahedin* detachment.

Third, with regard to the absence of any other authority over the *El Mujahedin* detachment, the Appeals Chamber finds that some of the Trial Chamber's findings suggest that the *El Mujahedin* detachment was more under the influence of Muslim clerics, than under that of the 3rd Corps. However, the Appeals Chamber disputes the relevance of the criterion identified by the Trial Chamber as an indicator of the existence of effective control. Hadžihasanović's effective control cannot be established by process of elimination. The absence of any other authority over the *El Mujahedin* detachment in no way implies that Hadžihasanović exercised effective control in this case.

Last, I turn to Hadžihasanović's argument that he could not have effective control over the *El Mujahedin* detachment if the only way for the 3rd Corps to obtain the release of the civilians abducted on 19 October 1993 was to use force.

The Appeals Chamber finds that the military operation that the Trial Chamber expected the 3rd Corps to undertake to rescue those hostages would be comparable to that necessary to obtain the release of hostages from an enemy force rather than a force under its effective control. Regardless of whether the use of force was materially feasible or advisable to save the lives of the hostages, the facts of the case reveal a situation in which the relationship between the *El Mujahedin* detachment and the 3rd Corps was not one of subordination. Instead, it was close to overt hostility since the only way to control the *El Mujahedin* detachment was to attack them as if they were a distinct enemy force. This scenario is at odds with the premise of the Trial Chamber that the *El Mujahedin* detachment was subordinated to the 3rd Corps. This conclusion further confirms that Hadžihasanović did not have effective control over the *El Mujahedin* detachment.

For the reasons set out in the Judgement, the Appeals Chamber concludes that no reasonable trier of fact could have concluded that it was established beyond reasonable doubt that Hadžihasanović had effective control over the *El Mujahedin* detachment between 13 August and 1 November 1993. As a result, the Appeals Chamber reverses Hadžihasanović's conviction for having failed to prevent the crimes of cruel treatment committed between 19 and 31 October 1993 and the murder of Dragan Popović.

C. Kubura's and Prosecution's appeals concerning Kubura's individual criminal responsibility as a superior

I now turn to Kubura's individual criminal responsibility as a superior. Under his first ground of appeal, Kubura submits that the Trial Chamber erred in convicting him of failing to take necessary and reasonable measures to punish the acts of plunder committed in June 1993 in the Ovnak area. He argues that the Trial Chamber erred in finding that the 7th Brigade was involved in the plunder committed in the Ovnak area and/or that he knew of

First, the Appeals Chamber notes that the Trial Chamber examined Kubura's claim that members of the 7th Brigade could not have been responsible for the plunder because they had already left the Ovnak area on 8 June 1993 but, following its review of the evidence, concluded otherwise. While, as Kubura argues, the Trial Chamber indeed found that members of the 7th Brigade did not enter the villages where the plunder was committed and left the sector on 9 June 1993, it also found that, following the end of combat operations, members of the 7th Brigade's military police units entered and systematically plundered the Ovnak area as of 9 June 1993 prior to their departure.

The Appeals Chamber finds that Kubura failed to establish that, given the evidence, no reasonable trier of fact could have concluded that members of the 7th Brigade committed plunder in the Ovnak area in June 1993.

Second, with regard to Kubura's argument that the Trial Chamber only relied on one witness to conclude that he had knowledge of the plunder committed in the Ovnak area on 9 June 1993, the Appeals Chamber finds that he ignores the additional evidence considered by the Trial Chamber and its resulting findings. Moreover, the Trial Chamber noted that Kubura received orders alerting him to plunder in the Ovnak area generally, which Kubura acknowledged and responded to. In addition, the Trial Chamber found that Kubura issued a report on 20 June 1993 to the 3rd Corps Command acknowledging that a standardised procedure for war booty had been implemented by the 7th Brigade. The Appeals Chamber finds that Kubura failed to demonstrate that, given the evidence, no reasonable trier of fact could have concluded that he had knowledge of plunder by his subordinates in the Ovnak area in June 1993.

In light of the foregoing, the Appeals Chamber accordingly upholds Kubura's conviction for failing to take necessary and reasonable measures to punish the plunder committed by his subordinates in June 1993 in the Ovnak area.

Under his second ground of appeal, Kubura submits that the Trial Chamber erred in convicting him of failing to take necessary and reasonable measures to prevent or punish the plunder which took place in Vareš in November 1993. He argues that the Trial Chamber erred in finding that the 7th Brigade was involved in the commission of acts of plunder in Vareš in November 1993 and/or that he knew or had reason to know of these acts.

First, with regard to the 7th Brigade's involvement, the Appeals Chamber finds that the documents relied upon by the Trial Chamber in reaching the finding that Kubura's subordinates engaged in plunder in Vareš specifically refer to the 7th Brigade's involvement in these acts. The Appeals Chamber finds that Kubura failed to demonstrate that, given the evidence, no reasonable trier of fact could have concluded that members of the 7th Brigade committed plunder in Vareš in November 1993.

Second, with regard to Kubura's knowledge of the acts of plunder in Vareš triggering his duty to prevent them, the Appeals Chamber notes that the Trial Chamber focused its reasoning on Kubura's failure to punish his subordinates' plunder in the Ovnak area some five months earlier. While portions of the Trial Judgement demonstrate that the Trial Chamber considered factors other than Kubura's past failure to punish his subordinates in determining whether he had reason to know of their acts of plunder in Vareš on 4 November 1993, the Trial Judgement suffers, at the very least, from a lack of clarity as to whether and, if so, how the Trial Chamber took into account the circumstances of the case in determining that Kubura had reason to know sufficient to trigger a duty to prevent his subordinates' plunder in Vareš. The Appeals Chamber deems it of significant import that the Trial Chamber found that, irrespective of the measures taken by Kubura to stop the acts of plunder in Vareš once he had knowledge of them, Kubura remained responsible for failing to prevent these acts in the first place based *exclusively* on his past failure to punish similar acts in the Ovnak area. Such a conclusion implies that the Trial Chamber considered Kubura's knowledge of and past failure to punish his subordinates' acts of plunder in the Ovnak area as automatically entailing that he had reason to know of their future acts of plunder in Vareš. The Appeals Chamber finds that this constitutes an error of law.

Having applied the correct legal standard to the evidence contained in the trial record, the Appeals Chamber recognises that Kubura's knowledge of and failure to punish his subordinates' past acts of plunder was likely to be understood by his subordinates at least as acceptance, if not encouragement of such conduct, such that it increased the risk that further acts of plunder, such as those in Vareš, would be committed again. The Appeals Chamber notes, however, that the acts of plunder committed by Kubura's subordinates in the Ovnak area on 9 June 1993 and in Vareš on 4 November 1993 were separated by some five months and some 40 kilometres. While the plunder was widespread on each of these two occasions, Kubura's subordinates were not found to have engaged in plunder on a frequent basis while under his command. The Appeals Chamber recalls that the Trial Chamber did not find that Kubura had any other knowledge regarding his subordinates' acts of plunder in Vareš prior to their commission, other than the knowledge it inferred from his past failure to punish.

However, with respect to Kubura's knowledge of his subordinates' acts of plunder whilst they were ongoing, the Appeals Chamber recalls that Kubura received orders on 4 November 1993 alerting him to the ongoing acts of plunder in Vareš and holding him responsible for stopping them. Indeed, the Trial Chamber found that Kubura received orders from the 3rd Corps Command directing him to use military police to prevent property from being plundered in Vareš, as well as instructions from the Operational Group East to cease all unauthorised acts, stop anything from being removed and withdraw his troops from the town.

While Kubura's knowledge of his subordinates' past plunder in Ovnak and his failure to punish them did not, in itself, amount to actual knowledge of the acts of plunder in Vareš, the Appeals Chamber concurs with the Trial Chamber that the orders he received on 4 November 1993 constituted, at the very least, sufficiently alarming information justifying further inquiry.

The Appeals Chamber accordingly finds that Kubura possessed knowledge sufficient to trigger a duty to prevent his subordinates from committing further plunder in Vareš as of his receipt of the orders alerting him to the ongoing plunder. For the reasons set out in the Judgement, the Appeals Chamber also finds that Kubura's knowledge of his subordinates' acts of plunder in Vareš was also sufficient to trigger his duty to punish them.

