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PREFACE

Dr. José Miguel Insulza

Secretary General of the Organization of American States

Human rights and fundamental freedoms must be respected at all times, in particular during armed conflicts. Promoting and ensuring respect for international humanitarian law – a branch of law designed to avert and limit human suffering in times of conflict – is therefore a priority for the Organization of American States (OAS), as demonstrated by the many relevant resolutions that have been successively adopted by the OAS General Assembly for well over a decade.

Cooperation with the International Committee of the Red Cross (ICRC), which has received a mandate from the international community to promote and serve as the guardian of international humanitarian law, is key to ensuring full compliance with the norms designed to safeguard the life and dignity of victims of war and other forms of violence. An initial introductory course on this topic has now been organized by the Office of International Law of the OAS together with the ICRC, sealing the excellent relations between the two organizations.

The course, held on the margins of the meeting of the Committee on Juridical and Political Affairs of the OAS on 31 January 2007, was attended by staff from the permanent missions of OAS member States and from the Office of the Secretary General as well as by various experts. Its purpose was to raise awareness of and respect for international humanitarian law among persons who may be called on, by virtue of their activities, to apply its norms and principles.

This publication, issued by the Office of International Law of the OAS, is a compilation of all the papers presented at the course. It should prove useful as a basis for future courses on the topic and as background material for anyone, within the OAS or elsewhere, who is interested in issues relating to international humanitarian law. The publication also includes the full text of the major international humanitarian law treaties.

We are grateful to the ICRC for the invaluable role that it played in helping to produce this publication and we look forward to undertaking further joint projects, such as a second course on international humanitarian law, that will serve to advance our common goals[*].

[*] *Editor's note:* A second course on International Humanitarian Law took place on January 24, 2008, while the English version of this publication was being prepared.

Dr. Jakob Kellenberger

President of the International Committee of the Red Cross

Armed conflicts have never been a simple matter and humanitarian endeavour has always had to face important challenges. To alleviate, or whenever possible to prevent, human suffering as a consequence of armed conflicts is at the heart of the mandate of the International Committee of the Red Cross (ICRC). This requires being close to those in need. It also supposes being understood and accepted by all actors involved in armed conflicts and other situations of violence -- something that does not come by itself in times when the legitimacy of neutral and independent humanitarian action is questioned, or falls prey to instrumentalization by those who wield power.

Ensuring respect for international humanitarian law in armed conflicts calls for informed decision-making based on knowledge of the rules. The ICRC is therefore pleased to join the Organization of American States (OAS) in the publication of presentations delivered by expert lecturers during the first introductory course on international humanitarian law for diplomats and staff of this preeminent regional body. This publication marks a significant occasion in the longstanding collaboration between both organizations in the promotion of humanitarian law. The occasion also serves to reaffirm a dedicated commitment to contribute to the protection of the lives and dignity of peoples of the Americas.

The ICRC acknowledges the importance that international humanitarian law has acquired for the inter-American system, as evidenced by references to these rules in numerous declarations and resolutions this regional body has adopted, especially in the last fifteen years. The process of drafting, negotiating, promoting and/or implementing the content of these OAS instruments requires that diplomats and staff have a good understanding of this body of law. In turn, through their knowledge and daily actions, OAS diplomats and staff contribute to uphold and disseminate a better respect of the law.

To conclude, I would like to express our sincere appreciation to the leadership and members of the Committee on Juridical and Political Affairs of the Permanent Council of the OAS, and of the OAS Department of International Legal Affairs. Their work has inspired and guided this first introductory course as a way to address the challenge of ensuring respect for international humanitarian law. It is a challenge that we must take up if this body of law is to continue to afford the vital protection needed by victims of armed conflict.

I. INTRODUCTORY REMARKS

Ambassador Osmar Chohfi

Chair of the Committee on Juridical and Political Affairs, Organization of American States (OAS)

Permanent Representative of Brazil to the OAS

Welcome to this introductory course on international humanitarian law organized by the Committee on Juridical and Political Affairs (CAJP).

As you all know, the protection and promotion of international humanitarian law is one of the fundamental pillars of the work of the OAS and the CAJP, which strive constantly to promote and ensure respect for the Geneva Conventions of 1949 and their Additional Protocols in all circumstances.

The OAS receives the unconditional support of the International Committee of the Red Cross in its work. Examples of this support include the organization of this course on international humanitarian law and the Special Session of the CAJP on current issues in international humanitarian law.

I would therefore like to express my personal gratitude to the International Committee of the Red Cross and the Office of International Law for all their hard work organizing this event over the past few months.

As chairman of the CAJP, I would like to stress how important all the educational activities organized for the staff of the Permanent Missions and the General Secretariat are in carrying out our work and improving our performance.

I would also like to thank the speakers who will be teaching the course classes – all of them renowned experts in international humanitarian law – some of whom have travelled a long way to be with us today: Professor Ximena Medellín, Professor Elizabeth Santalla Vargas, Dr. Danilo González, Captain Walter Rivera Alemán and Dr. Romaric Ferraro. They have the difficult task of covering a broad and complex subject in just a few hours, but we are confident that their expertise and knowledge of the subject will be of great value to us all.

Lastly, I would like to welcome and thank you all, the real protagonists of this event. As members of the Permanent Missions and staff of the General Secretariat of the OAS, our day-to-day work involves important aspects of the promotion and protection of international humanitarian law. I congratulate you on your commitment and for being here today to acquire new inputs and knowledge.

Mr. Yves Petermann

Head of the Humanitarian Diplomacy Unit
International Committee of the Red Cross

My sincere and warm thanks to Ambassador Osmar Chohfi and the Committee of Juridical and Political Affairs of the Permanent Council of the Organization of American States (OAS) for supporting the organization of this introductory course on international humanitarian law; and to all who helped prepare and hold this course, particularly Dr. Jean-Michel Arrighi, Dr. Dante Negro, and Dr. John Wilson of the OAS Department of International Legal Affairs, the expert instructors, and my colleagues of the International Committee of the Red Cross (ICRC).

As the guardian of international humanitarian law, the ICRC has a long tradition of teaching and promoting this body of legal norms. Such dissemination activities are an integral part of the ICRC's permanent priorities. The ICRC seeks thereby to create a favorable global environment for the respect of international humanitarian law, and in turn, for the respect and protection of victims of armed conflict and other situations of violence.

Noteworthy are two fundamental principles of international humanitarian law that come to my mind.

First is the responsibility of all states to abide by the Geneva Conventions, together with the responsibility of a majority of states that have ratified the Additional Protocols to uphold them. Essentially, it is the responsibility of states not only to transform international humanitarian law into national law applicable to situations covered by this body of law, but moreover to make sure that this body of law is fully respected and implemented, whenever applicable. In this regard, both the OAS and the ICRC are available to assist member states of the Americas.

Second is the principle of protection that requires states to respond by offering protection and relief to victims, and to ensure that such assistance is effective. Regardless of the evolution of modern warfare, people continue to suffer during armed conflict and other situations of violence, and to need protection. States are obliged to respond to human suffering, upholding the principle of protecting victims.

As we consider the norms, laws, articles, principles, and paragraphs on the pages of the instruments that together constitute international humanitarian law, let us not forget that beyond the printed words are the victims who suffer and require protection.

It is a pleasure to inaugurate the first international humanitarian law course at and for the OAS. The OAS plays a key role in the promotion of international humanitarian law and in the support that it offers in such a role to member states in the inter-American system. In this endeavor, the ICRC is pleased to join the OAS, as it does together with the United Nations and other organizations, to promote the teaching of international humanitarian law. This event also marks the shared desire of both organizations to strengthen and support their collaboration.

It is important for both of our organizations to ensure that courses in international humanitarian law meet the needs of participants. The ICRC hopes that this introductory course will meet your needs and that future ones will selectively delve into topics covered in this first course for the OAS.

Thank you very much.

Dr. Jean-Michel Arrighi

Director, Department of International Legal Affairs, General Secretariat, OAS

Thank you Mr. Chairman, thank you Mr. Petermann for your remarks. Dear representatives and colleagues from the General Secretariat:

One always feels apprehensive about organizing an event such as this, a course on law in a setting other than a law faculty. Although law faculties in all our countries tend to be overcrowded, law courses organized outside the university environment are not usually very well attended. It is therefore very encouraging to see such a high level of attendance by OAS delegates and staff at this event, carried out by the General Secretariat, through the Office of International Law.

In the first place, this shows the importance of the chosen subject and the degree of interest in it. Second, I think it also shows that delegates and staff are keen to acquire a better understanding of the instruments of international law by which we are governed. I was saying just the other day that we must not forget that the Charter of the OAS establishes that international law is the standard of conduct that governs our States, which means that the first step towards complying with the Charter is to respect international law, and in order to achieve this, we must first know and understand it.

This event paves the way for a series of courses that we could organize in the future on international law issues in this milieu and further strengthens the cooperation that has existed in recent years between the General Secretariat and the International Committee of the Red Cross in carrying out dissemination activities. We have already worked together on a number of events, for example, Red Cross staff participated in the Rio course and various seminars were held with the CAJP. This, however, represents a new approach, and its success shows that there is an interest in this kind of event and that we must continue to carry out activities to disseminate Inter-American law within the OAS.

Therefore, on behalf of the General Secretariat, I welcome you all and hope that your work here today will be fruitful. I also hope that this will be the first in a series of similar dissemination activities carried out within the OAS.

Dr. Dante M. Negro

Director, Office of International Law, Department of International Legal Affairs, Organization of American States

Ambassador Osmar Chohfi, Permanent Representative of Brazil to the Organization of American States (OAS) and Chair of the Committee on Juridical and Political Affairs of the Permanent Council of the OAS; Mr. Yves Petermann, Director of Humanitarian Diplomacy at the International Committee of the Red Cross (ICRC); the representatives of the Permanent Missions of the OAS Member States who honour us with their presence here today; distinguished speakers and guests; ladies and gentlemen of the OAS General Secretariat:

It is an honour for me to participate in the opening of this first Introductory Course on International Humanitarian Law. I would like express my special thanks to the International Committee of the Red Cross which, in conjunction with the Office of International Law of the Department of International Legal Affairs of the OAS and with the valuable support of the Chairman of the Committee on Juridical and Political Affairs, Ambassador Osmar Chohfi, carried out the coordination and preparatory work that have made this event possible. I would also like to thank the speakers, all renowned experts in the field of international humanitarian law, for coming to talk to us today.

This course has been organized in fulfilment of resolution AG/RES.2226 (XXXVI-O/06) of the General Assembly of the OAS, held in Santo Domingo in June of last year, which called on the General Secretariat to organize courses and seminars for the staff of the Permanent Missions of the OAS Member States and the General Secretariat, through the Office of International Law and in coordination with the ICRC, with a view to disseminating and strengthening the implementation of international humanitarian law and related Inter-American conventions.

Such an undertaking is not new to the Office of International Law, this event being just one of many that it organizes to promote and disseminate public and private international law, with a special emphasis on Inter-American law. One example is the Course on International Law that has been held every year in August in the city of Rio de Janeiro for the past 33 years. The ICRC has been closely involved in this course in recent years, with the participation of important speakers from the organization. Over one thousand five hundred students of different ages, many of them officials from the Permanent Missions represented here today, have benefited from the course. This and many other activities, such as the Workshops on International Law, which for the past seven years have brought together experts who teach international law to exchange academic experiences; a course on the Inter-American System aimed at diplomatic academies and other training centres for public officials; the dissemination of the Organization's law agenda through electronic media and legal publications; and the regular updating of the database on Inter-American treaties and bilateral cooperation agreements for which the Office of International Law is the depositary and which is freely available on its website, are carried out in implementation of the Inter-American Programme for the Development of

International Law adopted at the OAS General Assembly held in Lima, Peru, in 1997. The purpose of this programme is to develop, promote and implement international law, particularly that of the Inter-American system.

It is a great satisfaction to see that this new event that we have added to our activities has been favourably received by the Permanent Missions and the staff of the General Secretariat. This is a powerful incentive for us to continue working to organize new events for the benefit of all, not only in the area of international humanitarian law, in which we can count, I am sure, on the ICRC's close collaboration in the long term, but also in other areas where we could work in conjunction with the Permanent Missions to address their needs and priorities. We are, as always, at your service. On the occasion of the Declaration on the Decade of the Americas for the Rights and Dignity of Persons with Disabilities, for example, it would be fitting to propose the idea of a course on this subject, with a focus on technical and legal aspects, as well as development and inclusion issues, in order to promote a deeper understanding of these matters in the OAS. Other areas that we have been exploring, which could be the subject of future courses, include consumer protection, access to public information and migrant workers. It is worth noting that the purpose of these courses, in addition to promoting priority legal issues on the OAS agenda, is to create a greater awareness among us all, as individuals, of our responsibility as actors and promoters in our specific capacities (government representatives, staff of the General Secretariat, civil society) in the development of law in the Americas, contributing in this way to the greater wellbeing of the societies of our continent.

Article 3 of the Charter of the OAS, our system's founding document, establishes that international law is the standard of conduct of States in their reciprocal relations and that international order consists essentially of the faithful fulfilment of obligations derived from treaties and other sources of international law. The task of making international law an effective tool in building this international order does not stop with its creation, it must also be implemented, and for it to be implemented, it must be known and understood. The Office of International Law therefore works tirelessly to spread knowledge of this body of law, and no more so than in the area that concerns us here today; the countries of the Americas have always been strongly committed to promoting respect for international humanitarian law within the regional framework. Proof of this are the successive resolutions adopted by the OAS General Assembly since 1994 to encourage its member States to continue developing the means to better implement the rules of international humanitarian law.

I would like to reiterate our thanks to the Chairman of the Committee on Juridical and Political Affairs and all the delegations for promoting events such as these and making them available to the staff of the General Secretariat. For their steadfast commitment to the region, we thank Mr. Yves Petermann, Director of Humanitarian Diplomacy at the ICRC, and all the Red Cross staff who have worked so hard to organize this event. We must continue working together to find the best ways of developing even closer links among the General Secretariat, our office and the ICRC, with a view to promoting international law in general and international humanitarian law in particular. We have many challenges and tasks ahead, and I am sure that today's course and the special sessions to be held over

the next few days on the same subject and the subject of the International Criminal Court will provide a valuable insight, so that the proposals brought by the States to the General Assembly will benefit international law and international relations.

II. DOCTRINE

INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW*

I. International humanitarian law

International humanitarian law forms a major part of public international law and comprises the rules which, in times of armed conflict, seek to protect people who are not or are no longer taking part in the hostilities, and to restrict the methods and means of warfare employed. More precisely, what the ICRC means by international humanitarian law applicable in armed conflicts is international treaty or customary rules which are specially intended to resolve matters of humanitarian concern arising directly from armed conflicts, whether of an international or non-international nature; for humanitarian reasons those rules restrict the right of the parties to a conflict to use the methods and means of warfare of their choice, and protect people and property affected or liable to be affected by the conflict.

A. Geneva and The Hague

International humanitarian law (IHL) – also known as the law of armed conflicts or law of war (see "Terminology" further below) – has two branches:

- the “law of Geneva”, which is designed to safeguard military personnel who are no longer taking part in the fighting and people not actively involved in hostilities, i.e. civilians;
- the “law of The Hague”, which establishes the rights and obligations of belligerents in the conduct of military operations, and limits the means of harming the enemy.

The two branches of IHL draw their names from the cities where each was initially codified. With the adoption of the Additional Protocols of 1977, which combine both branches, that distinction is now of merely historical and didactic value.

B. The belligerents

An international armed conflict means fighting between the armed forces of at least two States (it should be noted that wars of national liberation have been classified as international armed conflicts).

A non-international armed conflict means fighting on the territory of a State between the regular armed forces and identifiable armed groups, or between

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* Text adapted from the publication “International Humanitarian Law: Answers to Your Questions,” Geneva, International Committee of the Red Cross, 2004. The text summarizes the essence of international humanitarian law (IHL). It does not have the authority of a legal instrument and in no way seeks to replace the treaties in force. It was drafted with a view to facilitating the promotion of IHL.

armed groups fighting one another. To be considered a non-international armed conflict, fighting must reach a certain level of intensity and extend over a certain period of time.

Internal disturbances are characterized by a serious disruption of internal order resulting from acts of violence which nevertheless are not representative of an armed conflict (riots, struggles between factions or against the authorities, for example).

C. Grotius and the law of nations

In current parlance, the law of nations is synonymous with the term "public international law" or "international law", which is the body of rules governing relations between States and between them and other members of the international community.

Grotius, a jurist and diplomat, was the father of the law of nations. Following the Reformation, which divided the Christian church in Europe, he took the view that the law was no longer an expression of divine justice but the fruit of human reason and that it no longer preceded action but arose from it. Hence the need to find another uniting principle for international relations. The law of nations was to provide that principle. In his book *De jure belli ac pacis*, Grotius listed rules which are among the firmest foundations of the law of war.

D. Terminology

The expressions international humanitarian law, law of armed conflicts and law of war may be regarded as equivalents. International organizations, universities and even States will tend to favor international humanitarian law (or humanitarian law), whereas the other two expressions are more commonly used by the armed forces.

II. The essential rules of international humanitarian law

The parties to a conflict must at all times distinguish between the civilian population and combatants in order to spare the civilian population and civilian property. Neither the civilian population as a whole nor individual civilians may be attacked. Attacks may be made solely against military objectives. People who do not or can no longer take part in the hostilities are entitled to respect for their lives and for their physical and mental integrity. Such people must in all circumstances be protected and treated with humanity, without any unfavorable distinction whatever. It is forbidden to kill or wound an adversary who surrenders or who can no longer take part in the fighting. Neither the parties to the conflict nor members of their armed forces have an unlimited right to choose methods and means of warfare. It is forbidden to use weapons or methods of warfare that are likely to cause unnecessary losses or excessive suffering.

The wounded and sick must be collected and cared for by the party to the conflict which has them in its power. Medical personnel and medical

establishments, transports and equipment must be spared. The red cross or red crescent on a white background is the distinctive sign indicating that such persons and objects must be respected.

Captured combatants and civilians who find themselves under the authority of the adverse party are entitled to respect for their lives, their dignity, their personal rights and their political, religious and other convictions. They must be protected against all acts of violence or reprisal. They are entitled to exchange news with their families and receive aid. They must enjoy basic juridical guarantees.

Fundamental principles of humanitarian law

Like Grotius, jurists and philosophers took an interest in the regulation of conflicts well before the first Geneva Convention of 1864 was adopted and developed.

In the 18th century, Jean-Jacques Rousseau made a major contribution by formulating the following principle about the development of war between States: "War is in no way a relationship of man with man but a relationship between States, in which individuals are enemies only by accident; not as men, nor even as citizens, but as soldiers (...). Since the object of war is to destroy the enemy State, it is legitimate to kill the latter's defenders as long as they are carrying arms; but as soon as they lay them down and surrender, they cease to be enemies or agents of the enemy, and again become mere men, and it is no longer legitimate to take their lives."

In 1899, Fyodor Martens laid down the following principle for cases not covered by humanitarian law: "(...) civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

The above, known as the Martens clause, was already considered a standard part of customary law when it was incorporated in Article 1, paragraph 2, of Additional Protocol I of 1977.

While Rousseau and Martens established principles of humanity, the authors of the St. Petersburg Declaration formulated, both explicitly and implicitly, the principles of distinction, military necessity and prevention of unnecessary suffering, as follows:

"Considering: (...) 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."

The Additional Protocols of 1977 reaffirmed and elaborated on these principles, in particular that of distinction: "(...) the Parties to the conflict shall at

all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." (Art. 48, Protocol I; see also Art. 13, Protocol II).

Finally, the underlying principle of proportionality seeks to strike a balance between two diverging interests, one dictated by considerations of military need and the other by requirements of humanity when the rights or prohibitions are not absolute.

III. Origins of international humanitarian law

What law governed armed conflicts prior to the advent of contemporary humanitarian law?

First there were unwritten rules based on customs that regulated armed conflicts. Then bilateral treaties (cartels) drafted in varying degrees of detail gradually came into force. The belligerents sometimes ratified them after the fighting was over. There were also regulations which States issued to their troops.

The law then applicable in armed conflicts was thus limited in both time and space in that it was valid for only one battle or specific conflict. The rules also varied depending on the period, place, morals and civilization.

A. The precursors of contemporary humanitarian law

Two men played an essential role in its creation: Henry Dunant and Guillaume-Henri Dufour. Dunant formulated the idea in *A Memory of Solferino*, published in 1862. On the strength of his own experience of war, General Dufour lost no time in lending his active moral support, notably by chairing the 1864 Diplomatic Conference. Dunant: "On certain special occasions, as, for example, when princes of the military art belonging to different nationalities meet (...) would it not be desirable that they should take advantage of this sort of congress to formulate some international principle, sanctioned by a Convention and inviolate in character, which, once agreed upon and ratified, might constitute the basis for societies for the relief of the wounded in the different European countries?" Dufour (to Dunant): "We need to see, through examples as vivid as those you have reported, what the glory of the battlefield produces in terms of torture and tears."

B. From idea to reality

The Swiss government, at the prompting of the five founding members of the ICRC, convened the 1864 Diplomatic Conference, which was attended by 16 States who adopted the Geneva Convention for the amelioration of the condition of the wounded in armies in the field.

C. The innovations of that Convention

The 1864 Geneva Convention laid the foundations for contemporary humanitarian law. It was chiefly characterized by:

- standing written rules of universal scope to protect the victims of conflicts;
- its multilateral nature, open to all States;
- the obligation to extend care without discrimination to wounded and sick military personnel;
- respect for and marking of medical personnel, transports and equipment using an emblem (red cross on a white background).

D. Humanitarian law prior to its codification

It would be a mistake to claim that the founding of the Red Cross in 1863, or the adoption of the first Geneva Convention in 1864, marked the starting point of international humanitarian law as we know it today. Just as there is no society of any sort that does not have its own set of rules, so there has never been a war that did not have some vague or precise rules covering the outbreak and end of hostilities, as well as how they are conducted.

"Taken as a whole, the war practices of primitive peoples illustrate various types of international rules of war known at the present time: rules distinguishing types of enemies; rules determining the circumstances, formalities and authority for beginning and ending war; rules describing limitations of persons, time, place and methods of its conduct; and even rules outlawing war altogether" (Quincy Wright).

The first laws of war were proclaimed by major civilizations several millennia before our era: "I establish these laws to prevent the strong from oppressing the weak" (Hammurabi, King of Babylon).

Many ancient texts such as the Mahabharata, the Bible and the Koran contain rules advocating respect for the adversary. For instance, the Viqayet – a text written towards the end of the 13th century, at the height of the period in which the Arabs ruled Spain – contains a veritable code for warfare. The 1864 Convention, in the form of a multilateral treaty, therefore codified and strengthened ancient, fragmentary and scattered laws and customs of war protecting the wounded and those caring for them.

E. The Lieber Code

From the beginning of warfare to the advent of contemporary humanitarian law, over 500 cartels, codes of conduct, covenants and other texts designed to regulate hostilities have been recorded. They include the Lieber Code, which came into force in April 1863 and is important in that it marked the first attempt to codify the existing laws and customs of war. Unlike the first Geneva Convention (adopted a year later), however, the Code did not have the status of a

treaty as it was intended solely for Union soldiers fighting in the American Civil War.

IV. The treaties that make up international humanitarian law

Initiated in the form of the first Geneva Convention of 1864, contemporary humanitarian law has evolved in stages, all too often after the events for which they were sorely needed, to meet the ever-growing need for humanitarian aid resulting from developments in weaponry and new types of conflict. The following are the main treaties in chronological order of adoption:

- 1864 Geneva Convention for the amelioration of the condition of the wounded in armies in the field.
- 1868 Declaration of St. Petersburg (prohibiting the use of certain projectiles in wartime).
- 1899 The Hague Conventions respecting the laws and customs of war on land and the adaptation to maritime warfare of the principles of the 1864 Geneva Convention.
- 1906 Review and development of the 1864 Geneva Convention.
- 1907 Review of The Hague Conventions of 1899 and adoption of new Conventions.
- 1925 Geneva Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of warfare.
- 1929 Two Geneva Conventions:
  - Review and development of the 1906 Geneva Convention;
  - Geneva Convention relating to the treatment of prisoners of war (new).
- 1949 Four Geneva Conventions:
  I. Amelioration of the condition of the wounded and sick in armed forces in the field;
  II. Amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea;
  III. Treatment of prisoners of war;
  IV. Protection of civilian persons in time of war (new).
- 1954 The Hague Convention for the protection of cultural property in the event of armed conflict.
- 1972 Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxic weapons and on their destruction.
- 1977 Two Protocols additional to the four 1949 Geneva Conventions, which strengthen the protection of victims of international (Protocol I) and non-international (Protocol II) armed conflicts.

- 1980 Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (CCW), which includes:
    - the Protocol (I) on non-detectable fragments;
    - the Protocol (II) on prohibitions or restrictions on the use of mines, booby traps and other devices;
    - the Protocol (III) on prohibitions or restrictions on the use of incendiary weapons.
- 1993 Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction.
- 1995 Protocol relating to blinding laser weapons (Protocol IV [new] to the 1980 Convention).
- 1996 Revised Protocol on prohibitions or restrictions on the use of mines, booby traps and other devices (Protocol II [revised] to the 1980 Convention).
- 1997 Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction.
- 1998 Rome Statute of the International Criminal Court.
- 1999 Protocol to the 1954 Convention on cultural property.
- 2000 Optional Protocol to the Convention on the rights of the child on the involvement of children in armed conflict.
- 2001 Amendment to Article I of the CCW.

A. Prompted by events

This list clearly shows that some armed conflicts have had a more or less immediate impact on the development of humanitarian law. For example:

The First World War (1914-1918) witnessed the use of methods of warfare that were, when not completely new, at least deployed on an unprecedented scale. These included poison gas, the first aerial bombardments and the capture of hundreds of thousands of prisoners of war. The treaties of 1925 and 1929 were a response to those developments.

The Second World War (1939-1945) saw civilians and military personnel killed in equal numbers, as against a ratio of 1:10 in the First World War. In 1949 the international community responded to those tragic figures, and more particularly to the terrible effects the war had on civilians, by revising the Conventions then in force and adopting a new instrument: the Fourth Geneva Convention for the protection of civilians.

Later, in 1977, the Additional Protocols were a response to the effects in human terms of wars of national liberation, which the 1949 Conventions only partially covered.

B. The origins of the 1949 Conventions

In 1874 a Diplomatic Conference, convened in Brussels at the initiative of Tsar Alexander II of Russia, adopted an International Declaration on the laws and customs of war. The text was not ratified, however, because some governments present were reluctant to be bound by a treaty. Even so, the Brussels draft marked an important stage in the codification of the laws of war.

In 1934, the 15th International Conference of the Red Cross met in Tokyo and approved the text of an International Convention on the condition and protection of civilians of enemy nationality who are on territory belonging to or occupied by a belligerent, drafted by the ICRC. No action was taken on that text either, the governments refusing to convene a diplomatic conference to decide on its adoption. As a result, the Tokyo draft was not applied during the Second World War, with the consequences we all know.

C. The origins of the 1977 Protocols

The 1949 Geneva Conventions marked a major advance in the development of humanitarian law. After decolonization, however, the new States found it difficult to be bound by a set of rules which they themselves had not helped to prepare. What is more, the treaty rules on the conduct of hostilities had not evolved since the Hague treaties of 1907. Since revising the Geneva Conventions might have jeopardized some of the advances made in 1949, it was decided to strengthen protection for the victims of armed conflict by adopting new texts in the form of Protocols additional to the Geneva Conventions.

The Geneva Conventions of 1949 and their Additional Protocols of 1977 contain almost 600 articles and are the main instruments of IHL.[*]

V. Parties bound by the Geneva Conventions

Only States may become party to international treaties, and thus to the Geneva Conventions and their Additional Protocols. However, all parties to an armed conflict – whether States or non-State actors – are bound by international humanitarian law.

At the end of 2007, all the world's States – 194, to be precise – were party to the Geneva Conventions. In the case of the Additional Protocols, 167 States were party to Protocol I and 163 to Protocol II by the same date.

A. Signature, ratification, accession, reservations, succession

Multilateral treaties between States, such as the Geneva Conventions and their Additional Protocols, require two separate procedures:

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[*] *Editor's note:* Part III of this volume includes the full text of these instruments, together with the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III).

a) Signature followed by ratification

While signature does not bind a State, it does oblige the State to behave in a way which does not render the substance of the treaty meaningless when the State subsequently ratifies and solemnly undertakes to respect the treaty.

b) Accession

This is the act whereby a State which did not sign the text of a treaty when it was adopted consents to be bound by it. Accession has the same implications as ratification.

A newly independent State may, by means of a declaration of succession, express the desire to remain bound by a treaty which applied to its territory prior to independence. It may also make a declaration of provisional application of the treaties while examining them prior to accession or succession.

Within the context of those procedures and under certain conditions, a State may make reservations in order to exclude or modify the legal effect of certain provisions of the treaty. The main condition is that such reservations do not run counter to essential substantive elements of the treaty.

Lastly, national liberation movements covered by Article 1, paragraph 4, of Protocol I may undertake to apply the Conventions and the Protocol by following the special procedure set down in Article 96, paragraph 3, of Protocol I.

B. The duty to spread knowledge of the Conventions and Protocols

States have a legal obligation to spread knowledge of the Conventions and Protocols:

"The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains" (Arts. 47, 48, 127 and 144 of, respectively, GC I, II, III & IV).

"The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population" (Art. 83, Protocol I).

"This Protocol shall be disseminated as widely as possible" (Art. 19, Protocol II).

C. The ICRC and the task of spreading knowledge of humanitarian law

Under the Statutes of the International Red Cross and Red Crescent Movement, it is the task of the ICRC to:

"(...) work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof" (Art. 5, para. 2g).

"(...) [maintain close contact with National Societies] (...) in matters of common concern, such as their preparation for action in times of armed conflict, respect for and development and ratification of the Geneva Conventions, and the dissemination of the Fundamental Principles and international humanitarian law" (Art. 5, para. 4a).

VI. *Jus ad bellum and jus in bello*

The purpose of international humanitarian law is to limit the suffering caused by war by protecting and assisting its victims as far as possible. The law therefore addresses the reality of a conflict without considering the reasons for or legality of resorting to force. It regulates only those aspects of the conflict which are of humanitarian concern. It is what is known as *jus in bello* (law in war). Its provisions apply to the warring parties irrespective of the reasons for the conflict and whether or not the cause upheld by either party is just.

In the case of international armed conflict, it is often hard to determine which State is guilty of violating the United Nations Charter. The application of humanitarian law does not involve the denunciation of guilty parties as that would be bound to arouse controversy and paralyse implementation of the law, since each adversary would claim to be a victim of aggression. Moreover, IHL is intended to protect war victims and their fundamental rights, no matter to which party they belong. That is why *jus in bello* must remain independent of *jus ad bellum* or *jus contra bellum* (law on the use of force or law on the prevention of war).

On the prohibition of war

Until the end of the First World War, resorting to armed force was regarded not as an illegal act but as an acceptable way of settling differences.

In 1919, the Covenant of the League of Nations and, in 1928, the Treaty of Paris (Briand-Kellogg Pact) sought to outlaw war. The adoption of the United Nations Charter in 1945 confirmed the trend: *"The members of the Organization shall abstain, in their international relations, from resorting to the threat or use of force (...)."*

When a State or group of States is attacked by another State or group of States, however, the UN Charter upholds the right to individual or collective self-defence. The UN Security Council, acting on the basis of Chapter VII of the Charter, may also decide on the collective use of force. This may involve:

- coercive measures – aimed at restoring peace – against a State threatening international security;
- peace-keeping measures in the form of observer or peacekeeping missions.

A further instance arises within the framework of the right of peoples to self-determination: in resolution 2105 (XX) adopted in 1965, the UN General Assembly *"recognizes the legitimacy of the struggle waged by peoples under colonial domination to exercise their right to self-determination and independence (...)"*.

VII. The application of international humanitarian law: systems of protection

International humanitarian law is applicable in two situations; that is to say, it offers two systems of protection:

a) International armed conflicts

In such situations the Geneva Conventions and Additional Protocol I apply. Humanitarian law is intended principally for the parties to the conflict and protects every individual or category of individuals not or no longer actively involved in the conflict, i.e.:

- wounded or sick military personnel in land warfare, and members of the armed forces' medical services;
- wounded, sick or shipwrecked military personnel in naval warfare, and members of the naval forces' medical services;
- prisoners of war;
- the civilian population, for example:
  - foreign civilians on the territory of parties to the conflict, including refugees;
  - civilians in occupied territories;
  - civilian detainees and internees;
  - medical and religious personnel or civil defence units.

Wars of national liberation, as defined in Article 1 of Protocol I, are classified as international armed conflicts.

b) Non-international armed conflicts

In the event of a non-international conflict, Article 3 common to the four Conventions and Protocol II apply. It should be noted that the conditions of application of Protocol II are stricter than those provided for by Article 3. In such situations, humanitarian law is intended for the armed forces, whether regular or

not, taking part in the conflict, and protects every individual or category of individuals not or no longer actively involved in the hostilities, for example:

- wounded or sick fighters;
- people deprived of their freedom as a result of the conflict;
- the civilian population;
- medical and religious personnel.

A. Humanitarian law and non-international armed conflicts

Article 3 common to the four Geneva Conventions is regarded as a sort of treaty in miniature. Even including the provisions of Protocol II, the rules on internal armed conflicts remain less complete than those dealing with international armed conflicts. It has proven difficult to strengthen the system of protection in non-international armed conflicts in the face of the principle of State sovereignty.

The rules contained in Article 3 are considered as customary law and represent a minimum standard from which the belligerents should never depart.

B. What law applies to internal disturbances and other situations of internal violence?

International humanitarian law does not apply to situations of violence not amounting in intensity to an armed conflict. Cases of this type are governed by the provisions of human rights law and such measures of domestic legislation as may be invoked.

VIII. The application of humanitarian law to "new" conflicts

There is much talk today of "new" conflicts. This expression covers different types of armed conflict: those known as "anarchic" conflicts and others in which group identity becomes the focal point. These terms are used fairly loosely.

"Anarchic" conflicts, the upsurge of which doubtless results from the end of the Cold War, are often marked by the partial, and sometimes even total, weakening or breakdown of State structures. In such situations, armed groups take advantage of the political vacuum in an attempt to grab power. This type of conflict is, however, marked above all by a weakening or breakdown in the chain of command within the same armed groups.

Conflicts aimed at asserting group identity often seek to exclude the adversary through "ethnic cleansing." This consists in forcibly displacing or even exterminating populations. Under the effect of spiraling propaganda, violence and hatred, this type of conflict strengthens group feeling to the detriment of the existing national identity, ruling out any possibility of coexistence with other groups.

International humanitarian law still applies in these "anarchic" and "identity-related" conflicts, in which the civilian population in particular is exposed to violence. Common Article 3 requires all armed groups, whether in rebellion or not, to respect individuals who have laid down their arms and those, such as civilians, who do not take part in the hostilities.

Consequently, it is not because a State's structures have been weakened or are nonexistent that there is a legal vacuum with regard to international law. On the contrary, these are precisely the circumstances in which humanitarian law comes fully into its own.

Admittedly, the humanitarian rules are harder to apply in these types of conflict. The lack of discipline among belligerents, the arming of the civilian population as weapons flood the territory and the increasingly blurred distinction between fighters and civilians often cause confrontations to take an extremely brutal turn, in which there is little place for the rules of law.

As a result, this is the type of situation in which particular efforts are needed to make people aware of humanitarian law. Better knowledge of the rules of law will not solve the underlying problem which led to the conflict, but it is likely to attenuate its deadlier consequences.

Common Article 3: a treaty in miniature

In the 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, as a minimum, the following provisions:

1) 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, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and any place whatsoever with respect to the above-mentioned persons:

a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

b) taking of hostages;

c) outrages against personal dignity, in particular humiliating and degrading treatment;

d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

IX. The development of humanitarian law and the role of the ICRC in this process

International humanitarian law is developed by States through codification or State practice. These two processes usually overlap. Widespread practice of States may crystallize customary international law. It is also State practice, sometimes combined with the activities of non-governmental organizations (NGOs), which may trigger the codification of international law. Codification takes the form of treaties, such as conventions, covenants, protocols, or pacts. For example, a number of States had already passed national legislation which implicitly or explicitly prohibited the use of anti-personnel mines. Yet that practice was not widespread and therefore no customary law had formed. Then in 1997 a conference was convened to develop a specific convention, and the use, stockpiling, production and transfer of anti-personnel mines became prohibited for all States which ratified the treaty.

The ICRC's role in the development of humanitarian law is to:

- monitor the changing nature of armed conflict;
- organize consultations with a view to ascertaining the possibility of reaching agreement on new rules;
- prepare draft texts for submission to diplomatic conferences.

The example of the two Protocols additional to the Geneva Conventions gives an idea of how humanitarian law is made, from the initial idea to its adoption:

- on the basis of draft rules prepared in 1956, then of resolutions adopted in the 1960s by two International Conferences of the Red Cross and by the International Human Rights Conference held in Tehran in 1968, the ICRC studied the possibility of supplementing the Conventions adopted in 1949;
- in 1969 the ICRC submitted that idea to the 21st International Conference of the Red Cross, in Istanbul; the participants, including the States party to the Geneva Conventions, mandated it accordingly and the ICRC's own lawyers embarked on the preparatory work;
- between 1971 and 1974, the ICRC organized several consultations with governments and the Movement; the United Nations was regularly given progress reports;
- in 1973 the 22nd International Conference of the Red Cross, in Tehran, considered the draft texts and fully supported the work done;

- in February 1974 the Swiss Government, as depositary of the 1949 Geneva Conventions, convened the Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts, in Geneva; it comprised four sessions and ended in June 1977;
- at the final session of that Conference, the 102 articles of Protocol I and the 28 articles of Protocol II were adopted by the plenipotentiaries of the 102 States represented.

A. The ICRC as promoter of humanitarian law

Under the Statutes of the International Red Cross and Red Crescent Movement, one of the ICRC's tasks is to prepare possible developments in international humanitarian law. It is therefore the promoter of IHL.

B. A few recent developments

The Protocol relating to blinding laser weapons, adopted at the Vienna Diplomatic Conference in October 1995, prohibits both the use and transfer of laser weapons, one of whose specific combat functions is to cause permanent blindness. The Protocol also requires States to take all appropriate precautions, including the training of armed forces, to avoid causing permanent blindness by the lawful use of other laser systems.

In the case of mines, the field of application of Protocol II to the 1980 Convention was extended by the adoption, in Geneva on 3 May 1996, of an amended version of the Protocol on prohibitions or restrictions on the use of mines, booby traps and other devices. The Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction, signed by 121 countries in Ottawa on 3-4 December 1997, entirely prohibits anti-personnel mines. This Convention also provides for mine-clearance and assistance to victims of mines.

IHL treaties containing rules applicable to environmental protection include Article 55 of Additional Protocol I and the Convention on the prohibition of military or any hostile use of environmental modification techniques of 10 December 1976.

However, the Gulf War of 1991 revealed that those rules were little known and sometimes imprecise. Therefore, in 1994, encouraged by the UN General Assembly and with the help of experts in the matter, the ICRC drafted Guidelines for military manuals and instructions on the protection of the environment in times of armed conflict.

Another recent development is the San Remo Manual on international law applicable to armed conflicts at sea. The importance of that undertaking, carried out by the International Institute of Humanitarian Law with the support of the ICRC, was recognized by governments in the resolution adopted by the 26th International Conference of the Red Cross and Red Crescent, held in Geneva in 1995.

Although the Geneva Conventions and their Additional Protocols do not expressly prohibit the use of nuclear weapons, the principles and rules of IHL do apply in such cases. Among other things, they require belligerents to distinguish at all times between combatants and civilians and prohibit the use of weapons likely to cause unnecessary suffering. The application of those principles to nuclear weapons was reaffirmed by the International Court of Justice in The Hague in 1996.

A further development was the adoption of the Statute of the International Criminal Court on 17 July 1998. The Statute is an important step towards reducing impunity and ensuring greater respect for humanitarian law. The new Court will have jurisdiction over war crimes committed in either international or non-international armed conflicts. Although IHL already lays down a duty to prosecute war criminals, the new Court adds to the tools available.

The latest development concerns means of combat. In December 2001, the scope of the 1980 UN Convention on prohibitions or restrictions on the use of certain conventional weapons was extended. Previously the Convention had only covered situations of international armed conflict, but the Second Review Conference amended Article 1 to include situations of non-international armed conflict.

X. International humanitarian law and material assistance to the victims of armed conflict

The States party to the Geneva Conventions recognize the right of victims of armed conflicts to receive supplies indispensable to their survival. That right was further developed with the adoption of the Additional Protocols in 1977. In an international armed conflict, the right to assistance includes in particular:

- free passage for consignments of certain objects necessary to the survival of the civilian population (Art. 23, Fourth Convention, drafted to deal with blockades);
- the duty of the Occupying Power to ensure essential supplies to the population of territories it occupies (Art. 55, Fourth Convention); if its own supplies are inadequate, the Occupying Power must agree to relief provided by outside sources (Art. 59, Fourth Convention).

Protocol I (Arts. 69 and 70) strengthens the body of rules adopted in 1949. For instance, a State at war must accept impartial humanitarian relief schemes carried out without discrimination for the population on its own territory, subject to the agreement of the parties concerned. If those conditions are met, however, it would be wrong to refuse such relief schemes, which are regarded neither as interference in the armed conflict nor as hostile acts.