With regard to the measures taken by Kubura to prevent his subordinates from committing further acts of plunder in Vareš, the Appeals Chamber recalls that, following the order of 4 November 1993 from the Operational Group *Istok* Command, Kubura withdrew his troops from Vareš the very same day and then forbade the members of the 7th Brigade from entering or staying in Vareš on 5 November 1993.

For the reasons set out in the Judgement, the Appeals Chamber finds that Kubura took necessary and reasonable measures, given the circumstances of the case, to *prevent* the plunder by putting a stop to the plunder once it had started so it would not be repeated. The Appeals Chamber however upholds the Trial Chamber's finding that Kubura failed to take necessary and reasonable measures to *punish* his subordinates' acts of plunder in Vareš on 5 November 1993. Kubura's conviction as a superior under Article 7(3) of the Statute for the plunder in Vareš is accordingly maintained.

I now turn to the Prosecution's second ground of appeal that Kubura should have been convicted under Article 7(3) of the Statute for the wanton destruction committed by his subordinates in Vareš on 4 November 1993.

The Trial Chamber found that Kubura's subordinates committed wanton destruction in Vareš on 4 November 1993 but that it was not proven beyond reasonable doubt that he knew or had reason to know of this crime.

First, as to whether Kubura received information concerning the destruction of property in Vareš, the Trial Chamber found, as correctly remarked by the Prosecution, that the Operational Group *Istok* issued a combat report to the 3rd Corps Command on 4 November 1993 noting the chaotic situation in Vareš. In this report, the Operational Group *Istok* requested that the 3rd Corps Command send police military units to the town of Vareš. In response, the 3rd Corps Command issued a combat report stating that it had issued orders that brigades use military police forces to prevent chaos and the destruction of property in Vareš. The Trial Chamber found that the 7th Brigade neither received the 4 November 1993 Operational Group *Istok* combat report to the 3rd Corps Command nor the 3rd Corps Command's combat report in response. Yet, from the content of the 3rd Corps Command combat report, it inferred that the 7th Brigade "must have received" orders to use military police forces to prevent chaos and the destruction of property in Vareš given that the 7th Brigade was subordinated to the 3rd Corps Command and present in Vareš. The 3rd Corps Command combat report, however, failed to make explicit the identity of the perpetrators of the acts of wanton destruction in Vareš. The Appeals Chamber notes that other brigades were also present in Vareš on 4 November 1993.

The Trial Chamber also found that the Operational Group *Istok* issued a separate order on 4 November 1993, specifically directed to the 7th Brigade Commander, which explicitly refers to activities of plunder and the need to prevent them but does not mention acts of destruction. The Appeals Chamber concurs with the Trial Chamber that, given the evidence taken as a whole, the inference that the 7th Brigade must have received orders from the 3rd Corps Command on 4 November 1993 does not establish, by itself, Kubura's knowledge of his subordinates' acts of wanton destruction.

Second, the Appeals Chamber considers that Kubura's knowledge of the acts of wanton destruction cannot automatically be inferred from his awareness of the plunder in Vareš on 4 November 1993. Indeed, the Trial Chamber's finding regarding Kubura's knowledge of the plunder in Vareš on 4 November 1993 rests on a much broader evidentiary basis. Furthermore, the Trial Chamber relied on Kubura's knowledge of and failure to punish his subordinates' past acts of plunder. The Trial Chamber made no such findings with respect to any past acts of wanton destruction by Kubura's subordinates. Thus, while there was a sufficient evidentiary basis for the Trial Chamber to conclude that Kubura had knowledge of the acts of plunder in Vareš, it was reasonable for it to conclude that his knowledge as regards the acts of wanton destruction was not established beyond reasonable doubt.

In light of the foregoing, the Appeals Chamber finds that the Prosecution failed to establish that no reasonable trier of fact could have concluded, on the basis of all the admitted evidence, that Kubura's knowledge of wanton destruction in Vareš on 4 November 1993 was not established beyond reasonable doubt. Kubura's acquittal is confirmed.

D. Appeals concerning the sentences imposed on Hadžihasanović and Kubura

Finally, I turn to the appeals concerning the sentences rendered. Hadžihasanović did not specifically appeal his sentence but alleged that the Trial Chamber erred in that the Disposition of the Trial Judgement does not adequately reflect some of the findings made by the Trial Chamber in the body of the Trial Judgement. Kubura appealed his sentence as manifestly excessive, and the Prosecution appealed both Hadžihasanović and Kubura's sentences as manifestly inadequate.

The Appeals Chamber allows Hadžihasanović's arguments and corrects the Disposition of the Trial Judgement concerning the temporal scope of the cruel treatment at the Zenica Music School to render it consistent with the Trial Chamber's findings. As regards the impact of this shorter period of responsibility on Hadžihasanović's sentence, the Appeals Chamber first recalls that the Trial Chamber, in its sentencing determination, correctly determined that the cruel treatment at the Zenica Music School took place over approximately seven months and not nine months as erroneously indicated in the Disposition of the Trial Judgement. The Appeals Chamber further notes that the Trial Chamber's finding regarding the large number of victims involved in the detention facilities in Zenica, which was considered an aggravating circumstance, remains valid for the relevant period. Thus, these factors remain unaffected by the above correction to the Disposition of the Trial Judgement and there is no impact on the sentence.

For the reasons set out in the Judgement, the Appeals Chamber dismisses the Prosecution's and Kubura's arguments. The Appeals Chamber finds that the Trial Chamber properly considered the gravity of the crimes, the relevant aggravating and mitigating factors, and the sentencing practices in the former Yugoslavia.

I will now read out in full the operative paragraphs of the Appeals Chamber's Judgement, that is, the Disposition. Mr. Hadžihasanović and Mr. Kubura, will you please stand.

DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the Parties and the arguments they presented at the hearings of 4 and 5 December 2007;

SITTING in open session, unanimously:

ALLOWS Hadžihasanović's appeal, in part, with respect to Ground 3; **REVERSES** his conviction for failing to take the necessary and reasonable measures to punish those responsible for the murder of Mladen Havranek (Count 3 of the Indictment) and the cruel treatment of six prisoners at the *Slavonija* Furniture Salon on 5 August 1993 (Count 4 of the

Indictment), as well as his conviction for failing to take the necessary and reasonable measures to prevent or punish the cruel treatment at the *Gimnazija* School Building, the *Slavonija* Furniture Salon, the *Iskra* FC Stadium and the *Vojin Paleksić* Elementary School in Bugojno as of 18 August 1993 (Count 4 of the Indictment);

ALLOWS Hadžihasanovic's appeal, in part, with respect to Ground 4, concerning certain errors in the Disposition of the Trial Judgement with regard to his conviction entered under Count 4 of the Indictment for his failure to prevent or punish the cruel treatment at the Zenica Music School; **SETS ASIDE** the related portion of the Disposition of the Trial Judgement and **REPLACES** it with the following:

> COUNT 4: GUILTY of failure to prevent or punish cruel treatment at the Zenica Music School from 8 May 1993 to 20 August 1993 or 20 September 1993, in addition to failure to punish cruel treatment at the Zenica Music School from 26 January 1993 to 8 May 1993.

ALLOWS Hadžihasanović's appeal, in part, with respect to Ground 5; **REVERSES** his conviction for failing to take the necessary and reasonable measures to prevent the murder of Dragan Popović on 21 October 1993 (Count 3 of the Indictment) and his conviction for failing to take the necessary and reasonable measures to prevent cruel treatment at the Orašac camp from 15 October 1993 to 31 October 1993 (Count 4 of the Indictment);

REDUCES the sentence of five years of imprisonment imposed on Hadžihasanović by the Trial Chamber to a sentence of three years and six months of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period Hadžihasanović has already spent in detention; and

DISMISSES Hadžihasanović's appeal in all other respects;

ALLOWS Kubura's appeal, in part, with respect to Ground 2; **REVERSES** his conviction for failing to take the necessary and reasonable measures to prevent, though not to punish, plunder in Vareš on 4 November 1993 (Count 6 of the Indictment);

REDUCES the sentence of thirty months of imprisonment imposed on Kubura by the Trial Chamber to a sentence of two years of imprisonment; and

DISMISSES Kubura's appeal in all other respects;

DISMISSES the Prosecution's appeal in its entirety;

ORDERS that this Judgement shall be enforced immediately pursuant to Rule 118 of the Rules.