In a non-international armed conflict, Protocol II (Art. 18) specifies, among other things, that if the civilian population is suffering excessive deprivation owing to a lack of supplies essential to its survival, relief actions which are of an exclusively humanitarian and impartial nature and conducted without any adverse

distinction must be undertaken subject to the consent of the warring parties. It is now generally recognized that the State must authorize purely humanitarian relief operations of this nature.

A. The ICRC and the right to assistance

The ICRC in any case has a right of initiative that enables it to offer its services to parties in conflict, in particular with a view to assisting the victims. Its offer of assistance (relief or other activities) does not constitute interference in the internal affairs of a State, since it is provided for in humanitarian law.

B. Humanitarian law and the "right to intervene on humanitarian grounds"

In so far as a "right – or even a duty – to intervene" is tantamount to justifying armed intervention undertaken for humanitarian reasons, this is a matter not for humanitarian law but for the rules on the legality of the use of armed force in international relations, i.e. of *jus ad bellum*.

If there is armed intervention on humanitarian grounds, the ICRC must, in accordance with its mandate, ensure that those engaged in the intervention observe the relevant rules of IHL; it must also endeavour to aid the victims of the conflict.

The ICRC is neither for nor against the "right to intervene." In the light of its own experience, the issue is a political one in which the ICRC cannot become involved without jeopardizing its humanitarian work.

XI. Humanitarian law and the restoration of family links

As a consequence of armed conflict, prisoners of war and civilian internees are separated from their loved ones, families are split up and people go missing. The Geneva Conventions and Protocol I contain a number of provisions for the protection of these victims. They apply in the event of international armed conflicts and empower the ICRC to carry out the following tasks:

1) Forwarding family messages and other information (Art. 25, Fourth Convention). This includes:

- receiving and registering prisoner-of-war capture cards and civilian internment cards, the duplicates of these cards being sent to the captives' families;
- forwarding mail between people deprived of their freedom and their families;
- forwarding family news (Red Cross messages) between separated members of a family when normal postal channels are unreliable;
- receiving and transmitting death notices.

More generally, the ICRC's Central Tracing Agency acts as an intermediary between the parties to the conflict or, more accurately, between their national information bureaux for the transmission of information on people protected by humanitarian law.

2) Inquiring into the whereabouts of missing persons (Art. 33, Protocol I; and Art. 26, Fourth Convention).

3) Reuniting dispersed families (Art. 74, Protocol I; and Art. 26, Fourth Convention).

The ICRC first did this type of work during the Franco-Prussian war of 1870. Acting as an intermediary, its tracing agency Basle set about restoring contact between prisoners of war and their families, starting with the exchange of lists of wounded in persons between the belligerents. Since then, the ICRC's Central Tracing Agency has considerably developed its activities.

A. National information bureaux

The Third Geneva Convention (Art. 122) states that upon the outbreak of hostilities each neutral or belligerent power that has enemy nationals on its territory must set up an official information bureau for the prisoners of war there. Each belligerent power must inform its own information bureau of all prisoners captured by its forces and provide the bureau with every available detail concerning the identity of these prisoners, so that their next-of-kin can be advised as quickly as possible. If there is no such bureau, as is often the case in conflicts, the ICRC itself undertakes to gather information on people protected by the Geneva Conventions.

B. Central Tracing Agency

"A Central Prisoners of War Information Agency shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency. The function of the Agency shall be to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as quickly as possible to the country of origin of the prisoners of war or to the Power on which they depend (...)" (Art. 123, Third Convention).

C. Dispersed families

"Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible (...)" (Art. 26, Fourth Convention).

XII. Provisions of humanitarian law governing use of the emblem

The Geneva Conventions of 1949 mention three emblems: the red cross, the red crescent and the red lion and sun, although only the first two are now being used. Also, Protocol III additional to the Conventions, adopted in 2005, recognizes a fourth distinctive emblem, the red crystal. The Conventions and their Additional Protocols contain several articles on the emblem. Among other things, they specify the use, size, purpose and placing of the emblem, the persons and property it protects, who can use it, what respect for the emblem entails and the penalties for misuse.

In times of armed conflict, the emblem may be used as a protective device only by:

- armed forces' medical services;
- National Red Cross and Red Crescent Societies duly recognized and authorized by their governments to lend assistance to the medical services of armed forces; the National Societies may use the emblem for protective purposes only for those of their personnel and equipment assisting official medical services in wartime, provided that those personnel and equipment perform the same functions – and only those functions – and are subject to military law and regulations;
- civilian hospitals and other medical facilities recognized as such by the government and authorized to display the emblem for protective purposes (first-aid posts, ambulances, etc.);
- other voluntary relief agencies subject to the same conditions as National Societies: they must have government recognition and authorization, may use the emblem only for personnel and equipment allocated exclusively to medical services, and must be subject to military law and regulations.

International humanitarian law also specifies that each State party to the Geneva Conventions is required to take steps to prevent and punish misuse of the emblem in wartime and peacetime alike, and to enact a law on the protection of the emblem.

A. Use of the emblem

Use of the emblem for protective purposes is a visible manifestation of the protection accorded by the Geneva Conventions to medical personnel, units and transports.

Use of the emblem for indicative purposes in wartime or in times of peace shows that a person or item of property has a link with the International Red Cross and Red Crescent Movement.

The ICRC is entitled at all times to use the emblem for both protective and indicative purposes.

B. Misuse of the emblem

Any use not expressly authorized by IHL constitutes a misuse of the emblem. There are three types of misuse:

- imitation, meaning the use of a sign which, by its shape and/or color, may cause confusion with the emblem;
- usurpation, i.e. the use of the emblem by bodies or persons not entitled to do so (commercial enterprises, pharmacists, private doctors, non-governmental organizations and ordinary individuals, etc.); if persons normally authorized to use the emblem fail to do so in accordance with the rules in the Conventions and Protocols, this also constitutes usurpation;
- perfidy, i.e. making use of the emblem in time of conflict to protect combatants or military equipment; perfidious use of the emblem is a war crime in both international and non-international armed conflict.

Misuse of the emblem for protective purposes in time of war jeopardizes the system of protection set up by IHL. Misuse of the emblem for indicative purposes undermines its image in the eyes of the public and consequently reduces its protective power in time of war. The States party to the Geneva Conventions have undertaken to introduce penal measures for preventing and repressing misuse of the emblem in wartime and peacetime alike.

XIII. Laws protecting refugees and internally displaced persons

Refugees are people who have fled their countries, while internally displaced persons (IDPs) are those who have not left their country's territory.

Refugees enjoy first and foremost the protection afforded them by refugee law and the mandate of the Office of the United Nations High Commissioner for Refugees (UNHCR). If they are in a State involved in an armed conflict, refugees are also protected by international humanitarian law. Apart from the general protection afforded by IHL to civilians, refugees also receive special protection under the Fourth Geneva Convention and Additional Protocol I. This additional protection recognizes the vulnerability of refugees as aliens in the hands of a party to the conflict and the absence of protection by their State of nationality.

IDPs are protected by various bodies of law, principally national law, human rights law and, if they are in a State undergoing armed conflict, international humanitarian law. If IDPs are in a State which is involved in an armed conflict, they are considered civilians – provided they do not take an active part in the hostilities – and, as such, are entitled to the protection afforded to civilians. When they are respected, these rules play an important role in preventing displacement, as it is often their violation which leads to displacement. In addition, humanitarian law expressly prohibits compelling civilians to leave their places of residence unless their security or imperative military reasons so demand.

Once displaced, IDPs are protected from the effects of hostilities by the general rules governing the protection of civilians and humanitarian assistance set out above.

The general rules of humanitarian law for the protection of civilians, if respected, can prevent displacement. If not, they can offer protection during displacement. Particular mention should be made of the following rules, which prohibit:

- attacks on civilians and civilian objects or the conduct of hostilities in an indiscriminate manner;
- starvation of the civilian population and the destruction of objects indispensable to its survival;
- collective punishments – which often take the form of destruction of dwellings.

There are also the rules requiring parties to a conflict to allow relief consignments to reach civilian populations in need.

Definition of a refugee

According to Article 1 of the 1951 UN Convention on the status of refugees, the term "refugee" applies to any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it."

The 1969 Convention of the Organization of African Unity on refugee problems in Africa and the 1984 Cartagena Declaration on refugees have broadened that definition to include people fleeing events which seriously disrupt public order, such as armed conflicts and disturbances.

XIV. Measures for implementing humanitarian law

The following implementation measures must be taken:

Preventive measures, based on the duty of States to comply with humanitarian law. They include:

- spreading knowledge of IHL;
- training qualified personnel to facilitate the implementation of IHL, and the appointment of legal advisers in the armed forces;
- adopting legislative and statutory provisions to ensure compliance with IHL;

- translating the texts of the Conventions.

Measures for monitoring compliance with the provisions of humanitarian law for the duration of the conflict:

- action by the Protecting Powers or their substitutes;
- ICRC action.

Repressive measures, based on the duty of the parties to the conflict to prevent and put a halt to all violations. Mechanisms for repression include:

- the obligation for the national courts to repress grave breaches considered as war crimes;
- the criminal liability and disciplinary responsibility of superiors, and the duty of military commanders to repress and denounce offences;
- mutual assistance between States on criminal matters.

Apart from the fact that they are inherent in any consistent legal construct, these repressive measures also serve as a deterrent.

There are other implementation measures, which encompass prevention, control and repression; the last two are derived chiefly from the duty of States to ensure respect for humanitarian law. They include:

- the enquiry procedure;
- the International Fact-Finding Commission;
- the examination procedures concerning the application and interpretation of legal provisions;
- cooperation with the United Nations.

Diplomatic efforts and pressure from the media and public opinion also help ensure implementation of IHL.

Legal provisions for implementation

"The High Contracting Parties shall (...) in peacetime endeavour (...) to train qualified personnel to facilitate the application of the Conventions and of this Protocol (...)" (Art. 6, Protocol I).

"The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances" (Article 1 common to the four Conventions).

"The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject" (Art. 82, Protocol I).

"The High Contracting Parties shall, if their legislation is not already adequate, take the measures necessary for the prevention and repression, at all times, of any abuse of the distinctive signs (...)" (Art. 45, Second Convention).

"The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof" (Art. 48/49/128/145 common to the four Conventions).

"The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention (...). Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts" (Art. 49/50/129/146 common to the four Conventions).

"The present Convention shall be applied with the cooperation and the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers" (Art. 8, GC I, II, III; and Art. 9, GC IV).

"The High Contracting Parties may at any time agree to entrust to an international organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention (...). If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention" (Art. 10, GC I, II, III; and Art. 11, GC IV).

"The depositary of this Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol" (Art. 7, Protocol I).

"The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains, and for their relief" (Art. 9/9/9/10 common to the four Conventions).

"In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter" (Art. 89, Protocol I).

"The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol (...). When circumstances permit, the High Contracting Parties shall cooperate in the matter of extradition (...)" (Art. 88, Protocol I).

"An International Fact-Finding Commission (...) consisting of 15 members of high moral standing and acknowledged impartiality shall be established. (...) The Commission shall be competent to: i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol (...)" (Art. 90, Protocol I).

XV. ICRC's role in ensuring respect for humanitarian law

As the promoter and guardian of international humanitarian law, the ICRC must encourage respect for the law. It does so by spreading knowledge of the humanitarian rules and by reminding parties to conflicts of their obligations.

A. Dissemination and Advisory Service

Since ignorance of the law is an obstacle to its implementation, the ICRC reminds States that they have undertaken to make the humanitarian provisions known. It also takes its own action to this end. The ICRC further reminds States that they must take all the necessary steps to ensure that the law is applied effectively and therefore respected. It does so chiefly through its Advisory Service on international humanitarian law, which provides technical guidance to States and helps their authorities adopt national implementing laws and regulations.

B. Reminding parties in conflict of their obligations

On the strength of the conclusions it draws from its protection and assistance work, the ICRC makes confidential representations to the relevant authorities in the event of violations of humanitarian law. If the violations are serious and repeated and it can be established with certainty that they have occurred, the ICRC reserves the right to take a public stance; it does so only if it deems such publicity to be in the interest of the people affected or threatened. This therefore remains an exceptional measure.

C. The ICRC as guardian of international humanitarian law

Humanitarian law enables the ICRC to ensure that humanitarian rules are respected.

"Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour (...)." And again: "The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives." (Art. 126, Third Convention).

Article 143 of the Fourth Convention contains similar provisions relating to civilian internees.

The Movement's Statutes specify that one of the ICRC's roles is: "to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law." (Art. 5, para. 2c).

XVI. Humanitarian law and the prosecution of war criminals

On becoming party to the Geneva Conventions, States undertake to enact any legislation necessary to punish persons guilty of grave breaches of the Conventions. States are also bound to prosecute in their own courts any person suspected of having committed a grave breach of the Conventions, or to hand that person over for judgment to another State. In other words, perpetrators of grave breaches, i.e. war criminals, must be prosecuted at all times and in all places, and States are responsible for ensuring that this is done.

Generally speaking, a State's criminal laws apply only to crimes committed on its territory or by its own nationals. International humanitarian law goes further in that it requires States to seek out and punish any person who has committed a grave breach, irrespective of his nationality or the place where the offence was committed. This principle of universal jurisdiction is essential to guarantee that grave breaches are effectively repressed.

Such prosecutions may be brought either by the national courts of the different States or by an international authority. In this connection, the International Criminal Tribunals for the former Yugoslavia and Rwanda were set up by the UN Security Council in 1993 and 1994, respectively, to try those accused of war crimes committed during the conflicts in those countries.

A. The repression of violations of humanitarian law

Humanitarian rules are not always respected and violations are not always repressed. Some claim that ignorance of the law is largely to blame, others that the very nature of war so wills it, or that it is because international law – and therefore humanitarian law as well – is not matched by an effective centralized system for implementing sanctions, among other things, because of the present structure of the international community. Be that as it may, whether in conflict situations or in peacetime and whether it is national or international jurisdiction that is in force, laws are violated and crimes committed.

Yet simply giving up in the face of such breaches and halting all action that seeks to gain greater respect for humanitarian law would be far more discreditable. This is why, pending a more effective system of sanctions, such acts should be relentlessly condemned and steps taken to prevent and punish them. The penal repression of war crimes must therefore be seen as one means of implementing humanitarian law, whether at national or international level.

Lastly, the international community has created a permanent International Criminal Court, which will be competent to try war crimes, crimes against humanity, and genocide.

B. Definition of a war crime

War crimes are understood to mean serious violations of international humanitarian law committed during international or non-international armed conflicts. Several legal texts contain definitions of war crimes, namely the Statute of the International Military Tribunal established after the Second World War in Nuremberg, the Geneva Conventions and their Additional Protocols, the Statutes and case law of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the Statute of the International Criminal Court. Definitions of the notion of war crime are also given in the legislation and case law of various countries. It is important to note that one single act may constitute a war crime. The following acts are, among others, included in the definition of war crimes:

- willful killing of a protected person (e.g. wounded or sick combatant, prisoner of war, civilian);
- torture or inhuman treatment of a protected person;
- willfully causing great suffering to, or serious injury to the body or health of, a protected person;
- attacking the civilian population;
- unlawful deportation or transfer;
- using prohibited weapons or methods of warfare;
- making improper use of the distinctive red cross or red crescent emblem or other protective signs;
- killing or wounding perfidiously individuals belonging to a hostile nation or army;
- pillage of public or private property.

It should be noted that the International Criminal Tribunal for the former Yugoslavia has recognized that the notion of war crime under customary international law also covers serious violations committed during non-international armed conflicts. The Statute of the International Criminal Court and the Statute of the International Criminal Tribunal for Rwanda also include in their respective lists of war crimes those committed during internal armed conflicts.

XVII. Difference between humanitarian law and human rights law

International humanitarian law and international human rights law (hereafter referred to as human rights) are complementary. Both strive to protect the lives, health and dignity of individuals, albeit from a different angle.

Humanitarian law applies in situations of armed conflict, whereas human rights, or at least some of them, protect the individual at all times, in war and peace alike. However, some human rights treaties permit governments to derogate from certain rights in situations of public emergency. No derogations are permitted under IHL because it was conceived for emergency situations, namely armed conflict.

Humanitarian law aims to protect people who do not or are no longer taking part in hostilities. The rules embodied in IHL impose duties on all parties to a conflict. Human rights, being tailored primarily for peacetime, apply to everyone. Their principal goal is to protect individuals from arbitrary behavior by their own governments. Human rights law does not deal with the conduct of hostilities.

The duty to implement IHL and human rights lies first and foremost with States. Humanitarian law obliges States to take practical and legal measures, such as enacting penal legislation and disseminating IHL. Similarly, States are bound by human rights law to accord national law with international obligations. IHL provides for several specific mechanisms that help its implementation. Notably, States are required to ensure respect also by other States. Provision is also made for an enquiry procedure, a Protecting Power mechanism, and the International Fact- Finding Commission. In addition, the ICRC is given a key role in ensuring respect for the humanitarian rules.

Human rights implementing mechanisms are complex and, contrary to IHL, include regional systems. Supervisory bodies, such as the UN Commission on Human Rights, are either based on the UN Charter or provided for in specific treaties (for example the Human Rights Committee, which is rooted in the International Covenant on Civil and Political Rights of 1966). The Human Rights Commission and its Subcommissions have developed a mechanism of "special rapporteurs" and working groups, whose task is to monitor and report on human rights situations either by country or by topic. Six of the main human rights treaties also provide for the establishment of committees (e.g. the Human Rights Committee) of independent experts charged with monitoring their implementation. Certain regional treaties (European and American) also establish human rights courts. The Office of the UN High Commissioner for Human Rights (UNHCHR) plays a key part in the overall protection and promotion of human rights. Its role is to enhance the effectiveness of the UN human rights machinery and to build up national, regional and international capacity to promote and protect human rights and to disseminate human rights texts and information.

A. Human rights instruments

The many texts now in force include:

a) Universal instruments:

- the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948;

- the Convention on the Prevention and Punishment of the Crime of Genocide of 1948;
- the International Covenant on Civil and Political Rights of 1966;
- the International Covenant on Social and Economic Rights of 1966;
- the Convention on the Elimination of All Forms of Discrimination against Women of 1981;
- the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 1984;
- the Convention on the Rights of the Child of 1989.

b) Regional instruments

- the European Convention on Human Rights of 1950;
- the American Convention on Human Rights of 1969;
- the African Charter of Human and Peoples' Rights of 1981.

B. The "hard core"

The international human rights instruments contain clauses that authorize States confronted with a serious public threat to suspend the rights enshrined in them. An exception is made for certain fundamental rights laid down in each treaty, which must be respected in all circumstances and may never be waived regardless of the treaty. In particular, these include the right to life, the prohibition of torture and inhuman punishment or treatment, slavery and servitude, and the principle of legality and non-retroactivity of the law. These fundamental rights that States are bound to respect in all circumstances – even in the event of a conflict or disturbances – are known as the "hard core" of human rights.

C. Points of convergence

Since humanitarian law applies precisely to the exceptional situations which constitute armed conflicts, the content of human rights law that States must respect in all circumstances (i.e. the "hard core") tends to converge with the fundamental and legal guarantees provided by humanitarian law, e.g. the prohibition of torture and summary executions (see p. 21; Art. 75, Protocol I; and Art. 6, Protocol II).

XVIII. Humanitarian law in contexts of peace-keeping and peace-enforcement operations carried out by or under the auspices of the United Nations

In situations of international and non- international armed conflict, members of military units taking part in a peace operation must respect international humanitarian law when they are actively engaged in armed confrontations against

a party to the conflict. When they are not, they are considered as civilians, as long as this situation remains unchanged.

For each contingent, humanitarian law applies according to the international obligations of each troop-contributing country. States that provide troops for such operations must ensure that their units are familiar with the humanitarian rules.

The applicability of humanitarian law to forces conducting operations under United Nations command and control was reaffirmed in the Bulletin of the UN Secretary- General issued on 6 August 1999 to mark the 50th anniversary of the adoption of the Geneva Conventions of 1949.

Under the title "Observance by United Nations forces of international humanitarian law", the Bulletin sets out a list of fundamental principles and rules of humanitarian law. These principles are applicable, as a minimum, to UN forces whenever they are engaged as combatants in an enforcement action or when acting in self-defence during a peace-keeping operation, to the extent and for the duration of armed engagements.

The obligation for UN forces to respect these fundamental principles and rules has also been included in the most recent agreements concluded between the United Nations and the countries in whose territory UN troops are deployed.

Distinction and definition

The purpose of peace-keeping operations is to ensure respect for cease-fires and demarcation lines and to conclude troop- withdrawal agreements. In the past few years, the scope of operations has been extended to cover other tasks such as the supervision of elections, the forwarding of humanitarian relief, and assistance in the national reconciliation process. The use of force is authorized only in cases of legitimate defence. Such operations take place with the consent of the parties on the ground.

Peace-enforcement operations, which come under Chapter VII of the United Nations Charter, are carried out by UN forces or by States, groups of States or regional organizations, either at the invitation of the State concerned or with the authorization of the UN Security Council. These forces are given a combat mission and are authorized to use coercive measures for carrying out their mandate. The consent of the parties is not necessarily required. The distinction between these two types of operation has become less clear in recent years. The term "peace support operations" has also started to emerge.

XIX. Humanitarian law and terrorism

Terrorist acts may occur during armed conflicts or in time of peace. As international humanitarian law applies only in situations of armed conflict, it does not regulate terrorist acts committed in peacetime.

The requirement to distinguish between civilians and combatants, and the prohibition of attacks on civilians or indiscriminate attacks, lies at the heart of humanitarian law. In addition to an express prohibition of all acts aimed at

spreading terror among the civilian population (Art. 51, para. 2, Protocol I; and Art. 13, para. 2, Protocol II), IHL also proscribes the following acts, which could be considered as terrorist attacks:

- attacks on civilians and civilian objects (Arts. 51, para. 2, and 52, Protocol I; and Art. 13, Protocol II);
- indiscriminate attacks (Art. 51, para. 4, Protocol I);
- attacks on places of worship (Art. 53, Protocol I; and Art. 16, Protocol II);
- attacks on works and installations containing dangerous forces (Art. 56, Protocol I; and Art. 15, Protocol II);
- the taking of hostages (Art. 75, Protocol I; Art. 3 common to the four Conventions; and Art. 4, para. 2b, Protocol II);
- murder of persons not or no longer taking part in hostilities (Art. 75, Protocol I; Art. 3 common to the four Conventions; and Art. 4, para. 2a, Protocol II).

Apart from prohibiting the above acts, humanitarian law contains stipulations to repress violations of these prohibitions and mechanisms for implementing these obligations, which are much more developed than any obligation that currently exists under international conventions for the prevention and punishment of terrorism.

CONVERGENCES AND DIVERGENCES: INTERNATIONAL HUMAN RIGHTS LAW, INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL CRIMINAL LAW IN RELATION TO ARMED CONFLICT

Elizabeth Santalla Vargas[*]

I. Introduction

International humanitarian law (IHL), as a law of exception, provides the normative framework for international law, which seeks to limit the effects of armed conflict, by establishing categories of protected persons and property and restricting means and methods of warfare. International human rights law (IHRL), essentially intended to apply in peacetime, is not however irrelevant to armed conflict. In fact, it is commonly accepted that IHRL also applies in situations of armed conflict. This raises a first question: what are the implications of the interaction between IHL and IHRL in regulating armed conflict? In other words, how do IHL and IHRL interact to regulate armed conflict? The dynamics of this relationship take on a new dimension in the context of penal repression, with developments in the emerging international criminal law (ICL). This leads to questions about the relationships generated between the normative frameworks constituted by IHL and IHRL with regard to the development, interpretation and application of ICL. The main aim of this paper is to address these questions.

In order to answer these questions, it is necessary to examine international jurisprudence, although this does not mean that the interpretation and application of the above-mentioned areas of law in relation to armed conflict by national jurisdictions is irrelevant; quite the contrary. However, in view of the limited scope of this paper, the analysis, which is brief and by no means exhaustive, is restricted to international jurisprudence.

II. Scenarios of convergence from the point of view of the International Court of Justice and the Inter-American Human Rights System

The interaction of IHL and IHRL in armed conflict has been addressed on numerous occasions by the International Court of Justice (ICJ). For example, in the Advisory Opinion on the Construction of a Wall in the Occupied Palestinian Territory of 2004 requested by the General Assembly investigating the legal consequences of the construction of a wall by Israel in the occupied Palestinian territory, in the light of the general principles and rules of international law, the ICJ reaffirmed the applicability of IHRL in situations of armed conflict, with the proviso that some of its rules are subject to derogation in times of emergency, e.g.

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Article 4 of the International Covenant on Civil and Political Rights[1] (this point will be discussed further below). This principle of applicability had previously been upheld by the ICJ in the controversial Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons of 1996, in which it established that the right not to be arbitrarily deprived of life also applies during hostilities. It refers to IHL as *lex specialis* for situations of armed conflict, the provisions of which help, in the case in issue, to define arbitrary deprivation of life (in a situation of armed conflict).[2]

This criterion for interpreting human rights (the right to life in this case: Article 4 of the American Convention on Human Rights) in the light of IHL (referring mainly to Article 3 common to the Geneva Conventions (GCs)) was also established in the *Tablada* case by the Inter-American Commission on Human Rights,[3] which highlights the need to interpret the right to life in armed conflict in the light of IHL, because the standards of the American Convention are insufficient for the resolution of alleged violations in this context.[4] Along the same lines, in the *Coard v. United States* case, the Commission also considered that it was necessary to refer to the standards of IHL in order to determine whether the detention of the petitioners was 'arbitrary' or not under the terms of Articles I and XXV of the American Declaration of the Rights and Duties of Man. The petitioners, who were civilians, were detained as the result of military action undertaken by the United States in Grenada in 1983. They alleged that after being detained by the armed forces of the United States during the first few days of the military operation, they were held incommunicado for several days and mistreated. Applying IHL, the Commission considered that the internment of civilians for imperative reasons of security is permitted when such reasons are justified (Article 78, GCIV) and that such reasons existed in this case. However, it also considered that civilians detained in exceptional circumstances such as these for reasons of security have the right to request that the legality of their detention be reviewed without delay (Article 78, GCIV) and that, in the case in issue, this right had been denied. The Commission therefore determined that, by failing to comply with this rule of IHL concerning the treatment of civilians by the Occupying Power, the United States had violated certain rules of international law, specifically Article I (right to freedom) and Article XXV (right to protection

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[1] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 106.

[2] ICJ, *Legality of the Threat or Use of Nuclear Arms,* Advisory Opinion of 8 July 1996, para. 25.

[3] Inter-American Commission on Human Rights, Case 11.137, *Juan Carlos Abella – Argentina*, 18 November 1997, para. 162.

[4] *Ibid,* para. 161. Note, however, that the Inter-American Commission on Human Rights affirms its competence to apply IHL directly and not just refer to it as a source of authoritative guidance for interpretation. For a criticism of this point, see L. Zegveld, 'The Inter-American Commission on Human Rights and international humanitarian law: A Comment on the Tablada Case', *International Review of the Red Cross,* 1998, No. 324.

against arbitrary detention) of the American Declaration of the Rights and Duties of Man.[5]

Following this line of jurisprudential reasoning, in the decision on the request for precautionary measures relating to the detainees in Guantánamo Bay (Cuba), the Commission reaffirmed its competence to apply standards and rules of IHL when interpreting the American Declaration and other Inter-American human rights instruments in situations of armed conflict.[6] Applying Article 5 of GCIII and Article XVIII of the American Declaration of the Rights and Duties of Man, it considered that a competent court or tribunal, as opposed to a political authority, should be charged with ensuring respect for the legal status and rights of persons falling under the authority and control of a State. It therefore requested that the United States urgently take the necessary measures for the legal status of the detainees at Guantánamo Bay to be determined by a competent court.

It should be noted, however, that in the *Las Palmeras* case (prior to the Guantánamo case), the Inter-American Court of Human Rights decided to admit the preliminary objection filed by Colombia alleging the lack of competence of the Commission and the Court itself to apply IHL directly.[7] Nevertheless, the Court considered that this did not prevent the Court (or, by extension, the Commission) from examining other national or international rules of law to determine their compatibility with the American Convention.[8] This implies that the Geneva Conventions of 1949, for example, should be analysed in the light of the American Convention ('examination of compatibility'), the reverse of the practice invoked by the Commission, i.e. the interpretation of the fundamental rights and guarantees established in the American Convention in the light of IHL (in situations of armed conflict). Although more eloquent with regard to jurisdiction, this position seems contrary to the recognition of IHL as *lex specialis*.

The *lex specialis* nature of IHL was also invoked by the Inter-American Commission on Human Rights. For example, in the *La Tablada* case, the Commission acknowledged the close interrelationship between the Covenant on Civil and Political Rights and Protocol II, considering the latter to be *lex specialis* in relation to the Covenant.[9] The consideration of IHL as a special law acquires additional implications in the above-mentioned Advisory Opinion issued by the ICJ on the construction of a wall in the occupied Palestinian territory, which specifies that there are situations that involve violations of both IHRL and IHL. In this case, the ICJ identifies a series of violations arising from the construction of a wall by Israel in the occupied Palestinian territory. These include *inter alia* violations of IHL, specifically the provision prohibiting the Occupying Power

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[5] Inter-American Commission on Human Rights, Case 10.951, *Coard et al v. United States,* 29 September 1999.

[6] Inter-American Commission on Human Rights, *Detainees in Guantánamo Bay, Cuba; Request for Precautionary Measures*, 13 March 2002.

[7] Inter-American Court of Human Rights, Case of *Las Palmeras v. Colombia,* Preliminary Objections, Judgement of 4 February 2000. Series C, No. 66. (Second and Third Preliminary Objections).

[8] *Ibid,* para. 32-33.

[9] Inter-American Commission on Human Rights, *supra* note 3*,* para. 166.

from deporting or transferring parts of its own civilian population into the territory it occupies (Article 49, GCIV) (part of the Israeli population that had begun to settle in the area forcibly and unilaterally separated by the wall built in occupied territory had to be transferred) and the provision prohibiting the destruction of property (Article 53, GCIV), as it was considered that the exception established in the provision, i.e. that such destruction is rendered absolutely necessary by military operations, did not apply (the construction of the wall in occupied territory resulted in the destruction of agricultural land, cropland, etc. belonging to the Palestinian population). The ICJ considers that the construction of the wall also contravenes provisions of IHRL, *inter alia*, such as Article 12 of the International Covenant on Civil and Political Rights, which guarantees freedom of movement (the construction of the wall constituted an (illegal) obstacle to the freedom of movement of the Palestinian population in the occupied territory). This dual interpretation is significant for a jurisdiction such as that of the ICJ, whose jurisdiction *ratione materiae* is not restricted to specific international instruments.

However, in the case of the Inter-American System, it is evident that jurisdiction *ratione materiae* extends only to determining whether the acts or laws of States are compatible with the American Convention on Human Rights and other Inter-American instruments that grant the Commission or the Court the authority to rule on the violation of rights recognized in such instruments (ratified or acceded to by the State in question). In this context, the doctrine of the existence of a "*hard core*" of fundamental rights that cannot be derogated from at any time and under any circumstances and which must therefore also be respected in the ambit of IHL application is particularly significant. Furthermore, this hard core of rights also contains IHL provisions. Article 3 common to the Geneva Conventions establishes minimum standards of protection applicable in non-international armed conflict, which are clearly also applicable in international armed conflict, as observed by the ICJ in its judgement on the case concerning *military and paramilitary activities in and against Nicaragua.*[10] The rationale underlying the conception of a hard core of non-derogable rights reflects the common objective pursued by both IHRL and IHL, which is to protect individuals and human dignity.

III. Interaction with international criminal law

The relationship between international criminal law (ICL) and armed conflict is essentially manifested in what are known as 'war crimes', which are the most serious infringements of IHL.[11] This relationship is not, however, divorced from the influence of and interaction with IHRL. It provides a kind of feedback in the

[10] ICJ, *Nicaragua v. United States* (case concerning military and paramilitary activities in and against Nicaragua), Judgement of 27 June 1986 (Merits), para. 218.

[11] This terminology is used to avoid inaccuracies and confusion with the terms 'grave breaches' and 'serious violations'. See M. Silva, "La Represión Nacional de los Crímenes de Guerra", in Defensor del Pueblo (ed.), *Implementación del Estatuto de la Corte Penal Internacional en Bolivia,* 2005, p. 11.

process of criminalizing the most serious infringements of IHL, in which human rights also play an important part. One of the most telling examples is the war crime of conscripting or enlisting children under the age of fifteen years into the national armed forces or groups or using them to participate actively in hostilities, first established in the Rome Statute of the International Criminal Court (ICC) of 1998 (Article 8(2)(b)(xxvi) for international armed conflict and Article 8(2)(e)(vii) for non-international armed conflict) and subsequently in the Statute of the Special Court for Sierra Leone (SCSL) of 2000 (Article 4(c)).[12]

This conduct is established as a war crime in IHL, specifically in the provision prohibiting the conscription and enlistment of children into armed forces and their participation in hostilities (Article 77(2) of Additional Protocol I of the GCs (API)[13] for international armed conflict and Article 4(3)(c) of Additional Protocol II,[14] which prohibits this act in situations of non-international armed conflict). These provisions, particularly the provision of API, inspired Articles 38(2) and (3) of the Convention on the Rights of the Child (CRC) of 1989.[15] Later efforts to develop international rules concerning this issue include Convention 182 of the International Labour Organization concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 2000 (Article 3(a)), which prohibits the forced or compulsory recruitment of children under the age of eighteen for use in armed conflict. This higher age limit of eighteen is also established in the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict of 2000. Some States, for which the protocol is binding, have incorporated this higher age limit when criminalizing this act in domestic legislation in the process undertaken to implement the Rome Statute of the ICC (in the Latin American region, cf. Brazil, Peru and Bolivia (bill)).[16]

However, the process of criminalizing the most serious infringements of IHL is not a simple task. It entails a series of dilemmas, which came to the fore in the first international criminal prosecution of the war crime of conscripting and enlisting children under the age of fifteen, which was the *Hinga Norman* case,

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[12] Art. 4(c), Statute of the SCSL: "Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities."

[13] "*The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest*."

[14] "*[C]hildren who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.*"

[15] These provisions contain similar wording to that used in Article 77(2), API.

[16] See E. Santalla, "Implementación del Estatuto de Roma de la Corte Penal Internacional en Bolivia: Análisis del Ordenamiento Jurídico Interno y de los Procesos de Implementación en la Legislación Comparada", in Defensor del Pueblo (ed.), *Implementación del Estatuto de la Corte Penal Internacional en Bolivia*, 2005, p. 159.

tried in the SCSL.[17] One of the main preliminary motions arguing lack of jurisdiction alleged that the Statute of the SCSL had been applied retroactively, which, according to the defence, constituted a violation of the principle of legality, as the crime had no foundation in international custom at the time when the alleged offences were committed (this preliminary motion was dismissed, although not unanimously).[18]

Whether or not one agrees with the majority opinion in the *Hinga Norma* case, the debate is particularly relevant in view of the fact that IHRL and IHL instruments do not provide for individual criminal responsibility, unless it is expressly established. This necessarily leads to an analysis of the above-mentioned process of criminalization of the most serious infringements of IHL. Happold identifies a series of positions that have been put forward in this regard.[19] One such position is based on the type of rule that has been violated (rule establishing a fundamental guarantee or the protection of 'important values'). However, this does not seem to provide a satisfactory solution in cases in which determination of the nature of the rule violated is open to different interpretations. Another position is that all violations of the laws and customs of war are war crimes, contrary to the trend initiated in the *Tadić* case,[20] whereby the violation of a rule of IHL must incur individual criminal responsibility for it to constitute a war crime. As can be seen, the debate is far from simple, as it involves different institutional interests and issues on which there seems to be no general consensus at the present time.

However, the difficulties inherent in the process of criminalizing the most serious infringements of IHL are not solely concerned with the time when the act can be considered a criminal offence under (customary) international law – in the case of the ICC this is, in fact, irrelevant because the principle of non-retroactivity does not exist in jurisdiction *ratione temporis* (Article 11 of the Rome Statute of the ICC) – but also with their characterization beyond the traditional dualistic approach adopted in IHL (i.e. traditional classification of hostilities into international and non-international armed conflict). It was precisely in relation to the crime of conscripting and enlisting children that this problem came to light in the first case brought before the ICC, the *Lubanga Dyilo* case*,* in which Thomas Lubanga was prosecuted for this crime.[21]

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[17] Special Court for Sierra Leone, Appeals Chamber, *Prosecutor v. Sam Hinga Norman,* case SCSL-2003-14-AR72 (E), Decision of 31 May 2004.

[18] For a critical analysis of the judgement and, in the absence of a conviction, the decision of the Appeals Chamber, which ruled that the crime of recruiting children had been established before 1996 (when the alleged offences were committed) in customary law, see M. Happold, "International Humanitarian Law, War Criminality and Child Recruitment: The Special Court for Sierra Leone's Decision in *Prosecutor v. Samuel Hinga Norman*", *Leiden Journal of International Law,* Volume 18*,* 2005. For the argument in favour, see A. Smith, "Child Recruitment and the Special Court for Sierra Leone", *Journal of International Criminal Justice,* Issue 2, 2004.

[19] *Ibid,* p. 294-297.

[20] International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Tadić,* case no. IT-94-I-A, Decision of 2 October 1995.

[21] In the context of the situation in the Democratic Republic of the Congo.

On 29 January 2007, Pre-Trial Chamber I of the ICC issued its decision on the confirmation of charges against Thomas Lubanga Dyilo, leader of the Union of Congolese Patriots (UPC) and the commander-in-chief of its armed military wing, the *Forces Patriotiques pour la Libération du Congo* (FPLC). It was alleged that the UPC/FPLC had committed a series of crimes during the armed conflict (mid-2002 to late 2003), including conscripting and enlisting children under the age of fifteen into its military wing.[22] Lubanga was charged by the prosecution with conscripting and enlisting children under the age of fifteen into armed forces or groups and using them to participate actively in hostilities in a *non-international* armed conflict (Article 8(2)(e)(vii) of the Rome Statute of the ICC).[23] However, the Pre-Trial Chamber considered, in a *sui generis* decision, that it was not bound by the prosecution's legal characterization.[24] Based on the precedent set by the *Tadić* case, it ruled that the involvement of the Uganda People's Defence Force (UPDF) made the hostilities in Ituri during part of the time to which the charges referred an armed conflict of an international nature,[25] arguing that the intervention of foreign armed forces had internationalized an internal armed conflict. Based on this reasoning, Pre-Trial Chamber I confirmed the charges of enlisting and conscripting children and using them to participate actively in hostilities, although it substituted the crime charged by the prosecution under Article 8 (2)(e)(vii) of the Rome Statute of the ICC with a different one under Article 8 (2)(b)(xxvi) of the Rome Statute of the ICC, holding that the armed conflict was internal from 2 June to 13 August 2003 and international from early September 2002 to 2 June 2003.[26]

In spite of the conflict of jurisdiction and powers that it poses,[27] the procedural innovation introduced by Pre-Trial Chamber I would probably not have been so controversial if the legal characterization of the crime in question were the same for both types of armed conflict. This is not, however, the case. Article 8 (2)(e)(vii) of the Rome Statute of the ICC criminalizes conscripting or enlisting children under the age of fifteen years into armed forces or *groups*, while Article 8 (2)(b)(xxvi) of the Rome Statute of the ICC only criminalizes

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[22] M. Happold, 'Prosecutor v. Thomas Lubanga, Decision of Pre-Trial Chamber I of the International Criminal Court, 29 January 2007', *International and Comparative Law Quarterly,* 56, 2007 p. 713.

[23] ICC, *Prosecutor v. Lubanga,* Decision on the Prosecutor's Application for a Warrant of Arrest, Art. 58, Pre-Trial Chamber I, 17 February 2006, ICC-01/04-01/06-8-Corr, para. 81.

[24] *Ibid,* para. 16.

[25] *Ibid,* para. 85.

[26] *Ibid,* final provisions.

[27] The Prosecutor applied for leave to appeal the decision in question. 'Application for Leave to Appeal Pre-Trial Chamber I's 29 January 2007 "Décision sur la confirmation des charges" of 5 February 2007 (ICC-01/04-01/06), arguing, *inter alia*, that Pre-Trial Chamber I had exceeded its powers. As the Prosecutor argues, the Rome Statute of the ICC only grants the Chamber the power to adjourn the hearing for the confirmation of charges and request the Prosecutor to consider amending the charges if the Chamber is of the view that the evidence submitted appears to establish a different crime than the one charged by the Prosecutor (Art. 61(7)(c)(ii) Rome Statute of the ICC). At the time of writing this paper, the appeal had not been resolved.

conscripting or enlisting children into the *national armed forces.* Therefore, if the armed conflict is classified as international, establishing individual criminal responsibility in the Lubanga case for conscripting or enlisting children under the age of fifteen into the FPLC would be atypical, as the FPLC, the military wing of an opposition party, could not be considered national armed forces. As Happold observes, the wording of Article 8 (2)(b)(xxvi) seems to refer to the national armed forces of one of the parties to the conflict (in this case the Democratic Republic of the Congo or Uganda).[28] In the Elements of Crimes the terminology used in the articles is simply reiterated in relation to the terms of the objection. This difficulty led Pre-Trial Chamber I to consider whether the term "national" armed forces restricted the scope of the article to government armed forces.[29]

The Chamber ruled that the term in question does not refer solely to government armed forces,[30] considering that the definition of 'national armed forces' established in Article 43 of API is sufficiently broad to preclude such an interpretation.[31] It also draws on the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, which interpreted the term 'national' as denoting not only nationality in the strictest sense of the word, but also as belonging – through other connections, such as ethnic links – to the opposing party.[32] The term is interpreted in this way in order to avoid the legal inconsistency that would arise from interpreting it literally, in which case acts such as those referred to in this case would not incur individual criminal responsibility if they were committed in the context of an international armed conflict.[33] Yet the fact that the same crime has been defined in different ways, however subtly, according to the type of armed conflict involved, seems to indicate that the intention of the drafters of the Rome Statute of the ICC was to establish different consequences in each case.[34]

In any event, the question of the scope of the Chamber's authority for the purposes of conducting its scrutiny of the charges brought by the Prosecutor according to the procedure established in the Rome Statute of the ICC, in particular the proper interpretation of the terms of Article 61(7)(c)(ii), and the formula "a different crime within the jurisdiction of the Court"[35] remain to be settled by the Appeals Chamber. However, regardless of the position eventually adopted, the discussion is significant in that it highlights the importance of

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28 Happold, *supra* note 15, p. 721.

29 Pre-Trial Chamber I, *supra* note 23, para. 275.

30 *Ibid,* para. 285.

31 *Ibid,* para. 271 and 273.

32 The Chamber refers to the cases of *Tadić* and *Delalić.*

33 Pre-Trial Chamber I, *supra* note 23, para. 284.

34 In this regard, K. Dormänn, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, ICRC, 2003, p. 471. The author observes that different wording is used to indicate that conscripting and enlisting children into rebel forces in a non-international armed conflict also constitutes a war crime. It is considered that the difference in wording established when the Rome Statute of the ICC was negotiated was intentional rather than accidental, although without good reason. See Happold, *supra* note 15, p. 722.

35 Application, *supra* note 27, para. 12.

overcoming the traditional dualistic approach to IHL, whereby distinctions are made according to whether an armed conflict is considered international or non-international when incorporating the repression of war crimes in domestic legislation. In national implementation, it is therefore appropriate not only to raise the standard of protection in keeping with advances in IHRL by adopting the higher age limit of eighteen, as mentioned above, but also to standardize all the constituent elements of criminal acts regardless of the type of armed conflict in which the punishable offence is committed.[36]

Another relevant consideration brought to the fore by the debate provoked by the *Lubanga* case, in addition to the question of jurisdiction, is the importance of extending individual criminal responsibility for serious infringements of IHL to non-State actors. However, such individual criminal responsibility, which necessarily assumes the existence of a collective, is not reflected in the current system for the establishment of collective responsibility. Consequently, if the *Lubanga* case had been tried within the Inter-American Human Rights System and the responsibility of the State with regard to the FPLC had not been determined, there would have been no jurisdiction to adjudicate on infringements of IHL by these actors.[37] As observed by the Inter-American Court of Human Rights in the case of *Myrna Mack Chang v. Guatemala,* a system of international responsibility that only establishes individual criminal responsibility or the international responsibility of the State is incomplete. It considered that

> […]both the legal person (referring to the State) and said individuals must answer for the consequences of their acts or omissions, especially when they bring about grave violations of human rights and of International Humanitarian Law.[38]

In view of current developments, it is necessary to consider the question of whether the unit of collective responsibility should necessarily be the State or whether it could also be a non-State collective entity. This question reveals an important gap in the dynamics that govern the complementariness and overlapping of IHRL and IHL. This presents IHRL protection systems with the challenge of addressing IHL as a body of law that also binds entities other than

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[36] This does not mean ignoring the existence of certain types of conduct that, by their very nature, only occur in situations of international armed conflict, for example, delaying the repatriation of prisoners of war.

[37] For example, in the Decision on the Request for Precautionary Measures in relation to Detainees in Guantánamo Bay, Cuba, the Inter-American Commission on Human Rights stated that: "[…] where persons find themselves *within the authority and control of a state* and where a circumstance of armed conflict may be involved, their fundamental rights may be determined in part by reference to international humanitarian law as well as international human rights law (emphasis added). Inter-American Commission on Human Rights, *supra* note 6.

[38] Inter-American Court of Human Rights, *Myrna Mack Chang v. Guatemala.* Judgement of 25 November 2003, Reasoned Opinion of Judge A.A. Cançado Trindade, para. 20 (clarification added).

States, as IHL has no monitoring mechanism of its own with a broad jurisdiction *ratione personae.*[39]

IV. Conclusion

Both the ICJ and the Inter-American Human Rights System have sustained that, in situations of armed conflict, fundamental rights, such as the right to life, protection against arbitrary detention and the legal guarantees provided for in IHRL, must be analyzed in the light of the standards enshrined in IHL. This interpretation is particularly relevant in light of the fact that IHL, unlike IHRL, has no specific monitoring system of its own to independently determine whether a violation has been committed and, where appropriate, to establish reparations. If the Inter-American System operating in the Americas lacked the jurisdiction to interpret the American Convention – and other Inter-American human rights instruments for which it has jurisdiction – in the light of IHL in situations involving the international responsibility of States in relation to armed conflict, would this not result in a lack of protection in emergency situations, which include armed conflict, when these are precisely the situations in which greater emphasis should be placed on such protection? Would this not run contrary to advances achieved in human rights protection?

Emerging ICL presents a new approach to interpretation, which necessarily extends beyond the scope of collective international responsibility and raises serious challenges for international law, for example, the extension of dual responsibility (individual and collective) to non-State actors. The processes currently in progress to implement substantive ICL provide an opportunity to boost the advance of customary IHL, for example, by gradually eliminating the traditional dualistic approach and moving towards full IHL application *ratione personae*.

These observations substantiate the importance of adopting a correlated approach to IHRL, IHL and ICL.

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[39] On the subject of the need for a specific mechanism to monitor fulfilment of obligations under IHL, see J. Kleffner, "Improving Compliance with International Humanitarian Law Through the Establishment of an Individual Complaints Procedure", *Leiden Journal of International Law*, 15, 2002.

INTERNATIONAL HUMANITARIAN LAW IN THE INTERAMERICAN SYSTEM

John M. Wilson*

I. Background

The main purpose of the Course on International Humanitarian Law of the Department International Law of the OAS and the International Committee of the Red Cross (ICRC) is, on one hand, to suport the Permanent Missions of the Member States in the drafting and negotiating General Assembly resolutions and other instruments on the subject of International Humanitarian Law (IHL), and, on the other, to support the members of the General Secretariat in the practical implementation of their mandates related to these IHL instruments.

The present chapter gives a general overview of the topics and resolutions related to IHL in the work-load of the OAS, with special emphasis on the resolutions significantly related to the IHL. In this sense, Section II provides an introduction to IHL principles constantly applied in this work and sections and sections III through X provide an overview of the topics closely related to IHL, covered by OAS resolutions. These topics include: Promotion of IHL; Disappeared Persons; Terrorism; Right to Truth; Internally Displaced Persons; Prisoners of War and Detainees; International Criminal Court; and Refugees and Asylum Seekers. Each of these sections is divided into two parts: the first describes the manner in which the topic relates to IHL and deleniates the relevant IHL instruments; the second section then provides pertinent paragraphs of General Assembly resolutions on that specific topic. This latter section is further divided into two parts: the first provide operative paragraphs of the resolution which contain political mandates to the states; the second, provides paragraphs with programatic mandates to the General Secretariat[1].

II. Introduction

As explained in the precedent chapters, the International Humanitarian Law is the set of international rules, established by treaty and custom, specifically aimed at addressing humanitarian problems arising from international or non-international armed conflicts. IHL protects persons and property that are, or may

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1 It is important to note that the intent of these resolutions is not to cover IHL in comprehensive fashion. The purpose of these is to detail the political and technical goals the member states wish to achieve with regard to the topic specific to each resolution. The present chapter, thus, provides only a basic panorama of OAS mandates on topics with a substantial connection to IHL, as complementing information to the annual resolution on IHL itself. As a result, the principal purpose of the chapter is to provide a survey of the manner in which the OAS covers topics related to IHL, with the hope that an enumeration of the political and technical mandates of each related resolution can be of interest and assistance to students of IHL in the Inter-American system.

be, affected by an armed conflict and, to a certain extent, limits the rights of parties to a conflict to use the methods and means of warfare of their choice. However, IHL acknowledges the extreme difficulties in enforcing law during war – by definition a time where the normative framework relinquishes control over dealings between states. As a result, the aim of IHL is not to cover a broad spectrum of rights and obligations, but to principally mitigate some of the most horrifying manifestations of international conflict and/or internal strife.

As explained, in cases of international armed conflict, IHL relies on the universal application of the four Geneva Conventions of 1949, as well as Additional Protocol I of 1977, to protect civilians, wounded combatants, and prisoners of war. Likewise, in the case of non-international armed conflicts, IHL relies on common article 3 of the Geneva Conventions of 1949, as well as Additional Protocol II of 1977, to protect civilians and other persons not (or no longer) engaged in hostilities.

It is important to put emphasis on these definitions because in recent years, the concepts of armed conflict, combatants and prisoners of war have become increasingly difficult to define and characterize. This is particularly true in the war on terrorism, where combatants are both, state and non-state, military and non-military actors, foreigners and nationals of targeted countries; where their acts, by definition, are principally aimed to harm civilian targets; and, where such targets can also be local and/or international in nature. Because of these difficulties, it has been said that IHL concepts exist at the vanishing point of international law. However, it should be clear even in contemporary times that treaty ratification and adherence to custom suggest not a shift in application of IHL, but an ever increasing relevance of its application in the international arena. In addition, IHL customary law applies to all belligerents, whether or not they are state parties to IHL instruments. This effect brought by the long-standing abandonment of the *si omnes* clause –a provision limiting application of IHL to contracting states– discredits any claim by parties to a conflict, regardless of their nature, that they can disregard existing customary IHL.

The changing nature of armed conflict has also shed light on the inexorable nexus between international humanitarian law, on one hand, and international human rights law, on the other. Recent international jurisprudence increasingly establishes that humanitarian law is less limited to traditional military concepts and increasingly conscientious of protecting the lives, health and dignity of individuals – important values under both IHL and human rights law, even if from different perspectives. Both types of law, for example, protect human life, prohibit torture and cruel treatment, provide guarantees for persons subject to a criminal process, prohibit discrimination, and protect vulnerable populations (including women and children), etc. The main differences between the two lie in the fact that human rights law applies whether or not there is an armed conflict, while IHL applies only in the former case. Hence, human rights law deals with peacetime aspects not regulated by IHL, including freedom of the press, right to assembly, right to vote, etc. Likewise, IHL applies to issues outside the purview of human rights, including the conduct of hostilities, combatants and prisoners of war, and protection of the Red Cross and Red Crescent emblems. Overall,

however, the relation between these two pillars of international law in application of hostilities and armed conflict is highly complementary.

The following sections provide a general survey of the manner in which these IHL concepts are covered by current General Assembly resolutions. The objective is to provide a brief overview of the institutional importance placed on each IHL related topic, which the Committee may then consider in determining the subjects on which to draft model laws for implementation in OAS member states.

III. Promotion of International Humanitarian Law

Since 1994, the decision-making bodies of the Organization of American States have made the implementation and enforcement of core international humanitarian law precepts a priority via a resolution of the general assembly dedicated to the promotion and protection of IHL in the Americas[2]. The operative paragraphs of the Resolution call on OAS Member States to ratify, if they have not already done so, some of the fundamental IHL treaties and conventions that have laid the groundwork for international legal norms and obligations in times of war (namely the Geneva Conventions I-IV of 1949 as well as the Additional Protocols I-II of 1977). The Resolution also highlights, and endorses, some of the more progressive measures adopted in the realm of IHL (namely the Rome Statute of 1998, the 1997 Convention against Anti-Personnel Mines, and the 1993 Convention on Chemical Weapons) in the hopes of projecting an image of the OAS as not only a beacon for democracy but also a bulwark for the rule of law.

Some of the Operative Paragraphs with special historical significance of these resolutions to be implemented by Member States are the following:

- To urge member states and the parties engaged in armed conflict to honor their obligations under international humanitarian law, including those pertaining to safeguarding the well-being and dignity of protected persons and property, and the proper treatment of prisoners of war.
- To urge member states that have not yet done so to consider becoming parties to the treaties related to IHL.[3]

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[2] General Assembly Resolutions AG/RES. 1270 (1994), AG/RES. 1335 (1995), AG/RES. 1408 (XXVI-O/96), AG/RES. 1503 (XXVII-O/97), AG/RES. 1565 (XXVIII-O/98), AG/RES. 1619 (XXIX-O/99), AG/RES. 1706 (XXX-O/00), AG/RES 1709 (XXX-O/00),AG/RES. 1770 (XXXI-O/01), AG/RES. 1771 (XXXI-O/01), AG/RES. 1904 (XXXII-O/02), AG/RES. 1944 (XXXV-O/05), AG/RES. 2231 (XXXVI-O/06), AG/RES. 2226 (XXXVI-O/06), AG/RES. 2293 (XXXVII-O/07).

[3] From the international instruments mentioned in those mandates, the following have special importance: The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and its 1954 and 1999 Protocols; The 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (Biological Weapons Convention); The 1977 Additional Protocols I and II to the 1949 Geneva Conventions; and the 2005 Additional Protocol III; including the declaration foreseen in

- To urge member states to adapt their criminal law in order to meet their legal obligations under the 1949 Geneva Conventions and, in the case of the states parties thereto, the 1977 Additional Protocol I thereto with respect to the definition of war crimes, the complementary universal jurisdiction, and the responsibility of superiors.

- To remind those member states that are parties to the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction of their obligation to prevent and suppress any activity prohibited therein when it is carried out by persons or in territory under their jurisdiction or control and of the importance of paying attention to the needs of victims of antipersonnel mines and, where appropriate, victims of explosive remnants of war.

- To urge member states to adopt, in accordance with their constitutional processes, legislative and other measures, including penal legislation, to implement fully the provisions of the 1925 Geneva Protocol, the 1972 Biological Weapons Convention, and the 1993 Chemical Weapons Convention, as well as to consider ways and means to enhance national implementation and regional and sub-regional cooperation on BWC implementation. (Operative Paragraph-10)

- To invite member states to consider adopting the appropriate measures, at the national and international levels, to address the grave humanitarian consequences of the unregulated availability of arms, in particular the enactment of laws aimed at strengthening control over the illicit manufacturing of and trafficking in firearms and other related materials, bearing in mind the pertinent provisions of international humanitarian law as one of the criteria for the manufacturing and transfer of weapons, as well as the Programme of Action adopted at the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (2001) and the results of its 2006 Review Conference.

- To invite member states to participate actively in the 30th International Conference of the Red Cross and Red Crescent Societies and to consider

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Article 90 of Additional Protocol I; The 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, including the amendment to its Article I adopted in 2001 and its five protocols; The 1989 Convention on the Rights of the Child, and its 2000 Optional Protocol on the involvement of children in armed conflicts; The 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention); The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines and on Their Destruction; The 1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA); The 1998 Rome Statute of the International Criminal Court; The 1999 Inter-American Convention on Transparency in Conventional Weapons Acquisitions; The 1994 Convention on the Safety of United Nations and Associated Personnel; Additional Protocol III to the Geneva Conventions of August 12, 1949, and relating to the Adoption of an Additional Distinctive Emblem, approved on December 8, 2005.

presenting pledges concerning the promotion of and respect for international humanitarian law. (Operative Paragraph-16)

- To call upon member states to enact laws to regulate the use of and to prevent and, when applicable, punish the misuse of the red cross, red crescent, and, where applicable, red crystal emblems, as well as their denominations, as established in relevant treaties.

- To urge member states, in keeping with their obligations under international law, to adopt effective measures to prevent the disappearance of persons in cases of armed conflict or other situations of armed violence, to determine the fate of those who have disappeared, and to attend to the needs of their family members.

- To encourage member states to ensure the adoption of the necessary measures and mechanisms to protect cultural property from the effects of armed conflict, in accordance with their international obligations, and in particular to give consideration to the adoption of preventive measures related to the preparation of inventories, the planning of emergency measures, the appointment of competent authorities, and the enactment of laws to ensure respect for such property.

- To call upon member states to adopt all necessary measures to comply with their respective international legal obligations regarding the recruitment and use of children in armed forces or armed groups, in accordance with recognized standards of international humanitarian law, international human rights law, and international refugee law.

- To encourage member states to establish procedures for determining, when studying, developing, acquiring, or adopting a new weapon or new means or methods of warfare, whether using, manufacturing, stockpiling, exporting, or transferring them would be contrary to international humanitarian law, and, in that event, to prohibit their use by the armed forces and their manufacture for such purposes.

- To recognize the humanitarian consequences of the use of some weapons, including cluster munitions.

- To invite member states to continue to support the work of national committees or commissions responsible for the dissemination and implementation of international humanitarian law; and to urge states where such bodies do not exist to consider establishing them.

- To invite member states that are parties to the Rome Statute to cooperate fully with the International Criminal Court and to define under their criminal law the crimes that are within its jurisdiction.

The following are the most relevant Programatic Paragraphs of those resolutions, to be implemented by OAS organs, organisms and entities:

- To request the Inter-American Juridical Committee to prepare and propose model laws supporting efforts to implement treaty obligations concerning international humanitarian law.

- To request the General Secretariat (International Law Department) to continue organizing, in the context of the Committee on Juridical and Political Affairs, and in coordination with the International Committee of the Red Cross (ICRC), courses and seminars for staff of the permanent missions of the member states to the Organization of American States and for General Secretariat staff and the general public, in order to promote knowledge of and respect for international humanitarian law and related inter-American conventions, including measures for their effective implementation.

- To instruct the Permanent Council, with support from the Office of International Law of the Department of International Legal Affairs of the General Secretariat, and in cooperation with the ICRC, to hold a special annual meeting on topics of current interest in international humanitarian law.

IV. Disappeared Persons

"Disappeared persons" is considered as the most important issue for Latin America by several critics, and this has striven to raise awareness among governments, the military and international organizations surrounding the tragedy of people unaccounted for as a result of armed conflict or internal violence. *Enforced disappearance* is defined, in short, as the abduction or deprivation of liberty of a person by state authorities, followed by the denial of those authorities to disclose the whereabouts or fate of the person. Apart from being expressly prohibited by customary IHL, disappeared persons have also been the topic of major international conventions[4].

In these conventions, particularly the UN Convention, there exists a number of procedural safeguards in-order to prevent people from going missing in the first place: people deprived of liberty have to be kept in an offical place, to be registered, and to have all their movements registered. Most importantly everyone deprived of liberty must be allowed to contact with the outside world, especially to communicate with their family and counsel, and the family and counsel have a right to information on the detention and whereabouts of the person. In regards to customary IHL specifically, the following provisions pertain to "disappeared persons":

- Families have the right to be informed of the fate of missing relatives.[5]
- The parties to a conflict must search for persons reported missing by an adverse party and facilitate enquiries made by members of families dispersed as a result of the conflict so as to help them restore contact with one another and try to bring them together again.[6]

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[4] The Inter-American Convention on Forced Disappearance of Persons; UN International Convention for the Protection of All Persons from Enforced Disappearance.

[5] Additional Protocol I, Art. 32.

[6] Additional Protocol I, Art. 33.

- The parties to a conflict must also encourage the work of organizations engaged in this task.[7]
- A further responsibility incumbent upon the parties to a conflict concerns deceased persons: lists showing the exact location and markings of the graves, together with particulars of the dead interred therein, must be exchanged.[8]

The following Operative Paragraphs of those resolutions to be implemented in member states, have special historical significance[9]:

- Urge all parties involved in armed conflict and actors in other situations of To armed violence to prevent the disappearance of persons, in accordance with applicable international law.

- To urge those member states that have not yet done so to consider signing and ratifying, ratifying, or acceding to, as the case may be, the Inter-American Convention on Forced Disappearance of Persons and the International Convention for the Protection of All Persons from Enforced Disappearance.

- To encourage member states to continue moving forward in preventing the forced disappearance of persons by considering, where appropriate, the adoption of laws, regulations, and/or instructions requiring the establishment of official registries in which records will be kept of all detained persons among other reasons to allow, as appropriate, family members, other interested persons, judicial authorities, and/or bodies that have a recognized mandate to protect detainees to learn, within a short period of time, of any detention that has taken place.

- To urge member states to step up their efforts to shed light on the fate of persons who have disappeared, and to that end, to assure that authorities and all mechanisms involved coordinate their work, cooperate among themselves, and complement one another's efforts.

- To urge member states to ensure that human remains are treated with due respect and in accordance with national and international practices and standards and legal and ethical standards applicable to the collection, exhumation, and management of unidentified remains, in order to assemble all the information needed to identify them and to ascertain the facts that led to that situation.

- To urge member states to punish those found guilty of violating, in armed conflict and other situations of armed violence, provisions of international human rights law and/or international humanitarian law, within their respective spheres of application, that protect persons from disappearances, in particular, forced disappearances.

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[7] Geneva Conventions IV of 1949, Art. 26.

[8] Additional Protocol I, Art. 34.

[9] Resolutions related to disappeared persons and assistance to their families AG/RES. 1904 (XXXII-O/02), AG/RES. 1944 (XXXIII-O/03), AG/RES. 2052 (XXXIV-O/04), AG/RES. 2127 (XXXV-O/05), AG/RES. 2134 (XXXV-O/05), AG/RES. 2231 (XXXVI-O/06), AG/RES. 2295 (XXXVII O/07).

- To encourage member states to request support from international and civil society organizations to address the problem of the disappearance of persons.

- To invite member states to continue their cooperation with the International Committee of the Red Cross, a recognized humanitarian institution, in its various areas of responsibility, and to facilitate its work.

V. Terrorism

Acts often described as terrorism have been banned by treaties on international humanitarian law (IHL) and treaties establishing international crimes. These include the Fourth Geneva Convention of 1949 and its two Additional Protocols of 1977. They ban terrorism during international and internal armed conflict, at least insofar as terrorism is understood to mean attacks directed against civilians.

Although the term terrorism is often understood to refer to acts by groups that are not part of the State, an important category of terrorist acts is those which may be carried out or sponsored by a State directly or indirectly or implicitly sanctioned by a State even where its own police or military forces are not involved. In addition to an express prohibition on all acts aimed at spreading terror among the civilian population, IHL also proscribes the following acts[10]:

- Attacks on civilians and civilian objects[11]
- Indiscriminate attacks[12]
- Attacks on places of worship[13]
- Attacks on works and installations containing dangerous forces[14]
- The taking of hostages[15]
- Murder of persons not or no longer taking part in hostilities[16]

The most important paragraphs in relation to the General Assembly resolutions on Protecting Human Rights and Fundamental Freedoms while Countering Terrorism are the following[17]:

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[10] Protocol I, Art. 51, paragraph 2 and Art. 13, paragraph 2.

[11] Protocol I, Arts. 51, paragraph 2 and 52; and Protocol II, Art. 13.

[12] Protocol I, Art. 51, paragraph 4.

[13] Protocol I, Art. 53 and Protocol II, Art. 16.

[14] Protocol I, Art. 56 and Protocol II, Art. 15.

[15] Protocol I, Art. 75; Art. 3 common to the four Conventions; Protocol II, Art. 4, paragraph 2b.

[16] Protocol I, Art. 75; Art. 3 common to the four Conventions; Protocol II, Art. 4, paragraph 2a.

[17] Resolutions on the protection of the human Rights and fundamental freedoms in the fight against terrorism: AG/RES. 1840 (XXXII-O/02), AG/RES. 1906 (XXXII-O/02), AG/RES. 1931 (XXXIII-O/03), AG/RES. 2035 (XXXIV-O/04), AG/RES. 2143 (XXXV-O/05), AG/RES. 2238 (XXXVI-O/06) y AG/RES. 2271 (XXXVII O/07).

- To reaffirm that the fight against terrorism must be waged with full respect for the law, including compliance with due process and human rights comprised of civil, political, economic, social, and cultural rights, as well as for democratic institutions, so as to preserve the rule of law and democratic freedoms and values in the Hemisphere.

- To reaffirm that all member states have a duty to ensure that all measures adopted to combat terrorism are in compliance with their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law.

- To urge all member states, with a view to fulfilling the commitments undertaken in this resolution, to consider signing and ratifying, ratifying, or acceding to, as the case may be and as soon as possible, the Inter-American Convention against Terrorism and the American Convention on Human Rights; and to urge the states parties to take appropriate steps to implement the provisions of those treaties.

- To urge member states to respect, in accordance with their obligations, the human rights of all persons deprived of their liberty in high-security detention centers, particularly observance of due process.

- To reaffirm that it is imperative that all states work to uphold and protect the dignity of individuals and their fundamental freedoms, as well as democratic practices and the rule of law, while countering terrorism.

- Finally, to request the Permanent Council to prepare draft common terms of reference for the protection of human rights and fundamental freedoms in the fight against terrorism, that would compile current international standards based on applicable international law, as well as best practices, for consideration by the General Assembly.

The most important operative paragraphs of these resolutions of the General Assembly to be implemented by OAS organs, organisms and entities are the following:

- To reiterate the importance of intensifying dialogue among the CICTE, the IACHR, and other pertinent areas of the Organization, with a view to improving and strengthening their ongoing collaboration on the issue of protecting human rights and fundamental freedoms while countering terrorism.

- To request the Inter-American Commission on Human Rights to continue promoting respect for and the defense of human rights and facilitating efforts by member states to comply appropriately with their international human rights commitments when developing and executing counterterrorist measures, including the rights of persons who might be at a disadvantage, subject to discrimination, or at risk as a result of terrorist violence or counterterrorist initiatives.

- To request that the Permanent Council hold consultations with the Inter-American Committee against Terrorism (CICTE) and with member states, so as

to conclude the process for preparing recommendations to the protection of the human rights by the Member States in the fight against terrorism[18].

VI. Right to the Truth

The "right to the truth" has emerged as a legal concept in myriad manners and jurisdictions. Its origins may be traced to the right under IHL of families to know the fate of their relatives, recognized by Articles 32 and 33 of the 1977 Additional Protocol I to the Geneva Conventions of 1949, as well as obligations incumbent on parties to armed conflicts to search for civilians who have been reported missing[19]. Enforced disappearances of persons and other egregious human/humanitarian rights violations during periods of extreme, state-sponsored violence, particularly in various countries in Latin America, prompted a broader interpretation of the right to be given information about missing persons. It also led to the identification and recognition of a "right to the truth" by various international organs, including the Inter-American Commission on Human Rights. This "right to the truth" has often been invoked, particularly in the aftermath of armed conflict or periods of internal strife via "truth commissions," to help societies understand the underlying causes of conflicts and/or the widespread violations of human rights.

The most important operative paragraphs of the resolutions of the General Assembly related to the Right to the Truth, since 2006, are the following[20]:

- To recognize the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promoting and protecting human rights.

- To welcome the establishment in several states of specific judicial mechanisms, as well as other non-judicial or ad hoc mechanisms, such as truth and reconciliation commissions, that complement the justice system, to contribute to the investigation of violations of human rights and of international humanitarian law; and to express appreciation for the preparation and publication of the reports and decisions of these bodies.

- To encourage other states to consider the possibility of establishing specific judicial mechanisms and, where appropriate, truth commissions or other similar bodies to complement the justice system, to contribute to the investigation and punishment of gross violations of human rights and serious violations of international humanitarian law.

- To encourage all states to take appropriate measures to establish mechanisms or institutions for disclosing information on human rights violations,

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[18] Resolution AG/RES. 2143 (XXXV-O/05), operative paragraph 5. This mandate is based on the document entitled "Recommendations for the Protection of Human Rights by OAS Member States in the Fight against Terrorism" prepared by the IACHR, contained in document CP/doc.4117/06.

[19] Additional Protocol I, Arts. 32 and 33.

[20] Resolutions on the Right to the Truth AG/RES. 2175 (XXXVI-O/06) and 2267 (XXXVII-O/07).

and to ensure that citizens have appropriate access to said information, in order to further the exercise of the right to the truth, prevent future human rights violations, and establish accountability in this area.

The most important programmatic paragraphs in relation to the resolutions on protecting the Right of Truth to be implemented by the OAS organs, organisms and entities are the following:

- To encourage states and the Inter-American Commission on Human Rights (IACHR) to provide the states with necessary and appropriate assistance concerning the right to the truth, through, inter alia, technical cooperation and information exchange on national administrative, legislative, and judicial measures applied, as well as experiences and best practices geared toward the protection, promotion, and implementation of this right.
- To request the IACHR to continue to prepare a report, for presentation to the Permanent Council, on the evolution of the right to the truth in the Hemisphere, which report shall include national mechanisms and experiences in this regard.

VII. Internally Disaplaced Persons

Armed conflicts have often been accompanied by large-scale movements of civilians, both within the borders of a country and across international borders. International humanitarian law expressly prohibits the forced displacement of civilians in both international and non-international armed conflicts, and offers protection should displacement occur.

The UN defines internally displaced people (IDPs) as "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized border."[21] In the context of internally displaced persons, IHL expressly prohibits any party to an armed conflict from compelling civilians to leave their places of residence, except for extraordinary circumstances of military expediency in which case the dislocation is temporary.[22]

In addition to this express prohibition, the rules of IHL intended to spare civilians from hostilities and their effects also play an important role in preventing displacement, as it is often violations of these rules that cause civilians to flee their homes. In regards to specifically enumerated safeguards for IDPs one can highlight the following:

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21 United Nations report, "*Guiding principles on Internal Displacement,"* 1998.

22 Fourth Geneva Convention of 1949 Art. 49 (1,2).

- In general, the IHL prohibits any transfer or displacement and any deportation of protected persons.[23]
- Specifically, the displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.[24]
- Also, the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory shall be regarded as a grave breach of the IHL.[25]
- Together with the IHL, the Rome Statute of the International Criminal Court establishes that the concept of internally displaced people fits into the definition of war crimes and the grave breaches of the laws applicable to the armed conflicts.[26]

The most important operative paragraphs of the resolutions of the General Assembly related to Internally Displaced Persons are the following[27]:

- To urge member states to consider adopting and implementing in their domestic law the Guiding Principles on Internal Displacement, which reflect

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[23] Fourth Geneva Convention of 1949, Art. 45 (4), 49 (1,2), and Art. 44, 70.

[24] Additional Protocol II, Art. 17.

[25] Additional Protocol I, Art. 85 (4)(a).

[26] The Rome Statute of the International Criminal Court contains in its definition of war crimes 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: 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; Rome Statute of the International Criminal Court, Art. 8 (2)(b)(viii). It also defines among 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, 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. Rome Statute of the International Criminal Court, Art. 8(2)(e)(viii).

[27] Resolutions on internally Displaced Persons: AG/RES. 1971 (XXXIII-O/03) "La protección de refugiados, repatriados, apátridas y desplazados internos en las Américas", AG/RES. 774 (XV-O/85), AG/RES. 838 (XVI-O/86), AG/RES. 951 (XVIII-O/88), AG/RES. 1021 (XIX-O/89), AG/RES.1039 (XX-O/90), AG/RES.1040 (XX-O/90), AG/RES. 1103 (XXI-O/91), AG/RES. 1170 (XXII-O/92), AG/RES. 1214 (XXIII-O/93), AG/RES. 1273 (XXIV-O/94), AG/RES. 1336 (XXV-O/95), AG/RES. 1416 (XXVI-O/96), AG/RES. 1504 (XXVII-O/97), AG/RES. 1602 (XXVIII-O/98), AG/RES. 1892 (XXXII-O/02), AG/RES. 2055 (XXXIV-O/04), AG/RES. 2140 (XXXV-O/05), AG/RES. 2229 (XXXVI-O/06) and AG/RES. 2277 (XXXVII-O/07).

certain aspects of international human rights law and international humanitarian law.

- In order to avert the internal displacement of persons, to encourage member states to address the factors that cause it and to establish preventive policies, such as early warning, bearing in mind that dialogue with all the actors involved is essential to the achievement of lasting solutions.

- To urge member states, in keeping with their responsibility to internally displaced persons, based on comprehensive strategies and from a human rights perspective, to commit to providing them with protection and assistance during displacement, through competent national institutions; and to invite member states to commit to seeking lasting solutions, including the safe and voluntary return of internally displaced persons and their resettlement and reintegration, whether in their place of origin or in the receiving community.

The most important programmatic paragraphs in relation to the resolutions on internally displaced persons to be implemented by the OAS organs, organisms and entities are the following:

- To urge member states to consider using the Guiding Principles on Internal Displacement, prepared by the Special Representative of the United Nations Secretary-General on Internally Displaced Persons.

- To appeal to the appropriate agencies of the United Nations and inter-American systems, and to other humanitarian organizations and the international community, to provide support and/or assistance, as requested by states, in addressing the various factors that cause internal displacement, and in assisting persons affected by internal displacement at all stages, where account should be taken of the Guiding Principles on Strengthening of the Coordination of Humanitarian Emergency Assistance.[28]

VIII. Prisoners of War and Detainees

A prisoner of war is a combatant, generally a member of the armed forces of a party to an international armed conflict or an individual enjoying equivalent legal status, who has fallen into the hands of an adverse party[29]. Whenever there are prisoners of war, the Detaining Power is responsible for their treatment. Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Geneva Conventions and after the Detaining Power has satisfied itself of the willingness and ability of such transferee to apply the Convention III concerning prisoners or war. When prisoners of war are transferred under such

[28] This support is required according to the United Nations General Assembly resolution 46/182.

[29] Geneva Convention III, Art. 4. Under IHL, individuals enjoying equivalent status include war correspondents, supply contractors, merchant marine and civil aircraft crews, and civilians who spontaneously take up arms to resist invading forces.

circumstances, responsibility for the application of the Convention rests on the Power that accepts the prisoners, while they are in its custody.[30]

In case of doubt, any person who takes part in hostilities is presumed to be a prisoner of war.[31]

Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied followed pursuant to the Convention.[32]

Furthermore, Prisoners of war must at all times be humanely treated and any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind, which are not justified by the medical, dental or hospital condition of the prisoner concerned, and carried out exclusively in his interest. Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited.[33]

Prisoners of war are entitled in all circumstances to the respect of their persons and honor. Women shall be treated with due regard due to their sex and shall in all cases benefit by treatment as favorable as that granted to men. Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or outside its own territory, of the rights such capacity confers except in so far as the captivity requires.[34]

The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health.[35]

Notwithstanding these protections to the prisoners of war, under IHL a person is not allowed to wear simultaneously two caps: the hat of a civilian and the helmet of a soldier. A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant; he is an unlawful combatant. Under IHL, an unlawful combatant can be lawfully targeted by the enemy, but he/she cannot claim the privileges appertaining to lawful combatancy or civilian status.[36]

However, in these cases, prisoners of war will always be treated with humanity and in the event of judicial proceedings they shall benefit by the

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30 Geneva Convention III, Art. 12.
31 Additional Protocol I of 1977, Art. 45.1.
32 Geneva Convention III, Art. 12.
33 Geneva Convention III, Art. 13.
34 Geneva Convention III, Art. 14.
35 Geneva Convention III, Art. 15.
36 Fourth Geneva Convention of 1949, Art. 5.

safeguards of a proper and fair trial. They will also recover the benefits of all their rights and privileges as protected person as soon as possible, always taking into consideration the security of the State. Under the current context of "the global war on terror" the detention of unlawful combatants must take place within a clear and appropriate legal framework and the relevant procedural safeguards. According to the ICRC, any person deprived of liberty cannot be detained and interrogated outside of an appropriate legal framework.[37] For specific IHL provisions see:

The most important operative paragraphs of the resolutions of the General Assembly on the Study of the Rights and the Care of Persons under any form of Detention or Imprisonment are the following:[38]

- To urge member states to comply, under all circumstances, with all applicable international obligations to respect the human rights of persons under any form of detention or imprisonment, including the rights established in the American Declaration of the Rights and Duties of Man and those established in all other human rights instruments to which they are party.
- To encourage member states to facilitate the visit to their countries of the Special Rapporteur on the Rights of Persons Deprived of Freedom in the Americas of the Inter-American Commission on Human Rights, including their detention centers; and to encourage all member states to facilitate such visits.

The most important programmatic paragraphs in relation to the resolutions on prisoners of war and other detainees to be implemented by the OAS organs, organisms and entities are the following:

- To instruct the Permanent Council to continue studying the question of the rights and the care of persons under any form of detention or imprisonment, in cooperation with the competent organs and entities of the inter-American system[39].
- To request the Inter-American Commission on Human Rights (IACHR) to continue reporting on the situation of persons under any form of detention or imprisonment in the Hemisphere and, using as a basis its work on the subject, to

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[37] Geneva Convention III, Relative to the Treatment of Prisoners of War, 1949; Geneva Convention IV, Relative to the Protection of Civilian Persons in Time of War, 1949; and Additional Protocol I, 1977, Articles 43 & 44.

[38] General Assembly resolutions on the Study of the Rights and the Care of Persons under any form of Detention or Imprisonment: AG/RES. 1816 (XXXI-O/01), AG/RES. 1897 (XXXII-O/02), AG/RES. 1927 (XXXIII-O/03), AG/RES. 2037 (XXXIV-O/04), AG/RES. 2125 (XXXV-O/05), AG/RES. 2233 (XXXVI-O/06) and AG/RES. 2278 (XXXVII O/07).

[39] According to the resolution AG/RES. 2278, this study will take place taking into account the conclusions and recommendations of the Sixth Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas, contained in the Final Report of that meeting (REMJA-VI/doc.24/06 rev. 1), including the report of the First Meeting of Officials Responsible for Penitentiary and Prison Policies of the OAS Member States (GAPECA/doc.4/03).

proceed with the compilation of the regional and global standards for detention and imprisonment policies in the member states, making reference to any problems and good practices observed.

- To reiterate to the Permanent Council that it should consider the possibility of drafting an inter-American declaration on the rights, duties, and care of persons under any form of detention or imprisonment, with a view to strengthening existing international standards on these topics, and the feasibility of preparing a hemispheric manual on penitentiary rights, taking as a basis the United Nations Standard Minimum Rules for the Treatment of Prisoners.[40]

IX. International Criminal Court

One of the priorities of the Inter-American system includes the promotion and local implementation of the Rome Statute of the International Criminal Court - a permanent institution with the power to exercise its jurisdiction over persons for the most serious crimes of international concern.[41] According to the Rome Statute those crimes include genocide, crimes against humanity and war crimes.[42]

Under the sphere of public international law it is important to stress the way in which International Humanitarian Law, International Human Rights Law and International Criminal Law convene in the topic of international tribunals since they all share the same purposes of protecting the life, health and dignity of the victims as well as requiring sanctions to those responsible for these violations.[43] A basic difference is that IHL only applies in situations of armed conflicts while International Human Rights Law applies whether there is or not a conflict.[44] On the other hand, IHL establishes applicable rules on the conduct of hostilities – a topic not covered by the International Human Rights Law.[45] The most important

[40] According to the resolution AG/RES. 2278, this determination will be made on the basis of the results of the discussions and studies conducted, including the inputs of the IACHR, and of the work of the Special Rapporteur on the Rights of Persons Deprived of Freedom in the Americas of the Inter-American Commission on Human Rights and the results of the Second Meeting of Officials Responsible for Penitentiary and Prison Policies, to be held pursuant to the REMJA VI decision.

[41] Rome Statute of the International Criminal Court, Preamble.

[42] Rome Statute, Art. 5.1. In this sense, the Rome Statute contains laws about war crimes and customary IHL, including its definition, which has been particularly important specially when considering the ICC jurisdiction over the Congo, Uganda, Central African Republic and Darfur, Sudan cases. Therefore, the Rome Statute appears nowadays as the most important articulation of the objectives of the IHL in the topic of war crimes.

[43] Both types of laws protect human life, prohibit tortures and inhumane treatment, provide guarantees to the persons subject to criminal proceedings, prohibit discrimination and protect vulnerable populations (including women and children), etc. See, Geneva Conventions, the Rome Statute and the International Human Rights instruments.

[44] Likewise, and in contrast to IHRL, human rights laws are related to the protection of individuals during peacetime in topics such as freedom of the press, right of assembly, right to vote, among others.

[45] Some areas of application of the IHL where there is no involvement of the IHRL include the conduct of hostilities, combatants and prisoners of war, the protection of the emblems of the Red Cross and the Red Crescent, among others.

topic for the Rome Statute is the prosecution of those responsible for the most serious crimes. As a result, the three types of law work in complementary manner to achieve the protection of victims and the punishment of those who have committed crimes under international law, in every circumstance.

The Rome Statute establishes that the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes and it defines "war crimes" to include: Grave breaches of the Geneva Conventions of 12 August 1949; other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law; in the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions; and other serious violations of the laws and customs applicable in armed conflicts not of an international character.[46] More specifically, under its definition of war crimes the Rome Statute establishes 8 (eight) grave braches of the Geneva Conventions;[47] 26 (twenty six) serious violations of the laws and customs applicable in international armed conflicts;[48] 4 (four) serious violations of the Art. 3 common to the Geneva Conventions;[49] and

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[46] Rome Statute, Art. 8.

[47] Those include: Willful killing; Torture or inhuman treatment, including biological experiments; Willfully causing great suffering, or serious injury to body or health; Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; Unlawful deportation or transfer or unlawful confinement; Taking of hostages. See, Rome Statute, Art. 8(a).

[48] Some of the most important are: Intentionally directing attacks against the civilian population; Intentionally directing attacks against civilian objects; Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission; 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; Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion; 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; 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; 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; among others. See, Rome Statute, Art. 8(b).