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International Criminal Tribunal for Rwanda

Prosecutor *v.* Alfred Musema
Judgement (summary)

Trial Chamber, 27 January 2000

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

SUMMARY

of the Judgement in the Alfred Musema Case, ICTR-96-13-T,

27 January 2000

1. Trial Chamber I of the United Nations International Criminal Tribunal for Rwanda, composed of Judge Lennart Aspegren, presiding, Judge Laïty Kama, and Judge Navanethem Pillay, is sitting this 27th day of January 2000 to render its Judgement in the matter of "The Prosecutor versus Alfred Musema".

2. The Judgement, which will be available in written form and on the Tribunal's website in English and French, after this hearing, covers over 300 pages. The Chamber will limit its oral delivery to a summary of the content of the Judgement and its Verdict on each of the counts charged against Musema. The Judgement, and not this summary, is the authoritative text.

3. Attached to the Judgement are two separate opinions which we will also summarize here.

Introduction

4. In the Judgement, the Chamber provides an overview on the International Tribunal, established by the United Nations Security Council. The proceedings before the Tribunal are governed by its Statute, annexed to Security Council Resolution 955, and its own Rules of Procedure and Evidence. The jurisdiction of the Tribunal is to prosecute persons charged with genocide or other serious violations of humanitarian law, committed in Rwanda during 1994.

The Indictment and Procedural Background

5. On 11 February 1995, Musema was arrested in Switzerland.

6. After the Prosecutor submitted an Indictment against Musema on 11 July 1996, which was confirmed by Judge Ostrovsky on 15 July 1996, he was transferred to the Tribunal's Detention Facility in Arusha on 20 May 1997. On 18 November 1997, he pleaded not guilty to all the counts preferred against him.

7. On 20 November 1998 the Prosecutor submitted an amended Indictment. The Chamber confirmed it on 14 December 1998; on the same day, Musema pleaded not guilty to the new charges.

8. The trial commenced on 25 January 1999. The Prosecutor submitted a further amended Indictment on 29 April 1999. The Chamber granted leave to amend this Indictment on 6 May 1999, at which time Musema pleaded not guilty to the new charges.

9. This Indictment, which is the basis of the present Judgement, charges Musema with genocide, with crime against humanity and with serious violations of Article 3 common to the Geneva Conventions and their Additional Protocol II.

10. During the trial, both parties presented extensive evidence to the Chamber, including thirty witnesses and 182 documents.

11. The parties made their closing arguments on 25 and 28 June 1999, after which the Chamber adjourned for deliberation.

The Accused

12. The accused, Alfred Musema-Uwimana, was born on 22 August 1949 in the Byumba *Préfecture*. He began his university studies in 1968 in Belgium and graduated in 1974. He married in 1975 and has three children.

13. Musema began his career in the Rwandan Ministry of Agriculture & Livestock Breeding. In 1984, by a presidential decree, he was appointed director of a public enterprise, the Gisovu Tea Factory.

14. This tea factory was in production for only a short time before Musema assumed responsibility, which encompassed the *Préfectures* of Kibuye and Gikongoro. By 1993 the tea factory was one of the most successful in Rwanda.

15. Musema was a member of the "*conseil préfectorial*" in Byumba *Préfecture* and a member of the Technical Committee in the Butare *Commune*. Both positions involved socio-economic and developmental matters and did not focus on *préfectorial* politics.

The Applicable Law

16. By his participation in the events described in the Indictment, Musema is alleged to be individually criminally responsible under **Articles 6(1)** and **6(3)** of the Statute.

17. The Chamber, in its Judgement, considers these two sub-Articles.

18. The Chamber recalls the constitutive elements under **Articles 2** and **3** of the Statute. Count 1 charges Musema with *genocide*. The Chamber recalls that the definition found in **Article 2** of the Statute is taken *verbatim* from the 1948 Genocide Convention. The Chamber adheres to the definition of genocide in the *Akayesu* Judgement.

19. In the alternative to Count 1, the Prosecutor, in Count 2, charges Musema with *complicity in genocide*. The Chamber finds that an accused cannot be convicted of both genocide and complicity in genocide for the same act. The Chamber adheres to the definition of complicity in genocide in the *Akayesu* Judgement.

20. Count 3 charges Musema with *conspiracy to commit genocide* under **Article 2(3)(b)** of the Statute. The Chamber defines conspiracy to commit genocide as an agreement between two or more persons to commit genocide.

21. Counts 4 to 7 charge Musema with *crime against humanity* under **Article 3** of the Statute. The Chamber recalls the case law on this crime and discusses the elements required to establish the crime.

22. With respect to crime against humanity, Musema is indicted for *murder*, *extermination*, *rape* and *other inhumane acts*. The Chamber adopts the definitions of murder and extermination articulated in the *Akayesu* and *Rutaganda* Judgements. The Chamber also concurs with the definition of rape, as a crime against humanity, articulated in the *Akayesu* Judgement.

23. Finally, Counts 8 and 9 charge Musema under **Article 4** of the Statute, with *serious violations of Article 3 common to the Geneva Conventions and the Additional Protocol II thereto*. Common Article 3 extends a minimum threshold of humanitarian protection to all persons affected by non-international conflicts.

24. The Chamber holds, *firstly*, that this protection is afforded throughout Rwanda, *secondly*, that the protection afforded extends to all civilians who do not take a direct part in the hostilities and, *thirdly*, that Musema, as a civilian, may be held responsible for serious violations of this kind.

25. The Chamber endorses the principle of *cumulative charges*. Multiple offences may be charged on the basis of the same acts, in order to capture the full text of the crimes committed by an accused. In this regard, the Chamber recalls that in Rwanda a doctrine exists which allows multiple charges for the same act under certain circumstances.

The Defence

26. In the Judgement, the Chamber thoroughly discusses the defences presented by Musema. The Defence put particular emphasis on Musema's alibi, developing it in detail.

27. The Defence argued that the Prosecution did not discharge its burden of proving Musema guilty, that it did not satisfy the Trial Chamber beyond reasonable doubt of Musema's guilt, and that it did not rebut the Defence alibi.

28. In addition, the Defence argued that Musema had no case to answer on Counts 7, 8 and 9 of the Indictment, since the Indictment containing those counts was never served on him.

29. The Chamber finds that Musema does have a case to answer on the Counts 7, 8, and 9, noting that Musema entered pleas of not guilty to these counts, establishing his knowledge and possession of the amended Indictment. Additionally, the presentation of the defence made it clear that the lack of service of the amended indictment did not significantly impede Musema's ability to defend himself.

30. The Defence also argued that Musema's political activity was minimal and that no evidence was presented with respect to his alleged influence, importance or civic authority. It was the Defence's position that Musema was not part of the *interim* government, politically or in any other manner.

31. Finally, the Defence argued against the reliability of the evidence presented by the Prosecution, alleging weaknesses in the investigations which produced the Prosecution evidence, and challenging the reliability of the testimony of Prosecution witnesses.

Factual Findings

32. In *Section 5.1* of the Judgement, the Chamber, in light of the admissions made by Musema, finds that the general allegations set forth in *paragraphs 4.1, 4.2* and *4.3* of the Indictment have been proved. The Chamber thus finds that in 1994 widespread or systematic attacks were directed against civilians on the grounds of ethnic or racial origin. The massacres in 1994 were targeted and directed against the Tutsi civilians not as individuals but as members of the said group. In the days following the crash of the plane transporting Rwandan President Juvénal Habyarimana, Musema witnessed massacres, the destruction of houses and the displacement of people from Kigali, marking the beginning of massacres which he described as constituting genocide.

33. In *Section 5.2* of the Judgement, with respect to the events alleged in *paragraphs 4.4, 4.5, 4.6* and *4.11*, the Chamber first recalls the testimony of Prosecution witnesses relevant to the events as they occurred, in chronological order. If there is a case to answer, the Chamber then, day by day, reviews the alibi presented by Musema, after which its factual findings are presented.

34. With respect to *15 April 1994*, the Chamber notes that the testimony supporting the allegation that Musema was present in the *communes* of Musebeya and Muko at the wheel of a Daihatsu truck transporting individuals armed with spears and machetes is hearsay corroborated by no other witnesses. Consequently this allegation has not been established beyond reasonable doubt.

35. With respect to the events which took place at the Karongi Hill FM Station on *18 April 1994,* although a credible witness was heard, the Chamber finds that Musema's alibi, that he had left Gisovu and was in Rubona and Gitarama at this time, creates doubt in the facts alleged by the Prosecutor. The Chamber thus finds that it has not been proven beyond reasonable doubt that Musema was present at the meeting on Karongi hill on 18 April 1994 or that he participated in an attack on a refugee camp in Gitwa immediately thereafter.