[49] These include: Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; Committing outrages upon personal dignity, in particular humiliating and degrading treatment; Taking of hostages; The passing of sentences and the carrying out of executions without previous judgment pronounced by a

12 (twelve) serious violations of the laws and customs applicable to international armed conflicts.[50]

IHL on the other hand, pursuant to the Geneva Conventions I, II and IV, establishes the following actions as grave breaches against persons or civilian objects: willful killing; torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[51] The Geneva Convention III adds as grave breaches compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial.[52] Additional Protocol I prohibits any danger to the physical or mental health and integrity of persons who are in the power of the adverse Party, and in particular, to carry out on such persons, even with their consent, physical mutilations; medical or scientific experiments or removal of tissue or organs for transplantation, and constitutes as a grave breach any willful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends.[53] Lastly, Additional Protocol I establishes as grave breaches of the Conventions any act if committed against persons in the power of an adverse Party protected by the Protocol, or against the wounded, sick and shipwrecked, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol. In addition, the following actions will also be considered grave breaches when committed

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regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable. See, Rome Statute, Art. 8 (c).

[50] These include: Intentionally directing attacks against the civilian population; Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Red Cross and the Red Crescent; Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping; 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; Pillaging a town or place; Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual; Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities; Ordering the displacement of the civilian population for reasons related to the conflict; Killing or wounding treacherously a combatant adversary; Declaring that no quarter will be given; 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; Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict. See, Rome Statute, Art. 8 (d).

[51] Geneva Convention I, Art. 50; Geneva Convention II, Art. 51; and Geneva Convention IV Art. 147.

[52] Geneva Convention III, Art. 130.

[53] Additional Protocol I, Art. 11.

willfully and causing death or serious injury to body or health: Making the civilian population or individual civilians the object of attack; Launching an indiscriminate attack affecting the civilian population or civilian objects; Launching an attack against works or installations containing dangerous forces; Making non-defended localities and demilitarized zones the object of attack; Making a person the object of attack in the knowledge that he is hors de combat; The perfidious use of the distinctive emblem of the red cross, red crescent or other protective signs.[54]

Finally, both the Rome Statute and the IHL request the Contracting Parties to enact any legislation necessary to define the gravest breaches and to provide effective criminal sanctions for persons committing, or ordering to be committed, any of the grave breaches.[55] However, on this topic it is important to note that, notwithstanding the common goals and the similar language used when typifying the war crimes and the grave breaches, the Rome Statute and the Geneva Conventions as well as it Additional Protocol I have several differences among them. Therefore, it is necessary to study with great detail the war crimes when typifying them under local legislation to ensure a comprehensive application of both types of law.

The most important operative paragraphs in relation to the promotion of the International Criminal Court and the application of the Rome Statute are the following:[56]

- To renew its appeal to those member states of the Organization that have not already done so to consider ratifying or acceding to, as the case may be, the 1998 Rome Statute of the International Criminal Court.

- To remind the member states of the Organization that are parties to the Rome Statute that it is important to adapt or amend their domestic law, as necessary, with a view to the full and effective implementation of the Statute, including the relevant adaptations in accordance with such instruments of international human rights law or international humanitarian law as may be applicable to them.

- To urge the member states of the Organization to cooperate to the greatest extent possible among themselves and, as appropriate, with the International Criminal Court so as to avoid the impunity of the perpetrators of the most serious international crimes, such as war crimes, crimes against humanity, and genocide, ensuring that their national legislation facilitates said cooperation and applies to crimes within the jurisdiction of the International Criminal Court.

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54 Additional Protocol I, Art. 85.

55 Geneva Conventions I (Art. 49), II (Art. 50), III (Art. 129) y IV (art. 146).

56 Resolutions related to the promotion of the International Criminal Court: AG/RES. 1619 (XXIX-O/99), AG/RES. 1706 (XXX-O/00), AG/RES. 1709 (XXX-O/00), AG/RES. 1770 (XXXI-O/01), AG/RES. 1771 (XXXI-O/01), AG/RES. 1900 (XXXII-O/02), AG/RES. 1929 (XXXIII-O/03), AG/RES. 2039 (XXXIV-O/04), AG/RES. 2072 (XXXV-O/05), AG/RES. 2176 (XXXVI-O/06); and AG/RES. 2279 (XXXVII O/07).

The most important programmatic paragraphs in relation to the promotion of the International Criminal Court to be implemented by Member States, the OAS organs, organisms and entities are the following:

- To encourage states to contribute to the Trust Fund established by the Assembly of States Parties to the Rome Statute for the benefit of victims of crimes within the jurisdiction of the International Criminal Court, and of the families of such victims, as well as to the Fund for the participation of least developed countries.

- To request the Inter-American Juridical Committee to prepare model law on cooperation between states and the International Criminal Court, taking into account the Hemisphere's different legal systems, and to submit it to the General Assembly of the Organization at its thirty-eighth regular session.[57]

[57] This mandate has to be applied on the basis of the information received from and updated by the member states, as well as the recommendations contained in report CP/doc. 4194/07, and the existing cooperation laws. Resolution AG/RES. 2279 (XXXVII O/07), Operative Paragraph 8.

BASIC RULES AND FUNDAMENTAL PRINCIPLES RELATING TO THE PROTECTION OF PERSONS IN INTERNATIONAL HUMANITARIAN LAW

Danilo González Ramírez*

Giebt es Krieg, so macht der Teufel die Hölle weiter
[When war rages, the devil expands hell]
- Anonymous

Seulement ceux qui sont assez fous pour penser qu'ils peuvent changer le monde pourront
[You will only be able to change the world if you are mad enough to think you can]
- H. Dunant

Introduction

The purpose of this chapter is to provide a written account of some of the issues that I addressed when I participated, as a guest speaker and lecturer, in the first *Introductory Course on International Humanitarian Law (IHL)* held on 31 January 2007 in the city of Washington, DC.[1] I had the honour of addressing the participants attending this event, organized by the Committee on Juridical and Political Affairs of the Organization of American States (OAS) Permanent Council, on the specific subject of the *Law of protected persons and objects*.

This is then an account of my address on the subject of the protection of the individual derived from the rules and principles of IHL in situations of international armed conflict in particular, with the addition of observations arising from the fruitful discussions that took place as a result of this first edition of the course.

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The author would like to congratulate and thank the organizers, the ICRC and the Office of International Law of the Department of International Legal Affairs of the OAS, for holding this successful event and for their initiative in producing this publication.

The views expressed by the author arise from the exercise of his academic freedom and the analysis of a variety of theoretical writings on the extensive doctrine of IHL. This article is in no way intended to reflect the international position or views of the country for which he currently acts as a diplomatic representative.

[1] The course was organized by th Office of International Law of the Department of International Legal Affairs of the OAS General Secretariat, in coordination with the International Committee of the Red Cross (ICRC), in fulfilment of the mandate granted by the General Assembly of the OAS during its Thirty-Sixth Regular Session held in June 2006 in Santo Domingo (Dominican Republic) in Resolution AG/RES. 2226 (XXXVI-O/06) of 2006 on the "Promotion of and Respect for International Humanitarian Law", and with a view to contributing to the goal of disseminating and strengthening the implementation of IHL and related international instruments through governmental conferences, courses and seminars aimed at the international community.

I sincerely hope that the general ideas expressed in this presentation and incorporated as a complementary and explanatory monograph in this compilation of treaty texts presented to us by the organizers will be of use not only to those who implement the texts, declarations and resolutions concerning IHL adopted by States, but also to those who interpret and assess them, taking into account the conceptual and dogmatic accuracy that this area often requires in order to develop a better understanding of the issues involved and, at the same time, ensure the effective and necessary protection of human beings during armed conflict.

In any such analysis, it should first be noted that, strictly speaking, war is universally outlawed under contemporary international law. Indeed, the United Nations has expressly enshrined the principle that prohibits resorting to "*the threat or use of force.*"[2] However, as the old Spanish saying goes "*del dicho al hecho, hay un gran trecho*" (there is a big gap between what is said and what is done). This is perhaps why renowned authors, scholars, humanists and thinkers, such as Nobel Peace Prize winner (1933) Sir Norman Angell, the prolific Afro-American academic Merze Tate, the Spanish humanist and Europeanist Salvador de Madariaga and, more recently, the British researcher Geoffrey Best, to name but a few, have, at different points in history, referred specifically to the pacifist ideas that began to emerge in the 20th century as a 'theatre of illusion'.[3] However,

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[2] Art. 2, para. 4, of the Charter of the United Nations of 1945 reads as follows: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

[3] See Sir Ralph Norman Angell, *The Great Illusion: A Study of the Relation of Military Power in Nations to Their Economic and Social Advantage*, G.P. Putnam's Sons/The Knickerbocker Press, New York/London, 1911, 417 pp. In this work, the British journalist, Labour member of parliament and pacifist expounds and perfects his theory – popularly known at the time as 'Norman-Angellism' – according to which military power, a factor in the then incipient doctrine of European economic integrationism, does not necessarily accord nations commercial superiority. See also Merze Tate, *The Disarmament Illusion: The Movement for a Limitation of Armaments to 1907*, MacMillan & Co., 1942. This historian and internationalist examines the political and diplomatic obstacles to modern disarmament, based on the French experience and its opposition in the late 19th century to the 'proportional disarmament' initiative advocated by the Triple Alliance of 1882 (Germany, Austria-Hungary and Italy). It was considered an 'unattainable utopia' in contemporary Europe at the first Hague Peace Conference held in 1899, which – in spite of the evident failure of the idea of disarmament – culminated in significant achievements, such as the adoption of the Hague Convention for the Pacific Settlement of International Disputes (it established the creation of a permanent optional mechanism for the peaceful settlement of international conflicts among the 27 signatory powers, which is the predecessor of today's International Court of Justice of The Hague), the Hague Convention with Respect to the Laws and Customs of War on Land, the Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864 (all dated 29 July 1899) and the three declarations of the same date on the launching of projectiles and explosives from balloons, and other methods of similar nature, the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases and the use of bullets which expand or flatten easily in the human body. Salvador de Madariaga, *Disarmament*, Coward-McCann Inc. New Cork, 1929, p. 26. This renowned Spanish diplomat and historian from Galicia, observed, in the

as observed by the renowned Genevan philosopher and deontologist Henri Frédéric Amiel – best known for his posthumously published work *Private Journal* – while a professor at the University of Berlin, "the spirit of man is fed by illusion rather than truth." Certainly, it is an undeniable fact that however we approach any aspect of humanitarian law, there is an underlying ethical and moral substratum in all discussion, cutting across historical memory, political syllogism and the rules of law.

I do not mean, by this, to advocate a neo-Grotian view of the international community or a generally axiological approach to the rules that govern it. I simply wish to highlight the fact that, whichever approach one chooses to adopt – international-contractualist, functional-rationalist, sociological-constructivist or strictly rational-positivist – the inescapable fact is that there is a certain measure of ethical reasoning inherent in the very notion of humanity when it comes to the humanitarian principles, rules and standards of the Law of The Hague and the Law of Geneva.

Despite the valuable ideas that positively influenced modern thought, first the doctrine of *jus contra bellum* and later the universal and 'outlawry of war' schools,[4] it cannot be denied that, in practice, a big gap exists today between the

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context of the League of Nations, that "[w]hether disarmament appeals to a feeling of international trust, the existence of which it implies, or is in itself the indispensable condition for such a feeling to develop, it cannot be doubted that the present state of the world is not particularly favorable for either disarming or even discussing disarmament schemes." Geoffrey Best, "The Restraint of War on Historical Perspective", in Astrid J.M. Delissen and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead,* Martinus Nijhoff Publishers, Dordrecht, 1991, pp. 3-6. This well-known historian and Oxford University lecturer refers specifically to the "illusion of disarmament", pointing to an empirical trend observed by various historiographers, which shows that every disarmament conference since St Petersburg and The Hague has, in fact, been a conference about the arms race, where defence is regarded as aggression and weapons are considered defensive by those who have them and offensive by those who do not.

[4] See Hans W. Wehberg, *The Outlawry of War*, Carnegie Endowment for Peace, New York, 1931, p. 149, translated by Edwin H. Zeydel (also at: http://www.questia.com/PM.qst?a=o&d=59423083) and, by the same author, "Le problème de la mise de la guerre hors la loi", in *Recueil des cours,* Académie de Droit International de La Haye, The Hague, 1928, Vol. 24, no. 4, pp. 147-306. Also, Quincy Wright, "The Outlawry of War and the Law of War", in *American Journal of International Law*, Washington, DC, Vol. 47, No. 3, July, 1953, pp. 365-376 (also at: http://links.jstor.org/sici?sici=0002-9300(195307)47%3A3%3C365%3ATOOWAT%3E2.0.CO%3B2-8). Charles Clayton Morrison, *The Outlawry of War: A Constructive Policy for the World Peace,* Willett, Clark & Colby, Chicago, 1927 (also at: http://www.ilab.org/db/book191_010335.html). Also Stanimir A. Alexandrov, "Self Defense against the Use of Force in International Law", in *The International and Comparative Law Quarterly*, Oxford University Press, Vol. 48, No. 1, (January, 1999), pp. 243 ff. (also at: http://links.jstor.org/sici?sici=0020-5893(199901)48%3A1%3C243%3ASATUOF%3E2.0.CO%3B2-U). Guillaume Sacriste and Antoine Vauchez, "La 'Guerre hors-la-loi' (1919-1930). Les Origines de la Définition d'un Ordre Politique International", in *Actes de la recherche en sciences sociales*,

empirical reality of human experience in the second half of the 20th century and the beginning of this century and the intention expressed by the international community in international legal instruments relating to the doctrinal fragmentation and the subsequent theoretical reduction of *jus ad bellum* and *casus belli*, starting in the postwar period. This is clearly evident in the fact that the vast majority of the one hundred plus high-intensity armed conflicts waged between the Second World War and the present day have been unquestionably non-international in character and are therefore not expressly authorized by *jus cogens*.

One could argue, as Swinarski does, that it necessarily follows from the fact that the use of force is generally prohibited by treaty law, resulting in the virtual disappearance of *jus ad bellum* from contemporary international law, that in its historical digression "all that remains of the classical international rules of the law of war are those concerned with making armed conflict, now unlawful, more human in the way it is conducted, by means of the prohibitions established in the Law of The Hague, and with protecting the victims of armed conflict through the provisions of the Law of Geneva. The rules of the law of war that remain in force are those that currently constitute international humanitarian law" (ICRC translation).[5]

However, although war – in its various manifestations, under its different names and with its diverse ramifications – is expressly forbidden, it continues to cast a shadow over our civilization decades after the San Francisco Conference of 1945 and other similar events[6] and in spite of the clear tendency of the international community and international case law, more recently, to promote the convergence of the various branches of international law, which together deal directly with the protection of persons.[7]

Université de Paris I, Paris, No. 151-152, March 2004, pp. 91-95 (also at: http://www.u-picardie.fr/labo/curapp/Publications/Cv_vauchez12.pdf).

[5] Christophe Swinarski, *Introducción al Derecho Internacional Humanitario*, ICRC, Geneva, 1984, Ch. I, Sec. 5. See also Robert Kolb, "Origin of the twin terms jus ad bellum/jus in bello", in *International Review of the Red Cross (IRRC),* No. 320, September-October 1997, pp. 553-562.

[6] A similar position was formally expressed at the Ninth International Conference of American States held in 1948, which culminated in the creation of the Organization of American States. See the Charter of the American States of 1948. Article 22 of the Charter expressly establishes that "[t]he American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defence…", going on to authorize measures adopted in accordance with current international law "for the maintenance of peace and security" (Article 23). Additionally, Article 3 (paras. g and h) establishes that "[t]he American States condemn war of aggression…" and "[a]n act of aggression against one American State is an act of aggression against all the other American States" (see also Article 28). All these principles are directly related to others, which affirm the right of each State "to protect itself and to live its own life (Article 15) and to "defend its integrity and independence" (Article 13).

[7] For example, Antônio Augusto Cançado Trindade, Gérard Peytrignet and Jaime Ruiz de Santiago, *As Três Vertentes da Proteção Internacional dos Direitos da Pessoa Humana: Direitos Humanos, Direito Humanitário, Direito dos Refugiados,* ICRC, Geneva, 2004, Part I, Sec. I. These authors observe that there is a clear interconnection between international human rights law, international humanitarian law and international

Within the realm of current thought and the rules of contemporary international law, Chapter VI of the Charter of the United Nations does in fact legitimize, as an exceptional measure, the use of force as a last resort in the exercise of individual or collective self-defence, the implementation of collective measures to "maintain or restore international peace and security" and in what are termed "wars of national liberation" against colonial powers or racist regimes. This latter type of armed conflict – under the aegis of the principle of the self-determination of peoples –also gains real international legal relevance.[8] However, it is also true that the associated arguments for the use of force – whether lawful or unlawful – have regrettably continued to be used, even in our most recent history, not only as a justification for managing and acting in wars, but also as an inherent excuse for everything lumped under the term *proschemata*[9] through the ages, which covers all manner of hostile acts.

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refugee law, which is manifested not only in the fact that they complement each other, but also in their interaction at the normative level with regard to both dogmatic and operational aspects. This can be explained as follows: "A critical review of classical doctrine shows that it suffered from a compartmentalized view of the three great pillars of the international protection of persons – human rights, humanitarian law and refugee law – owing in large part to the excessive emphasis placed on the separate historical origins of the three branches (in the case of international humanitarian law, to protect the victims of armed conflict, and in the case of international refugee law, to re-establish the basic human rights of those who had left their countries of origin). The convergence of these three pillars which seems to us clearly evident today does not at all mean total uniformity, in terms either of substance or of procedure; moreover, it would no longer be appropriate to speak of pillars or branches in the international protection of persons."

[8] Charter of the United Nations: collective security measures: "Article 42. (…) the Security Council (…) may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security…"; self-defence and the defence of third parties: "Article 51. Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations…"; principle of self-determination: "Article 1. The purposes of the United Nations are: (…) 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace", and "Article 55. With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote…." The points that follow are related to Article 1, para. 4, of AP I of 1977 of the Geneva Conventions of 1949, which provides that "[t]he situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

[9] Originally *πρόσχῆμα [přoschēma]*, hence the plural *πρόσχῆματα [přoschēmata]*. The Athenian narrator Thucydides draws on this concept in his *History of the Peloponnesian War* [Ιστορία του Πελοποννήσιακού Πολέμου]. It implicitly involves a dialectical analysis of the 'apparent motives' or 'professed reasons' as visible and external aspects, that is, the pretext under which Athens made the Hellenic city-states

It should be noted here, as recently observed by Elizabeth Salmón, my distinguished colleague from the Pontificia Universidad Católica del Perú, that if, strictly speaking, the use of force is outlawed under international law, then IHL is necessarily applied in material terms to specific situations that would not exist if this first prohibition were actually observed.[10] This is why it is often said that the purpose of IHL is, in fact, to illuminate, with a minimum of humanity, a dark reality which, in our opinion, is quintessentially infrahuman in ontological terms and inhuman in deontological terms.

The concerns raised by the sadly famous *Memory of Solferino* and the tragedies of the Napoleonic Wars, recorded by the humanist and Nobel Peace Prize winner (1901) Henry Dunant, remain with us even today. It was, in fact, the human suffering and misery that he had witnessed that led him, in 1862, to propose the creation of an international organization that would become known throughout the world as the International Committee of the Red Cross (ICRC).[11]

There was an awareness of humanitarian need from that time on, which was extensively recorded for the first time and then systemized and codified in relation to the specific situation of armed conflict, thanks to the skilful drafting of Francis Lieber and the insight of Abraham Lincoln, in the famous Lieber Code of 1863 (Instructions for the Government of Armies of the United States in the Field, General Order No. 100 of the Lincoln Administration). It is this humanitarian need – many aspects of which are regrettably outstanding issues on the world agenda – that gives rise to a real and crucial requirement in today's world to maintain and continue to strengthen the application of the rules of IHL as an unfailing expression of a commitment and determination to achieve the universal

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into tribute-paying subject states of the Delian League (to defend its members against the Persians), in contrast to the 'real and actual reason', which was to establish its political hegemony over the Aegean Sea. This was just before the Peloponnesian War (431-404 B.C.), which eventually ended the hegemony of Athens in the region with the victory of its adversaries Sparta and the Peloponnesian League. The term "*proschema*" is later repeated with certain conceptual variations in the works of Herodotus and Sophocles.

[10] Elizabeth Salmón, *Introducción al Derecho Internacional Humanitario*, Fondo Editorial-Instituto de Democracia y Derechos Humanos de la Pontificia Universidad Católica del Perú (IDEHPUCP)/ICRC, Lima, 2004, 174 pp.. See the introduction on p. 17.

[11] Jean Henry Dunant, "*Un Souvenir de Solférino*", Geneva, 1862, 1st ed., in Frederick W. Haberman, *Nobel Lectures: Peace 1901-1925*, Elsevier Publishing Company, Amsterdam, 1972. Henry Dunant described the Solferino battle scene in these Dantesque terms: "chaotic disorder, despair unspeakable and misery of every kind." It was to a large extent these writings that inspired the diplomatic conference called by the Swiss Government to adopt the original Geneva Convention in 1864 on the protection of military victims of land warfare, which was then extended in 1899 by the Hague Convention to protect wounded, sick and shipwrecked members of armed forces at sea. In 1929 another convention was adopted for the protection of prisoners of war. These are the predecessors of modern humanitarian law treaties. Following the tragic experiences of Coventry, Dresden, Stalingrad and Tokyo during the Second World War, they were revised, improved and extended from 1949 onwards to produce the IHL treaties in force today, which include legal protection for the civilian population against the direct effects of hostilities.

aspiration of preserving human integrity and dignity. It is particularly noteworthy that this is precisely the body of law that applies, as *lex specialis,*[12] in – and in spite of – all armed conflicts for the purpose of unreservedly guaranteeing the protection of people and property during hostilities, which requires limiting and regulating the means and methods of warfare used.[13]

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[12] ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, in *ICJ Reports*, 1996, p. 240, para. 25: "In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities." However, as the Inter-American Court of Human Rights observes in the Matter of the Peace Community of San José de Apartadó (Order on Provisional Measures of 15 March 2005, San José, p. 20, para. 6), there is an increasingly strong inclination in international doctrine and international jurisprudence to consider the existence of an effective "*right to humanitarian assistance*" for the express purpose of preventing or mitigating human suffering in any circumstances, giving rise – in the view of this court – to a clear convergence of international human rights law and international humanitarian law. This was also recognized by the Institute of International Law, which adopted a resolution dated 2 September 2003 to this effect at a meeting held in Bruges, Belgium, 2003. The Inter-American Court has recognized that "indeed, new requirements arising in relation to the protection of persons – revealed by situations such as this – (…) have largely contributed in recent years to promoting convergences, in normative, hermeneutic and operational terms, among the three dimensions of the protection of the rights of human beings, namely international human rights law, international humanitarian law and international refugee law" (ICRC translation), Matter of the Peace Community of San José de Apartadó, *ibid*, p. 19, para. 3. The same view is also expressed in this order on provisional measures (p. 4, para. 11) and in Antônio Augusto Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, Ed. Jurídica de Chile, Santiago, 2001, pp. 183-265. See also the Case of the Serrano-Cruz Sisters, Inter-American Court of Human Rights, Judgement of 23 November 2004, Preliminary Objections, San José, 2004, p. 39, paras. 112-113. The court stated the following: "Regarding the complementarity of international human rights law and international humanitarian law, the Court considers it should emphasize that all persons, during internal or international armed conflict, are protected by the provisions of international human rights law, such as the American Convention, and by the specific provisions of international humanitarian law. Consequently, there is a convergence of international norms protecting those who are in such situations. In this regard, the Court stresses that the specificity of the provisions of international humanitarian law that protect individuals subject to a situation of armed conflict do not prevent the convergence and application of the provisions of international human rights law embodied in the American Convention and other international treaties. (…) The Court has recognized this convergence of the provisions of international human rights law and the provisions of international humanitarian law in other cases, in which it declared that the defendant States had violated the American Convention owing to actions in the context of a non-international armed conflict." See also Inter-American Court of Human Rights, Molina Theissen Case, Judgement of 4 May 2004, San José, p. 106, para. 40; and Bámaca Velásquez Case, Judgement of 22 February 2002 (Reparations and Costs), San José, p. 91, para. 85.

[13] Christophe Swinarski, *Introducción al Derecho Internacional Humanitario, op. cit*., Ch. I, Sec. 5.

In short, it is pressing challenge on the agenda of our times to examine and rethink this set of rules, which seek to strike a delicate and intricate balance between military necessity and the requirements of conducting hostilities, on the one hand, and the laws and principles of humanity and the effective protection of human beings during armed conflict, on the other.

It is possible to summarize the essence of IHL, in terms of its essentially humanitarian substance and purpose, in four core pillars, converging into a single common goal, namely the protection of human dignity, regardless of status. Gasser provides the following summary:

> "Humanitarian law has become a complex set of rules dealing with a great variety of issues. Indeed, six major treaties with more than 600 articles and a fine mesh of customary law rules place restrictions on the use of violence in wartime. Such complexity should not, however, make us forget that the gist of humanitarian law can be summarized in a few fundamental principles:
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> a) Persons who are not, or are no longer, taking part in hostilities shall be respected, protected and treated humanely. They shall be given appropriate care, without any discrimination.
>
> b) Captured combatants and other persons whose freedom has been restricted shall be treated humanely. They shall be protected against all acts of violence, in particular against torture. If put on trial they shall enjoy the fundamental guarantees of a regular judicial procedure.
>
> c) The right of parties to an armed conflict to choose methods or means of warfare is not unlimited. No superfluous injury or unnecessary suffering shall be inflicted.
>
> d) In order to spare the civilian population, armed forces shall at all times distinguish between the civilian population and civilian objects on the one hand, and military objectives on the other. Neither the civilian population as such nor individual civilians or civilian objects shall be the target of military attacks."[14]

As acknowledged by the International Court of Justice (ICJ) in its judgement of 9 April 1949 in the well-known Corfu Channel Case, a significant milestone in international case law – because it provides an uncluttered interpretation of IHL rules and because it is the first decision on the merits made by this international court in the exercise of its contentious jurisdiction – there are certainly obligations that bind all States on the basis of "certain general and well-recognized principles, namely: *elementary considerations of humanity*, even more exacting in peace than in war."[15]

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[14] Hans-Peter Gasser, "International humanitarian law and the protection of war victims", extract from *International Humanitarian Law: an introduction*, Henry Dunant Institute/Paul Haupt Publishers, Geneva/Bern, 1993, Ref. No. 2116; 02, updated by the author in November 1998.

[15] ICJ, Corfu Channel Case, Judgement of 9 April 1949, in *ICJ Reports*, pp. 4 ff., para. 22. The Court stated the following: "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based,

The ICJ elaborated on this point in a later judgement, stating, in relation to the "fundamental general principles of humanitarian law", that the *dual obligation* "to respect and to ensure respect" for the Conventions "in all circumstances" (according to Article 1 common to the Geneva Conventions) derives essentially from the existence of "fundamental general principles" of international humanitarian law and that "the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles",[16] based on the fundamental consideration previously expounded by this international court on repeated occasions that there are certainly "principles which are recognized by civilized nations as binding on States, even *without any conventional obligation*" and which are therefore clearly universal in scope[17] and, as such, *erga omnes* in character.[18]

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not on the Hague Convention of 1907, No. VII, which is applicable in time of war, but on *certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war*..." (emphasis added).

[16] ICJ, Case concerning Military and Paramilitary Activities in and against Nicaragua, Judgment on the Merits of June 27, 1986, *ICJ Reports*, 1986, pp. 14 ff. The judgement states the following: "The Court however sees no need to take a position on that matter, since in its view the conduct of the United States may be judged according to the *fundamental general principles of humanitarian law*; in its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles" (para. 218). In the same judgement, the ICJ affirmed that "[t]he Court considers that there is an obligation (…) in terms of Article 1 of Geneva Conventions, to 'respect' [*sic*] the Conventions and even 'to ensure respect' [*sic*] for them 'in all circumstances' [*sic*], since such an obligation does not derive only from the Conventions themselves, but from the *general principles of humanitarian law to which the Conventions merely give specific expression*. (…) is thus under an obligation not to encourage persons or groups engaged in the conflict (…) to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions…" (para. 220) (emphasis added).

[17] ICJ, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, in *ICJ Reports*, 1951, p. 23. The Court establishes that "[t]he solution of these problems must be found in the special characteristics of the Genocide Convention. The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se,* and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' [*sic*] involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (1) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the *principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation*. A second consequence is the universa1 character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' [*sic*] (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be *definitely*

On the basis of these *customary rules of humanity*, which are non-derogable, fundamental and applicable in all armed conflict situations, IHL also governs the conduct that all parties to an armed conflict – whether international or not – must adopt in relation to the sick, wounded and shipwrecked, prisoners of war, civilians and other persons and property entitled to special protection.[19] They therefore constitute the foundation of the protection that international law confers on actors in and victims of the conflict as human beings, by virtue, in particular, of the universal principles established in the four Geneva Conventions of 12 August 1949,[20] the Additional Protocols of 8 June 1977[21] and related treaties and conventions.

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universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States" (emphasis added).

[18] ICJ, Barcelona Traction, Light and Power Company, Limited, New Application, Judgment of February 5, 1970, in *ICJ Reports*, 1970, p. 3, para. 33. The Court stated the following: "In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are *obligations erga omnes*." Along similar lines, in the most recent case law of the Inter-American Court of Human Rights, specifically the Case of the Rochela Massacre, Judgement of 11 May 2007 (Merits, Reparations and Costs), San José, p. 89, para. 303, the Court recognized the existence of "imperative rules of International Law" and "principles and rules governing the protection of human rights and international humanitarian laws", ordering the following: "Considering that the Rochela Massacre was perpetrated, in violation of imperative rules of International Law, by paramilitaries with the participation of government agents, the State must adopt measures designed to educate and train members of security forces on the principles and rules governing the protection of human rights and international humanitarian laws, including limitations that constrain them." In the same vein, the General Assembly of the OAS in Resolution AG/RES 2293 (XXXVII-O/07) of 5 June 2007 on the Promotion of and Respect for International Humanitarian Law (Thirty-Seventh Regular Session, Panama) also categorically stated that "international humanitarian law contains provisions that reflect customary international law that states must observe."

[19] Christophe Swinarski, *Introducción al Derecho Internacional Humanitario*, *op. cit*., Ch. I, Sec. 5. Swinarski defines international humanitarian law as "… the set of international rules of conventional or customary origin, specifically intended to be applied in international and non-international armed conflicts, which limit, for humanitarian reasons, the right of the parties to a conflict to freely choose the means and methods of warfare used in the conflict and which protect persons and property who are, or may be, affected by the conflict" (ICRC translation).

[20] Elizabeth Salmón, *Introducción al Derecho Internacional Humanitario, op. cit*., p. 36. Salmon observes that in 2004 there were 191 States party to the four Geneva Conventions of 1949 and that the only international instrument registered with the United Nations with more signatories than the Geneva Conventions was the Convention on the Rights of the Child of 1989, which had 192 States Parties. It should also be noted that, in the same year, the General Assembly of the OAS, in Resolution AG/RES. 2293 (XXXVII-O/07) of 5 June 2007 on the Promotion of and Respect for International Humanitarian Law (Thirty-Seventh Regular Session, Panama), acknowledged the universal acceptance of the Geneva Conventions, indicating that there were 194 States

These *universal principles of humanity* are of particular significance in this monographic study and of great value, in view of their essentially foundational and teleological nature and their usefulness as "guidelines in unforeseen cases",[22] to legal practitioners in their efforts to interpret and apply the provisions of IHL contained in written instruments.[23] This has been clearly acknowledged in

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Parties: "WELCOMING the universal adoption of the four 1949 Geneva Conventions on the protection of victims of war, to which 194 states are parties to date." See also Inter-American Court of Human Rights, Case of Plan de Sánchez Massacre, Judgement of 29 April 2004 (Merits), San José. In his Concurring Opinion (Sec. III, para. 18), Judge Antônio Augusto Cançado Trindade asserted that "[i]n relation to the principles of international humanitarian law, it has been argued with persuasion that, instead of trying to identify provisions of the 1949 Geneva Conventions or the 1977 Additional Protocols that could be considered to express general principles, it would be preferable to consider these conventions and other humanitarian law treaties as a whole, as constituting the expression – and the development – of those general principles, applicable under any circumstances, so as to better ensure the protection of the victims."

[21] Elizabeth Salmón, *Introducción al Derecho Internacional Humanitario, op. cit*., p. 36. She also indicates that, at the time of going to print in 2004, AP I of 1977 had 161 States Parties and AP II, 156 States Parties.

[22] See Jean Pictet, *Development and Principles of International Humanitarian Law*, Martinus Nijhoff Publishers/Henry Dunant Institute, Dordrecht/Geneva, 1985, p. 59.

[23] For a similar view, see Inter-American Court of Human Rights, Case of the Mapiripán Massacre, San José, Judgement of 15 September 2005, San José, pp. 93-94, paras. 114-115. The Court establishes the following: "Likewise, with regard to establishment of the international responsibility of the State in the instant case, the Court cannot set aside the existence of general and special duties of the State to protect the civilian population, derived from International Humanitarian Law, specifically Article 3 common of the August 12, 1949 Geneva Agreements and the provisions of the Additional Protocol to the Geneva Conventions regarding protection of the victims of non-international armed conflicts (Protocol II). Due respect for the individuals protected entails passive obligations (not to kill, not to violate physical safety, etc.), while the protection due entails positive obligations to impede violations against said persons by third parties. Carrying out said obligations is significant in the instant case, insofar as the massacre was committed in a situation in which civilians were unprotected in a non-international domestic armed conflict. (…) The obligations derived from said international provisions must be taken into account, according to Article 29.b) of the Convention, because those who are protected by said treaty do not, for that reason, lose the rights they have pursuant to the legislation of the State under whose jurisdiction they are; instead, those rights complement each other or become integrated to specify their scope or their content. While it is clear that this Court cannot attribute international responsibility under International Humanitarian Law, as such, said provisions are useful to interpret the Convention, in the process of establishing the responsibility of the State and other aspects of the violations alleged in the instant case." In the same vein, in the Case of the Serrano-Cruz Sisters", *op. cit*. (p. 39, para. 111), the Inter-American Court on Human Rights also makes it clear that it "is empowered to interpret the norms of the American Convention in light of other international treaties." In the same judgement, it observes that "[i]n this regard, in its constant case law, this Court has decided that 'for the purpose of interpreting a treaty, it does not only take into account the agreements and instruments formally relating to it (second paragraph of Article 31 of the Vienna Convention), but also the context (third paragraph of Article 31)' [*sic*]. In its case law, the Court has indicated that this concept is particularly important for international human rights law, which has

international case law, for example, by the International Criminal Tribunal for the Former Yugoslavia in the Tadič case. On the subject of non-international armed conflicts, the tribunal argues that the "general essence" of the rules governing international armed conflict, and not the "detailed regulation" contained in the written or codified rules, has become applicable to internal conflicts. It also states that "it cannot be denied that customary rules have developed to govern internal strife", going on to say that "[t]hese 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."[24]

In the same vein, the ICJ, in its later well-known Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons issued in 1996, firmly asserted the existence of a series of "cardinal principles", which are "intransgressible principles of international customary law" and include the following: a) the right

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made substantial progress by the evolutive interpretation of the international protection instruments. These parameters allow the Court to use the provisions of international humanitarian law, ratified by the defendant State, to give content and scope to the provisions of the American Convention" (*Ibid*., p. 41, para. 119).

[24] International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Prosecutor v. Dusko Tadič, aka 'DULE' [*sic*]" (Case No. IT-94-1), Decision of October 2, 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction, The Hague, Netherlands, 1995, paras. 125 ff. The Tribunal stated the following: "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" (emphasis added).

of States to choose *means and methods of warfare* is not unlimited; b) the *protection* of civilians and civilian objects; c) the *principle of distinction* between combatants and non-combatants and between military objectives and civilian objects; d) the use of weapons with *indiscriminate effects* is prohibited; and, e) it is prohibited to cause combatants *unnecessary harm* or *uselessly aggravate their suffering*.[25]

At the same time, international doctrine, particularly IHL doctrine, has consistently recognized the existence of a fundamental, basic and essential *principle of humanity*, which – in our opinion – encloses and sustains the more specific principle that the ICJ has termed the '*principle of protection*'. This principle was expressly recognized in the context of the Americas, for example, by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights,[26] both in the widely known 1997 Tablada Case, on the

[25] See ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, *op. cit*., p. 226, para. 78: "78. The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use." On the scope and extent of the principle of humanity, see also Inter-American Court of Human Rights, Case of the Plan de Sánchez Massacre, *op. cit*. In his Concurring Opinion, Judge Antônio Augusto Cançado Trindade argues that "[h]umane treatment, under any and every circumstance, encompasses all forms of human behavior and all situations of vulnerable human existence. More than an aspect of those guarantees, humane treatment corresponds to the principle of humanity that cuts across the whole *corpus juris* of both treaty-based and customary international humanitarian law" (Sec III, para. 9) and that "[c]ontemporary international law (treaty-based and general) has been characterized overall by the emergence and evolution of its peremptory norms (*jus cogens*), and an increased awareness, on a virtually universal scale, of the principle of humanity. Grave human rights violations, acts of genocide and crimes against humanity, amongst other atrocities, violate absolute prohibitions of *jus cogens*. *Humaneness* – which is a feature of a new *jus gentium* of the twenty-first century – cuts across all the *corpus juris* of contemporary international law" (Sec. III, para. 13).

[26] The general trend in recent times in the Inter-American Human Rights System, which includes the Inter-American Court of Human Rights, has been to look to the general principles and conventional rules of IHL in order to interpret and apply the principles and rules of regional conventions and declarations relating to international human rights law. On this subject, see Antônio Augusto Cançado Trindade, Gérard Peytrignet and Jaime Ruiz de Santiago, *As Três Vertentes da Proteção Internacional dos Direitos da Pessoa Humana: Direitos Humanos, Direito Humanitário, Direito dos Refugiados*, *op. cit*. These authors put forward the following view: "At the regional inter-American level, in the case of the invasion of Grenada (1983) the Inter-American Commission on Human Rights declared that the request (...) for an interpretation of Article 1 of the 1948 American Declaration of the Rights and Duties of Man in the light of the principles of humanitarian law was admissible, thereby implying, in other words, the application of human rights to an armed conflict. Ibid., p. 122. And indeed, already by the

subject of the specific application of the rules of IHL to non-international armed conflict situations established in Article 3 common to the four Geneva Conventions, and in the Report on Terrorism and Human Rights published in 2002.[27]

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end of the 1970s the Inter-American Commission was invoking provisions of the 1949 Geneva Conventions in some of its reports." However, the jurisprudential position of the Inter-American Court of Human Rights has been clear from the outset: "In order to carry out this examination, the Court interprets the norm in question and analyzes it in the light of the provisions of the Convention. The result of this operation will always be an opinion in which the Court will say whether or not that norm or that fact is compatible with the American Convention. The latter has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions." With regard to the jurisdiction of the Inter-American Court of Human Rights, it argues that "[a]lthough the Inter-American Commission has broad faculties as an organ for the promotion and protection of human rights, it can clearly be inferred from the American Convention that the procedure initiated in contentious cases before the Commission, which culminates in an application before the Court, should refer specifically to rights protected by that Convention (*cf.* Articles 33, 44, 48.1 and 48). Cases in which another Convention, ratified by the State, confers competence on the Inter-American Court or Commission to hear violations of the rights protected by that Convention are excepted from this rule; these include, for example, the Inter-American Convention on Forced Disappearance of Persons." Inter-American Court of Human Rights, Case of Las Palmeras, Judgement of 4 February 2000 (Preliminary Objections), San José, paras. 33 ff. In this same judgement, Judge Cançado Trindade elaborates on this point in his Concurring Opinion: "… the interpretative interaction between distinct international instruments of protection of the rights of the human person is warranted by Article 29(b) of the American Convention (pertaining to norms of interpretation). In fact, such exercise of interpretation is perfectly viable…" (paras. 5-6). See also Inter-American Commission on Human Rights, Case of José Rubén Rivera, Petition 880/01, Report on Admissibility 53/05 of October 2005, Washington, para. 21. The Commission establishes that "…[t]hen, too, the IACHR will have to examine the State's obligations under the Convention in light of the provisions of International Humanitarian Law, which will serve as *lex specialis* providing a standard for interpretation pursuant to Article 29 of the Convention." In the same vein, see Inter-American Commission on Human Rights, Case of Ana Julia and Carmelina Mejía Ramírez, Petition 779/01, Report on Admissibility 56/05 of 12 October 2005, Washington, paras. 21 ff.; Inter-American Commission on Human Rights, Case of José Adrián Rochac Hernández, Petition 731/03, Report on Admissibility 90/06 of 21 October 2006, Washington, paras. 21 ff.; and Inter-American Commission on Human Rights, Case of Gregoria Herminia, Serapio Cristián and Julia Inés Contreras, Petition 708/03, Report on Admissibility 11/05 of 23 February 2005, Washington, paras. 19 ff.