36. It is alleged that on or about *20 April 1994*, Musema transported armed attackers in the vicinity of the Gisovu Tea Factory to the Bisesero region to kill *Inyenzi.* The Chamber finds that the evidence presented is insufficient and that the allegations are therefore not proved.

37. With regard to the events that took place on Gitwa Hill on *26 April 1994*, during which it is alleged that Musema took part in a large scale attack, the Chamber finds, on the evidence presented, that Musema took part in this attack. The Chamber does not accept Musema's alibi that he was in Gitarama at this time.

38. With regard to the alleged attacks at *the end of April and the beginning of May 1994*, the Chamber is not satisfied beyond reasonable doubt that Musema participated in the alleged attacks between 17 and 30 April. However, the Chamber is convinced that on one day between 27 April and 3 May Musema participated in an attack on Rwirambo hill.

39. With respect to the attack alleged to have taken place on *13 May 1994 on Muyira hill*, the Chamber finds that attackers from Gisovu, Gishyita, Gitesi, Cyangugu, Rwamatamu and Kibuye arrived at Muyira hill in an array of vehicles, including Daihatsu vehicles belonging to the Gisovu Tea Factory. Among the attackers were communal policemen, workers from the tea factory wearing their uniforms, *Interahamwe*, prison guards, armed civilians and soldiers. Musema was one of the leaders of the attack. It was estimated that only 10,000 of the 40,000 to 50,000 Tutsi refugees survived the attack. The Chamber finds that the attackers, including Musema, launched the attack with gunfire and shot at refugees.

40. As pertains to the alleged attack of *14 May 1994 on Muyira hill,* the Chamber finds that Musema was one of the leaders of a large scale attack against Tutsis, in which the assailants were armed with firearms, grenades and traditional weapons, singing "Let's exterminate them." However, the Chamber is not convinced that Musema shot at Ntambiye or Iamuremye during this attack.

41. With respect to the two other attacks alleged to have taken place in *mid-May 1994*, the Chamber finds that Musema led attackers from Gisovu, including *Interahamwe*, and factory workers in uniform in an attack against Tutsi refugees on Muyira hill. Musema launched the attack with a gunshot and personally shot at refugees. The Chamber is also convinced that Musema took part in an attack near the middle of May on Mumataba hill and in Birembo, in which the assailants attacked a place of refuge for 2000 to 3000 Tutsis, most of whom were killed.

42. As pertains to Musema's alibi for the period of 7 to 19 May 1994, the Chamber rejects Musema's alibi for 13 and 14 May and the rest of mid-May 1994, as there were a number of inconsistencies and material discrepancies in the evidence presented in support of the alibi.

43. As pertains to the alleged attack at *the end of May 1994* at the Nyakavumu cave, the Chamber finds that Musema participated in an attack on approximately 300 to 400 Tutsis seeking refuge in the cave, by ordering, along with others, that the entrance to the cave be sealed with wood and set on fire. Only one person survived the attack. The Chamber rejects Musema's alibi for this time.

44. With respect to the attack of *31 May 1994* at Biyiniro, the Chamber finds that Musema's alibi and the documents tendered in support thereof, including copies of Musema's passport stamped by Rwandan and Zairean immigration authorities on 31 May 1994, cast doubt on the allegations of the Prosecutor. Therefore the Chamber does not find that Musema participated in the attack on Biyiniro hill on 31 May 1994.

45. With regard to the attack of *5 June 1994* near Muyira Hill, the Chamber finds that the alibi presented by Musema for this period, that he was in Shagasha with his family until 10 June 1994, casts doubt on the allegations of the Prosecutor. As such, the Chamber finds that it has not been proven beyond reasonable doubt that Musema participated in the attack.

46. With regard to the attack at Nyarutovu *cellule* on *22 June 1994*, the Chamber finds that Musema's alibi for this date casts doubt on the allegations of the Prosecutor. Evidence was presented that Musema was in Gisenyi from 22 to 27 June 1994, during which period he also visited Goma, Zaire. As a result, the Chamber finds that it has not been proven beyond reasonable doubt that Musema led or participated in the attack of 22 June 1994.

47. In *Section 5.3* of the Judgement, with respect to the *sexual crimes* with which Musema has been charged, under *paragraphs 4.7, 4.8, 4.9* and *4.10* of the Indictment, the Chamber finds that the allegations that Musema ordered the rape of Tutsi women on Karongi hill on 18 April 1994, are not proved by the evidence presented. The evidence does not prove beyond reasonable doubt that Musema was present at the meeting on 18 April 1994 on Karongi hill.

48. In regard to the alleged *rape and murder of Annunciata Mujawayezu on 14 April 1994*, the Chamber finds that it has been proved beyond reasonable doubt that Musema ordered the rape and the cutting off of her breast to be fed to her son. No evidence was introduced that Musema ordered her to be killed. There is no conclusive evidence that she was raped or that her breast was cut off.

49. With respect to the alleged *rape and murder of Immaculée Mukankuzi on 13 May 1994* by Musema, in concert with others, and the allegations that Musema thereafter ordered others accompanying him to rape and kill Tutsi women seeking refuge from attacks, the Chamber finds unexplained inconsistencies in the testimony presented in support of this allegation. While the Chamber recognizes that it is especially difficult to testify about rape and sexual violence in a public forum, the Chamber must question the accuracy of this evidence. Recalling the high burden of proof on the Prosecutor and the lack of any corroborating evidence, the Chamber cannot find beyond reasonable doubt that these allegations have been proved.

50. With respect to the alleged *rape of a woman called Nyiramusugi on 13 May 1994* by Musema, acting in concert with others, and his alleged encouragement of others to rape and kill her, the Chamber finds that before the attack, Musema ordered a policeman to bring Nyiramusugi to him and that after bringing her to Musema, four youths held her down while Musema raped her. The Chamber accepts that after Musema left, the four took turns raping her and then left her for dead. Concerning Musema's alibi, the Chamber finds that it does not stand with respect to this time period. The Chamber finds that Musema raped Nyiramusugi and by his example encouraged others to rape her. However, there is no evidence that he encouraged them to kill her.

51. In *Section 5.4* of the Judgement, with respect to any *individual criminal responsibility* on the part of Musema, in terms of **Article 6(3)** the Chamber is satisfied beyond reasonable doubt that Musema exercised both *de facto* and *de jure* authority over employees of the Gisovu Tea Factory, and the resources of the tea factory.

52. The Chamber finds it proved beyond a reasonable doubt that at the time of the events alleged in the Indictment, a *de jure* superior-subordinate relationship existed between Musema and the employees of the Gisovu Tea Factory.

53. The Chamber is not satisfied beyond reasonable doubt that Musema exercised *de jure* and *de facto* power over other members of the population of Kibuye *Préfecture*.

Legal Findings

54. In *Section 6.1* of the Judgement, the Chamber reviews its legal findings with respect to Count 1, genocide, and Count 2, complicity in genocide.

55. The Chamber reviews the factual findings regarding whether Musema committed the alleged acts to determine if Musema incurs individual responsibility for those acts. The Chamber then determines whether those acts are constituent elements of genocide or complicity in genocide.

56. The Chamber finds beyond reasonable doubt that Musema participated in an attack on *Gitwa hill on 26 April, on Rwirambo hill between 27 April and 3 May, on Muyira hill on 13 May, 14 May and mid-May, on Mumataba in mid-May,* and at the *end of May at Nyakavumu cave*. The Chamber finds that Musema incurs individual criminal responsibility for these acts under **Article 6(1)** of the Statute for having ordered, and by his presence and participation, aided and abetted in the murder of members of the Tutsi ethnic group and the causing of serious bodily and mental harm to the members of the group.

57. Additionally, the Chamber finds Musema criminally responsible for these acts under **Article 6(3)** of the Statute. The Chamber finds that: (1) employees of the tea factory, over whom Musema had not only *de jure* but also *de facto* control, among others, participated in the above-mentioned attacks and their participation resulted, inevitably, in the commission of acts referred to under **Articles 2** to **4** of the Statute; (2) Musema was present at the attack sites, thus he knew or had reason to know the employees were committing these crimes; and (3) Musema failed to take any measures to prevent or punish the commission of these crimes, rather he abetted in their commission by his presence and, in some cases, his participation.