[27] For example, the jurisprudence of the Inter-American Commission on Human Rights. In particular, see the Report on Terrorism and Human Rights, 22 October 2002, Washington, OEA/Ser.L/V/ll.116, para. 65. The report states that "[t]he principle of humanity, which both complements and inherently limits the doctrine of military necessity. This principle prohibits [*sic*] the infliction of suffering, injury or destruction not actually necessary, i.e. proportionate, for the realization of lawful military purposes. Moreover, the principle of humanity also confirms the basic immunity of civilians from being the object of attack in all armed conflicts. Accordingly, the conduct of hostilities by the parties to all armed conflicts must be carried out within the limits of the prohibitions

of international law, including the restraints and protections inherent in the principles of military necessity and humanity." See also, Inter-American Commission on Human Rights, Tabalda Case (Juan Carlos Abella), Case No. 11.137, Final Report 55/97 of 30 October 1997, Washington, OEA/SERV/L/V/II.97, Doc. 38. The Commission states the following: "176. Common Article 3's basic purpose is to have certain minimum legal rules apply during hostilities for the *protection of person's [sic] who do not or no longer take a direct or active part in the hostilities* [principle of protection]. Persons entitled to Common Article 3's mandatory protection include members of both State and dissident forces who surrender, are captured or are *hors de combat*. Individual civilians are similarly covered by Common Article 3's safeguards when they are captured by or otherwise subjected to the power of an adverse party, even if they had fought for the opposing party. 177. In addition to Common Article 3, *customary law principles applicable to all armed conflicts require the contending parties to refrain from directly attacking the civilian population and individual civilians* [principle of military objective] and to distinguish in their targeting between civilians and combatants and other lawful military objectives [principle of distinction]. In order to spare civilians from the effects of hostilities [principle of humanity], other customary law principles require the attacking party to take precautions so as to avoid or minimize loss of civilian life or damage to civilian property incidental or collateral to attacks on military targets [principles of military necessity and proportionality]" (emphasis added). See also Liesbeth Zegveld, "The Inter-American Commission on Human Rights and international humanitarian law: a comment on the Tablada Case", in *IRRC*, No. 324, September 1998, pp. 505-511. This author summarizes the five points of the argument put forward by the Commission to support its view, as follows: a) The competence to apply international humanitarian law could be derived from the overlap between the substantive norms of the American Convention on Human Rights and the 1949 Geneva Conventions. In this regard, the Commission argued: "Indeed, the provisions of common Article 3 [of the four Geneva Conventions] are essentially pure human rights law. Thus, as a practical matter, application of common Article 3 by a State party to the American Convention involved in internal hostilities imposes no additional burdens on [a State], or disadvantages its armed forces vis-à-vis dissident groups. This is because Article 3 basically requires the State to do, in large measure, what it is already legally obliged to do under the American Convention." b) Article 29b of the American Convention should not be interpreted as "[r]estricting the enforcement or exercise of any right or freedom recognized by virtue of (...) another convention to which one of the said States is a party." This effectively provides a legal basis for the application of international humanitarian law (note that, in this regard, the Commission argues that "…where there are differences between legal standards governing the same or comparable rights in the American Convention and a humanitarian law instrument, the Commission is duty bound to give legal effort [*sic*] to the provisions of that treaty with the higher standards applicable to the rights or freedoms in question. If that higher standard is a rule of humanitarian law, the Commission should apply it"). c) Article 25 of the American Convention entitles everyone to an effective remedy before a national court to protect his or her fundamental rights, including those enshrined in the four Geneva Conventions of 1949 and the two Additional Protocols of 1977, where they have been incorporated in the domestic legislation of the State concerned. d) Article 27, para. 1, of the American Convention stipulates that derogation measures taken by States in time of emergency may "not be inconsistent with a State's other international legal obligations", which, according to mainstream doctrine, is generally interpreted as including international humanitarian law. e) There are precedents in which the Inter-American Court of Human Rights has authorized the Commission to

In addition to the above, it should also be noted that, as Salmón has pointed out, in general terms the *principle of humanity* consists primarily of the *humane treatment* that all individuals should receive, whether they are *non-combatants*, who are, after all, innocent victims, or *combatants*, who must not be subjected to superfluous injury or unnecessary suffering.[28] The parties to a conflict are under an inescapable obligation to abide by this principle.[29]

It should be noted that this principle of humanity, which is manifested in the *prohibition on causing superfluous injury or unnecessary suffering*, is primarily a safeguard against the use of any artefact, weapon or military tactic that is excessively harmful to combatants and exceeds its lawful purpose under IHL, which is limited to disabling adversaries or rendering them *hors de combat* in some other way. It is therefore widely recognized in the specialized doctrine that, in the context of armed conflict, a balance must be struck between military necessity and the effectiveness of military action, on the one hand, and the damage caused and the suffering inflicted on the adversary, on the other, as explained in the following paragraph.[30]

As already mentioned, the *principle of distinction* requires the parties to a conflict to distinguish between civilians and those who are taking part in the hostilities and between civilian objects and property and military objectives.[31] It

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consider the application of other human rights treaties adopted outside the Inter-American System.

[28] Elizabeth Salmón, *Introducción al Derecho Internacional Humanitario, op. cit.*, p. 54. In the widely known Caesar Case, the Inter-American Court of Human Rights ruled that "…norms of international humanitarian law absolutely prohibit the use of corporal punishment in situations of armed conflict, as well as in times of peace (…) It should be noted that a number of those States that still retained corporal punishment have recently abolished it. Moreover, an increasing number of domestic courts have concluded that the imposition of corporal punishment, regardless of the circumstances of the case and the modalities through which it is carried out, constitutes cruel, inhuman and degrading treatment, and represents a form of punishment no longer acceptable in a democratic society." Inter-American Court of Human Rights, Case of Ceasar v. Trinidad and Tobago, Judgement of 11 March 2005 (Merits, Reparations and Costs), San José, paras. 65-66.

[29] See also Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Colombia, 26 February 1999, No. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, Washington, Ch. IV, para. 38. The Commission observes that "[t]he principle of humanity both complements and inherently limits the doctrine of military necessity. This principle prohibits the infliction of suffering, injury or destruction not actually necessary, i.e. proportionate, for the realization of lawful military purposes. Moreover, the principle of humanity also confirms the basic immunity of civilians from being the object of attack in all armed conflicts. Accordingly, the conduct of hostilities by the parties to all armed conflicts must be carried on within the limits of the prohibitions of international law, including the restraints and protections inherent in the principles of military necessity and humanity."

[30] See also Article 35, para. 2, AP I: "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

[31] The Inter-American Commission on Human Rights, in its Report on Terrorism and Human Rights, *op. cit.* (para. 66), makes the following observation on the subject of the principle of distinction: "In a similar vein, the principle of distinction prohibits [*sic*],

also establishes the rule that only *combatants* and *military objectives* may be made the object of attack. A series of essential principles or rules is derived from this important, basic principle, which is central to the normative fabric and constitutes the cornerstone of the ideals of IHL. These include the *principle of military objective*, which requires attacks to be strictly limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization offers a *definite military advantage* to the adversary (see Art. 52 of Additional Protocol I (AP I)); the *principle of military necessity*, according to which parties to a conflict may only take the measures necessary to achieve their proposed objective, which means that they may only carry out those operations strictly necessary to weaken the enemy with the least possible expenditure of human and economic resources for the parties to the conflict;[32] and, closely associated with

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inter alia, the launching of attacks against the civilian population or civilian objects and requires the parties to an armed conflict, at all times, to make a distinction between members of the civilian population and persons actively taking part in the hostilities or civilian objects and military objectives, and to direct their attacks only against persons actively taking part in the hostilities and other legitimate military objectives." See also Richard Baxter, "The duties of combatants and the conduct of hostilities (Law of The Hague)", in *International Dimensions of Humanitarian Law,* UNESCO (ed), Henry Dunant Institute/UNESCO/Martinus Nijhoff Publishers, Geneva/Paris/Dordrecht, 1988, p. 118. Baxter summarizes the essence of the rules of IHL, remarking that "[t]he *basic rule* is that a party to a conflict must 'at all times *distinguish between the civilian population and the combatants and between civilian objects and military objectives*' [*sic*], and must accordingly direct its operations only against military objectives. The civilian population and individual civilians, who are to enjoy general protection from the dangers arising from military operations, must not be made the object of attack" (emphasis added).

[32] See *infra* note 99. The *principle of military necessity* was recognized as early as 1868 in the Preamble to the Declaration of St Petersburg renouncing the use, in time of war, of certain explosive projectiles. It states the following: "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." It was also recognized in the Hague Regulations concerning the Laws and Customs of War on Land, annexed to the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907. Art. 23 reads as follows: "In addition to the prohibitions provided by special Conventions, it is especially forbidden (…) g. To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." See also Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* ICRC/Martinus Nijhoff Publishers, Geneva/Dordrecht, 1987, Commentaries Nos. 1923 ff., pp. 613 ff. It makes a subtle, but important, semantic distinction – which has enormous practical implications – between the terms 'civilian objects' and 'military objectives' used in Article 51 of AP I, concluding as follows: "In French the word '*objectif*' [*sic*] is defined as follows in the Dictionnaire Robert: '*point lequel est dirigé une opération stratégique ou tactique; par extension: résultant qu'on se propose d'atteindre par une opération militaire*' [*sic*]. There is however no doubt that in this article both the English and French texts intended tangible and visible things by the

this rule, the *principle of proportionality*, which, as mentioned above, requires the means and methods of warfare employed to be reasonable, proportionate and in keeping with the concrete and direct military advantage anticipated, which also implies a prohibition on causing collateral damage affecting civilians or civilian objects. Evidently, it also requires the parties to a conflict to refrain from any form of excessive violence that is not essential to weakening the enemy.[33]

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word 'objective' [*sic*], and not the general objective (in the sense of aim and purpose) of a military operation; therefore the extended meaning given by the Dictionnaire Robert is not included in this article." It is worth noting that in the American context, the Inter-American Commission on Human Rights referred to this principle in its Report on Terrorism and Human Rights, *op. cit*. (para. 65), in the following terms: "The principle of military necessity, which justifies those measures of military violence not forbidden by international law that are necessary and proportionate to securing the prompt submission of the enemy with the least possible expenditure of human and economic resources." In a similar vein, the General Assembly of the OAS in Resolution AG/RES. 2261 (XXXVII-O/07) on Support for Action Against Antipersonnel Mines in Ecuador and Peru (5 June 2007, Panama, Thirty-Seventh Regular Session) recognized, in relation to this principle, that "the presence of land mines in border areas between the two countries and in the vicinity of power grids in Peru constitutes a serious threat to civilian populations and stands in the way of economic development in rural and urban areas; and that their elimination constitutes an obligation and prerequisite for the development and integration of peoples." It also affirms that "humanitarian demining contributes to sustainable social and productive development of the border area between Ecuador and Peru, fosters an improved quality of life for population groups living on either side of the border, and facilitates the inclusion of those groups in economic integration programs and activities." Lastly, with regard to the principle of military objective, the International Commission on Human Rights has sustained that "[a]t the same time, a democratic government elected in accordance with the Constitution cannot use any means to conquer an insurgency movement. The human rights of all persons must be respected. The Government's obligation under international law, particularly with regard to noncombatant civilians, is clear. The Government must respect the human rights of such persons and, under international humanitarian law, must refrain from indiscriminate attacks upon civilian population centers, even when that Government is convinced that there may be insurgents or criminals there." Inter-American Commission on Human Rights, Fourth Report on the Human Rights Situation in Guatemala, 22 May 1993, Washington, Ch. VIII.

[33] Jean Pictet, *Development and Principles of International Humanitarian Law, op. cit.*, p. 178. The Inter-American Commission on Human Rights, in its Report on Terrorism and Human Rights, *op. cit.* (para. 66), considers that "[t]he principle of proportionality prohibits 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." In its Third Report on the Human Rights Situation in Colombia, *op. cit.* (paras. 77-79), the Inter-American Commission on Human Rights also observes the following on the subject of the principle of proportionality: "*77.* The legitimacy of a military target does not provide unlimited license to attack it. The rule of proportionality prohibits '[a]n 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' [*sic*]. 78. This rule of proportionality imposes 'an additional limitation on the discretion of combatants in deciding whether an object is a military objective under para. 2 of Article

As argued by the ICJ in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the *principle of limitation* establishes that the right of States to choose means and methods of warfare in an armed conflict is not unlimited and that the humanitarian consequences place restraints on their use.[34] In the view of Chilean author Salinas Burgos, the principle of limitation primarily regulates the means and methods of warfare used by the parties to a conflict, because it does not, in the final analysis, recognize an absolute military necessity that would justify the free and indiscriminate use of means and methods of warfare or their use in excess of the express purpose of gaining a definite military advantage.[35]

Lastly, some also acknowledge the existence of a *principle of environmental protection.* This issue has gained relevance in relation to armed conflict in the international community since the Vietnam War, when large-scale deforestation was used as a method of warfare, taking advantage of the particular characteristics of the natural environment in that part of the world.[36]

52' [*sic*]. Should an attack be expected to cause incidental civilian casualties or damage, the requirement of an anticipated 'definite' [*sic*] military advantage under Article 52 is elevated to the more restrictive standard of a 'concrete' [*sic*] and 'direct' [*sic*] military advantage in Article 51(5)(b). 79. Another aspect of the proportionality equation requires that foreseeable injury to civilians and damage to civilian objects not be disproportionate or 'excessive' [*sic*] to the anticipated 'concrete and direct military advantage' [*sic*]. The ICRC Commentary furnishes examples of what may constitute 'excessive' [*sic*] damage. For instance, 'the presence of a soldier on leave obviously cannot justify the destruction of a village' [*sic*], yet 'if the destruction of a bridge is of paramount importance for the occupation or non-occupation of a strategic zone, it is understood that some houses may be hit, but not that a whole urban area be leveled' [*sic*]." See also Inter-American Court of Human Rights, Case of the Miguel Castro-Castro Prison, Judgement of 25 November 2006 (Merits, Reparations and Costs), San José, para. 36. In his Concurring Opinion, Judge Antônio Augusto Cançado Trindade clearly states that "[i]n its substantial study on *Customary International Humanitarian Law*, diffused by the International Committee of the Red Cross, the principle of proportionality marks presence as a *prohibition* to attack causing death and injuries in the civil population in an excessive manner with foreseeable military advantages."

[34] Art. 35, para. 1, AP I: "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited." See also ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, *op. cit.*, p. 226, para. 78. As mentioned above, the court states that "it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use." See *supra* note 33.

[35] Hernán Salinas Burgos, "Principios del Derecho Internacional Humanitario en Materia de Conducción de las Hostilidades", in María Teresa Caffi, *Uso de la Fuerza y Derecho Internacional Humanitario*, Serie de Publicaciones Especiales, No. 77, Instituto de Estudios Internacionales de la Universidad de Chile, Santiago, 1995, p. 21 (cited by Elizabeth Salmón, *Introducción al Derecho Internacional Humanitario, op. cit.*, p. 57).

[36] Art. 35, para. 3, AP I: "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." See also Elizabeth Salmón, *Introducción al Derecho Internacional Humanitario*, *op. cit.*, pp. 57-58. She draws on the arguments of Frits

It is important to remember that there is a universally accepted principle arising from customary law, which determines that, in all circumstances not covered by the rules of IHL, 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. This customary principle, which is expressly recognized in Article 1, paragraph 2, of AP I,[37] is also known as the *Martens Clause*,[38] which gives rise to

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Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law,* 3rd ed., ICRC, Geneva, 2001, p. 127.

[37] The Martens Clause figures in all four Geneva Conventions, in the provisions relating to the denunciation of the conventions, and reads as follows: "The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue 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." See para. 4 of the following articles: Art. 63 of GC I, Art. 62 of GC II, Art. 142 of GC III and Art. 158 of GC IV. In the Inter-American system, this principle has been implicitly recognized most recently by the General Assembly of the OAS, in Resolution AG/RES. 2293 (XXXVII-O/07) of 5 June 2007 on the Promotion of and Respect for International Humanitarian Law (Thirty-Seventh Regular Session, Panama), in which the countries of the Americas unanimously agree "that international humanitarian law contains provisions that reflect customary international law that states must observe." The Commentary on the Additional Protocols makes the following clarification: "There were two reasons why it was considered useful to include this clause yet again in the Protocol. First, despite the considerable increase in number of subjects covered by the law of armed conflicts, and despite the detail of its codification, it is not possible for any codification to be complete at any given moment; thus the Martens clause prevents the assumption that anything which is not strictly prohibited by the relevant treaties is therefore permitted. Secondly, it should be seen as a dynamic factor proclaiming the applicability of the principles mentioned regardless of subsequent developments of types of situation or technology.- In conclusion, the Martens clause, which itself applies independently of participation in the treaties containing it, states that the principles of international law apply in all armed conflicts, whether or not a particular case is provided for by treaty law, and whether or not the relevant treaty law binds as such the Parties to the conflict." Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, op. cit*., Commentaries Nos. 55-56, pp. 38-39.

[38] Rupert Ticehurst, "The Martens Clause and the Laws of Armed Conflict", in *IRRC,* No. 317, March-April 1997, pp. 125-134. Ticehurst observes that this principle deriving from customary law now undisputedly forms part of international humanitarian law and has done since its first appearance in a convention, which was in the preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land. The Martens Clause, as it is known today, takes its name from Fyodor Fyodorovich Martens (1845-1909), a Russian professor, legal consultant, diplomat and humanist, who was the Russian delegate to the Hague Peace Conference held in 1899. Many authors have mistakenly referred to him as Frédéric von Martens or Frederic de Martens, the name of a fictitious character from a novel by the Estonian author Jaan Kross, entitled *Professor Marten's Departure* [*Professor Martensi ärasõit in Estonian, written in Latin script*], who also happened to be an expert in international law). Fyodor Martens read a declaration at the Peace Conference, which was unanimously accepted and subsequently incorporated

the generally accepted notion that humanitarian rules and principles are not confined to the rules and principles established in IHL treaties.

It is also important to remember that the protection of persons deriving from IHL *cannot generally be renounced or removed*,[39] as this would essentially undermine its protective nature and inviolability.

We continue now with an overview of the principal rules contained in the relevant conventions, which provide for the protection of persons in international armed conflicts, taking into account the above considerations and preliminary notes, which serve to guide and orient us in this task. It should also be noted that the comments below refer solely to international armed conflicts. For reasons of clarity and space, we have sought to omit specific references to non-international armed conflict. As we will see below, the rules governing this type of conflict figure, for the most part, in Additional Protocol II (AP II) of 1997, so that, with the exception of the principles enshrined in Article 3 common to the four Geneva Conventions and the Martens Clause, they fall outside the general object of the Geneva Conventions and AP I in particular, which deals specifically with international armed conflicts.

I. General character of the Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977

The titles alone of the four basic IHL texts, the Geneva Conventions of 1949, provide a preliminary insight into their general character, with a view to defining the scope of application *ratione personæ* of the relevant conventional rules.

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into the international convention (Martens Preamble), in order to resolve a dispute among various delegations, which had different views on the legal status that should be granted to civilians who take up arms against an occupying power. Following the declaration, the States agreed to include the following passage in the 1899 Convention: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience." See also Inter-American Court of Human Rights, Case of Plan de Sánchez Massacre, *op. cit.*, Sec. III, para. 22. In his Concurring Opinion, Judge Antônio Augusto Cançado Trindade states that "[t]he Martens clause maintains that the principles of international law, the laws of humanity and the requirements of the public conscience continue to be applicable, irrespective of the emergence of new situations. Accordingly, the said clause (which forms part of general international law) prevents *non liquet*, and plays an important role in the hermeneutics of humanitarian legislation. The 'laws of humanity' [*sic*] and the 'requirements of the public conscience', which it invokes, fall within the domain of *jus cogens*. In summary, the Martens clause, as a whole, has been conceived and repeatedly affirmed to the benefit of the whole human race, thus ensuring its continuing relevance; it can be considered an expression of the *reason of humanity*, imposing limits on the *reason of State* (*raison d'État*)."

[39] See Art. 7 of GC I, II and III and Art. 8 of GC IV, which provide that people "may in no circumstances renounce in part or in entirety the rights secured to them."

The First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949 (GC I) evidently refers to the victims – the wounded and sick – of land warfare. Similarly, the title of the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949 (GC II) indicates that it provides protection for the victims – the wounded, sick and shipwrecked – of war at sea. The Third Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949 (GC III) deals essentially with the treatment and status of those who have served as combatants and other persons who have fallen into the hands of the enemy, whether or not they are entitled to prisoner-of-war status. Lastly, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 (GC IV) is basically concerned with the civilian population and, in particular, with civilians in occupied territory and foreigners in the territory of the enemy State. Two protocols were later adopted, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977 (AP I), which, as its name indicates, extends the scope of protection to all those persons affected by *international armed conflict*, and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977 (AP II), which provides for the protection of all those persons affected by *non-international armed conflict*. These additional instruments also serve to complement the rules established in the Law of The Hague governing lawful means and methods of conducting hostilities.

Aside from the important distinction made between international and non-international armed conflict in Article 3 common to the conventions, it should be noted, at this point, that the application and extent *ratione materiæ* of the Geneva Conventions is determined, in general terms, by Article 2 also common to the four conventions, which establishes that armed conflict is considered to be all cases of occupation, as well as cases of "declared war or of any other armed conflict" which may arise between two or more adverse parties, even if the state of war is not recognized by one of them.

The mainstream view expressed in specialized literature – by Kotzsch and Sir Bowett, for example – is that the scope of application of the rules of IHL and the protection derived from the four Geneva Conventions is, in material terms, very broad.[40] This and the fact that these are the basic conventional texts currently in

[40] Lothar Kotsch, *The Concept of War in Contemporary History and International Law*, E. Droz, Geneva, 1956, 310 pp., p. 56. This author sustains that modern international humanitarian law refers not only to armed conflicts formally recognized as such, but also to the *material situations* of any other *de facto* armed conflict, regardless of how it is classified. He makes the following observation: "Material war implies a continuous clash of arms conducted by organized armies which engage the responsibility of governments. It does not presume the condition that the belligerents must be States. The existence of war in the material sense is something to be judged by evidence not of intention, but of the activities of military forces in the field." For a similar view on this subject, see Sir William Dereck Bowett, *et al*., *United Nations Forces: A Legal Study of United Nations*

force has prompted us to approach the subject from this traditional methodological standpoint.

This clarification of Common Article 2 makes it significantly easier to understand the application of the legal provisions of the Geneva Conventions in terms of dynamics and systemization. If, for example, we take into account the categories of persons referred to in the special rules that they contain, the following conclusions, aptly summarized by Colombian author Delio Jaramillo Arbeláez, can readily be inferred:

> "According to Article 2 common to the four Geneva Conventions, they begin to apply when hostilities break out. Therefore, those who are potentially entitled to protection begin to be protected under the First Geneva Convention when they become a member of any of the categories referred to in Article 13 [combatants and other protected persons]. These persons may or may not fall into the hands of the enemy. If they do, they may be exchanged or interned, in which case they continue to be protected until such time as they are finally repatriated. They also acquire prisoner-of-war status and are protected by the guarantees established in GC III, so that either of these instruments may be invoked. People who fall into the power of an adverse party or an occupying power of which they are not nationals, but do not belong to any of the categories established in this article, are accorded protection under GC IV.- The Preamble to GC II indicates that it revises the Hague Convention (X) of 18 October 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906. It also adapts those of GC I of August 1949.- The convention specifies that its provisions apply only to forces on board ship, which means that forces put ashore become subject to GC I. By the same token, if land forces are temporarily at sea, they become subject to GC II. However, the religious, medical and hospital personnel of hospital ships and their crews may not be captured during the time that they are in the service of the hospital ship even if they are on land (Art. 36 of GC II).- Protected forces on board ship include all those persons listed in the relevant provisions of GC II. The intention here, then, is to simply indicate which convention applies to which branch of the armed forces, and which convention each branch should observe" (ICRC translation).[41]

The above provides a preliminary idea of the general approach adopted here to address the subject under analysis. However tempting it may be to undertake an examination of the system of protection established by the Law of Geneva for situations of non-international armed conflict based on Article 3 common to the Geneva Conventions and AP II, it is a subject that falls outside the scope of our proposed study and better addressed in a separate study. Inclusion here would make this monographic analysis excessively long. I have therefore kept the study

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Practice, Frederick A. Praeger, New York, 1964, 579 pp., p. 498. In the Commentary on the Additional Protocols, it is observed that, according to mainstream doctrine, "[t]his covers not only armed conflict or war in the formal sense, but also any *de facto* armed conflict, even if it is not recognized as such." Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, *op. cit.*, Commentary No. 1660, p.506.

[41] Delio Jaramillo Arbeláez, *Derecho Humanitario Internacional de los Conflictos Armados*, (2nd ed.), Universidad de Santo Tomás de Bogotá, Bogotá, 1986, pp. 52-53.

within certain limits, permitting a general description of the system of protection established in the above-mentioned international instruments, referring essentially to situations of international armed conflict, the classical context in treaty law and doctrine.

I have also endeavoured to include the most significant Inter-American contributions, in the form of doctrine, case law and resolutions, which support the views advanced.

II. Protection of the wounded, sick and shipwrecked

Based strictly on GC I and GC II of 1949 and as observed by Swinarski,[42] the term 'wounded and sick' refers solely to *members of the armed forces in the field*[43] who are in need of medical assistance or care and who refrain from any act of hostility. The parties to the conflict are under an obligation to respect and protect the wounded and sick in all circumstances and are bound to provide treatment and humanitarian assistance without discrimination. Torture and any attempt upon their lives or violence against their person are strictly prohibited, and a party to a conflict compelled to abandon the wounded and sick to the enemy is required to leave part of its medical personnel and material to assist in their care.[44]

AP I of 1977, however, constituted a definite and effective advance in providing protection for persons in international armed conflicts, as it eliminates the, in many ways artificial, distinction between members of the armed forces in the field (according to the categories expressly defined in Art. 13 of GC I and GC II) and civilians. AP I therefore extends the protection provided under the Geneva Conventions to wounded and sick civilians who are not taking part in the hostilities, defining as 'wounded' and 'sick' those "persons, whether *military or civilian*, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility" (emphasis added).[45]

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[42] Christophe Swinarski, *Introducción al Derecho Internacional Humanitario*, *op. cit.*, Ch. II, Sec. 4.

[43] Art. 13 of GC I and II indicates *grosso modo* that the rules of these conventions apply specifically to the "wounded and sick" who are "members of regular armed forces" or of "militias" or "other volunteer corps" (including "organized resistance movements") that belong to or act on behalf of a party to the conflict (providing that they are commanded by a person responsible for his subordinates, are clearly identifiable by a distinctive sign or carry arms openly), "persons who accompany" the armed forces under authorization (e.g. civilian members of crews, war correspondents, service personnel, etc.) and irregular combatants in non-occupied territory (e.g. civilians participating in the hostilities, providing that they are carrying arms openly).

[44] Art. 12 of GC I and GC II.

[45] Art. 8, para. a), AP I. The Commentary on the Additional Protocols remarks that the idea behind the category of the 'wounded and sick' is to establish a conceptual two-

As Rezek observes, "[a] definition of the three categories of protected persons (…) did not appear in the 1949 Conventions (…) but in the First Additional Protocol of 1977. (…) While the First and Second Geneva Conventions of 1949 referred to the wounded, sick and shipwrecked belonging to the combatant forces in the strict sense and to a fairly limited number of other categories (Article 13), Protocol I includes both military and civilian persons among victims. The official (quadripartite) distinction made thirty years ago was not established on any scientific or practical basis, and was not considered suitable for re-inclusion. The new set of rules now applies to 'all those affected by a situation' [*sic*] resulting from the ever-widening field of international armed conflicts.- Naturally enough, the texts relating to protection appear to be concerned chiefly with wounded, sick and shipwrecked persons belonging to the adverse Party. The form of language, however, should not obscure the principle that the fundamental duty of the State which is a party to the conflict is also concerned with its own nationals, and particularly with those in a condition of dependence on the said State."[46]

The scope of protection established for the wounded and sick not only entitles them to receive humane treatment and medical assistance from the party to a conflict, without any adverse distinction founded on sex, race, nationality, religion, political belief or on any other similar criteria (with the sole exception of urgent medical reasons), but also includes express and absolute prohibitions on attempts on their lives or violence to their persons, torture, killing, extermination, biological experiments, failure to provide medical assistance and care and unnecessary exposure to contagion or infection.[47] Those entitled to this protection may not renounce the rights it grants to them (Art. 7 of GC I and GC II).

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part term that can be used flexibly from a semantic point of view to the extent that it covers people who are not wounded or sick in the usual sense of the word, such as new-born babies, maternity cases, expectant mothers and the infirm, who are included here to bring them under this higher standard of protection that the rules of international humanitarian law establish for this conceptual category. In this regard, the Commentary observes that "…when the Protocol mentions the wounded and the sick, it is not concerned with the wounded and the sick according to the ordinary meaning of these words, but with the persons defined here. The definition of the 'wounded' [*sic*] and the 'sick' [*sic*] is at the same time wider and narrower than the more common definition of these terms. It is wider in that it encompasses, as we have pointed out, persons who are not wounded or sick in the usual sense of these words, but narrower in that it does not protect such persons as a whole (i.e., also the wounded and sick according to the usual meaning) unless they abstain from all hostile acts." Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, op. cit.*, Commentary No. 301, p. 117.

[46] José Francisco Rezek, "Protection of the Victims of Armed Conflicts: Wounded, Sick and Shipwrecked Persons", in *International Dimensions of Humanitarian Law, op. cit.*, 1988, pp. 153-154.

[47] Art. 12 of GC I and GC II. Article 10 of AP I establishes the following: "1. All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected. 2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded

An important point to be considered here is the scope of protection *ratione temporis*. According to the rules of IHL, the wounded and sick in the hands of the enemy are protected until their final repatriation (Art. 5 of GC I). In this regard, it is also important to note that the provisions of IHL determine that the wounded and sick who have served as combatants and fallen into the power of the enemy must be considered prisoners of war and granted prisoner-of-war status.[48] On this subject, Jaramillo Arbeláez succinctly describes one of the most significant characteristics of the treatment of the wounded, sick and shipwrecked who have served as combatants prior to the incident in question:

> "In addition to receiving the care, treatment and attention to which they are entitled, the wounded, sick and shipwrecked members of the armed forces of a party to the conflict who fall into the hands of the adverse party are also prisoners of war and, as such, enjoy all the guarantees of protection established in international law for prisoners of war.- (… Art. 14 of GC I, Art. 16 of GC II, Art. 117 of GC III).- This rule therefore eliminates any possible solution of continuity in the application of the First and Second Conventions and the Third Convention in relation to the wounded, sick and shipwrecked members of the armed forces of a party to the conflict who have fallen into the hands of an adverse party" (ICRC translation).[49]

In relation to the protection and care of the wounded and sick, the Law of Geneva also entitles "medical units" to special protection in international armed conflicts, safeguarding them from attack. Medical units are considered to be establishments and other units, "whether military or civilian", which "may be fixed or mobile, permanent or temporary" and include hospitals, blood transfusion centres and medical and pharmaceutical stores, as well as field hospitals, medical tents and transports organized for medical purposes, which include the search for the wounded and sick, their care and treatment, the prevention of disease and other such humanitarian purposes. These units must not be used to shield military objectives from attack or support the hostilities.[50] The parties to a conflict are able to establish hospital zones and localities for these purposes in their own

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on any grounds other than medical ones." Article 7 of AP II contains a similarly worded provision applying specifically to non-international armed conflicts.

[48] Art. 14 of GC I. Note, in particular, Article 13 of the same convention, which is also common to GC II. In this regard, with specific reference to Article 13 of GC I and GC II, see also Delio Jaramillo Arbeláez, *Derecho Humanitario Internacional de los Conflictos Armados*, *op. cit.*, p. 57. Jaramillo clearly states that in the archetype of IHL designed by the Geneva Conventions "[t]his provision is in no way intended to establish a distinction with regard to the treatment of the wounded, sick and shipwrecked, whatever their situation as human beings, as provided for in the previous chapter [relating to international armed conflict and non-international armed conflict]. The First and Second Conventions simply intend to establish that, in view of these characteristics, they should be treated as prisoners of war and then receive protection under the Third Convention, in which the same categories are listed in Article 4 A" (ICRC translation).

[49] Delio Jaramillo Arbeláez, *Derecho Humanitario Internacional de los Conflictos Armados*, *ibid.*, p. 59.

[50] Art. 19 of GC I and Arts. 8, para. e), 9, 12 and 13 of AP I.

territory and in occupied areas.[51] Provision is also made for recognized and authorized civilian medical units to be made available to a party to the conflict for humanitarian purposes. These may be the units of societies of neutral States or international humanitarian organizations, such as the ICRC.[52] It is prohibited to intentionally destroy the buildings, material and stores of military medical units that fall into the hands of the enemy, which are subject to strict restrictions, requiring that they be reserved for the care of the sick and wounded. Civilian medical buildings, material and stores are regarded as private property.[53]

"*Medical transports*" (means of evacuating the wounded and sick by land, sea or air and the transportation of medical personnel and equipment) are protected in the same way as medical units. In the particular case of medical transports by air, all aircraft used for this purpose are required to clearly display the prescribed distinctive markings, such as the Red Cross emblem.[54]

In GC II of 1949, the wounded and sick are joined by a third category of protected persons associated with naval warfare, that is, the "shipwrecked." Under GC II, the shipwrecked are granted largely the same protection in terms of scope and content as wounded and sick soldiers involved in land warfare.[55] GC II establishes that the term "shipwreck" refers to shipwreck from any cause and includes forced landings at sea and falling into the sea. AP I of 1977 puts civilians on the same footing as wounded, sick and shipwrecked members of the armed forces in the field (according to the categories expressly defined in Art. 13 of GC I and GC II), therefore extending protection to include civilian victims who are

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[51] Art. 23 of GC I.

[52] Arts. 9, 27 and 32 of GC I and Art. 9 of AP I.

[53] Arts. 33 and 34 of GC I and Art. 14 of AP I.

[54] Arts. 35 to 37 of GC I, Arts. 38 and 39 of GC II and Art. 8, paras. f)-j) of AP I.

[55] On this subject, see José Francisco Rezek, "Protection of the Victims of Armed Conflicts: Wounded, Sick and Shipwrecked Persons", in *International Dimensions of Humanitarian Law, op. cit.*, p. 153. Rezek observes that *refraining from hostile acts* is, under IHL, a *sine qua non* condition of the behaviour of the wounded and sick, adding that "[r]efraining from hostile acts should also characterize the behaviour of shipwrecked persons, defined as those 'who are in peril at sea or in other waters' [*sic*] and who continue to hold this *ephemeral status during rescue operations*" (emphasis added). In the Commentary on the Additional Protocols, it is observed that "[t]wo essential elements mentioned with regard to the definition of the 'wounded' [*sic*] and 'sick' [*sic*] are repeated with regard to the definition of the 'shipwrecked' [*sic*]: those who are not shipwrecked in the strict sense of the word may be covered by the definition, but anyone shipwrecked, even if he is shipwrecked in the usual sense of the word, is only considered as such if he refrains from any act of hostility.- A particularly difficult question with regard to the protection given shipwrecked persons is also dealt with, namely, the duration of the 'shipwrecked' [*sic*] status.- (…) The Protocol specifies that shipwrecked 'shall be considered shipwrecked during their rescue' [*sic*], which means that they retain their status until they are returned to land. However they can lose this status earlier if they acquire another status under the Conventions or the Protocol." Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, *op. cit.*, Commentaries Nos. 308-309, pp. 118 ff.

not taking part in hostilities and have not done so.[56] AP I expressly defines "the shipwrecked" as being all "persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue *until they acquire another status* under the Conventions or this Protocol" (Art. 8, para. b of AP I; emphasis added). The status accorded to the shipwrecked is therefore transitory and instrumental during the rescue operation, after which they acquire another status under the applicable provisions as prisoners of war, wounded, sick, etc.

It is useful to summarize the guiding principles of humanitarian action in relation to the wounded, sick and shipwrecked. The following summary is based on the one provided by Rezek:

- *Suffering has the effect of peremptorily conferring equality.* According to this philosophy, irregular combatants and mercenaries have the same right to protection, because *exceptis excipiendis* no unfavourable distinction may be admitted on the grounds of race, sex, nationality, religion, political opinions, etc. Distinctions may only be made for strictly medical reasons.
- *The protection due to the wounded, sick and shipwrecked is extended generally to the persons caring for them and to the property necessary to do so.* The immunity granted under IHL only applies to such persons and property when devoted *exclusively* to their humanitarian role. They must not therefore take part in active military efforts.
- *The rights of wounded, sick and shipwrecked persons are inalienable.* In application of the principle of protection, even voluntary renunciation is inadmissible, and these rights reflect a minimum that can be extended through special agreements between parties to the conflict. This also applies to medical and religious personnel.
- *Any State that is party to a conflict is responsible for providing the protection provided by IHL.* From the outbreak of hostilities, the State is responsible for upholding the rights of all the persons in its power and for which it is responsible.
- *A distinctive characteristic of the protection granted to wounded and sick persons is stability.* The role and purpose of medical personnel, supplies, units and transports captured by the adverse party must be maintained.
- *Identification must guarantee the safety of the protected persons and their property.* Medical, religious and relief society personnel, as well as

[56] Art. 12 of GC II and Art. 8, para. b) of AP I.

mobile and fixed property assigned to humanitarian functions must be respected, provided that they are duly identified.[57]

Lastly, it is worth noting the observations made by Swinarski on the usefulness of the application of GC I and GC II in Latin America:

> "If we take, once again, the example of the Falklands War, we can see that practically all the categories of protected persons and property benefited from the applicable provisions of the Conventions. It is also significant that this was the first time that the Second Geneva Convention had been applied, because this was the first international conflict to be fought at sea since it was adopted. In these circumstances, some difficulties were encountered in the practical implementation of the system established in the Second Convention for hospital ships and their protection. The four British and two Argentine hospital ships (S.S. 'Uganda' [*sic*], HMS 'Herald' [*sic*], HMS 'Hecla' [*sic*], HMS 'Hydra' [*sic*], A.R.A. 'Bahía Paraíso' [*sic*] and A.R.A. 'Almirante Irízar' [*sic*] were required to observe provisions of the Second Convention concerning distinctive markings, communications and identification in order to benefit from the protection that they were entitled to, which posed some difficulty. It was also the first time that Article 30 of the Second Convention had been invoked to designate a neutral area on the open sea to ensure the best possible protection for the wounded, sick and shipwrecked" (ICRC translation).[58]

It should be noted that *medical personnel* enjoy similar special humanitarian protection to that established for medical units and transports. In IHL, the term 'medical personnel' refers to persons, whether military or civilian, assigned by a party to the conflict exclusively to the search for, collection, transportation, diagnosis, treatment – including first-aid treatment – or care of the wounded, sick and shipwrecked, or for the prevention of disease, those assigned to the administration of medical units or the operation of medical transports and the personnel of civil defence organizations.[59] A distinction is made between *permanent* medical personnel (assigned exclusively to medical purposes for an indeterminate period) and *temporary* medical personnel (assigned exclusively to medical purposes for limited periods during the whole of such periods).[60]

The personnel of National Red Cross Societies and other national voluntary aid societies are, to all intents and purposes, placed on the same footing as medical personnel, so that they are entitled to the special protection established under IHL for the latter, provided that they are actually performing humanitarian assistance functions and are subject to military laws and regulations.[61]

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[57] José Francisco Rezek, "Protection of the Victims of Armed Conflicts: Wounded, Sick and Shipwrecked Persons", in *International Dimensions of Humanitarian Law, op. cit.*, pp. 154-155.

[58] Christophe Swinarski, *Introducción al Derecho Internacional Humanitario*, *op. cit.*, Ch. II, Sec. 4.

[59] Art. 8, para. c) of AP I.

[60] Art. 8, para. k) of AP I.

[61] Arts. 26 and 27 of CG I and Art. 8 c) ii) of AP I.

In the rules of IHL, medical personnel and religious personnel are often referred to together as a sort of two-part conceptual term. The most obvious reason for this, in our view, is that the extent and scope of protection accorded to these two categories under IHL is similar in many ways or, at least, comparable in technical terms. To mention but one of the most significant similarities, neither of them, as a rule, is entitled to prisoner-of-war status, because they do not have combatant status.

IHL defines 'religious personnel', the other member of the pair, as military or civilian persons exclusively engaged in the work of their ministry attached, either permanently or temporarily, to the armed forces of a party to the conflict (e.g. chaplains attached to the armed forces), to the medical units or transports of a party to the conflict or of aid societies of neutral countries or to the civil defence organizations of a party to the conflict.[62]

Medical and religious personnel and the personnel of the Red Cross and other aid societies accorded the same status may be detained or interned by the adverse party only in so far as the state of health, spiritual needs and number of prisoners of war require. Once in the power of the adverse party, they may continue to exercise their medical and spiritual functions, but are not accorded *prisoner-of-war status*. They are only entitled to the *treatment established for prisoners of war*.[63] This is not the case for members of the armed forces specially trained to provide medical services (military doctors, nurses or stretcher-bearers), who are entitled to prisoner-of-war status, where appropriate.[64]

GC I and GC II establish that medical and religious personnel are authorized to make periodic visits to prisoners of war detained in hospitals or working detachments and may even do so outside the camp where they are being held. As part of the protection that they are entitled to, they have the right to be returned by the detaining power to the power to which they belong as soon as circumstances permit, irrespective of any consideration of race, religion or political opinion and preferably according to the chronological order of their capture and their state of health.[65]

Closely related to the special protection deriving from the status of medical and religious personnel in international armed conflict at sea are the GC II provisions safeguarding 'hospital ships' as specially protected objects in such conflicts. A distinction is made between military hospital ships (the sole purpose of which is to assist, treat and transport the wounded, sick and shipwrecked and carry out coastal rescue operations) and the hospital ships of private persons of neutral countries, National Red Cross Societies and other officially recognized relief societies. GC II expressly prohibits attacking or capturing any such ships,

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62 Art. 8 d) of AP I

63 Art. 4, C) of GC III, which, in this respect, reads *ad litteræ*: "This article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention." On the concept of "treatment of prisoners of war", see the following section.