58. With respect to the allegation of the *rape of Annunciata Mujawayezu*, although it has been proven that Musema ordered the rape, he does not incur individual criminal responsibility for this act because no evidence was adduced to show that a rape took place as a result of the order. Furthermore it has not been shown that Musema ordered the killing of Annunciata Mujawayezu and her son.

59. With respect to the alleged *rape of Nyiramusugi*, the Chamber finds that Musema incurs individual criminal responsibility under **Article 6(1)** for having raped her, for having caused serious bodily and mental harm to a member of the Tutsi group, and for having abetted others to rape by his example. However, the Prosecutor did not establish that the assailants who attacked Nyiramusugi were Musema's subordinates. Thus, the Chamber holds that Musema does not incur individual criminal responsibility as a superior under **Article 6(3)** for the rape.

60. The Chamber then reviews the evidence adduced to determine whether the acts were committed by Musema with genocidal intent. Musema acknowledged that the genocide against the Tutsis took place at the time of the events alleged in the Indictment and at the sites where the acts with which he is charged were committed. The Chamber notes that these acts were committed as part of a widespread and systematic perpetration of other criminal acts against members of the Tutsi group. The Chamber finds that anti-Tutsi slogans made during the attacks, and humiliating utterances made during acts of serious bodily and mental harm, including rape and other forms of sexual violence, demonstrate that the objective of Musema and other attackers was the destruction of the Tutsis.

61. Thus the Chamber finds that, *firstly*, Musema incurs individual criminal responsibility for these acts which are the constituent elements of genocide, *secondly*, Musema committed these acts with the specific intent to destroy the Tutsi group, and *thirdly*, the Tutsi group constitutes a protected group within the meaning of the Genocide Convention and **Article 2** of the Statute. Thus Musema incurs individual criminal responsibility under **Articles 6 (1)** and **6(3)** of the Statute for genocide, punishable under **Article 2(3)(a)** of the Statute.

62. Considering that the Chamber finds that these acts constitute genocide as charged in Count 1, the Chamber does not consider whether these acts constitute complicity in genocide, as charged in Count 2.

63. In *Section 6.2* of the Judgement, the Chamber considers Count 3 of the Indictment, which charges Musema with *conspiracy to commit genocide*, punishable under **Article 2(3)(b)** of the Statute.

64. The Chamber holds that conspiracy to commit genocide is defined as an agreement between two or more persons to commit genocide. The Chamber finds that the Prosecutor neither has alleged, nor has adduced evidence that Musema conspired with others to commit genocide nor that he and such persons reached an agreement to act to that end.

65. Furthermore, the alleged facts on which the Prosecutor based the count of conspiracy to commit genocide are the same as those adduced by the Prosecutor to establish Musema's participation in the commission of genocide, the substantive offence in relation to the conspiracy.

66. Therefore, the Chamber holds that Musema does not incur criminal responsibility for the crime of conspiracy to commit genocide.

67. In *Section 6.*3 of the Judgement, the Chamber considers Count 5 of the Indictment which charges Musema with *crime against humanity (extermination),* pursuant to **Articles 3(b)**, **6(1)** and **6(3)** of the Statute.

68. The Chamber notes that the Defence admitted: that the Tutsi were either a racial or ethnic group; that there were widespread or systematic attacks throughout Rwanda, between January 1 and 31 December 1994; and that these attacks were directed against civilians on the grounds of ethnic affiliation and racial origin. Thus, the Chamber finds that these elements of crime against humanity have been proved.

69. The Chamber finds that Musema had knowledge of a widespread or systematic attack directed against the civilian population in Rwanda in 1994 and that his participation in the events in which he has been found to be involved was consistent with the pattern of this attack and formed part of this attack.

70. The Chamber finds that Musema's conduct in ordering and participating in the attacks on Tutsi civilians who sought refuge on Muyira hill and on Mumataba hill, in aiding and abetting in the aforementioned attacks by providing motor vehicles belonging to the Gisovu Tea Factory for the transport of attackers to Muyira hill and Mumataba hill, and his participation in attacks on Tutsi civilians who sought refuge in the Nyakavumu cave, Gitwa hill and Rwirambo hill, renders Musema individually criminally responsible for crime against humanity (extermination), pursuant to **Articles 3(b)** and **6(1)** of the Statute, with respect to these acts.

71. Additionally the Chamber finds that at the time of the events alleged in the Indictment, Musema exercised *de jure* control over the employees of the Gisovu Tea Factory. The Chamber has found that Musema failed to prevent or punish participation by these employees, or use of the tea factory property, in the attacks. Thus, the Chamber finds that Musema is also individually criminally responsible for crime against humanity (extermination) pursuant to **Article 6(3)** of the Statute for these acts.

72. In *Section 6.*4 of the Judgement, the Chamber considers Count 4 of the Indictment which charges Musema with *crime against humanity (murder)*, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment, pursuant to **Articles 3(a)**, **6(1)** and **6(3)** of the Statute.

73. The Chamber notes that Musema is also charged with crime against humanity (extermination) under Count 5 of the Indictment for the same alleged acts.

74. The Chamber concurs with the reasoning in the *Akayesu* Judgement that it is acceptable to convict an accused of two offences in relation to the same set of facts where: the offences have different elements; the provisions creating the offences protect different interests; or it is necessary to record a conviction for both offences in order to describe fully what the accused did. However the Chamber finds that it cannot convict an accused of two offences in relation to the same facts where one offence is a lesser and included offence of the other.

75. The Chamber finds that Musema cannot be held criminally responsible for both crime against humanity (murder) and crime against humanity (extermination), for the same acts, on the basis that murder and extermination, as crimes against humanity, share the same constituent elements of the offence.

76. The Chamber finds that the killings at Gitwa hill, Muyira hill, Rwirambo hill, Mumataba hill and the Nyakavumu cave represent killings of a collective group of individuals, hence they constitute extermination and not murder. Therefore, Musema is not individually criminally responsible for crime against humanity (murder) in respect of these killings.

77. In *Section 6.5* of the Judgement, the Chamber reviews the allegations of *crime against humanity (other inhumane acts),* pursuant to **Articles 3(i), 6(1)** and **6(3)** of the Statute, as set out in Count 6 of the Indictment. The Chamber finds that the Prosecutor has failed to specify which acts constitute this offence and to prove the relevant allegations beyond reasonable doubt.

78. In *Section 6.6* of the Judgement, the Chamber reviews the allegations of *crime against humanity (rape),* pursuant to **Articles 3(g)**, **6(1)** and **6(3)** of the Statute, as set out in Count 7 of the Indictment.

79. The Chamber has found that on 13 May 1994, Musema raped Nyiramusugi. Based on the finding of Musema's knowledge of a widespread or systematic attack on the civilian population and the finding that his participation was consistent with the pattern of this attack and formed part of the attack, the Chamber finds Musema individually criminally responsible for crime against humanity (rape), pursuant to **Articles 3(g)** and **6(1)** of the Statute. However, the Chamber finds that the Prosecutor has failed to establish beyond reasonable doubt the individual criminal responsibility of Musema pursuant to **Article 6(3)** of the Statute.

80. In *Section 6.7* of the Judgement, with respect to Counts 8 and 9 alleging serious violations of Common Article 3 to the Geneva Conventions and the Additional Protocol II thereto, the Chamber finds that the Prosecutor failed to establish the existence of a nexus between the acts for which Musema is individually criminally responsible under **Articles 6(1)** and **6(3)** and the internal armed conflict. Consequently, the Chamber finds Musema not guilty of serious violations of Common Article 3.

Verdict

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments, THE CHAMBER finds Musema:

Count 1: Guilty of Genocide

Count 2: Not Guilty of Complicity in Genocide

Count 3: Not Guilty of Conspiracy to Commit Genocide

Count 4: Not Guilty of Crime against Humanity (Murder)

Count 5: Guilty of Crime against Humanity (Extermination)

Count 6: Not Guilty of Crime against Humanity (Other Inhumane Acts)

Count 7: Guilty of Crime against Humanity (Rape)

Count 8: Not Guilty of Violation of Common Article 3 to the Geneva Conventions and the Additional Protocol II thereto, Article 4(a) of the Statute

Count 9: Not Guilty of Violation of Common Article 3 to the Geneva Conventions

and the Additional Protocol II thereto, Article 4(e) of the Statute

Sentence

81. Regarding sentencing, the Chamber summarizes the legal provisions relating to sentences and penalties and their enforcement, and discusses the scale of sentences and general principles applicable in the determination of penalties. The Chamber also reviews the submissions of the parties concerning the determination of the sentence.