64 Arts. 28 and 29 of GC I, Art. 37 of GC II and Art. 33 of GC III.

65 Arts. 28, 30 and 31 of GC I, Arts. 36 and 37 of GC II and Arts. 33 and 35 of GC III.

provided that they have been duly authorized and identified and their details notified, in the case of the former, and that they display distinctive markings and are not used for military purposes beyond their humanitarian work, in the case of the latter.[66]

III. Protection of prisoners of war

The specific protection established by GC I and GC II for the wounded, sick and shipwrecked in the field, extended to civilians by AP I, is complemented by protection, mainly established in GC III, for a fourth category, namely 'prisoners of war'.[67] They are expressly defined and characterized as being all those persons who have fallen into the hands of the enemy and who have formed part of the *regular armed forces* of the adverse party or *militias or volunteer corps* (including *organized resistance movements*) that belong to or act on behalf of a party to the conflict (providing that they are commanded by a person responsible for his subordinates, are clearly identifiable by a fixed distinctive sign or are carrying arms openly), *persons who accompany* the armed forces under authorization (e.g. civilian members of crews, war correspondents, supply contractors, service and support personnel, etc.), *civilian crew members* and *irregular combatants* in non-occupied territory (e.g. civilians participating in the hostilities, providing that they are carrying arms openly).[68] It can be seen, then, that the rules of IHL contained in this Third Convention establishing protection for persons considered prisoners of war differ very little in content and character from those contained in GC I and GC II relating to the wounded, sick and shipwrecked.[69]

The basic notion of what a prisoner is is founded in the classical philosophy of IHL, which Pilloud explains as follows:

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[66] Arts. 22-35 of GC II.

[67] Claude Pilloud, "Protection of the Victims of Armed Conflicts: Prisoners of War", in *International Dimensions of Humanitarian Law, op. cit.*, pp. 167-168. Pilloud observes that the first real international rules on prisoners of war appeared in Chapter II of the Hague Regulations concerning the Laws and Customs of War on Land of 29 July 1899. Prior to this, he remarks, in ancient times, warriors who fell into the hands of the enemy were invariably exterminated. It was soon discovered, however, that prisoners constituted a useful and very cheap supply of manpower, and in Egypt, Greece and Rome, they began to enslave them, although prisoners of war were still slaughtered from time to time. In the Middle Ages, when the Christian Church forbade the enslavement of people of the Christian faith, the practice of releasing prisoners on payment of a ransom gained favour, and Islam too adopted a more humanitarian attitude. Nevertheless, the wars between Muslims and Christians were marked by massacres and the cruel treatment of prisoners. In the Modern Age, it became common practice to exchange prisoners of war at the close of hostilities, according to the new philosophy that the prisoners were not responsible for acts committed by their governments. In the period before the adoption of the 1899 Hague Regulations, the influence of the French Revolution gave rise to the humanitarian notion that no act of violence should be committed against prisoners of war. In practice, this led to the adoption of unilateral decrees to this effect.

[68] Art. 4 of GC III.

[69] See Art. 4 of GC I and GC II.

> "For this reason captivity as a result of war should not be considered as of a punitive or infamous character; its sole objective is to make the combatant incapable of doing harm and to prevent him from re-engaging in hostilities.- During their captivity POWs remain members of their armed forces but are subject to the laws, regulations and general orders in force within the armed forces of the Detaining Power, without, however, being in duty bound to the latter."[70]

One can argue, as Swinarski does, that "[i]n the Geneva Law system, a prisoner of war is any member of the armed forces of a party to the conflict, that is, any combatant who falls into the power of the adverse party. In addition to the members of the regular armed forces of the parties to the conflict, other persons entitled to prisoner-of-war status are those who participate in a mass uprising, that is, the inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, provided that they carry arms openly, persons authorized to accompany the armed forces without actually being members thereof and military personnel assigned to civil defence organizations" (ICRC translation).[71]

Indeed, while it is easy to infer important elements derived from the Geneva Conventions from the reasoning employed by Swinarski (e.g. the categories of persons entitled to prisoner-of-war status) the crux of the argument, in our view, lies in paragraph 1 of Article 44 of AP I, which expressly and simply states that "[a]ny combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war."[72] This rule is complemented by the presumption *juris tantum* established by IHL (in clear application of and directly derived from the *principle of protection*), according to which anyone who participates in

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[70] Claude Pilloud, "Protection of the Victims of Armed Conflicts: Prisoners of War", in *International Dimensions of Humanitarian Law, op. cit.*, p.169.

[71] Christophe Swinarski, *Introducción al Derecho Internacional Humanitario, op. cit.*, Ch. II, Sec. 5.

[72] Art. 44, para. 1, AP I. An important legal precedent for this provision can be found, with almost the same wording, in Articles 1 and 3 of the Hague Regulations concerning the Laws and Customs of War on Land of 18 October 1907 (Annex to the Hague Convention (IV) respecting the Laws and Customs of War on Land of 18 October 1907). See also Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, op. cit*. The Commentary refers specifically to the fact that this article is mainly concerned with combatants using methods of guerrilla warfare, although this is not explicitly stated (Commentary No. 1684, p. 520). It also adds the following: "At first sight, this paragraph is perfectly clear. Those combatants complying with general conditions laid down in Article 43 (Armed forces), which gives an overall definition of armed forces, have the right, when captured, to prisoner-of-war status. In reality matters are perhaps not as straightforward as this. It has been said that the problem is no longer one of knowing how to obtain the status of combatant (and prisoner-of-war status). The real problem is probably knowing what to do to avoid forfeiting this status" (Commentary No. 1687, p. 522).

hostilities and falls into the power of the adverse party shall always be presumed to be a prisoner of war.[73]

This gives rise to a basic dual rule of IHL, whereby, as explained above, a person definitely considered to be a combatant is entitled to *combatant status*, and a person with combatant status is entitled to *prisoner-of-war status*. Therefore, in order to determine the scope *ratione personæ* of prisoner-of-war status, it is first necessary to determine *ab initio* the conditions and circumstances that generally determine combatant status in an armed conflict.

A first insight into the issue can be gained from the simple statement made in Article 43, paragraph 2, of AP I, to the effect that "[m]embers of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities." In simple terms, the definition – by opposition – deriving from this rule, is essentially established by identifying the combatant according to a series of common characteristics, broadening this category in conceptual terms to a *tertium comparationis*, which makes it possible to distinguish a combatant from a civilian.

So far, we have a simple normative equation, where 'A = B = C'. The line of discourse of AP I permits an equivalence of values and meanings to be established in general terms, in which being a 'member of the armed forces' is equivalent to being a 'combatant' (A = B). It therefore follows that, as a general rule, the combatant in the power of the adverse party is a prisoner of war (hence B = C). It can be readily deduced then that in the AP I equation, being a member of the armed forces posits (at least potentially) an equivalence with being a 'prisoner of war', given the necessary circumstances (hence, it is also ultimately true that A = C).

However, although the equation is relatively straightforward in abstract terms, it is not quite so simple in practice. As mentioned above, the rules established in GC III give rise to a legal equivalence between various categories of persons and the combatant category, a distinction that is rather complex in IHL doctrine. They act, in fact, as variables, which must necessarily be taken into account in order to determine the real extent and scope *ratione personæ* of legal humanitarian protection for prisoners of war under current international law.

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[73] Art. 5, para. 2, of GC III and Art. 45, para. 1, of AP I. See Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ibid.*, Commentaries Nos. 1730 ff., pp. 546 ff. In the Commentary, it is made clear that this presumption refers mainly to those who participate in hostilities as guerrilla fighters, for example, or other persons identified in Art. 44 of AP I, who may be considered combatants for the purpose of establishing prisoner-of-war status. Although they do not form part of regular armed forces (as defined in Art. 43 of AP I), they are under an obligation to distinguish themselves from the civilian population. In some cases, therefore, there may be some doubt. It is also possible for them to fall into the power of the adversary in situations other than combat, for example, while going about their normal everyday civilian activities. In these cases too, the presumption applies.

De Preux, for example, establishes that the armed forces, from an essentially pragmatic point of view, are composed of the following categories of persons:

- *combatants* (who are entitled to take a direct part in the hostilities under IHL; see endnote 78 below);
- *non-combatants* (medical, religious and civil defence personnel), who are not entitled to take part in hostilities (Arts. 21 and 22 of GC I, Arts. 34 and 35 of GC II and Arts. 43 and 67 of AP I);
- *civilians* who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces (Art. 4 of GC III). Evidently, such people are also non-combatants.[74]

The above-mentioned articles establish the relevant rules. Article 43 of AP I governs the composition of the armed forces, structuring and unifying the concept under two fundamental ideas. The first is the idea of 'organization', according to which armed forces must be subject to an internal disciplinary system which, *inter alia*, guarantees compliance with the rules of international law applicable in armed conflict. The second is the idea of 'responsible command', which legitimizes and authorizes the conduct of subordinates and makes the high command accountable for their behaviour. Therefore, in the *ratio legis* of Article 43, para. 1, of AP I, it is perfectly logical that this should be reflected, in general terms, in the spirit and letter of the provision, which reads as follows: "The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict."[75]

These two basic ideas (organization and responsible command), used to order and categorize, make it easier, then, to understand the scope of Article 4 of GC III, which in general terms, provides for and defines the category of persons who are considered prisoners of war. It reads as follows:

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[74] Jean de Preux, "Combatant and prisoner-of-war status", in *IRRC*, January-February 1989, No. 268, pp. 43-50.

[75] Jean de Preux, "Combatant and prisoner-of-war status", in *IRRC*, *ibid.* International humanitarian law establishes certain conditions for the recognition of groups or movements as part of the armed forces: subordination to a party to the conflict, military-style organization, responsible command and enforced compliance with the rules of international law applicable in armed conflict (Art. 43 of AP I). De Preux remarks that insurrection or mass uprising [*levée en masse*] is not required to have military-style organization or responsible command, but warns that recognition is valid only while the invasion lasts (Art. 2 of the Hague Regulations concerning the Laws and Customs of War on Land of 18 October 1907 and Art. 4 of GC III).

"*Art 4. A. Prisoners of war*, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

a) that of being commanded by a person responsible for his subordinates;

b) that of having a fixed distinctive sign recognizable at a distance;

c) that of carrying arms openly;

d) that of conducting their operations in accordance with the laws and customs of war.

3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

6) 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."

As a general note, in the event of capture by the adverse party, all combatants have prisoner-of-war status (Art. 4, sec. A 1, of GC III and Art. 44 of AP I), as do members of militias or other corps forming part of the armed forces (Art. 4, sec. A 2, of GC III), whether or not they are recognized by the adverse party (Art. 4, sec. A 3, of GC III), civilians authorized to accompany the armed forces (Art. 4, sec. A 4, of GC III), members of crews (Art. 4, sec. A 5, of GC III), civilians who spontaneously take up arms ('*levée en masse'* doctrine, Art. 4, sec. A 6 of GC III), military personnel assigned to civil defence organizations (Art. 67 of AP I), and the combatants of neutral countries who join the armed forces of a party to the conflict (Art. 17 of the Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 18 October 1907).[76] As

[76] The Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 18 October 1907. In general terms, this convention governs the status of neutrality of countries during land warfare and establishes that the nationals of a State not taking part in the war are considered to be

Jaramillo Arbeláez observes, the list given in Article 4 of GC III is very similar to the list provided in Article 13 common to GC I and GC II. Therefore, as mentioned above, the protection established in the first two Geneva Conventions is instrumental in the protection that GC III establishes for prisoners of war, given the conditions established with regard to capture.[77]

In the view of de Preux, a correct interpretation of the rules of the Law of The Hague and of the Law of Geneva in particular leads to the conclusion that the following categories of people are all *combatants*,[78] as they are expressly considered to be or have the same status as members of the armed forces:

- the army of a party to a conflict (Art. 1 of the Regulations concerning the Laws and Customs of War on Land annexed to The Hague Convention (IV) respecting the Laws and Customs of War on Land of 18 October 1907, Art. 4 of GC III and Arts. 43 and 44 of AP I);
- militias or volunteer corps forming all or part of the army (Art. 1 of the Hague Regulations of 1907, Art. 4 of GC III and Art. 43 of AP I);
- members of the merchant marine organized to take direct part in the hostilities and actually doing so (Art. 4 of GC III); experience shows that this is not an uncommon occurrence;
- the members of a mass uprising ('*levée en masse*' doctrine, i.e., the inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading troops, provided they carry arms openly and respect the laws and customs of war (Art. 2 of the Hague Regulations of 1907 and Art. 4 of GC III);
- police forces (paramilitary or armed law enforcement agency), if the other parties to the conflict have been duly notified (Art. 43 of AP I);

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neutral persons (Art. 16). However, Article 17, which deals with the loss of the status of neutrality, states the following: "A neutral cannot avail himself of his neutrality (a) If he commits hostile acts against a belligerent; (b) If he commits acts in favour of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties. In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act."

[77] See *supra* note 72.

[78] Richard Baxter, "The duties of combatants and the conduct of hostilities (Law of The Hague)", in *International Dimensions of Humanitarian Law, op. cit.*, p. 104. Baxter makes the following observation on this particular subject: "In the past the term 'combatant' [*sic*] has not been used as a *technical term* in the treaties relating to the conduct of warfare and the protection of war victims. In the doctrine, the term has been used in a general sense to describe *any member of the 'fighting' (sic) armed forces* (other than medical personnel and chaplains and service and support personnel) or *any civilian who engages in combat.* Thus, until the adoption of Protocol I to the Geneva Conventions of 1949, the characterization of an individual as 'combatant' [*sic*] or 'non-combatant' of itself entailed no legal consequences." (emphasis added). In the same vein, see the work of British lawyer and military consultant, James Molony Spaight, *War Rights on Land*, MacMillan, London, 1911, p. 58.

- national liberation movements or forces recognized by the international community according to the principle of self-determination established in the Charter of the United Nations (Art. 1, para. 2), particularly if the movement has made the declaration provided for in Article 96, paragraph 3, of AP I, when the adversary is a State Party to this international instrument (Art. 43 of AP I).[79]

As Baxter observes, for the purpose of establishing prisoner-of-war status and other categories of protection, IHL also theoretically distinguishes people who are *hors de combat*, a situation in which combatants are highly vulnerable, when they have not yet been physically captured or acquired prisoner-of-war status (or some other protected status), but refrain from committing any hostile act and do not attempt to escape. In these cases, Baxter notes, people who are *hors de combat* must not, as a general rule, be made the object of attack.[80]

The rules of IHL that establish combatant status or the legal situation of combatants, who are the persons entitled – and, we should add, physically able – to take part in the hostilities[81] give rise to a principle that imposes an *essential*

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[79] Jean de Preux, "Combatant and prisoner-of-war status", in *IRRC*, *op. cit.*

[80] This category includes, for example, any person in the power of an adverse party, even if he has served as a combatant, any person who clearly expresses an intention to surrender and any person who has been rendered unconscious or is otherwise incapacitated (by injury or sickness) and therefore incapable of defending himself. See Richard Baxter, "The duties of combatants and the conduct of hostilities (Law of The Hague)", in *International Dimensions of Humanitarian Law, op. cit.*, p. 124. Based on this, he observes that "[o]ne of the basic rules is that it is forbidden to deny quarter, that is, 'to order that there shall be no survivors, to threaten an adversary therewith, or to conduct hostilities on this basis' [*sic*], as Article 40 of Protocol I puts it." See also Arts. 41 and 42 of AP I. In the same vein, see José Francisco Rezek, "Protection of the Victims of Armed Conflicts: Wounded, Sick and Shipwrecked Persons", in *International Dimensions of Humanitarian Law, op. cit.,* p. 153. Rezek clarifies the characterization of this category as follows: "It has long been recognized that the wounded, sick and shipwrecked are not necessarily the same as persons *hors de combat*. For, on the one hand, a combatant may give up fighting without suffering from wounds or disease, while on the other hand a wounded or sick person may maintain a hostile attitude, in which case he will act at his own risk." The Inter-American Commission on Human Rights has also referred to this distinction, observing that "… excesses and abuses committed against the persons who were no longer offering resistance, especially those who had been taken prisoner, as the denunciation alleges occurred, to which the government makes no reference in its answer, constitute violations of the standards in existing treaties on international humanitarian law applicable to non-international conflicts." Inter-American Commission on Human Rights, Case 7481, Final Report of 8 March 1982, Washington (Whereas 5). For a similar observation, see also the Case of Severiano and Hermelindo Santiz Gómez, Case 48/97, Final Report 11.411 of 18 February 1998, Washington (paras. 42 ff.).

[81] In the Inter-American context, the Inter-American Commission on Human Rights sustained that "[t]he combatant's privilege in turn is in essence a license to kill or wound enemy combatants and destroy other enemy military objectives. A privileged combatant may also cause incidental civilian casualties. A lawful combatant possessing this privilege must be given prisoner-of-war status, as described below, upon capture and immunity from criminal prosecution under the domestic law of his captor for his hostile acts that do

duty on combatants to distinguish themselves from the civilian population, ensuring their visual distinguishability while they are engaged in an attack or in a military operation preparatory to an attack (Art. 44, para. 2, of AP I).

IHL provides that there are certain exceptional circumstances (e.g. in occupied territory, uneven conflict or anti-guerrilla operations) in which combatants may be freed from this obligation to ensure visual distinguishability, but only by decision of their high command. In such circumstances, it is sufficient for them to carry arms openly during such time as they are physically visible to the adversary while engaged in a military operation or a military deployment preceding the launching of an attack in which they are to participate (Art. 44, para. 3, of AP I). According to de Preux, this means that during any movement toward a place from which an attack is to be launched, combatants are under an obligation to at least carry arms openly as a means of distinguishing themselves. He describes this as an "exception" relating to the duty that they normally have to ensure their visual distinguishability.[82] IHL imposes severe sanctions on combatants who violate this rule, either because they are not bearing arms openly or because they are making improper use of the provision relating to exceptional circumstances. Combatants who are caught violating the provision forfeit their entitlement to prisoner-of-war status, although they remain entitled to "protections equivalent in all respects to those accorded to prisoners of war."[83]

In general situations, the loss of combatant status, which also entails loss of prisoner-of-war status, is a direct consequence of a series of situations that IHL groups under the term 'perfidy'. Conventionally, ruses of war are not considered perfidious. They can be defined as military tactics which are essentially intended to mislead an adversary or to induce him to act recklessly, but which infringe no rule of IHL (e.g. camouflage, decoys, mock operations) and, as such, are permitted under AP I.[84] Perfidy, however, is a prohibited and punishable act expressly defined in AP I as all acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of IHL applicable in armed conflict, with intent to betray that

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not violate the laws and customs of war. This immunity does not, however, extend to acts that transgress the rules of international law applicable in armed conflict." It also considered that "[w]hile certain norms are common to all armed conflicts regardless of their nature, others are limited to the realm of international armed conflicts as defined in the 1949 Geneva Conventions and Additional Protocol I. Among the most significant of these norms is the notion of the 'combatant's privilege' [*sic*] and the related concept, discussed below, of 'prisoner-of-war status' [*sic*]. A 'combatant' [*sic*] is generally defined as a person who directly engages in hostilities by participating in an attack intended to cause physical harm to enemy personnel or objects. A 'lawful' [*sic*] or 'privileged' [*sic*] combatant is a person authorized by a party to an international armed conflict to engage in hostilities and, as such, is entitled to the protection encompassed in the 'combatant's privilege' [*sic*] as well as the status and protections of a prisoner of war as provided for under the Third Geneva Convention when they have fallen into the power of the enemy." Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, *op. cit.*, paras. 68 and 67.

82 Jean de Preux, "Combatant and prisoner-of-war status", in *IRRC*, *op. cit.*

83 Art. 44, para. 4, of AP I.

84 Art. 37, para. 2, of AP I.

confidence. Art. 37, para. 1, of AP I establishes that perfidy includes acts intended to mislead the adverse party or induce it to act recklessly by feigning an incapacitation by wounds or sickness, feigning civilian, non-combatant status, feigning an intent to negotiate under a flag of truce or surrender and feigning protected status by the use of signs, emblems or uniforms of the United Nations or neutral or other States not parties to the conflict. The crux of the difference between the two concepts is therefore misleading the adverse party about the protection provided under IHL, which is precisely the conduct that is prohibited and punishable according to these rules.

Under IHL, *mercenaries* who do not belong to the armed forces of a party to the conflict are not entitled to combatant status,[85] nor are they entitled, therefore, to prisoner-of-war status or to be treated as prisoners of war (Art. 47 of AP I). However, the most severe sanction is perhaps that established for *spies*, who are not entitled to combatant status or treatment as prisoners of war, even if they are members of the armed forces of the adverse party, when they are caught in the act and the case is clearly and unequivocally proved. This is largely because IHL considers espionage to be an unlawful and criminal act.[86] Another special case is the *parlementaire*,[87] who loses his entitlement to immunity and may be treated as

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[85] A mercenary is defined as a foreigner who is specially recruited locally or abroad by a party to the conflict, does, in fact, take a direct part in the hostilities, is not a regular member of its armed forces, is essentially motivated by the desire for private gain and is promised extraordinary material compensation. See Art. 47 of AP I. It is essentially the *animus lucrandi* that has, in general terms characterized mercenaries in military theory through the ages and earned them their historically negative notoriety. Cameroonian professor, politician and lawyer, Adamou Ndam Njoya, expresses an interesting view in "Humanitarian Ideas Shared by Different Schools of Thought and Cultural Traditions: The African Concept", in *International Dimensions of International Law, op. cit*., p. 11. He explains that the African States were concerned by the phenomenon of mercenaries in the service of colonial powers during the wars of national liberation in the continent, remarking that it was "[o]n the initiative of Nigeria [that] the 1974-77 Diplomatic Conference adopted Article 47 of the AP I. This defines the mercenary and denies him combatant and prisoner-of-war status."

[86] See Art. 46 of AP I. See also Erik Castrén, *The Present Law of War and Neutrality*, Suomalaisen Tiedeakatemian Toimituksia, Helsinki, 1954, p. 152; and Richard Baxter, "The duties of combatants and the conduct of hostilities (Law of The Hague)", in *International Dimensions of Humanitarian Law, op. cit.*, pp. 111 ff. Baxter makes the following observation: "Espionage in time of war is, in essence, the gathering or attempted gathering by clandestine means of military information about the enemy. It is the clandestine character of the activity and the spy's intention to deceive, that distinguish espionage from the reconnaissance, scouting, or surveillance performed by military forces and by individual members of the armed forces. (…) Thus, the spy is normally tried for a violation of domestic law under authority granted by international law."

[87] See Arts. 32-34 of the Hague Regulations concerning the Laws and Customs of War on Land, annexed to the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907. The *parlementaire* is a person who has been authorized by one of the parties to the conflict to enter into communication with the other, and who advances bearing a white flag. He has a right to inviolability (immunity), which also applies to other members of the delegation (flag-bearer, interpreter, trumpeter, bugler or drummer).

a spy, if he has taken advantage of his privileged position to carry out acts of espionage, which is considered an 'act of treason' under IHL.

It should be noted that prisoner-of-war status entails a system of normative protection that operates on three different levels, which are the rules that regulate the conduct of the combatant who captures and holds a prisoner of war, the rules that establish and delimit the duties and rights (status in the strictest sense of the word) of the prisoner of war and the rules that govern prisoner of war camps. According to GC III, prisoner-of-war status entails a series of special rights and duties, including proof of identity, the duty of loyalty, due regard for rank, permission to wear badges of rank and decorations, the duty to salute and show respect to officers of a higher rank of the detaining power, the duty to work and the right to pay, prohibition on recruitment, the rule of more favourable treatment (disciplinary system), the right to repatriation, etc. The regulations concerning prisoner-of-war status appear in various parts of the instruments of the Law of Geneva, particularly GC III.

Swinarski provides a valuable synthesis of the rights deriving from prisoner-of-war status, based on the basic rules established in various parts of the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. In addition to the most important and representative right granted to the prisoner of war, which is *immunity*[88] from prosecution under the internal legislation of the captor for hostile acts that do not violate the laws and customs of war, Swinarski provides the following summary of the set of rights deriving from prisoner-of-war status:

> "The system of protection established for prisoners of war protects these categories of people to ensure their safety, their physical and mental well-being, their rights and their proper treatment by the detaining power. Prisoners of war must not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone. They may be interned only in premises located on land in hygienic and healthy conditions. They may not be sent to combat zones where their presence may be used to render certain points or areas immune from military operations. Prisoners of war are entitled to receive from the detaining power everything necessary to keep them in good health. The detaining power must provide them with adequate quarters, food and clothing and attend to their needs with regard to hygiene and medical care. They are also entitled to practice their religion and carry out intellectual and physical activities. The detaining power may not make a profit from their work and must provide them with certain financial resources. Prisoners of war are entitled to send and receive correspondence and receive relief shipments. The Third Geneva Convention recognizes, to a certain extent, the right of prisoners to escape and the right to be represented by trusted persons elected from among the detained officers and soldiers. With regard to sanctions that may be imposed on them, prisoners of war are subject to the laws, regulations and orders in force in the armed forces of the detaining power. This means that as far as judicial and disciplinary sanctions are

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[88] Anna Galetti, La Protezione dei Bambini Soldato: Una Scommessa per il Diritto delle Genti, op. cit., p. 20. In her interpretation of Art. 44, para. 1, of AP I, Galetti makes the following observation: "This provision guarantees immunity from criminal prosecution for captured combatants who have not violated the law of armed conflicts."

concerned, they must be treated in the same way as the members of the forces of the detaining power. Once the hostilities are over, they are entitled to be repatriated. Those who are sick or wounded may be repatriated before the hostilities are over, provided that they do not return to active military service. Lastly, prisoners of war retain some civil powers, for example, they are entitled to make a will"[89] (ICRC translation).

Jaramillo Arbeláez also observes the following, on the subject of the responsibilities of the detaining power:

"In recent times, specific cases have arisen such as allied countries fighting together under a unified command or United Nations forces on a statutory mission. In such situations, the important question is not who captured the prisoners, but that the detaining power or the transferee power is a party to the convention. Direct responsibility lies with the State in whose custody the

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[89] Christophe Swinarski, *Introducción al Derecho Internacional Humanitario, op. cit.*, Ch. II, Sec. 5. In the same vein, see also Delio Jaramillo Arbeláez, *Derecho Humanitario Internacional de los Conflictos Armados*, *op. cit.*, p. 167 ff. Jaramillo states that, on the basis of Article 13 of GC III in particular, "[h]umane treatment and the prohibition on committing any inhumane act are absolute obligations that also apply to prisoners and internees in occupied territories and in the territories of the parties to a conflict" (ICRC translation). In addition to this, Jaramillo observes that the general protection established for prisoners of war under IHL also includes the following: "Prisoners of war are entitled in all circumstances to respect for their persons and their dignity. Women must be treated with all the regard due to their sex and benefit, at all times, by treatment as favourable as that granted to men.- All prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The detaining power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as captivity requires (Art. 14 of GC III).- Respect for the person of the prisoner not only implies ensuring his physical integrity, but also respect for his moral values.- There are various rules that protect their physical integrity, by prohibiting any acts or omissions that would harm them (Art. 13 of GC III), coercion during interrogation (Art. 17 of GC III), corporal punishment (Arts. 97, 89 and 108 of GC III), the delegation of disciplinary powers in a prisoner of war (Art. 96 of GC III), limitation on the use of weapons on prisoners attempting to escape (Art. 42 of GC III) and the obligation to investigate the death or injury of prisoners under unusual circumstances (Art. 121 of GC III). There are also rules relating to their well-being during captivity and in places of internment (Art. 22 of GC III), quarters (Art. 25 of GC III), food (Art. 26 of GC III), appropriate clothing and a favourable climate (Art. 27 of GC III), hygiene and medical attention (Arts. 29 to 31 of GC III), precautions when transferring prisoners from one place to another (Arts. 19, 20 and 46 to 48 of GC III), precautions relating to work (Arts. 49 ff. of GC III) and removal from combat zones (Art. 23 of GC III). IHL also takes into account the moral values of prisoners of war. In this regard, prisoners are not only entitled to hold religious beliefs, but also to practice their religion (Art. 34 of III), to wear badges of rank and decorations (Art. 40 of GC III), to be treated in accordance with their rank and age (Art. 44 of GC III), not to be employed in humiliating or dangerous work (Art. 52 of GC III) and to burial according to the rites of their religion in the event of death (Arts. 16 and 17 of GC I; Arts. 19 and 20 of GC II; and Art. 120 of GC III).- With regard to civil rights, it is a principle of IHL that captivity does not in any way imply *capitis diminutio*. Civil capacity was, in fact, guaranteed in the doctrine prior to the conventions…"(ICRC translation).

prisoners are being held. If prisoners have been transferred, the detaining power has an obligation under the relevant provision to respect and ensure respect for their rights. It is up to the protecting power to report any violation of the rights of the prisoners and notify the power that transferred them, which must then decide how to remedy the situation"[90] (ICRC translation).

In addition to the above, it should also be noted that the rights deriving from the protection accorded to prisoners of war under IHL are inalienable and cannot be renounced (Art. 7 of GC III).

This analysis reveals a universal dual rule of IHL, which establishes, as de Preux observes, that those who have combatant status are entitled to prisoner-of-war status when they are captured and that those who have prisoner-of-war status are necessarily entitled to the corresponding treatment. However, with regard to the humanitarian concept of the prisoner of war, GC III of 1949 establishes a clear normative and formal distinction between 'prisoner-of-war status' and 'treatment of prisoners of war.' The two sections of Article 4 of GC III address this differentiation. The second section establishes that certain categories of people are entitled to be treated as prisoners of war, for example, people who were originally released by the detaining power, but who need to be re-interned when that power occupies the territory (in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment) and those persons specifically entitled to prisoner-of-war status who have been received by neutral or non-belligerent powers on their territory.[91] Medical and religious personnel are also entitled to be treated as prisoners of war, as mentioned above.

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[90] Delio Jaramillo Arbeláez, *Derecho Humanitario Internacional de los Conflictos Armados, op. cit.*, p. 166. See also Art. 1 common to the four Geneva Conventions in relation to Art. 12 of GC III.

[91] Art. 4, Sec. B), of GC III, reads as follows: "The following shall likewise be treated as prisoners of war under the present Convention: (1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment. (2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties." On the concept of 'Protecting Power' and for

Swinarski makes the following observation on this subject: "In addition, the provisions of the Law of Geneva establish that certain persons who do not have prisoner-of-war status are entitled to be treated as prisoners of war, such as persons detained in occupied territory because they belong to the armed forces of the occupied country, military internees in a neutral country and non-combatant members of the medical and religious personnel attached to the armed forces" (ICRC translation).[92]

De Preux provides a rather longer list, including the following categories of people who do not have prisoner-of-war status, but are entitled to be treated as prisoners of war:

- the medical personnel and chaplains of the armed forces, including the staff of relief societies attached to the armed forces (Arts. 28 and 30 of GC I and Art. 33 of GC III);
- military internees in occupied territory or in a neutral country (Art. 4 of GC III);
- any person who has taken part in the hostilities and whose status has not yet been determined (Art. 5 of GC III and Art. 45, para. 3, of AP I), including detained mercenaries, spies and *parlementaires*;
- combatants who have forfeited their right to prisoner-of-war status by not visibly distinguishing themselves as combatants or by failing to carry their arms openly (Art. 44, para. 4, of AP I);
- Child combatants (Art. 77, para. 3, of AP I).[93]

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a detailed explanation of the role of the ICRC in performing this function, see another of the works, *in toto*, of Delio Jaramillo Arbeláez, *La Protección de Hombre en el Derecho de los Conflictos Armados,* (2nd ed.), Facultad de Derecho de la Universidad de Santo Tomás de Bogotá, Bogotá, 1981, 142 pp., p. 15. Jaramillo provides the following explanation: "The Protecting Power is a neutral or any other State that is not a party to the conflict, which has been designated [*sic*] by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and Additional Protocol I. It is the duty of the Parties to a conflict from the beginning of the conflict to secure the supervision and implementation of international law by appointing Protecting Powers to safeguard their interests. Each party to the conflict must designate a Protecting Power without delay for the purpose of applying the law of armed conflict established in the conventions and Additional Protocol I.- If a Protecting Power has not been designated or accepted, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the parties to the conflict with a view to the designation of a Protecting Power. (…) If an agreement is not reached, the International Committee of the Red Cross or any other organization capable of performing the functions of the Protecting Power will act as a substitute" (ICRC translation).

[92] Christophe Swinarski, *Introducción al Derecho Internacional Humanitario, op. cit.*, Ch. II, Sec. 5.

[93] Jean de Preux, "Combatant and prisoner-of-war status", in *IRRC*, *op. cit.* See also Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,*

Although prisoner-of-war status is a concept developed by IHL basically to determine the special position of the prisoner of war, as a human being, within the context of armed conflict, establishing duties, attributes and rights and applying essentially to combatants who fall into the hands of the adverse party, it is evident that IHL also considers other situations. Therefore, although prisoner-of-war status technically derives from the previous status of the prisoner as a combatant, it is significant that IHL provides that people other than combatants are entitled to the same guarantees and to receive the same *humanitarian treatment as prisoners of war*. In the opinion of de Preux, such people are entitled to be treated as prisoners of war even though they have not served as combatants and are generally granted a series of *additional rights or guarantees* owing to their particular circumstances. For example, medical and religious personnel are permitted relative freedom of movement and early repatriation (Art. 30 of GC I; Art. 37 of GC II; and Art. 33 of GC III). There are also other preferential measures that apply to military internees (Art. 4 of GC III) and child combatants (Art. 77 of AP I). If combatant status is definitively refused, such persons, accused of bearing arms, are entitled to due legal process (Art. 5 of GC III; Art. 68 of GC IV; and Art. 45 of AP I).[94]

Protection established on the basis of recognition of prisoner-of-war status and entitlement to be treated as a prisoner of war apply *ratione temporis* "from the time they fall into the power of the enemy and until their final release and repatriation." It should also be noted that it is expressly provided that when there is any doubt as to the type, extent and scope of protection that a person is entitled to, that person shall receive the protection accorded to prisoners of war until such time as their status has been determined by a competent tribunal.[95]

The status of *journalists* within this special category of prisoners of war is also worth mentioning. Although they are strictly considered civilians under IHL (Art. 79, para. 1, of AP I) and, as such, would be entitled to the special protection accorded to civilians by the rules of IHL, because they act as war correspondents, they are not granted this legal standard of protection, but that accorded to prisoners of war. They are therefore granted prisoner-of-war status pursuant to Article 4, sec. A 4, of GC III.

International protection for prisoners of war established in the Law of Geneva also includes provision for a Central Prisoners of War Information Agency (Art. 123 of GC III) to be created to carry out – without restricting the activities of the ICRC or other relief societies – efforts in each neutral country during an armed

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op. cit. The Commentary specifies, in relation to para. 3 of Art. 77 of AP I, that "[o]ne does not often see an instrument laying down rules governing the situation which would arise if an article of the same treaty were violated. This paragraph is an example of such case. It is intended to cover the case where, despite the prohibitions contained in the first two paragraphs, 'under fifteens' [*sic*] were to participate in hostilities. However, the text itself emphasizes the 'exceptional' [*sic*] character of such cases" (Commentary No. 3192, p. 902). It goes on to clarify that "… all children who are in the situation just referred to can rely on the provisions of Article 77, even if they are prisoners of war or protected persons under the Fourth Convention" (Commentary No. 3796, p. 903).

94 Jean de Preux, "Combatant and prisoner-of-war status", in *IRRC*, *op. cit.*

95 Art. 5, para. 1, of III GC.

conflict to collect all the information it may obtain through official or private channels relating to prisoners of war and to compile and transmit it as rapidly as possible to the country of origin and the families of the prisoners of war to facilitate tracing efforts and protect prisoners of war against the consequences of losing their identity.

Lastly, an additional mechanism to ensure the protection and rights of prisoners of war is provided through the visiting system established in the Law of Geneva, a mission entrusted to the protecting power according to the 'Geneva Mandate', although it can be, and is, undertaken by the ICRC as part of its work (Art. 126 of GC III). Experience has revealed an almost universal reluctance on the part of the international community, since the First World War, to implement the Geneva Mandate and the system of protecting powers in the context of international armed conflict. It has also shown the effectiveness and relative ease with which the ICRC – in spite of the evident weaknesses of this mechanism because it depends on the unilateral will of the party to the conflict – has been granted access by detaining powers since then for the express purpose of visiting prisoner of war camps. The success of the ICRC in undertaking this role which, subsidiary to the system of protecting powers, was entrusted to it under IHL, led to the creation of the International Prisoners of War Agency, which later became the Central Tracing Agency. Based on this valuable accumulated experience and the lessons learned from it, the international community should undertake efforts to renovate and strengthen this mechanism. However, it must also be said that there have been hitches in the efforts undertaken by the ICRC in this regard. It proved materially impossible, for example, for the ICRC to gain access to the prisoners of war held by the former USSR and to Soviet prisoners held in Germany during the Second World War and to those detained in North Vietnam decades later.

IV. Protection of civilians

IHL also establishes protection for the civilian population and civilians in wartime, in addition to the above-mentioned protection specifically established by GC I and GC II for the wounded, sick and shipwrecked in the field, extended by AP I to civilian victims, and the additional protection provided in GC III for prisoners of war.

Human experience throughout history and particularly since the Second World War (1939-1945) not only highlighted the terrible atrocities and suffering inflicted on innocent civilians and non-combatants, but also showed that civilians and all those who do not belong to the armed forces of the parties to a conflict, as innocent victims of war, require special protection under IHL.[96] Official figures

[96] Richard Baxter, "The duties of combatants and the conduct of hostilities (Law of The Hague)", in *International Dimensions of Humanitarian Law, op. cit.*, pp. 114-115. On this subject, Baxter explains that in the Hague Regulations of 1899 and 1907 the provisions concerning the protection of civilians (generally termed 'non-combatants') were essentially limited to the protection of the civilian population in occupied areas and did not cover other situations (e.g. civilians in enemy territory or in the territory of which

published by UNICEF reveal that in the First World War (1914-1918) civilian deaths accounted for just 5% of the total number of casualties caused by the hostilities, while in the armed conflicts of the 1990s, this percentage had risen to an alarming 90%, with an official death toll of over 20 million civilians – mostly women and children – in the more than 150 armed conflicts occurring in the postwar period.[97] The Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War, anticipating events, was developed to address precisely these issues. It should be noted that the provisions of GC IV of 1949, like those of the three previous conventions, are substantially supplemented and extended by AP I of 1977.

In general terms, the rules of IHL contained in GC IV are intended to protect those persons who, in situations of conflict or occupation, find themselves in the power of a party to the conflict (Art. 4 of GC IV) and also expressly broaden the scope of protection to include the "the whole of the populations of the countries in conflict, without any adverse distinction" (Art. 13 of GC IV). AP I provides an even broader and more general definition, stating that, under IHL, a civilian is any person who does not belong to the armed forces (Art. 43 of AP I) and is not a prisoner of war (Art. 4, Sec. A, of GC III). It also provides that – according to the dominant concept derived from the principle of protection – if there is any doubt as to whether a person is a civilian, that person must be assumed to be a civilian (Art. 50, para. 1, of AP I). It also defines 'civilian population' as all persons who are civilians, establishing the safeguard and clarification that the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character (Art. 50, para. 2, of AP 1).

It is important to note here that – in addition to the extension of the protection provided under IHL not only to civilians but also to the abstract concept of 'civilian population' – AP I also establishes protection *mutatis mutandi* for 'civilian objects'.[98] These are, *grosso modo*, the three categories of protection

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they are nationals, etc.). He also remarks that the provisions on the conduct of hostilities were more concerned with the protection of civilian property and places than with the lives and welfare of civilians themselves. In our opinion, therefore, the subsequent development of IHL in the provisions of GC IV of 1949 and, later, in those of the two Additional Protocols of 1977 after the Second World War and the following three decades in which all kinds of conflicts took place, reveal a significant historical progression in this particular area, as they focus the system of legal protection on civilians and the civilian population.

[97] Anna Galetti, *La Protezione dei Bambini Soldato: Una Scommessa per il Diritto delle Genti*, *op. cit.*, pp. 3 ff.: "The percentage of civilian victims rocketed from the 5% recorded in the First World War to over 90% in the conflicts of the 1990s. Over 150 major conflicts between 1945 and 1982 caused over 20 million deaths, the majority of them women and children."

[98] Civilian objects, in the terms of AP I, are all those objects which are not 'military objectives' nor may be considered as such, when, in view of their nature, location, purpose or use, they do not make an effective contribution to military action and do not offer a definite military advantage (Art. 52, AP I). This article also clarifies that, if there is any doubt, objects that are normally used for civilian purposes, such as places of worship, dwellings and schools, shall be presumed to be civilian objects.

established in GC IV. In very general terms, the *tertium comparationis* is the *principle of distinction* which, as mentioned above, is one of the keystones of IHL and gains particular and special significance in this regard.[99]

Professor Umozurike, the Nigerian academic and a current member of the International Commission of Jurists, provides a valuable observation on the term 'civilian', derived by exclusion – a definition by opposition –from the rules of IHL:

> "It may be said in brief that a civilian [by negative definition or by exclusion] is a person who is not a member of the armed forces and does not belong to the militia, volunteer corps or organized resistance movement whether or not such movement is recognized by the adverse party. The term excludes an inhabitant of a non-occupied territory who spontaneously takes up arms to resist an invader. A civilian is thus a person not directly involved in hostilities and a civilian population consists of such persons. The basic rule is that the parties to a conflict should distinguish between civilians and civilian objects on the one hand and combatants and military objects on the other, and should direct their operations against the latter. The safeguards for the former are operative whether the conflict is of an international character or not, and in whatever territory they may be, whether the war is specifically declared or not, and whether or not a party to the conflict is recognized by the adversary."[100]

In the view of Jaramillo Arbeláez, IHL considers that the civilian population, as such, as well as individual civilians, are entitled to special protection and, above all, must not be the object of attack.[101] The author provides an in-depth examination of the question, based on the principles of protection, humanity and

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[99] See *supra* note 32. This principle is explained in a simple and illustrative manner in Art. 48 of AP I, which reads as follows: "Basic Rule. In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives. On this subject, see Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, op. cit.*, Commentary No. 1863, p. 598. It provides the following explanation: "The *basic rule* of protection and distinction is confirmed in this article. It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be distinguished from combatants and military objectives." The entire system established in The Hague in 1899 and 1907 and in Geneva from 1864 to 1977 *is founded on this rule of customary law*: It was already implicitly recognized in the St. Petersburg Declaration of 1868 renouncing the use of certain projectiles, which had stated that *'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy'* [*sic*]" (emphasis added).

[100] Oji Umozurike, "Protection of the Victims of Armed Conflicts: Civilian Population", in *International Dimensions of Humanitarian Law, op. cit.*, pp. 188-189.

[101] Delio Jaramillo Arbeláez, *Derecho Internacional Humanitario de los Conflictos Armados*, *op. cit.*, p. 249. On this subject, see Part II of this work, pp. 248-258, and on the subject of protected persons in occupied territory, see Part IV, pp. 272-293.

distinction and the doctrine of the fundamental guarantees of protection established in Article 75 of AP I.

It is important to note that the theory of principle and the common denominator of the protection established for persons and property is that they may not be the object of attack or acts of violence, whether in offence or defence, by any of the parties to the conflict (Arts. 49, 51 and 52 of AP I). Swinarski summarizes the protection provided under IHL for the civilian population as follows:

> "In general, provisions for the protection of the civilian population prohibit any indiscriminate attack against it. The victims of armed conflict included in this category are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices and their manners and customs. Civilians must at all times be humanely treated and protected against all acts of violence and intimidation (Art. 27 of GC IV). The civilian population is entitled to receive the necessary relief supplies. Special protection is established for members of the civilian population who are especially vulnerable to the effects of armed conflict, particularly women and children. Civilians affected by armed conflict who are in the power of one of the parties to a conflict must be treated humanely in all circumstances and shall enjoy certain fundamental guarantees, without any adverse distinction. These fundamental guarantees protect the members of the civilian population from violence to their life, health and physical and mental well-being, including murder, physical and mental torture of any kind, corporal punishment and mutilation. They are also protected from outrages upon their personal dignity, in particular humiliating and degrading treatment and any form of indecent assault. It is prohibited to take hostages, impose collective punishments or threaten to commit any of these acts against the civilian population. These fundamental guarantees also grant the members of the civilian population the right to a fair trial in accordance with the provisions of Article 75 of Additional Protocol I, which include the following non-derogable conditions: the accused has the right to be informed without delay of the particulars of the offence alleged against him, anyone charged with an offence is presumed innocent, laws may not be applied retroactively, coercion must not be used to elicit a confession and trials must be public. Lastly, it is prohibited to take measures intended to starve the civilian population (Art. 54 of AP I)" (ICRC translation).[102]

In relation to the above, while a civilian is generally considered to be a non-combatant under IHL, as already mentioned, there are situations foreseen in IHL in which non-combatant status is lost when an individual decides to take a direct and active part in hostilities.[103]

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[102] Jean de Preux, "Combatant and prisoner-of-war status", in *IRRC*, *op. cit.*

[103] The Inter-American Commission on Human Rights refers specifically to this subject, observing that "[a]s a practical matter, a civilian directly or actively participates in hostilities when he, whether singly or as a member of a group, assumes the role of a combatant. Such civilians present an immediate threat of harm to the adversary when they prepare for, participate in, and return from combat. As such, they become subject to direct attack. Further, by virtue of their hostile acts, such civilians lose the benefits pertaining to peaceable civilians of precautions in attack and against the effects of indiscriminate or

In keeping with the foregoing, GC IV also creates a series of mechanisms for the specific purpose of providing an operational basis for the implementation of safeguards and measures established under IHL to protect the civilian population. For example, there is provision for the parties to the conflict to establish "hospital and safety zones and localities" in their own territory and in occupied areas in order to protect civilians, including the wounded, the sick, children, women and the elderly (Art. 14 of GC IV), from the effects of armed conflict. Another of the mechanisms provided for under IHL is the establishment, in the regions where fighting is taking place, of "neutralized zones" intended to protect wounded and sick combatants and non-combatants and any civilians who perform no work of a military character (Art. 15 of GC IV).

With regard to the application *ratione temporis* of IHL to the civilian population, it is also useful to take into account the distinction *ratione loci* that Jaramillo Arbeláez makes between territory occupied by the adverse party and the territory of the party to the conflict. On this subject, he clearly explains that "[i]n the territory of the parties to the conflict these provisions apply from the moment the conflict begins until military operations cease. In occupied territory, they apply from the time when the adverse forces cross the border until one year after military operations have ceased. However, if the occupying power continues to exercise government functions in the occupied territory, it continues to be bound to respect and ensure respect for international humanitarian law under all circumstances…" (ICRC translation).[104]

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disproportionate attacks. 55. It is important to understand that while these persons forfeit their immunity from direct attack while participating in hostilities, they, nonetheless, retain their status as civilians. Unlike ordinary combatants, once they cease their hostile acts, they can no longer be attacked, although they may be tried and punished for all their belligerent acts. 56. In contrast, civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party. The New Rules confirms this view by noting that '[c]ivilians who support the armed forces (or armed groups) by supplying labor, transporting supplies, serving as messengers or disseminating propaganda may not be subject to direct individualized attack, but they remain amenable to domestic legislation against giving aid and comfort to domestic enemies'. Clearly, persons who exercise their right to vote or to seek or hold elective office also cannot be regarded as committing, directly or indirectly, acts hostile to a party to any armed conflict." Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Colombia, *op. cit.*, Ch. IV, paras. 54-56.

[104] Delio Jaramillo Arbeláez, *Derecho Humanitario Internacional de los Conflictos Armados*, *op. cit.*, p. 240. See also Art. 6 of GC IV. The Inter-American Commission on Human Rights has stated the following in this regard: "It should be noted that the protections of the Fourth Geneva Convention begin to apply 'from the outset of any conflict or occupation mentioned in Article 2' [*sic*]. Relations between advancing troops and civilians are governed by the Convention (whether that advance includes hostilities or not), and there is no gap in the application of the provisions 'between what might be

This distinction is useful in instrumental terms when studying and implementing IHL, because the Hague Regulations concerning the Laws and Customs of War on Land of 18 October 1907 refer to territory being considered occupied when it is actually placed under the authority of the adverse party and state that once the authority of the legitimate power has in fact passed into the hands of the occupant, the latter is bound to take all the measures necessary to restore and ensure public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[105] It is precisely because few situations relating to the conduct of hostilities present greater difficulties than occupation that it is accorded special consideration under IHL. A series of specific rules are established to govern questions as varied as deportation, transfers and evacuation from occupied areas or territories, the protection of their inhabitants and public officials and their employment, the protection of property, public health, the provision of basic necessities for the population, the requisitioning of hospitals, spiritual assistance, guarantees relating to criminal prosecution, the role of the ICRC and protecting powers, provisions relating to assigned residence and internment, etc.[106]

It should also be noted that the protection established in IHL for the civilian population in situations of international armed conflict or occupation also includes provisions to protect persons who are *aliens* in the territory of a party to the conflict, particularly those who do not have normal diplomatic representation in that country, as well as *refugees* and *stateless persons*. These provisions include, for all these categories of people, the right to leave the territory at the outset or during the hostilities. They may be displaced, exchanged, repatriated,

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termed the invasion phase and the inauguration of a stable regime of occupation' [*sic*]." Inter-American Commission on Human Rights, Case of Coard *et al*., Case 10.951, Final Report 109/99 of 29 September 1999, Washington, para. 51. In accordance with this, the Commission also made the following observation: "Under exceptional circumstances, international humanitarian law provides for the internment of civilians as a protective measure. It may only be undertaken pursuant to specific provisions, and may be authorized when: security concerns require it; less restrictive measure could not accomplish the objective sought; and the action is taken in compliance with the grounds and procedures established in pre-existing law." *Ibid*., para. 52.

[105] See Arts. 42-47 of the Hague Regulations concerning the Laws and Customs of War on Land, annexed to the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907.

[106] On this subject, see Delio Jaramillo Arbeláez, *Derecho Humanitario Internacional de los Conflictos Armados*, *op. cit.*, Part IV "*Régimen de las Personas en Territorio Ocupado*", pp. 272 ff. The Inter-American Commission on Human Rights describes a specific prohibition derived from IHL concerning the civilian population: "International humanitarian law specifically prohibits [*sic*] the taking of hostages. The term 'hostages' [*sic*] applies when individuals or groups hold persons in their power for the purpose of obtaining specific actions or omissions to act (i.e. release of prisoners, cancellation of military operations, etc...) from a third party. International humanitarian law also prohibits [*sic*] the detention or internment of civilians except where necessary for imperative reasons of security." Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Colombia, *op. cit.*, Ch. IV, para. 122.

returned to their country of residence or accommodated in a neutral country.[107] If they are not repatriated, the rights that they have as aliens under international and domestic law (including benefits under labour law) must be upheld throughout the conflict, with the exception of *safety measures* authorized under IHL, which include *internment* and *assigned residence* in extreme cases and without discrimination on the sole grounds of nationality.[108] Aliens who are nationals of the adverse party also have the right not to take part in military operations against their country.[109]

According to IHL, aliens are strictly defined as those persons who are not nationals of the occupying country (or its allies) or of the occupied country. They are therefore the nationals of neutral countries or of another party to the conflict

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[107] Art. 35 of GC IV and Art. 73 of AP I. See also Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, op. cit.*, Commentaries Nos. 2957 ff., pp. 850 ff. The Commentary provides a precise definition of the terms 'stateless persons' and 'refugees': "One treaty of universal application is entirely devoted to the protection of stateless persons: this is the Convention Relating to the Status of Stateless Persons of 28 September 1954. It gives the following definition in Article 1: 'The term 'stateless person' [*sic*] means a person who is not considered a national by any State under the operation of this law' [*sic*]. The main causes of statelessness are: lack of harmonization of rule of private international law (conflict of laws), having stateless parents at birth, and disappearance of the State of origin. Thus this is a status created by factual circumstances or legal rules, rather than a status that is conferred.- Apart from the 1954 Convention which defines the status of stateless persons, there is another Convention that should be mentioned, one which deals with the actual source of the problem of statelessness: the Convention on the Reduction of Statelessness of 30 August 1961" (Commentaries 2957-2958). The Commentary also observes: "Convention Relating to the Status of Refugees of 28 July 1951.- According to Article 1, Section A, paragraph (2), the term 'refugee' [*sic*] applies to any person who: '… owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it' [*sic*]" (Commentary No. 2961). In the same vein, see also Resolution AG/RES. 2296 (XXXVII-O/07) on the Protection of Asylum Seekers and Refugees in the Americas of 5 June 2007, General Assembly of the OAS, Thirty-Seventh Regular Session, Panama. The General Assembly welcomed the fact that "(…) 28 member states of the Organization of American States (OAS) have acceded to the 1951 Convention Relating to the Status of Refugees and 30 to its 1967 Protocol; that, in 2006, Argentina, Costa Rica, and Uruguay adopted new domestic legal provisions for the protection of refugees; and that Chile, Mexico, and Nicaragua are in the process of adopting new domestic legislation on refugees."

[108] Arts. 38, 48, 49 and 79 of GC IV.

[109] Art. 40 of GC IV specifically defines the work that persons of enemy nationality may perform, which means that – *a contrariis* and by exclusion – the rule already established in the Regulations concerning the Laws and Customs of War on Land of 18 October 1907 applies. This provides that they cannot be compelled to contribute to the war effort by "taking part in military operations." This rule does not apply to the nationals of States other than the adverse party.

and, as such, are entitled to leave the occupied territory. IHL also considers stateless persons, persons whose nationality status is doubtful and refugees (or asylum seekers, *lato sensu*)[110] to be aliens and therefore entitled to leave occupied territory. Both stateless persons and refugees lack any form of diplomatic protection from any government or State (the former because they have no nationality and the latter because they have sought protection in the territory and from the government of the adverse State of which they are not nationals, which is not provided for under diplomatic law). IHL establishes a favourable distinction for such persons and accords special attention to their situation.

Finally, the last question addressed in this section on the protection of civilians in armed conflict is the protection established under IHL for persons subject to *assigned residence* (those required to leave their usual place of residence and live in an assigned residence elsewhere) or *internment* [note that, technically, the term 'imprisonment' cannot be used here, because it is reserved, semantically and logically, for prisoners of war] by a party to the conflict. The system of protection is similar to the one applied to prisoners of war, with the logical differences arising from the natural distinctions between these categories of protected persons. In general, these are very exceptional measures that may be imposed, theoretically, by a party to the conflict when the safety measures established in GC IV prove ineffective or insufficient to ensure the safety of the people in question.[111]

V. Special protection for women and children

We have already made several references to the set of principles of protection, humanity and non-discrimination and the specific provisions of IHL contained in the Geneva Conventions of 1949 and the Additional Protocols of 1977, which essentially establish a duty on the part of the States participating in a conflict to expressly protect all those persons in its power "without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria."[112] However, in addition to this general rule, it should be taken into account that there is also a complementary rule establishing privileged treatment for children on account of their age (Art. 12 of GC I and GC II; Art. 14 of GC III) and special protection for women, who must be treated with due regard to their sex (Art. 16 of GC III; Art. 27 of GC IV). In our view, these provisions do not constitute a derogation from the humanitarian principle of non-discrimination, but rather contribute to bolstering and strengthening the principle of protection, as they establish more favourable treatment – in the form of special consideration – for people who tend to be particularly vulnerable in situations of armed conflict, such as women and children.

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[110] Arts. 48 and 49 of GC IV.

[111] Arts. 41-43 and 78 of GC IV.

[112] Art. 12 of GC I and GC II; Art 16 of GC III; Arts. 13 and 27 of GC IV; Art. 75 of AP I; and Art. 3 common to the four Geneva Conventions.

Special protection established under current IHL is justified in the particular case of children, because it is necessary to ensure their overall physical, mental, emotional and spiritual development, and in the case of women, because it is necessary to ensure their moral and personal integrity. This applies to women and children whether they are civilians, combatants, prisoners or wounded or sick.

On the subject of the participation of children in armed conflict, the author Anna Galetti provides empirical data that shows that this is a disturbing reality in today's world:

> "Over 150 major conflicts which took place between 1945 and 1982 have caused the deaths of more than 20 million people, mainly women and children. In the following ten years, internal conflicts alone took a heavy toll on children, resulting in 1.5 million dead, 4 million injured and 5 million missing 'Some military leaders may find it more advantageous to wound rather than to kill enemy personnel – military or civilian – since the opponents must then consume valuable resources to take care of their wounded' [*sic*]. Since 1990 over 2 million children have lost their lives in armed conflicts and many more than the 6 million reported have been injured or mutilated. This tragic situation is further aggravated by the overwhelmingly high number of landmines distributed in varying concentrations in all the continents, which kill and disable over 10 million children each year."[113]

While it is clear that the articles of GC IV of 1949 provide important special protection for children under 15 years of age as civilians,[114] essentially intended to safeguard their dignity and protect them if they are held by the adverse party, it is also evident that it does not provide a definitive solution to the problem of the participation of children, as such, in the hostilities. AP I again includes the

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[113] Anna Galetti, *La Protezione dei Bambini Soldato: Una Scommessa per il Diritto delle Genti, op. cit.*, pp. 3-4. Galetti makes the following observation: "Over 150 major conflicts which took place between 1945 and 1982 have caused the deaths of more than 20 million people, mainly women and children. In the following ten years, internal conflicts alone took a heavy toll on children, resulting in 1.5 million dead, 4 million injured and 5 million missing 'Some military leaders may find it more advantageous to wound rather than to kill enemy personnel – military or civilian – since the opponents must then consume valuable resources to take care of their wounded'. Since 1990 over 2 million children have lost their lives in armed conflicts and many more than the 6 million reported have been injured or mutilated. This tragic situation is further aggravated by the overwhelmingly high number of landmines distributed in varying concentrations in all the continents, which kill and disable over 10 million children each year" (ICRC translation).

[114] This protection is provided for, *ad es*, in particular, under the following articles of GC IV: Art. 14 (hospital and safety zones), 17 (in the event of evacuation), 23 (guaranteeing the free passage of consignments of clothing, foodstuffs and medical supplies), 24 (safeguards for children who are orphaned, separated from their families or transferred to neutral countries to ensure their identification, care, education and the exercise of their religion), 38 (treatment of prisoners of war), 50 (proper working of all institutions devoted to the care and education of children), 76 (special quarters for children), 89 (clothing and special food according to physiological needs), 94 (measures to ensure the education of children and the opportunity to attend school) and 132 (special measures for the release, repatriation and accommodation of children).

prohibition established in GC IV on recruiting children under 15 years of age and their direct participation in hostilities. It also complements the special protection established by that instrument for children under the age of 15 as civilians regardless of whether they are imprisoned, detained or interned by the adverse party.[115]

In spite of this, it should be noted that, as observed by Jaramillo Arbeláez, neither the concept of 'childhood' or the definition of 'child' is expressly specified in any of the four Geneva Conventions or the two Additional Protocols,[116] although with regard to the application *ratione personæ* of the special protection established in their provisions, there are various references to different ages (usually 15 and exceptionally 18 years of age). However, there is no doubt that IHL provides special protection for children under 15 years of age, whether or not they are in the custody of the adverse party. As observed by Galetti, Article 77, para. 2, of AP I maintains the notion classically derived from IHL of the child, which is conventionally established in GC IV of 1949 as all persons under fifteen years of age, although, as remarked by the ICRC itself, the wording finally adopted in this provision is too vague ["shall take all feasible measures" to ensure that children do not take a direct part in hostilities].[117]

On this subject, Goodwin-Gill and Cohn, quite rightly point out that a considerable number of authors are of the view that there is a general acceptance *ex lege* of a significant degree of flexibility in the Geneva Conventions, to the extent that it would be possible to maintain in an extreme case – though plausible in a legal exegesis –that "voluntary indirect participation in hostilities by children under fifteen would not involve any breach of Art. 77 [of AP I].[118] Therefore, in

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[115] The following articles of AP I: Art. 70 (priority relief actions for children), Art. 77 (special respect and protection of the innocence and dignity of children, measures to prevent their recruitment and participation in the hostilities, if they are under fifteen years of age, special quarters in the event of imprisonment, detention or internment and prohibition on giving the death penalty to persons under the age of eighteen) and Art. 78 (special measures for the evacuation of children).

[116] Delio Jaramillo Arbeláez, *Derecho Humanitario Internacional de los Conflictos Armados, op. cit.*, pp. 246-247.

[117] "The age limit of 15 years, proposed by Article 77(2) as a distinction for participation in hostilities and almost as a sign of reaching adulthood, is no particular innovation in AP I as it corresponds to the limit already set by the majority of the provisions of GC IV in relation to children, in particular Article 24 GC IV, regarded as the one that has been expanded in Article 77 AP I. The protection given to boys and girls taking part in hostilities is set out in the terms of rather a flexible obligation imposed on the Parties to an international armed conflict to adopt 'all feasible measures' (sic) to prevent the direct participation of children in the hostilities. The weakness of this wording is obvious: 'all feasible measures' (sic) is not the same as 'all necessary measures' (sic), which is what the ICRC had proposed in vain – in every case, States are bound only to fulfil the specific – and always achievable – obligation to refrain from in any way recruiting children under the age of 15 into their armed forces." Anna Galetti, *La Protezione dei Bambini Soldato: Una Scommessa per il Diritto delle Genti, op. cit.*, p. 11.

[118] Guy Goodwin-Gill and Ilene Cohn, *Child Soldiers: The Role of Children in Armed Conflict,* Oxford University Press/Henry Dunant Institute, New York/Geneva, 1994, p. 61. However, it is clear that the authors agree with the mainstream position:

spite of these regulations, the provisions of the Geneva Conventions and the Additional Protocols are not sufficient to address the problem of the participation of children in armed conflict because, in their *ratio legis*, these international instruments go no further than creating a series of controls over the process of recruiting children, in general, without providing for or imposing any rule aimed at the parties to the conflict specifically and concretely establishing a prohibition on children taking a direct part, as combatants, in the hostilities,[119] in spite of the efforts of the ICRC and the fact that the draft article that it originally submitted for inclusion in the AP I sought to establish a broader prohibition banning even the *indirect participation* of children in armed conflict (e.g. transmission of information, transport of arms and provision of supplies, etc.).[120]

However, there has been a clear tendency in recent years in the international community for the legal definitions of the concept of the 'child combatant' arising

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"*Indeed, article 77 is essentially about the limited freedom of parties to the conflict to recruit or involve children, while recognizing that a child who does participate in hostilities as a member of the armed forces should not lose combatant status and its consequential entitlements*" (p. 63).

[119] The 1998 and 2000 reports of Rädda Barnen, the Swedish branch of the international organization Save the Children, featuring the 'Black List' of conflicts in progress and figures on the recruitment of minors, drew the attention of the UN Secretariat to concerns about the participation of children in armed conflicts at the end of the last millennium. Based on this report, Anna Galetti, *La Protezione dei Bambini Soldato: Una Scommessa per il Diritto delle Genti, op. cit.*, p. 11, provides the following figures and observations: "To provide systematic information on the problem, the Swedish publication supplements its annual 'Black List' (sic) with notes on recourse to the recruitment of minors. With 36 conflicts recorded in 1998, it was proven that children aged even less than 15 had participated directly in no less than 28 of them. For 2000 the 'Black List' (sic) records 31 current conflicts, 20 of which were already ongoing in 1996 at the time of the survey for the above-mentioned [Graça] Machel study. Knowing that the presence of children – both in the ranks of regular armed forces and among those of armed opposition groups – is partly due to forced recruitment practices only adds a tinge of horror to a form of exploitation that violates many of the most fundamental rights enshrined ten years ago by the Convention on the Rights of the Child, the body of international law on human rights that enjoys almost absolute universal approval."

[120] María Teresa Dutli, "Captured Child Combatants", in *IRRC*, No. 278, September-October 1990, pp. 421-434, and Guy Goodwin-Gill and Ilene Cohn in *Child Soldiers: The Role of Children in Armed Conflict, op. cit.* p. 47. On the subject of the process of adoption of the current wording of Art. 77, para 2, AP I, these authors observe that in the Report on the work of the Working Group submitted to Committee III of the 1974-1978 Diplomatic Conference held in Geneva, it was noted, in relation to the draft text originally prepared and submitted by the ICRC to the conference for consideration and approval, that "[p]aragraph 2 reflects a compromise in which a flat ban on recruiting children under 15 is coupled with a more flexible restructure, on the acceptance of voluntary services, i.e., to 'take all feasible measures' [*sic*] to prevent them taking a direct part in hostilities. The Working Group recognized that sometimes, particularly in occupied territories and in wars of national liberation, a total prohibition on the voluntary participation of children under 15 would be unrealistic." Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974-1978, Vol. XV, p. 546.

from the latest developments in international human rights law to be converged with or even superimposed on those established in IHL.[121] An example of this is Resolution 3318 (XXXIX) adopted by the United Nations General Assembly on 14 December 1974 relating to the Declaration on the Protection of Women and Children in Emergency and Armed Conflict.

This declaration is an important international precedent to the Convention on the Rights of the Child of 1989, which was developed on the basis of an initiative brought before the United Nations by Poland in 1978 and which, until recently, was the international instrument with the largest number of ratifications by countries around the world. The convention was later supplemented by the Optional Protocol of 2000 on the involvement of children in armed conflict.[122]

The Convention on the Rights of the Child is a significant international milestone, worthy of attention, because although it does maintain the classical IHL conception prohibiting the direct participation of children under the age of 15 in any armed conflict,[123] Article 1 of the convention expressly introduces the

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[121] "Two branches of international law contribute to the definition of the legal concept of child soldier: international humanitarian law and all the regulatory provisions on human rights." Anna Galetti, *La Protezione dei Bambini Soldato: Una Scommessa per il Diritto delle Genti*, *op. cit.*, p. 5. See also Inter-American Court of Human Rights, Case of the Plan de Sánchez Massacre, *op. cit.*, Sec. III, paras. 19 ff. In this oft-quoted Concurring Opinion, Judge Antônio Augusto Cançado Trindade makes the following observation on the subject of the convergence of and parallelisms between international humanitarian law and international human rights law, with specific reference to the principle of humanity (see *supra* note 25): "In the *Mucic et allii* case (Judgment of February 20, 2001), the International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber) considered that both international humanitarian law and international human rights law are founded on their common concern for safeguarding human dignity, which forms the basis for their minimum standards of humanity (para. 149). Indeed, the principle of humanity may be understood in different ways. First, it can be conceived as an underlying principle of the prohibition of inhuman treatment established in Article 3 common to the four 1949 Geneva Conventions. (…) Second, this principle may be invoked referring to humanity as a whole, in relation to matters of common, general and direct interest to the latter. And, third, the same principle may be used to quality [*sic*] a specific quality of humaneness. In the *Celebici* case (Judgment of November 16, 1998), the said International Criminal Tribunal for the Former Yugoslavia (Trial Chamber), described *inhuman treatment* as an intentional or deliberate act or omission, which caused 'serious mental or physical suffering or damage' [*sic*], or constituted a 'serious attack on human dignity' (para. 543). And added that: 'inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed 'grave breaches' [*sic*] in the Conventions fall' (para. 543) [*sic*]. Subsequently, in the *T. Blaskic* case (Judgment of March 3, 2000), the same Tribunal (Trial Chamber) reiterated this position (para. 154)."

[122] Convention on the Rights of the Child, UN General Assembly, Resolution 44/25 of 20 November 1989, and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict of 2000, UN General Assembly, Resolution A/RES/54/263 of 25 May 2000.

[123] Art. 38 of the Convention on the Rights of the Child states the following: "1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. 2.

concept and legal definition of the child as "every human being below the age of eighteen years" (unless under the law applicable to the child, majority is attained earlier). This, in theory, has laid the legal basis for altering the application of protection *ratione personæ*, by raising the age limit from 15 (as traditionally specified in humanitarian law texts) to 18, in keeping with the new dominant trend in international human rights law.[124] Indeed, the Optional Protocol to the convention adopted later in 2000 expressly includes this definition and requires States Parties – and armed groups (Art. 4) – to adopt "all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities" (Art. 1) and to ensure that "persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces" (Art. 2). [125]

States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. 3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest. 4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict."

[124] In spite of this mainstream position, some States have been reluctant to accept the higher age limit for humanitarian protection to 18. This was the case at the General Assembly of the OAS, which in Resolution AG/RES. 2293 (XXXVII-O/07) of 5 June 2007 on the Promotion of and Respect for International Humanitarian Law (Thirty-Seventh Regular Session, Panama) failed to take a position on the conceptualization of the child in law as being under 18 or under 15 years of age, and limited its remarks on this subject to calling upon "member states to adopt all necessary measures to comply with their respective international legal obligations regarding the recruitment and use of children in armed forces or armed groups, in accordance with recognized standards of international humanitarian law, international human rights law, and international refugee law."

[125] Art. 3 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict of 2000 establishes a series of safeguards concerning the voluntary enlistment of children under the age of eighteen that States must implement to ensure such recruitment is genuinely voluntary and that it is carried out with the informed consent of the person's parents or legal guardians. Along the same lines, the Inter-American Commission on Human Rights stressed that "[a]lthough laws in most member countries establish a minimum age of 18 for conscription, practices violating the human rights of children persist. The Commission finds such practices comparable to slavery and forced servitude. One example is the forced 'drafting' by state military forces, which generally recruit young people from poor and/or indigenous families. Armed dissident groups also recruit minors, often through kidnapping, or by forcing families to surrender them as contributions to the war. The use of children and adolescents in armed conflicts places their lives, well-being, and education at great risk. They are forced to use high-caliber weapons. They are required to lay explosives, to kill other children who are considered 'traitors' or change their minds, and to participate in kidnappings, surveillance, and bomb intelligence work. In some cases, children as young as eight are used for these perilous tasks. These illegal, perverse practices subject boys, girls, and youths to the inherent risks of combat, to sexual abuse, and to other forms of abusive, brutal, and

IHL contains special measures to protect children, including the requirement to identify all children under twelve years of age and provide them with some means of identification in the event of evacuation, providing information on parents and relatives and their general state of health.[126] It also requires priority to be given to children in the distribution of relief aid and other basic necessities, such as essential foodstuffs, clothing and drugs ["tonics"], and communication with their families must be facilitated.[127] Another important measure is the prohibition on executing the death penalty for an offence related to the armed conflict on persons who had not attained the age of eighteen years at the time the offence was committed.[128]

In addition to this special protection for children in general, there are also measures relating to the care of children who have been orphaned or separated from their families. In such cases, the State that has the children in its power must ensure that they are cared for, facilitate the exercise of their religion and their education, which should, as far as possible, be entrusted to persons of a similar cultural tradition, and arrange for their eventual reception in a neutral country.[129] The reunion of dispersed families is also a matter specifically provided for under IHL, with measures establishing tracing mechanisms and facilitating the efforts of humanitarian organizations engaged in this task.[130] Other measures established under IHL include the admission of children under 15 years of age to hospitals and safety zones and localities and their evacuation from besieged or encircled areas.[131]

Particularly noteworthy is the special protection granted to new-born babies by virtue of their inclusion under IHL in the category 'wounded and sick' (Art. 8 of AP I).

Children under the age of 15 in the hands of an occupying power in occupied territory are granted special status, through a series of measures establishing preferential treatment, with regard to such things as food, medical care, protection against the effects of war and the proper working of institutions devoted to their care and education, preferably by persons of their own nationality, language and religion (Art. 50 of GC IV). Other protection measures that apply during occupation prohibit enlisting children in the armed forces or other organizations of the occupying power, forcing children under 18 years of age to work, carrying out transfers or evacuations of children resulting in the separation of families, and evacuating children to a third country except for health reasons.[132]

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humiliating treatment. They are drawn into a culture of violence, and their rights to education and to ordinary participation in society are curtailed." Inter-American Commission on Human Rights, Recommendation for eradicating the recruitment of children and their participation in armed conflicts of 4 October 2004, Washington.

[126] Arts. 24, 50 and 136 of GC IV.

[127] Arts. 23 and 35 of GC IV; Art. 70 of AP I.

[128] Arts. 68 and 77 of AP I.

[129] Art. 24 of GC IV; Art. 78 of AP I.

[130] Art. 26 of GC IV; Art. 74 of AP I.

[131] Arts. 14 and 17 of GC IV.

[132] Arts. 49-51 of GC IV; Art 78 of AP I.

With regard to the internment of children, the rules of IHL provide that in cases where families are imprisoned, detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the adults' quarters.[133]

The special protection accorded to women, in addition to the general provisions of IHL that seek to protect the civilian population, is established in specific rules making them the object of special respect, with a view to protecting their honour and, in particular, safeguarding them against rape, forced prostitution or any form of indecent assault. A particularly special group within this category are pregnant women and mothers with dependent infants, who must receive priority treatment from the detaining power. It is also provided that the death penalty must not be executed on such women for offences related to the armed conflict.[134]

Women with prisoner-of-war status must be held in quarters that are separate from men's quarters and in all internment camps must be under the immediate supervision of women. This rule also applies to camps in which civilians are interned. Women must be assigned work with due regard to their gender.[135] With regard to judiciary or disciplinary punishment, women prisoners must not be treated more severely than male members of the armed forces of the detaining power, nor may they be awarded or sentenced to a more severe sanction than female members of the armed forces of the detaining power.[136] In general terms, in view of their particularly vulnerable situation, women are entitled to admission to specially designated hospital and safety zones and localities.[137] In addition, it is provided that they shall be the object of particular protection and respect, be given priority in the distribution of relief consignments, in particular, foodstuffs, clothing and drugs, receive preferential treatment and be evacuated from besieged or encircled areas.[138]

IHL establishes special measures for *expectant mothers and maternity cases* who refrain from any act of hostility. In addition to the treatment established for the wounded and sick, they are also entitled to be admitted to any institution where adequate treatment can be given and shall receive care not inferior to that provided for the general population. They must not be transferred if the journey would be seriously detrimental to them, unless absolutely necessary for their own safety.[139] If they are arrested, detained or interned for reasons related to the armed conflict, their cases must be considered with the "utmost priority." When in occupied territory, they must be given additional food, in proportion to their physiological needs, and lastly, agreements should be concluded, in all cases, for

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[133] Art. 82 of GC IV; Arts. 75 and 77 of AP I.

[134] Art. 27 of GC IV and Arts. 75 and 76 of AP I.

[135] Arts. 25, 29, 49, 85, 76, 97 and 108 of GC III; Arts. 76, 119 and 124 of GC IV; Art. 75 of AP I.

[136] Art. 88 of GC III.

[137] Art. 23 of GC I; Art. 14 of GC IV.

[138] Art. 16 and 17 of GC IV; Art. 70 of AP I.

[139] Arts. 91 and 127 of GC IV.

their release, repatriation, return to place of residence or accommodation in a neutral country.[140]

Measures to protect mothers of young children established under IHL include the admission of those with children under the age of seven to designated hospital and safety zones and localities. Nursing mothers are entitled to preferential treatment and must be given priority in the distribution of relief supplies, in particular foodstuffs, clothing and drugs.[141] If they are arrested, detained or interned for reasons related to the armed conflict, their cases must be considered with the "utmost priority" and agreements should be concluded for their release, repatriation, return to place of residence or accommodation in a neutral country, as appropriate.[142]

The special preferential treatment to which pregnant women and the mothers of young children are entitled includes measures requiring the parties to the conflict to avoid the pronouncement of the death penalty on such women and prohibiting its execution while the particular situation entitling them to special treatment continues.[143]

VI. Protection of civilian objects and cultural property

Just as people are protected under IHL according to different legal characterizations and categorizations, as briefly described above, mankind has always been concerned, through the ages, with safeguarding the buildings and monuments that form part of a people's cultural heritage,[144] because underlying the concept or notion of humanity is the deep historical conviction that the physical, moral and spiritual survival of a people in armed conflicts is linked to the preservation of its cultural heritage.

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[140] Arts. 21, 22, 89 and 132 of GC IV; Arts. 8 and 76 of AP I.

[141] Arts. 14 and 23 of GC IV; Art. 70 of AP I.

[142] Art. 132 of GC IV; Art. 76 of AP I.

[143] Art. 76 of AP I.

[144] The annals of history record the agreement reached among the Swiss cantons around 1393 during the era of the *Sempacherbrief* [*Document (of the valley) of Sempach*] at the time of the growth of the Swiss Confederacy and against a background of military threats and imperialist incursions from Habsburg Austria. In this treaty, the alliance of eight cantons [*Acht Orte*] pledged not to set fire to churches or convents or pillage them. Similarly, the Instructions for the Government of Armies of the United States in the Field of 1863, known as the Lieber Code, expressly prohibits the United States army from destroying or improperly appropriating cultural property (Arts. 35 and 36). These provisions also inspired similar measures in the Hague Regulations concerning the Laws and Customs of War on Land of 18 October 1907. Later, the Washington Treaty of 27 June 1934 on the Protection of Movable Property of Historic Value and the Washington Treaty of 15 April 1935 on the Protection of Artistic and Scientific Institutions and Historic Monuments extended protection in the period between the two wars until the adoption, in the postwar context and under the aegis of UNESCO, of the Hague Convention of 14 May of 1954 for the Protection of Cultural Property in the Event of Armed Conflict and the ensuing international legislation, which remains in force to the present day.

I will not discuss the regulations established for this purpose at any length for methodological reasons and because they do not fall within the scope of the specific purpose of this chapter. I will, however, refer briefly to the protection established for civilian objects and cultural property in the Law of The Hague and the Law of Geneva currently in force.

The provisions of the four Geneva Conventions of 1949 and, in particular, the two Additional Protocols of 1977 contain a series of measures specifically intended to protect civilian objects, cultural property and places of worship. The Additional Protocols specifically establish that it is prohibited to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, to use such objects in support of the military effort and to make such objects the object of reprisals (Art. 53 of AP I; Art. 16 of AP II). In addition, AP I also establishes the perfidious use of the protective emblems and signs of cultural property as a grave breach (Arts. 38 and 85 of AP I). GC IV and AP I establish broad protection for civilian objects.[145]

As Baxter remarks, special protection is established for three types of civilian objects:

- cultural objects (Art. 53 of AP I);
- objects indispensable to the survival of the civilian population (Art. 54 of AP I);
- works and installations containing dangerous forces (Art. 56 of AP I), even where these objects are military objectives, if such an attack might cause the release of dangerous forces and consequent severe losses among the civilian population.[146]

The Law of The Hague addresses this question in the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, the Regulations of 14 May 1954, the Protocol of 14 May 1954 and the Second Protocol of 26 March 1999. In general terms, the Convention of 1954, as a *corpus juris* and cornerstone of these rules, first provides an express definition of the term 'cultural property', broadening the meaning (in relation to the Geneva

[145] The Inter-American Commission on Human Rights makes the following observation in its Third Report on the Human Rights Situation in Colombia, *op. cit.*, (Ch. IV, para. 67): "Article 52(1) [of AP I] negatively defines civilian objects as all objects that are not military objectives as defined in paragraph 2 of that same article, which sets forth the twofold test for military objectives. Therefore, Article 52 implicitly characterizes all objects as civilian, unless they make an effective contribution to the enemy's military action and unless destroying, capturing, or neutralizing them offers a definite military advantage in the circumstances." Under AP I, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works are accorded special protection. It is also prohibited to make them the object of reprisals and to use starvation of civilians as a method of warfare (Art. 54, AP I).

[146] Richard Baxter, "The duties of combatants and the conduct of hostilities (Law of The Hague)", in *International Dimensions of Humanitarian Law, op. cit.*, p. 120.

Conventions) and clearly stating that it covers, irrespective of origin or ownership, movable or immovable property of great importance to the *cultural heritage* of every people (e.g. monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or reproductions of such property), *buildings whose main and effective purpose is to preserve or exhibit* such movable cultural property (e.g. museums, large libraries and depositories of archives and refuges intended to shelter, in the event of armed conflict, movable cultural property) and *centres containing monuments* (all those containing a large amount of cultural property).

Second, the 1954 Hague Convention establishes the content of this protection through *measures to safeguard* cultural property (appropriate measures to be undertaken in peacetime by the parties to the convention to prepare for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict) and *measures to ensure respect* for cultural property (prohibiting acts of hostility, reprisals, theft, pillage, misappropriation and acts of vandalism directed against cultural property and the use of the property and its immediate surroundings or the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict, except in the case of imperative military necessity). On the subject of the safeguard measures, which aim to protect material property and therefore play a particularly important preventive role, Henckaerts observes that "[p]ursuant to Article 3 of the 1954 Convention, States undertake to prepare in time of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict 'by taking such measures as they consider appropriate' [*sic*]. But the Convention does not provide any further details on measures States should take.- The Second Protocol aims to provide more guidance in this respect, as it provides specific examples of concrete measures to be taken in time of peace: the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision of adequate in situ protection of such property, the designation of competent authorities responsible for the safeguarding of cultural property.- These measures are of great practical importance for the protection of cultural property in the event of armed conflict. Clearly, they also require financial resources and know-how. With these requirements in mind, the Second Protocol provides for the setting up of a Fund for the protection of cultural property in the event of armed conflict. The Fund was specifically established to provide financial or other assistance in support of preparatory or other measures to be taken in peacetime. It will be managed by the Committee for the Protection of Cultural Property in the Event of Armed Conflict…"[147]

[147] Jean-Marie Henckaerts, "New rules for the protection of cultural property in armed conflict", in *IRRC,* No. 835, September 1999, pp. 593-620. See also Arts. 2-4 of the

Third and lastly, the 1954 Convention establishes additional measures concerned with the practical implementation of the protection of cultural property, including identification, distinctive marking and monitoring (Arts. 6, 10 and 16), observance and dissemination (Arts. 7 and 25), transport and transfer (Arts. 12 ff.), cooperation with UNESCO and technical assistance provided by this organization (Art. 23), special agreements (Art. 24) and enforcement and sanctions (Art. 28), all aimed at protecting cultural property and derived from the system of "special protection" established in the convention (Arts. 8 ff.).[148]

On the subject of special protection and with regard to the relevant treaty provisions, Nahlik observes:

> "Property placed under 'special' [sic] protection enjoys immunity. It means that the country possessing the property undertakes to refrain from using it for any military purpose and that the adverse party must abstain from any act of hostility directed against it. The granting of this kind of protection is subject however to very rigorous conditions, with regard both to substances and procedure. As concerns substance, the property in question must not only be 'of very great importance' [sic], and not be used for military purposes, but it must also be 'situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point' [sic]. (…) With regard to procedural requirements, any country desiring to have one of its possessions enjoy 'special' [sic] protection must, in time of peace, request its inclusion in the International Register of Cultural Property under Special Protection maintained by UNESCO."[149]

Lastly, with regard to the general protection derived from IHL for property in general, it is also important to note that there are provisions concerned with the natural environment, which establish protection against widespread, long-term and severe damage, particularly if it is likely to prejudice the health or survival of the civilian population.[150]

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

[148] The General Assembly of the OAS expressed the same view more recently in Resolution AG/RES. 2293 (XXXVII-O/07) of 5 June 2007 on the Promotion of and Respect for International Humanitarian Law (Thirty-Seventh Regular Session, Panama), declaring the following: "AWARE of the Hemisphere's rich cultural heritage, which contains cultural assets recognized by UNESCO as world heritage, and that could benefit from the systems for the prevention and protection of international humanitarian law." It also encourages "member states to ensure the adoption of the necessary measures and mechanisms to protect cultural property from the effects of armed conflict, in accordance with their international obligations, and in particular to give consideration to the adoption of preventive measures related to the preparation of inventories, the planning of emergency measures, the appointment of competent authorities, and the enactment of laws to ensure respect for such property."