82. *The Prosecutor* submitted a number of aggravating circumstances to be taken into account.

83. The Prosecutor asked for a separate sentence for each of the counts on which Musema is found guilty in order to fully recognize the severity of each crime and Musema's particular role in its commission. The Prosecutor recommended life imprisonment for each count on which Musema is convicted.

84. *The Defence* submitted that the Prosecutor failed to prove Musema's guilt and that Musema should be found not guilty and released. In the alternative, the Defence submitted certain mitigating circumstances in the event that he is found guilty of any of the alleged crimes.

85. *The Chamber*, with respect to *aggravating circumstances*, considers the following:

(i) The offences of which Musema is guilty are extremely serious, as the Chamber pointed out when it described genocide as the "crime of crimes".

(ii) Musema led attackers who killed a large number of Tutsi refugees in the Bisesero region in mid-May 1994, including on 13 and 14 May 1994. Musema was armed with a rifle and used the weapon during the attacks. He took no steps to prevent the participation of tea factory employees or the use of its vehicles in the attacks. Moreover, Musema raped a young Tutsi woman and by his example encouraged others to rape her.

(iii) Musema did nothing to prevent the commission of the crimes and he took no steps to punish the perpetrators over whom he had control. Musema had the power enabling him to remove, or threaten to remove, an individual from his or her position at the Gisovu Tea Factory if he or she were a perpetrator of crimes punishable under the Statute.

86. With respect to *mitigating circumstances*, the Chamber considered that Musema admitted that a genocide occurred against the Tutsi people in Rwanda in 1994, expressed his distress about the deaths of so many innocent people, paid tribute to all victims of the tragic events in Rwanda and expressed regret that the Gisovu Tea Factory facilities may have been used by the perpetrators of atrocities. Additionally, Musema's co-operation, through his admission of facts, continued during the trial and facilitated expeditious proceedings.

87. Having reviewed all the circumstances of the case, the Chamber *concludes* that the aggravating factors outweigh the mitigating factors, especially as Musema personally led attackers to attack large numbers of Tutsi refugees and raped a young Tutsi woman. He knowingly and consciously participated in the commission of crimes and never showed remorse for his personal role in the commission of the atrocities.

TRIAL CHAMBER I

FOR THE FOREGOING REASONS,

DELIVERING its decision in public, *inter partes* and in the first instance;

PURSUANT to **Articles 22, 23** and **26** of the Statute of the Tribunal and **Rules 101** to **104** of the Rules;

NOTING the general practice regarding prison sentences in Rwanda;

NOTING that Musema has been found guilty of:

Genocide - Count 1,

Crime Against Humanity (extermination) - Count 5, and

Crime Against Humanity (rape) - Count 7;

NOTING the closing briefs submitted by the Prosecutor and the Defence; and

HAVING HEARD the Prosecutor and the Defence;

IN PUNISHMENT OF THE ABOVE-MENTIONED CRIMES,

SENTENCES Alfred Musema to:

A SINGLE SENTENCE OF LIFE IMPRISONMENT

FOR ALL THE COUNTS ON WHICH HE HAS BEEN FOUND GUILTY;

RULES that imprisonment shall be served in a State designated by the President of the Tribunal in consultation with the Trial Chamber, and that the Government of Rwanda and the Government of the designated State shall be notified of such designation by the Registrar;

RULES that this Judgement shall be enforced immediately, and that, however,

(i) Until his transfer to the designated place of imprisonment, Musema shall be kept in detention under the present conditions;

(ii) Upon notice of appeal, if any, the enforcement of the sentence shall be stayed until a decision has been rendered on the appeal, with the convicted person nevertheless remaining in detention.

88. The Judgement was signed in Arusha, on the 27th day of January 2000, by the three Judges.

89. Judge Aspegren and Judge Pillay attach their separate opinions to the Judgement.

Separate Opinion of Judge Aspegren

90. In a separate opinion, Judge Aspegren expresses his dissent from the majority concerning certain events during 1994 in respect of which he remains unconvinced that Musema participated, as alleged.

91. Judge Aspegren concurs with all the Chamber's factual findings except those made in *Section 5.2* of the Judgement with regard to the alleged events of 26 April at Gitwa hill, 27 April to 3 May at Rwirambo hill, and the end of May at Nyakavumu cave, and the findings made in *Section 5.3* with regard to the alleged events of 14 April 1994. Judge Aspegren remains unconvinced that it has been established beyond reasonable doubt that Musema participated in the events as alleged.

92. With respect to *26 April 1994, Gitwa hill*, Judge Aspegren finds that Musema's alibi casts reasonable doubt on the allegation that Musema was involved in this attack.

93. In respect of *27 April to 3 May 1994, Rwirambo hill*, Judge Aspegren finds that the evidence that the Prosecutor presented to show that Musema participated in the attack is unreliable due to material contradictions in the testimony of the sole witness. Judge Aspegren finds these contradictions to be serious enough to cast doubt on its credibility. Thus he finds that it has not been established beyond reasonable doubt that Musema participated in the alleged attack on Rwirambo hill.

94. With respect to the alleged attack at *the end of May 1994 at Nyakavumu cave*, Judge Aspegren finds that doubt prevails in the matter as it cannot be adduced from the evidence when the attack occurred. Moreover, an inability to specify the date of the attack does not allow Musema to fully answer the relevant charges against him. Therefore Judge Aspegren finds that Musema's participation in the attack is not proved beyond reasonable doubt.

95. With respect to the alleged *rape of Annunciata Mujawayezu*, Judge Aspegren is not convinced beyond reasonable doubt that Musema ordered or encouraged the rape.

96. Regarding the legal findings (Section 6 of the Judgement), Judge Aspegren, concurs to the extent that they pertain to acts other than these events. Being overruled concerning Musema's ordering of the rape, he joins the majority in its legal finding that the order, as such, is not punishable.

97. Judge Aspegren agrees with the majority's findings of guilt to the extent that they pertain to the acts other than those above. Being partially overruled as to the factual and legal findings, he concurs with the verdict (Section 7) and the sentence (Section 8).

Separate Opinion of Judge Pillay

98. In her separate opinion, Judge Pillay expresses her dissent from the majority solely with respect to a number of factual findings in Sections 5.2 and 5.3 of the Judgement.

99. With respect to the *alibi* presented by Musema, Judge Pillay assesses the evidence presented in support of the alibi as a whole, rather than day by day. Judge Pillay reviews the evidence given by the Prosecution witnesses and the evidence presented by the Defence and evaluates its credibility, as well as the credibility of the alibi, generally. Musema denied his presence at the alleged attacks. A number of documents were tendered in support of this position, along with the testimony of Musema, and other witnesses, which Judge Pillay does not find persuasive. She notes numerous inconsistencies between Musema's evidence at trial and evidence he gave prior to trial. Judge Pillay notes that the testimony of Musema's wife does not specifically corroborate his account of his whereabouts. Finally she questions the probative value, and in some cases, the authenticity, of documents produced in support of the alibi. In light of the evidence presented by the Prosecutor with respect to Musema's whereabouts, she rejects Musema's alibi.

100. With respect to *18 April, Karongi hill*, Judge Pillay finds that Musema's alibi does not stand, and thus she finds that it has been proved beyond reasonable doubt that Musema took part in the meeting and the attack, at which he encouraged the rape of Tutsi women, as alleged. Judge Pillay holds that these findings should be considered as cumulative evidence when assessing culpability for genocide and crime against humanity (extermination and rape).

101. With respect to *31 May, Biyiniro hill*, *5 June near Muyira hill* and *22 June at Nyarutovu cellule,* Judge Pillay concurs with the findings of the majority, but for different reasons. She finds reasonable doubt in the evidence presented by the Prosecutor but this doubt has not been created by the defence of alibi.

102. On all other issues in the Judgement, including the verdict and sentence, Judge Pillay is in agreement with the majority.

International Criminal Court

Prosecutor *v.* Thomas Lubanga Dyilo
Judgment pursuant to Article 74 of the Statute
(summary)

Trial Chamber I, 14 March 2012

Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-01/06**
Date: **14 March 2012**

TRIAL CHAMBER I

Before: **Judge Adrian Fulford, Presiding Judge**
Judge Elizabeth Odio Benito
Judge René Blattmann

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SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF THE PROSECUTOR v .THOMAS LUBANGA DYILO

Public

Summary of the "Judgment pursuant to Article 74 of the Statute"

Decision/Order/Judgment to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence
Ms Catherine Mabille
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims
Mr Luc Walleyn
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Paul Kabongo Tshibangu

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massida

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of *Prosecutor v. Thomas Lubanga Dyilo* ("*Lubanga* case"), issues the following Summary of the "Judgment pursuant to Article 74 of the Statute":

A. Introduction

1. This is the summary of the Chamber's Judgment under Article 74 of the Rome Statute as to whether the Prosecutor has proved the guilt of the accused.

B. Charges against the accused

2. On 29 January 2007 the Pre-Trial Chamber issued its Decision on the Confirmation of Charges. The Pre-Trial Chamber confirmed that there was sufficient evidence to establish substantial grounds to believe that:

> Thomas Lubanga Dyilo is responsible, as co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(3)(a) of the Statute from early September 2002 to 2 June 2003.

Additionally, the Pre-Trial Chamber confirmed that there was sufficient evidence to establish substantial grounds to believe that:

> Thomas Lubanga Dyilo is responsible, as co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute from 2 June to 13 August 2003.

C. Jurisdiction

3. Pursuant to Article 19 of the Statute, the "Court shall satisfy itself that it has jurisdiction in any case brought before it." The Democratic Republic

of the Congo ("DRC") became a State party on 11 April 2002 and, pursuant to Article 14 of the Statute, President Kabila referred the situation in the DRC to the Prosecutor in March 2004. Pre-Trial Chamber I concluded that the case falls within the Court's jurisdiction, and the Appeals Chamber confirmed the Pre-Trial Chamber's Decision on the accused's challenge to the jurisdiction of the Court. The personal, temporal, territorial and subject-matter elements that are relevant to the Court's jurisdiction have not altered since the Decision on the Confirmation of the Charges, and the issue has not been raised by the parties or any State before the Trial Chamber.

D. Brief case history

4. The first status conference before the Trial Chamber was held on 4 September 2007, and thereafter there were 54 status conferences prior to the commencement of the trial. The following is a summary of the main procedural events which had a significant impact on the course of the proceedings.

5. The trial was stayed twice as a consequence of disclosure issues. The first stay was imposed by the Chamber on 13 June 2008, and it was lifted on 18 November 2008. A second stay was imposed on 8 July 2010. The presentation of evidence resumed on 25 October 2010.

6. The parties and the legal representatives of victims made their opening statements on 26 and 27 January 2009. The prosecution called its first witness on 28 January 2009. The prosecution's oral evidence concluded on 14 July 2009.

7. On 3 September 2009, the Chamber adjourned the presentation of evidence pending an interlocutory appeal. The Appeals Chamber issued its judgment on the matter on 8 December 2009 and the evidence resumed on 7 January 2010.

8. The defence presented a bifurcated case. In the first part the defence in essence called into question the testimony of all the prosecution's child soldier witnesses, a process that included the presentation of rebuttal witnesses by the prosecution. On 10 December 2010, the defence filed an application seeking a permanent stay of the proceedings. The Chamber issued a Decision dismissing the defence application on 23 February 2011.

9. The second part of the defence evidence was introduced thereafter and on 20 May 2011 the presentation of evidence formally closed.

10. The Trial Chamber heard 67 witnesses, and there were 204 days of hearings. The prosecution called 36 witnesses, including 3 experts, and the defence called 24 witnesses. Three victims were called as witnesses following a request from their legal representatives. Additionally, the Chamber called four experts. The prosecution submitted 368 items of evidence, the defence 992, and the legal representatives 13 (1373 in total). In addition to the written submissions, the oral closing arguments of the parties and participants were heard on 25 and 26 August 2011. Since 6 June 2007, when the record of the case was transmitted to the Trial

Chamber, the Chamber has delivered 275 written decisions and orders and 347 oral decisions.

11. In accordance with Article 68(3) of the Statute, victims have participated in the case, and in particular they have applied to introduce evidence, they have questioned witnesses and they have advanced written and oral submissions with the leave of the Chamber and with the assistance of their legal representatives. The total number of individual victims authorised to participate in the proceedings is 129 (34 female and 95 male victims).

12. At the request of the accused and in accordance with Article 76(2) of the Statute, the Chamber in an oral Decision ruled that there would be a separate sentencing hearing if the accused is convicted.

E. Factual overview

13. The Trial Chamber heard the testimony of several expert witnesses and it reviewed documentary evidence that relates to the existence of an inter-ethnic conflict in Ituri between 1999 and 2003.

14. Against this background, the Union des Patriotes Congolais ("UPC") was created on 15 September 2000. Although Thomas Lubanga was one of the UPC's founding members and its President from the outset, the nature of the group when it was created is a matter of dispute in this case. These topics are analysed in greater detail below when the

Chamber deals with the individual criminal responsibility of the accused.

15. The UPC and its military wing, the *Force Patriotique pour la Libération du Congo* ("FPLC"), took power in Ituri in September 2002.

F. The Burden and Standard of Proof

16. Under Article 66 of the Statute, the accused is presumed to be innocent until the Prosecutor has proved his guilt. For a conviction, each element of the crime charged must be established "beyond reasonable doubt".

G. Intermediaries

17. An issue that occupied the Chamber for a significant part of this trial concerned the use by the prosecution of local intermediaries in the DRC. The Chamber is of the view that the prosecution should not have delegated its investigative responsibilities to the intermediaries as analysed in the judgment, notwithstanding the extensive security difficulties that it faced. A series of witnesses have been called during this trial whose evidence, as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on.

18. The Chamber spent a considerable period of time investigating the circumstances of a substantial number of individuals whose evidence was, at least in part, inaccurate or dishonest. The prosecution's negligence in failing to verify and scrutinise this material sufficiently before it was introduced led to significant expenditure on the part of the

Court. An additional consequence of the lack of proper oversight of the intermediaries is that they were potentially able to take advantage of the witnesses they contacted. Irrespective of the Chamber's conclusions regarding the credibility and reliability of the alleged former child soldier witnesses, given their youth and likely exposure to conflict, they were vulnerable to manipulation.

19. The Chamber has withdrawn the right of six dual status witnesses to participate in the proceedings, as a result of the Chamber's conclusions as to the reliability and accuracy of these witnesses.

20. Likewise, the Chamber has not relied on the testimony of the three victims who testified in Court (a/0225/06, a/0229/06, and a/0270/07), because their accounts are unreliable. Given the material doubts that exist as to the identities of two of these individuals, which inevitably affect the evidence of the third, the Chamber decided to withdraw the permission originally granted to them to participate as victims.

21. The Chamber has concluded that there is a risk that intermediaries P-0143, P-316 and P-321 persuaded, encouraged, or assisted witnesses to give false evidence. These individuals may have committed crimes under Article 70 of the Statute. Pursuant to Rule 165 of the Rules, the responsibility to initiate and conduct investigations in these circumstances lies with the prosecution. Investigations can be initiated on the basis of information communicated by a Chamber or any reliable source. The Chamber communicates the relevant information to the

OTP, and the Prosecutor should ensure that the risk of a conflict of interest is avoided for the purposes of any investigation.

H. Armed conflict and its nature

22. Although the Pre-Trial Chamber in its Confirmation of Charges Decision determined that for part of the relevant period the conflict was international in character, the Chamber concludes that the UPC/FPLC, as an organised armed group, was involved in an internal armed conflict against the Armée Populaire Congolaise ("APC") and other Lendu militias, including the *Force de Résistance Patriotique en Ituri* ("FRPI"), between September 2002 and 13 August 2003. Accordingly, applying Regulation 55 of the Regulations of the Court, the Chamber has changed the legal characterisation of the facts to the extent that the armed conflict relevant to the charges was non-international in character.

I. Legal definition of conscription, enlistment and use

23. The charges against the accused include three distinct criminal acts. The Chamber has concluded that the crimes of conscription and enlistment are committed at the moment a child under the age of 15 is enrolled into or joins an armed force or group, with or without compulsion. These offences are continuous in nature. They end only when the child reaches 15 years of age or leaves the force or group.

24. As regards the offence of using children under the age of 15 to participate actively in hostilities, the Chamber has concluded that this includes a wide range of activities, from those children on the front line

(who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an "indirect" role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. In the judgment of the Chamber these combined factors – the child's support and this level of consequential risk – mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them.

J. The facts relating to the conscription and enlistment of children under the age of 15 and using them to participate actively in the hostilities

25. It is alleged that the accused, jointly with others, conscripted and enlisted children under the age of 15 years into the armed group of the UPC/FPLC and that he used them to participate actively in hostilities between 1 September 2002 and 13 August 2003.

26. The Chamber has concluded that the UPC/FPLC was an armed group.

27. The Chamber finds that between 1 September 2002 and 13 August 2003, the armed wing of the UPC/FPLC was responsible for the widespread recruitment of young people, including children under the age of 15, on an enforced as well as a "voluntary" basis.

28. Multiple witnesses testified credibly and reliably that children under 15 were "voluntarily" or forcibly recruited into the UPC/FPLC and sent to either the headquarters of the UPC/FPLC in Bunia or its military training camps, including at Rwampara, Mandro, and Mongbwalu. Video evidence clearly shows recruits under the age of 15 in the Rwampara camp.

29. The evidence demonstrates that children in the military camps endured harsh training regimes and were subjected to a variety of severe punishments. The evidence also establishes that children, mainly girls, were used by UPC/FPLC commanders to carry out domestic work. The Trial Chamber heard evidence from witnesses that girl soldiers were subjected to sexual violence and rape. Witnesses specifically referred to girls under the age of 15 who were subjected to sexual violence by UPC/FPLC commanders. Sexual violence does not form part of the charges against the accused, and the Chamber has not made any findings of fact on the issue, particularly as to whether responsibility is to be attributed to the accused.

30. The evidence has established beyond reasonable doubt that children under the age of 15 were conscripted and enlisted into the UPC/FPLC forces between 1 September 2002 and 13 August 2003.

31. The testimony of multiple witnesses and the documentary evidence have demonstrated that children under the age of 15 were within the ranks of the UPC/FPLC between 1 September 2002 and 13 August 2003. The evidence proves that children were deployed as soldiers in Bunia,

Tchomia, Kasenyi, Bogoro and elsewhere, and they took part in fighting, including at Kobu, Songolo and Mongbwalu. It has been established that the UPC/FPLC used children under the age of 15 as military guards. The evidence reveals that a special "Kadogo Unit" was formed, which was comprised principally of children under the age of 15. The evidence of various witnesses, as well as video footage, demonstrates that commanders in the UPC/FPLC frequently used children under the age of 15 as bodyguards. The accounts of several witnesses, along with the video evidence, clearly prove that children under the age of 15 acted as bodyguards or served within the presidential guard of Mr Lubanga.

32. In all the circumstances, the evidence has established beyond reasonable doubt that children under the age of 15 were used by the UPC/FPLC to participate actively in hostilities between 1 September 2002 and 13 August 2003.

K. Legal analysis of Articles 25(3)(a) and 30 of the Statute

33. The Chamber has concluded that pursuant to Articles 25(3)(a) and 30 of the Statute, the prosecution must prove in relation to each charge that:

(i) there was an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, will result in the commission of the relevant crime in the ordinary course of events;

(ii) the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime;

(iii) the accused meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or he was aware that

by implementing the common plan these consequences "will occur in the ordinary course of events";

(iv) the accused was aware that he provided an essential contribution to the implementation of the common plan; and

(v) the accused was aware of the factual circumstances that established the existence of an armed conflict and the link between these circumstances and his conduct.

L. The facts relating to the individual criminal responsibility of Mr Thomas Lubanga

34. The evidence has confirmed that the accused and his co-perpetrators agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. In the ordinary course of events, this resulted in the conscription and enlistment of boys and girls under the age of 15, and their use to participate actively in hostilities.

35. The Chamber has concluded that from late 2000 onwards Thomas Lubanga acted with his co-perpetrators, who included Floribert Kisembo, Bosco Ntaganda, Chief Kahwa, and commanders Tchaligonza, Bagonza and Kasangaki. Mr Lubanga's involvement with the soldiers (including young children) who were sent to Uganda for training is of significance. Although these events fall outside the period covered by the charges and are outwith the temporal jurisdiction of the Court, they provide evidence on the activities of this group, and they help establish the existence of the common plan before and throughout the period of the charges.

36. The accused was in conflict with Mr Mbusa Nyamwisi and the *Rassemblement Congolais pour la Démocratie - Mouvement de Libération* ("RCD-ML") from at least April 2002, and he led a group that sought to bring about political change in Ituri, including the removal of Mr Mbusa Nyamwisi by force, if necessary. The accused remained in control, by delegated authority, whilst he was detained during the summer of 2002 and he sent Chief Kahwa and Mr Beiza to Rwanda to obtain arms. During that period, Floribert Kisembo, Bosco Ntaganda and Chief Kahwa, three of the accused's principal alleged co-perpetrators, were generally responsible for recruitment and training, which included girls and boys under the age of 15.

37. The accused and at least some of his co-perpetrators were involved in the takeover of Bunia in August 2002. Thomas Lubanga, as the highest authority within the UPC/FPLC, appointed Chief Kahwa, Floribert Kisembo and Bosco Ntaganda to senior positions within the UPC/FPLC. The evidence has established that during this period, the leaders of the UPC/FPLC, including Chief Kahwa, and Bosco Ntaganda, and Hema elders such as Eloy Mafuta, were active in mobilisation drives and recruitment campaigns in order to persuade Hema families to send their children to join the UPC/FPLC. Those children recruited before the formal creation of the FPLC were incorporated into that group and a number of military training camps were added to the original facility at Mandro. The Chamber has concluded that between 1 September 2002 and 13 August 2003, a significant number of high-ranking members of the UPC/FPLC and other personnel conducted a large-scale recruitment

exercise directed at young people, including children under the age of 15, on both voluntary and coercive bases.

38. The Chamber is satisfied beyond reasonable doubt that as a result of the implementation of the common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri, boys and girls under the age of 15 were conscripted and enlisted into the UPC/FPLC between 1 September 2002 and 13 August 2003. Similarly, the Chamber is satisfied beyond reasonable doubt that the UPC/FPLC used children under the age of 15 to participate actively in hostilities including during battles. They were used, during the relevant period, as soldiers and as bodyguards for senior officials including the accused.

39. Thomas Lubanga was the President of the UPC/FPLC, and the evidence demonstrates that he was simultaneously the Commander-in-Chief of the army and its political leader. He exercised an overall coordinating role as regards the activities of the UPC/FPLC. He was informed, on a substantive and continuous basis, of the operations of the FPLC. He was involved in the planning of military operations, and he played a critical role in providing logistical support, including providing weapons, ammunition, food, uniforms, military rations and other general supplies to the FPLC troops. He was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits. In his speech at the Rwampara military camp, he encouraged children including those under the age of 15 years, to join the army and to provide security for the populace once deployed in the field after their

military training. Furthermore, he personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC staff members who were below the age of 15. The Chamber has concluded that these contributions by Thomas Lubanga, taken together, were essential to a common plan that resulted in the conscription and enlistment of girls and boys below the age of 15 into the UPC/FPLC and their use to actively participate in hostilities.

40. The Chamber is satisfied beyond reasonable doubt, as set out above, that Thomas Lubanga acted with the intent and knowledge necessary to establish the charges (the mental element required by Article 30). He was aware of the factual circumstances that established the existence of the armed conflict. Furthermore, he was aware of the nexus between the said circumstances and his own conduct, which resulted in the conscription, enlistment and use of children below the age of 15 to participate actively in hostilities.

M. Conclusion of the Chamber

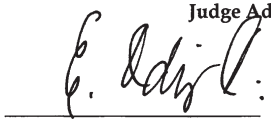
41. Although Judges Odio Benito and Fulford have written separate and dissenting opinions on particular discrete issues, the Chamber has reached its decision unanimously.

42. The Chamber concludes that the prosecution has proved beyond reasonable doubt that Mr Thomas Lubanga Dyilo is guilty of the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the

meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute from early September 2002 to 13 August 2003.

Done in both English and French, the English version being authoritative.

Judge Adrian Fulford



Judge Elizabeth Odio Benito

Judge René Blattmann

Dated this 14 March 2012

At The Hague, The Netherlands