[149] Stanislaw-Edward Nahlik. "Protection of Cultural Property", in *International Dimensions of Humanitarian Law, op. cit.*, p. 207-208.

[150] See Art. 55 of AP I, which expressly prohibits reprisals against the "natural environment" and the use of means of methods of warfare intended to damage it.

VII. Conclusion

My intention here has been to offer a brief overview of the broad lines and fundamental notions of the system of protection established in IHL, and in particular in the Law of Geneva, to safeguard human beings in the event of international armed conflict. While not an exhaustive examination of all the cited sources of treaty law, doctrine, resolutions, declarations, case law, etc. – not to mention others that I have not cited – this overview looks at the provisions of this body of law that are essential to addressing this subject, sets forth the main doctrinal approaches and presents some of the landmark developments in case law and theoretical reasoning that have influenced its evolution.

As mentioned above, for strictly methodological reasons, the overview does not address the subject from the point of view of non-international armed conflict. As indicated in the introductory paragraphs of this chapter, the immediate purpose of this analysis is to provide some general comments on the subject and, with this in mind, it was considered more constructive to confine our observations to the provisions dealing with the classical situation of international armed conflict, which comprise a broader and more extensive set of rules, although, it must also be said, perhaps more idealistic and less pragmatic in relation to the postwar scenario, which has, in fact, been very much dominated for almost six decades, particularly from the 1970s onwards, by non-international armed conflicts in different parts of the world.

I must also make one last observation on the methodological approach adopted here. I do not mean to minimize in any way the value and importance of the rules specifically developed to protect people and property and limit means and methods of warfare in non-international armed conflict derived from the *ratio legis* of Article 3 common to the four Geneva Conventions of 1949 and AP II of 1977. Quite the contrary; I firmly support the view held by many renowned authors, including the two Swiss authors, Großrieder, the Dominican humanist, and Freymond, the distinguished historian and professor, that underestimating the importance of the historical development of AP II implicitly leads not only to the absurdity of denying the truly universal scope and significance of the rules and principles of IHL, but also to the contradiction of denying the adaptability – and consequently the usefulness – of the principles of humanity that govern – or should govern – the new realities of armed conflict. This has long been recognized by the international community and duly incorporated in customary law by virtue of the Martens Clause.[151] The delimitation of the scope of this overview was therefore established, I must once again stress, for purely methodological reasons.

As shown in this study, the spectrum of humanitarian protection in armed conflict and even after it has ended, is very broad. This is only natural, as it is a system of legal guarantees for *all* human beings in any armed conflict situation. IHL seeks to ensure the systematic implementation of this protection by means of

[151] Paul Calybite Grossrieder, "A future for international humanitarian law and its principles?", in *IRRC,* No. 833, March 1999, pp. 11-18. On the subject of the Martens Clause, see *supra* notes 37-38.

an intricate theoretical and normative framework, which contains a series of explicit and realistic categorizations and characterizations of legal protection, some of which overlap, while others are exclusive, complementary or derived from one another. The ultimate result is that *all* victims of armed conflict, whether civilians or soldiers, combatants or non-combatants, prisoners of war, detainees or internees, elderly persons, women or children, members of the armed forces, persons authorized to accompany the armed forces or service and support personnel, that is, all those who are actually or potentially affected, directly or indirectly, by the hostilities, are covered by the protection, which varies in degree, scope and extent, established in IHL.

While it is undoubtedly true that non-international armed conflict is an issue of particular historical and practical interest from an Inter-American perspective, it should not be forgotten that international armed conflict has also cast its shadow over our hemisphere in the postwar era on more than a few occasions. Indeed, as Kacowicz observes, official figures for the postwar period reveal that there have been forty-one international armed conflicts in the world between 1945 and 2001. The Middle East is the region that ranks first, with eight international armed conflicts, East Africa and Eastern Europe registered five and South and South-East Asia and the Americas share third place.[152]

We have seen how the Geneva Conventions and their Additional Protocols provide effective protection for people through a complex *corpus juris*, basically composed of over six hundred articles divided into four conventions and, following the recent addition, three protocols, and how they complement and are interrelated with many other international instruments. This overview has also highlighted the 'general essence' intrinsic and inherent in the rules of IHL and which finds concrete expression in those 'universal principles of humanity' which, in the historical *continuum* of IHL and in the words of the International Court of Justice, systematically play a cardinal, guiding and requisite role in the multiple and varied intrinsic goals of humanity, limitation, prohibition, distinction, balance and protection.

Moreover, the humanitarian – *and humanizing* – ideas on which the Law of The Hague and the Law of Geneva have been built act, both in times of peace and war, as a safeguard and guarantee of the safety of all human beings and, consequently, of all actual and potential victims of armed conflict, converging, in this dimension, with the protection provided by international human rights law and refugee law.[153]

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[152] Arie Marcelo Kacowicz, *The Impact of Norms in International Society: The Latin American Experience (1881-2001),* Notre Dame University, University of Notre Dame Press/Hellen Kellogg Institute for International Studies, 2005, pp. 175 ff. This author refers specifically to the hostilities between Ecuador and Peru in 1981 and their resurgence in 1995, the war between Argentina and the United Kingdom in 1982, known as the Falklands War and, lastly, the Football War between El Salvador and Honduras in 1969.

[153] For example, the General Assembly of the OAS, in Resolution AG/RES. 2295 (XXXVII-O/07) of 5 June 2007 on Persons who have Disappeared and Assistance to Members of Their Families (Thirty-Seventh Regular Session, Panama) highlights the

However, it must be said that, all theoretical considerations aside, there are still serious challenges ahead. There is no doubt that eradicating war is, and always has been, an ethical imperative and one that requires us, as countries and nations, but above all as individuals, to be permanently committed to ensuring the protection of persons. It is an inescapable obligation that remains as crucial as ever in today's world, in the face of the relentless advance of technology, the upsurge of nationalist and regionalist feeling and the strengthening of the role of armies and armed groups and forces under the notion of national sovereignty, to name but a few of the factors that influence the conduct of hostilities in the current scenario of armed conflict.

There have been significant conceptual advances in the Inter-American community, which have contributed to strengthening and reaffirming IHL. These advances, in keeping with the requirements of today's world and universal thought, have developed over the last decade and are reflected, in particular, in a series of resolutions adopted from 1994 onwards by the General Assembly of the Organization of American States relating to the promotion of and respect for IHL and others relating to the right to the truth, universal jurisdiction, the restriction and control of arms and certain means of warfare and missing persons and assistance for their families. All these resolutions are indisputably based on a clearly humanitarian notion in accordance with current universal reflections and the principles enshrined in the instruments of the Law of Geneva and the Law of The Hague.

In addition to these developments, doctrinal and jurisprudential contributions from other important bodies within the system, such as the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, have played a significant role in the region in strengthening this commitment to upholding the general rules and principles of IHL and promoting their implementation. On numerous occasions, they have applied universal humanitarian principles that are still at the early stages of implementation in other parts of the world.

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growing convergence, since the organization was created, of the various branches of international law in relation to the protection of persons, stating that "the problem of missing persons and assistance to members of their families is addressed in international humanitarian law and international human rights law within their respective spheres of application, their legal frameworks being distinct", guided by "the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 thereto, the American Declaration of the Rights and Duties of Man of 1948, the American Convention on Human Rights of 1969, the Inter-American Convention on Forced Disappearance of Persons of 1994, the International Convention for the Protection of All Persons from Enforced Disappearance of 2006, and applicable international law." By way of illustration, it can be said that something similar has happened with regard to the issue of torture. See Walter Kälin, "The struggle against torture", in *IRRC,* No. 324, September 1998, pp. 433-444. Kälin comments that "[t]he subject of torture is an area where human rights law and humanitarian law clearly converge and where the two sets of norms reinforce each other. The different provisions on torture are a good example of how norms for the protection of human beings today are often based on unified concepts that underlie different institutional frameworks."

Despite this progress, however, there are still outstanding issues of universal concern associated with IHL on the region's agenda. They include measures to control the trade and transfer of conventional arms, particularly when there is knowledge of their potential use in contravention of international law;[154] a ban on cluster munitions, which have indiscriminate and long-lasting effects and are excessively harmful to people;[155] measures to punish serious violations of IHL

[154] It must be acknowledged that, although the issue of placing restrictions on the trade and transfer of conventional arms is closely related to international humanitarian law, it is a matter that spills over into a broader scope of discussion. However, as stressed by various authors and international organizations, it is important not to lose sight of the humanitarian consequences. On this subject, see Chris Stevenson and Eugenia María Zamora, (eds.), *The Arms Trade Treaty (ATT) and Central American Existing Law,* Fundación Arias para la Paz y Progreso Humano - Serie de Documentos sobre el TCA, San José, 2006, p. 13. The authors observe the following: "We Need an Arms Trade Treaty ASAP. Since the end of World War II, the international community has developed a number of binding agreements concerning human rights, humanitarian law, and peaceful co-existence. However, to date, there are no existing international provisions to govern arms transfers. Yet, world military expenditures and the value of the arms trade in 2004 were estimated to be over $1 trillion dollars. Within that, the total of arms sales and transfer agreements to industrialized and developing nations in 2004 was nearly $37 billion dollars, with an increase in budget spending that is the highest level since 2000. Conventional arms kill hundreds of thousands of people every year, and leave about 1.5 million disabled. They have been responsible for the death of over 2 million children since 1990. They are the driving force behind the approximate 35 million refugees in the world today. They further inflict ethnic conflict, murder, genocide, a cycle of underdevelopment and poverty, violence and insecurity." As far as the OAS is concerned, there would seem to be a communion of purpose up to this point, without any elaboration on the means that could be employed to achieve it, when it recently invited "member states to consider adopting the appropriate measures, at the national and international levels, to address the grave humanitarian consequences of the unregulated availability of arms, in particular the enactment of laws aimed at strengthening control over the illicit manufacturing of and trafficking in firearms and other related materials, bearing in mind the pertinent provisions of international humanitarian law as one of the criteria for the manufacturing and transfer of weapons, as well as the Programme of Action adopted at the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (2001) and the results of its 2006 Review Conference." General Assembly of the OAS, Resolution AG/RES. 2293 (XXXVII-O/07) of 5 June 2007 on the Promotion of and Respect for International Humanitarian Law, Thirty-Seventh Regular Session, Panama.

[155] For example, Resolution 61/89 of the UN General Assembly, Towards an Arms Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms of 6 December 2006. This resolution recognizes that arms control, disarmament and non-proliferation are essential to maintaining world peace and security and that it is necessary to reaffirm respect for international human rights law, international humanitarian law and the Charter of the United Nations. It calls on the UN Secretary General: "to seek the views of Member States on the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms, and to submit a report on the subject…", and "to establish a group of governmental experts, (…) to examine (…) the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and

and implement universal jurisdiction through the International Criminal Court and the Statute of Rome;[156] the application of humanitarian rules and principles to

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transfer of conventional arms (…).” As observed by a non-governmental organization, this resolution was necessary because “[f]ollowing the failure of the UN Convention on Certain Conventional Weapons (CCW) to agree to urgent action to address the humanitarian impact of cluster munitions at the third review conference in November 2006, despite five years of discussions around the issue and calls from 30 nations in support of negotiations, the Norwegian government announced its intention to establish a new international process to establish a treaty to ban cluster bombs.” This gave rise to what has become known as the “Oslo Process”, which was launched this year with the participation of 47 States and the Declaration of the Oslo Conference on Cluster Munitions held 22-23 February 2007. A further conference was held in Lima on 23-25 May 2007, followed by another in Vienna in December 2007 (this time with the attendance of 83 States). Other conferences are planned for February 2008 in Wellington and for June 2008 in Dublin. In the context of the Americas, there has been clear recognition of the “humanitarian consequences of the use of cluster munitions” and a general invitation to States “to participate, in the pertinent forum, in ongoing discussions about how to address these consequences”, which naturally include the Oslo Process. The OAS General Assembly confined itself to making a general appeal “to the OAS member states to address the problems identified in Resolution 61/89 of the UN General Assembly.” General Assembly of the OAS, Resolution AG/RES. 2293 (XXXVII-O/07) of 5 June 2007 on the Promotion of and Respect for International Humanitarian Law, Thirty-Seventh Regular Session, Panama. Note also that, based on similar humanitarian considerations, the OAS General Assembly, in Resolution AG/RES. 2269 (XXXVII-O/07) of 5 June 2007 on the Americas as an Antipersonnel-Land-Mine-Free Zone (Thirty-Seventh Regular Session, Panama), recognized, on this specific subject, which is closely related to the issue of cluster munitions, “[t]he serious threat that mines and other unexploded ordnance pose to the safety, health, and lives of local civilian populations, as well as of personnel participating in humanitarian, peacekeeping, and rehabilitation programs and operations.” It also declares that “mines have a humanitarian impact with very serious consequences which are long-lasting and require sustained socioeconomic assistance to victims.” It therefore agreed, with just one dissenting member State “[t]o firmly condemn, in accordance with the principles and norms of international humanitarian law, the use, stockpiling, production, and transfer of antipersonnel mines by non-state actors.”

[156] The General Assembly of the OAS recently emphasized that “in cases of serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate, and if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations, and if found guilty, the duty to punish them”, going on to stress “the obligation of states to take all necessary measures, including, when applicable, penal sanctions, for the suppression of other breaches.” In the same session, it also invited “member states that are parties to the Rome Statute to cooperate fully with the International Criminal Court and to define under their criminal law the crimes that are within its jurisdiction” and urged “member states to adapt their criminal law in order to meet their legal obligations under the 1949 Geneva Conventions and, in the case of the states parties thereto, the 1977 AP I thereto with respect to the definition of war crimes, the complementary universal jurisdiction, and the responsibility of superiors.” General Assembly of the OAS, Resolution AG/RES. 2293 (XXXVII-O/07) of 5 June 2007 on the Promotion of and Respect for International Humanitarian Law, Thirty-Seventh Regular Session, Panama. On the same occasion, the OAS General Assembly, in Resolution AG/RES. 2279 (XXXVII-O/07) of 5 June 2007 on

low-level, non-international armed conflict, internal disturbances and tensions and other 'grey areas', as they have been termed in the specialized doctrine, which are situations in which the atrocities committed against human beings often reach dramatic proportions and which are not necessarily covered *per se* by the rules of IHL;[157] the role of new non-State armed actors in conflicts and the clarification of their legal status according to the provisions of the Law of Geneva and the Law of The Hague; the scope and extent of humanitarian rules with regard to terrorism; the integration and complementary or supplementary nature of human rights law in relation to IHL;[158] etc. While not an exhaustive list, these are all issues that

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the Promotion of the International Criminal Court (Thirty-Seventh Regular Session, Panama), recalled that 23 of the 104 States that have ratified or acceded to the Statute of Rome and 27 of the 139 States that have signed the Statute are members of the OAS. It also declared that "states have the primary duty to investigate, prosecute, and punish those violations so as to prevent their recurrence and avoid the impunity of the perpetrators of those crimes" and that "the adoption of the Statute of the International Criminal Court, on July 17, 1998, in Rome, is a milestone in efforts to combat impunity, and that the Court is a component of the international criminal justice system and an effective instrument for consolidating international justice and peace." With the exception of just one State, the Member States agreed on the importance of "preserving the effectiveness and legal integrity of the Rome Statute", which requires them "to adapt or amend their domestic law, as necessary, with a view to the full and effective implementation of the Statute, including the relevant adaptations in accordance with such instruments of international human rights law or international humanitarian law as may be applicable to them."

[157] The Inter-American Court of Human Rights considered that "...in certain situations of public emergency or disturbances, States use their armed forces to control the situation. In this regard, the Court considers it absolutely necessary to emphasize the need for States to exercise extreme caution when using their armed forces as a means to control social protest, internal disturbances or violence, exceptional situations and common crime. As this Court has previously argued 'the States must restrict to the maximum extent the use of armed forces to control domestic disturbances, since they are trained to fight against enemies and not to protect and control civilians, a task that is typical of police forces' [*sic*]. The demarcation of military and police functions must guide the strict fulfilment of the duty of domestic authorities with regard to prevention and the protection of rights at risk. There have been some advances in this area, such as the 'Declaration of Minimum Humanitarian Standards' [*sic*] applicable in situations of public emergency ('Declaration of Turku' [*sic*]), which declares that it is important to reaffirm and develop principles governing the behaviour of all persons, groups, and authorities in situations of internal violence, ethnic, religious and domestic conflicts, disturbances, tensions and exceptional situations and that certain standards cannot be derogated from in these situations…" (ICRC translation). Inter-American Court of Human Rights, Case of Zambrano Vélez *et al.*, Judgement of 4 July 2007 (Merits, Reparations and Costs), San José, para. 51. The view of the Inter-American Commission on Human Rights, however, seems to differ substantially. See Inter-American Commission on Human Rights, Case of Juan Carlos Abella, Case No. 11.137, Final Report 55/97 of 18 November 1997, Washington, para. 151. The Commission clearly states the view that "[s]ituations of internal disturbances and tensions are expressly excluded from the scope of international humanitarian law as not being armed conflicts. Instead, they are governed by domestic law and relevant rules of international human rights law."

[158] On this subject, see Noam Lubell, "Challenges in applying human rights law to armed conflict", in *IRRC*, No. 860, December 2005, pp. 737-754. Lubell observes that

require further work and the development of theoretical, hermeneutic and conceptual definitions, which is an area in which the Inter-American community can make a valuable contribution.

In addition to the above, there are certainly also other legitimate concerns of a less conceptual and more practical nature within the current framework of treaty law, mainly associated with the implementation of the rules currently in force, which require more immediate solutions. They can be defined, in the words of Gasser, as follows:

> "The Geneva Conventions and the Additional Protocols require the States party to adopt a number of measures in order to assure compliance with these treaties. Some of these measures have to be taken in peacetime, others in the course of an armed conflict. In this short overview, only three such obligations will be mentioned, as examples:
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> - Instructions to and training of the armed forces: the complex set of obligations arising out of the Conventions and the Protocols must be translated into a language which is clearly understandable to those who have to comply with the rules, in particular the members of armed forces, according to their ranks and their functions. Good manuals on humanitarian law play a decisive part in effectively spreading knowledge of that law among military personnel. Rules which are not understood by or remain unknown to those who have to respect them will not have much effect.
> - Domestic legislation on implementation: Many provisions of the Geneva Conventions and of their Additional Protocols imperatively require each State Party to enact laws and issue other regulations to guarantee full implementation of its international obligations. This holds particularly true for the obligation to make grave breaches of international humanitarian law (commonly called 'war crimes') crimes under domestic law. In the same way, misuse of the red cross or the red crescent distinctive emblem must be prosecuted under domestic law.
> - Prosecution of persons who have committed grave breaches of international humanitarian law: Such persons must be prosecuted by any State party under whose authority they find themselves. That State may, however, extradite the suspect to another State Party which is willing to prosecute him. Individuals accused of violating humanitarian law may also be tried by an international criminal court. The United Nations Security Council has established two such courts: the Tribunals for the former Yugoslavia and for Rwanda. On 17 July 1998, a Diplomatic Conference convened by the United Nations in Rome adopted the Statute of the International Criminal Court. For the first time in history a permanent international court has jurisdiction over crimes committed not only in the course of international armed conflicts but

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"[t]he debates over the relationship between International Humanitarian Law and International Human Rights Law, have often focused on the question of whether human rights law continues to apply during armed conflict, and if so, on how these two bodies of law can complement each other." The solution put forward by the author essentially consists of the continued application of human rights law, although this poses numerous difficulties, including, *inter alia*, the extraterritorial applicability of human rights law, the mandate and expertise of human rights bodies and terminological and conceptual differences between the two bodies of law.

> also during non-international armed conflicts. The Court's jurisdiction does not affect the obligation of States Parties to prosecute war criminals in their own domestic courts."[159]

The real effectiveness and applicability of humanitarian rules and principles, in their archetypal form and ideal conception, require a series of measures to be established, aimed at prevention, enforcement (or implementation) and punishment, linked to each other in such a way that the latter only come into play when enforcement measures have failed, and enforcement measures are only necessary if preventive measures have proved insufficient.

It is therefore reasonable to affirm that respect for the rules and principles of IHL largely and ultimately depends, as in any other legal system, on an effective system of punishment, which is far from easy to achieve.

Empirical experience relating to Nuremberg, Tokyo, Kosovo, Kigali, Darfur, Khartoum and Dili has clearly shown that the protection of people from the injurious effects of armed conflict, whether internal or international, ultimately depends on the real effectiveness of timely and efficient international justice. At the end of the day, international peace and security also depend on people, as individuals, and nations, as international subjects, having substantive access to universal justice.[160]

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[159] Hans Peter Gasser, "International humanitarian law and the protection of war victims", *op. cit.*

[160] See Inter-American Commission on Human Rights, Case of Goiburú *et al.,* Judgement of 22 September 2006 (Merits, Reparations and Costs), San José, Sec. I, paras. 6 ff. In his Separate Opinion, Judge Antônio Augusto Cançado Trindade clearly states the following: "Following the embodiment of the grave violations in the four 1949 Geneva Conventions on international humanitarian law (and the two 1977 Additional Protocols), the current historic process in international law of *criminalizing* such *grave* violations of human rights and international humanitarian law was gradually initiated – and has intensified in recent years. The facts concerning 'Operation Condor' confirm how appropriate it was to establish a hierarchy of both laws and international illegal acts, in order to determine the legal consequences and avoid the repetition of *grave* human rights violations. Just as *jus cogens* prohibitions (cf. *infra*) have been established on the normative level and, above and beyond this, on the level of substantive law, the establishment of a ranking of violations of law (some being particularly serious, and constituting, in my opinion, true State crimes - *infra*) is being sought, in order to determine their legal consequences. 7. Indeed, recent advances in the *criminalization* of *grave* violations of human rights and international humanitarian law have accompanied *pari passu* the evolution of contemporary international law; the establishment of an international criminal jurisdiction is seen nowadays as an element that strengthens international law, overcoming basic shortcomings of the past in relation to the inability to prosecute and sanction perpetrators of crimes against humanity.[160] These advances in our times are due to the intensification of the clamor of all humanity – to the universal juridical conscience as the ultimate *material* source of all law – against the atrocities that, in recent decades, have made victims of millions of human beings throughout the world – atrocities that cannot be tolerated and that must be combated with determination. 8. We must turn our attention to the superior universal *values* underlying the whole issue of the recent creation of an international criminal jurisdiction with a permanent seat. The materialization of the international criminal responsibility of the individual (alongside the

As already mentioned, the protection of human beings, naturally considered a fundamental task, is complemented by and converges with other important branches of international law, such as human rights law and refugee law. It must also be said, however, that this task will always remain unfinished without the necessary convergence and concurrence of international criminal law.

Indeed, when the individual criminal responsibility of the perpetrator is shielded and veiled by the international responsibility of the State (and vice-versa) and when the experience of recent decades has demonstrated that violations of the most elemental and fundamental humanitarian principles can only be stopped by implementing true restorative justice, it becomes necessary to recognize, without reserve, that truly universal justice ultimately and undeniably depends, as a '*raison d'être',*[161] on the will of the international community to collectively prosecute the deplorable violations of the most absolute principles of humanity that still occur today.

I would like to bring this chapter to a close by quoting my distinguished colleague and friend, Professor Úbeda Rivera, who, paraphrasing the words of Professor Elizabeth Odio Benito, the renowned Costa Rican academic, legal expert and current vice-president of the International Criminal Court, in one of her most recent addresses at our *alma mater*, the University of Costa Rica, stated that "there can be no peace without justice." Úbeda goes on to say that "these few words have profound significance and reflect the enormous challenges involved in building peace among nations and world peace. There can be no peace without justice, and for there to be justice, States and the international community must implement both national and international measures to ensure that international crimes are prosecuted and punished" (ICRC translation).[162]

In this regard, I must add that there is no doubt that IHL, essentially conceived to govern situations of armed conflict, paradoxically constitutes a solid pillar of international security, and perhaps a means of achieving international harmony, as its role in humanizing hostilities also inherently involves the task of bringing order to human chaos in war.

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responsibility of the State), and the current process of criminalization of *grave* violations of human rights and humanitarian law constitute elements of crucial importance to combat impunity and for the treatment that should be accorded to past violations, in order to safeguard human rights."

[161] ICJ, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, *op. cit.,* "…the Contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention. Consequently, in a Convention of this type one cannot speak of individual advantages and disadvantages to States, of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the Parties, the foundation and measure of all its provisions" (emphasis added).

[162] Gioconda Úbeda Rivera, Paper delivered at the Regional Meeting on Harmonizing National Criminal Law with International Humanitarian Law Treaties, published in Anton Camen, Paula Gil and Romaric Ferraro, *Memoria de la Reunión Regional sobre la Adecuación del Derecho Penal Nacional a los Tratados de Derecho Internacional Humanitario,* Mexico, ICRC/OAS, 7-8 December 2004, p. 145.

CONDUCT OF OPERATIONS

Walter Rivera Alemán*

This module deals with the rules of the law of armed conflict governing the conduct of operations and establishing restrictions, in particular the rule of proportionality**.**

The two main principles established in the provisions of the Hague Convention IV of 1907 and reaffirmed in Additional Protocol I (Article 35) of the Geneva Conventions of 1949, which imposes restrictions on the conduct of hostilities, are:

- The right to choose methods and means of warfare is not unlimited;
- The principle of proportionality, according to which superfluous injury or unnecessary suffering must be avoided and any form of violence beyond that required to subdue the enemy is prohibited.

These two principles embody the spirit of the Law of the Hague and the Law of Geneva, and together they form a common basis for planning military operations.

These principles are not intended to hinder the action of the combatant, but they do impose restrictions on the use of violence.

Military operations may only be directed against military objectives. Every effort must therefore be made to ensure that the objective chosen is a military one. To this end, the commanders of military units must make use of the information provided to them, verified by the General Staff and intelligence officers.

Careful attention must be paid to the choice of weapons and methods of warfare to avoid incidental loss of civilian life, injury to civilians and damage to civilian objects. An operation must be aborted or suspended if it is expected to cause loss, injury or damage that would be excessive in relation to the direct military advantage anticipated. The choice of weapons should be based on careful selection of the target and the avoidance, wherever possible, of collateral damage.

Effective advance warning must be given of attacks which may affect the civilian population, circumstances permitting.

Before commencing a bombardment, the commander of the attacking force must do his utmost to warn the local authorities (of the targeted location), *except* when the target is to be taken by storm or the element of surprise is a vital factor in the success of the operation. This applies to the bombardment of places where there are civilians. A military target is still regarded as such even when there are civilians present.

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Civilians should be moved as far as possible from the vicinity of military targets, and warring parties should avoid locating military facilities near areas populated by civilians. The population should be notified by announcements in the local media, posted notices or warnings issued by commanders.

The family, personal dignity and religious practices and convictions must be respected.

I. Prohibitions

It is prohibited to:

a) Attack the civilian population, individual civilians or civilian objects as a deliberate method of warfare.

b) Compel the nationals of the adverse party to take part in operations of war against their own country, even if they were in the service of the attacking force before the hostilities began.

c) Attack or bombard cities, towns, villages, dwellings or buildings that are not defended.

d) Pillage a city or town, even when it has been taken by storm.

e) Take reprisals against protected persons or property.

f) Use the starvation of civilians as a method of warfare.

g) Spread terror among the civilian population by acts or threats of violence.

h) Order that there shall be no survivors, threaten an adversary therewith or conduct hostilities on this basis.

i) Carry out attacks on objects indispensable to the survival of the civilian population, such as foodstuffs, crops, livestock and drinking water.

j) Employ methods of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

k) Attack dikes, nuclear power stations or dams, when doing so could cause the release of dangerous forces and consequent severe losses among the civilian population, unless they are being used in regular, significant and direct support of military operations or for military purposes and if such attack is the only feasible way to terminate such support.

l) Carry out indiscriminate attacks, that is, attacks that are not directed at a specific military target and that could affect military objectives and civilians and civilian objects without distinction. Area bombardment is an example of indiscriminate attack. When assessing if an attack is indiscriminate or not, the attack as a whole should be considered, rather than isolated aspects of it. Commanders must take decisions based on the information available to them at that time.

II. Protection of property

It is prohibited to destroy or confiscate the property of the adverse party unless necessary for military reasons.

In sieges, bombardments and attacks, all feasible precautions must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments, important works of art, hospitals and other places for the sick and wounded, provided that they are not being used for military purposes. Such buildings must be clearly marked and identified as places that must be preserved. If a place of worship, hospital, museum or similar building is used for military purposes, the part being used may be considered a military target.

III. Other protective emblems

In addition to the protective emblems used for medical services, civil defence, cultural property and plants and facilities containing dangerous forces, the protective emblems described below may also be used.

a) The abbreviation PW or POW, which stands for 'prisoner of war', or PG, which stands for '*prisonnier de guerre*' or '*prisionero de guerra*', painted on the walls and/or roofs of camps indicates that they have protected status and must not be attacked. Other such markings include IC, which stands for 'internment camp', or CI, which stands for '*camp d'internement*' or '*campo de internamiento*'. The Fourth Geneva Convention of 1949 provides that, in some cases, civilians may be interned for reasons of security. Internment camps are, of course, protected and may not be attacked.

b) The white flag or flag of truce only indicates an intention to begin negotiations with the enemy. It does not necessarily signify a desire to surrender. The party that waves the white flag must first cease fire and, on observing this, the other party must do the same. There is no obligation to receive the flag bearer, and he may be sent directly back. He must not be attacked, and once he has fulfilled his mission, he must be allowed to return to his lines.

c) Hospitals and safety zones are marked with oblique red lines on a white background.

d) In February 2007, the red crystal emblem was adopted as a symbol of humanitarian service, like the red cross.

IV. Reprisals

Customary law allows reprisals to be taken against illegal acts of war. Reprisals may only be taken if:

- the intention is to ensure legitimate warfare;
- prior notice has been given;

- they are proportionate to the violation of the law of war committed by the enemy;
- they are discontinued when the violation ceases;
- the order to take reprisals comes from a high-ranking officer, and the reprisals are directed solely against combatants and military objectives.

Reprisals are an unsatisfactory way of enforcing the law. They tend to be used as an excuse for employing unlawful methods of warfare and risk triggering a vicious circle of reprisals and counter-reprisals.

The Geneva Conventions and Additional Protocol I prohibit reprisals against prisoners of war, the wounded, the sick, the shipwrecked, medical and religious personnel, buildings and materiel, civilians, cultural property, the environment and works and facilities containing dangerous forces.

V. Non-hostile relations with the enemy

Officers in command may order a temporary ceasefire for specific, limited reasons, for example, to collect and evacuate the wounded. They must report any such action to their superiors. Any negotiations with the enemy require absolute good faith. Commanders must secure prior approval from their superiors for other types of ceasefire or armistice, which could have far-reaching political or military consequences.

VI. Evacuation

A local ceasefire may be ordered in order to evacuate the wounded, the sick, children, the elderly and pregnant women from areas that are surrounded or under siege. Evacuations may also be ordered for military reasons or to ensure the safety of the population.

VII. Safe passage of relief supplies

The parties to the conflict must permit and facilitate the rapid and unhindered passage of all consignments of relief supplies and equipment for the civilian population and the personnel transporting such supplies, even when they are for the civilians of the adverse party. The parties have the right to prescribe the technical provisions under which safe passage is permitted, including searches.

The parties to the conflict must protect the relief supplies and facilitate rapid distribution.

VIII. Child welfare

The parties to the conflict must care for children under the age of fifteen who have been orphaned or separated from their families. Children may not be used for political propaganda purposes.

IX. Contact with family

The parties to the conflict must help the members of a family to remain in contact and, if possible, reunite them.

X. Localities and zones under special protection

Hospital and safety zones and localities:

Hospital and safety zones may be designated in peacetime as hospitals and places for the wounded, sick, elderly, children under fifteen, pregnant women and mothers with children under the age of seven.

Upon the outbreak and during the course of hostilities, the parties concerned may conclude agreements for mutual recognition of the designated zones and localities.

XI. Undefended localities

These are improvised protected areas from which military weapons and equipment have been withdrawn and in which military activities have ceased. They are:

- inhabited places in or near an area where armed forces are in contact;
- open for occupation by an adverse party.

These areas can be established by making a unilateral announcement and notifying the adverse party. However, to ensure a greater degree of safety, the two parties should exchange formal agreements (according to customary law and the Hague Regulations, undefended localities open for occupation may not be bombarded, even if their status has not been notified).

XII. Demilitarized zones

These are specific protected areas open to all non-combatants and governed by an express verbal or written agreement concluded by the parties to the conflict. The agreement may be concluded in peacetime or after the outbreak of hostilities.

The conditions that demilitarized zones should meet are, in practice, the same as for undefended localities:

a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;

b) no hostile use shall be made of fixed military installations or establishments;

c) no acts of hostility shall be committed by the authorities or by the population;

d) any activity linked to the military effort must have ceased.

XIII. Neutralized zones

As an emergency measure, the officers in command of the parties to the conflict may establish neutralized zones in areas where fighting is taking place in order to protect the following categories of people, without distinction, from the effects of war:

a) wounded and sick combatants and non-combatants;

b) civilian persons who take no part in hostilities, and who, while they reside in the designated zones, perform no work of a military character.

Representatives of the parties to the conflict must sign a written agreement in order to establish the neutralized zones.

XIV. Signs

The perimeter of the area must be clearly recognizable from the air and on the ground (for example, beach, boundary of a built-up area or a forest, main road, river). When necessary, the boundary of the area will be marked with clearly visible signs as agreed.

XV. Instructions to armed forces

Armed forces will be issued with strict instructions on conduct:

- when they leave a protected area;
- when they leave it without fighting;
- when they take it;
- when it is prohibited to extend military operations to the area;
- when they participate in hostilities near the area.

XVI. Conduct of offensive operations

Attacks must be strictly limited to military objectives. Military objectives must be identified as such and clearly designated and assigned.

If the attacker has a choice between more than one military objective, each of which could yield a similar military advantage, the objective selected must be the one that is expected to cause the least danger to civilians and civilian objects.

It is prohibited to carry out any attack that 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.

The time and location of the attack must be chosen with a view to minimizing the loss of civilian lives and damage to civilian objects (for example, an attack on a factory outside normal working hours).

The precautions that must be taken when firing on targets are similar to those that must be taken when choosing a military objective. The expected tactical result, in particular, should be taken into account (destruction, neutralization), as should the destructive power of the ammunition employed (amount, ballistic data, accuracy, point or area covered and possible effects on the environment).

XVII. Responsibility for accurate targeting

a) It depends on the effects caused in the place of impact by the weapon or weapon system chosen;

b) The officer in command has the authority to decide which weapon or weapon system will be used to fire on a certain target.

When tactical circumstances permit, reasonable prior warning must be given of any attack that may affect the civilian population (for example, infantry fire, so that civilians can take shelter, propaganda dropped from planes). Prior warning given a reasonable time in advance will allow the defending party to take safety measures and provide relevant information.

The withdrawal of the immunity of cultural property marked with a distinctive, protective emblem (in the exceptional case of unavoidable military necessity) shall be, when tactical circumstances permit, limited in time and restricted to the least important parts of the property.

The attack must be aborted or suspended if it is realized that the target or objective is not a military one.

The rule of proportionality must be observed in all circumstances and at all times.

XVIII. Conduct of defensive operations

Defensive operations are mainly organized outside inhabited areas.

Civilians and civilian objects must be removed from the vicinity of military objectives. The officers in command should attempt to secure the cooperation of the civilian authorities to this end.

If the defender has a choice between more than one defence position, each of which could yield a similar military advantage, the position selected must be the one that is expected to cause the least danger to civilians and civilian objects.

Counter-attacks launched from a defensive position are governed by the same provisions that apply to offensive attacks.

When civilians are transferred to remove them from the vicinity of military objectives, they should preferably be taken to places that they know and that present no danger to them.

Civilian objects should preferably be transferred to places that are not in the vicinity of military objectives.

The marking of protected establishments with distinctive signs should be adapted to tactical circumstances (for example, adequate size, camouflage requirements).

When the tactical situation permits, reasonable prior warning must be given of defensive operations that could affect civilians.

If, in the course of defensive operations, the protection granted to cultural property marked with distinctive protective signs is withdrawn (in the exceptional case of unavoidable military necessity), it should be for a limited time and restricted to the least important parts of the objective. Precautionary measures should be taken to avoid the indiscriminate use of protective markings.

XIX. Mobilization and location

Military formations, except for medical units, must move and be stationed outside inhabited areas, when their presence, even if temporary, may put civilians or civilian objects in danger.

Movements through or near inhabited areas must be effected rapidly.

Interruptions for movements (for example, regular formations at certain intervals or occasional formations) should take place, tactical circumstances permitting, away from inhabited areas or, at least, in little populated areas. A military presence, even if temporary, can put civilians and civilian objects in danger.

Formations located in or near inhabited areas should be deployed in such a way as to ensure that civilian areas are at as little risk as possible (for example, a minimum physical separation, a safe distance between buildings used for military purposes and those used for other purposes).

For longer-term situations, the officer in command must take additional measures to reduce risks in inhabited areas (for example, a clear boundary, marked if necessary, around the area where the formation is stationed, restricted access to the site, instructions to members of the formation and appropriate information issued to the civilian population).

XX. Foreign aircraft

Subject to prohibitions and restrictions on access to national airspace, foreign aircraft (except enemy military aircraft) must not be an object of attack.

Foreign civilian aircraft may be attacked:

a) when escorted by enemy military aircraft;

b) when flying alone in the circumstances specified in chapter "C", Foreign Aircraft[1].

[1] Additional protocols, articles 27, 30; Chapter "C" Foreign Aircraft; Rule 467, Exception, and Rule 469, Attack, p. 120, F. de Mulinen, *Manual sobre Derecho de la*

Such aircraft may be ordered to change course, land or alight on water for inspection. If, on inspection, it is discovered that the aircraft contains military personnel or equipment or has in some way infringed the law of war (for example, it has been used for gathering or transmitting intelligence, is transporting contraband or has violated the conditions of a prior agreement), it may be seized as a prize of war. If a foreign civilian aircraft refuses to change course, land or alight on water, it may be attacked after a warning has been issued to it to this effect.

The provisions contained in this section on foreign civilian aircraft may also be applied, by analogy, to neutral military aircraft.

XXI. Medical aircraft

Medical aircraft are used for medical transports by air.

The use of medical aircraft is subject to restrictions applying to flight over areas physically controlled by enemy forces and contact zones.

'Contact zone' means any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground.

No agreement is required for medical aircraft to fly over areas not physically controlled by an adverse party. For greater safety, however, it is advisable to notify the adverse party, particularly when such aircraft are making flights that bring them within range of enemy surface-to-air weapons systems.

In order to ensure the safety of medical aircraft flying over contact or similar zones, it is highly advisable to conclude an agreement with the adverse party. Although, in the absence of such an agreement, medical aircraft operate at their own risk, they must nevertheless be respected after they have been identified as such.

Protection for medical aircraft flying over areas physically controlled by the enemy can be fully effective only by prior agreement with the adverse party. A medical aircraft which flies over such an area without, or in deviation from the terms of, an agreement, must make every effort to identify itself.

As soon as a medical aircraft is identified by the adverse party, that party may order it to land or to alight on water or take other measures to safeguard its own interests. In any case, it must allow the aircraft time to comply before resorting to an attack against the aircraft.

While carrying out flights over areas physically controlled by the enemy or contact zones, medical aircraft must not, except by prior agreement with the adverse party, be used to search for the wounded, sick and shipwrecked.

Notifications and agreements must state the proposed number of medical aircraft, their flight plans and means of identification.

Guerra para las Fuerzas Armadas: "Foreign aircraft may receive the order to modify their course, to land or alight on water, if it refuses, it may be attacked after being warned."

The parties to the conflict must take the necessary measures to rapidly forward the substance of any such notifications and agreements to the military units concerned.

Medical aircraft flying over areas that are physically controlled by an adverse party or over areas where physical control is not clearly established, may be ordered to land or alight on water, as appropriate, to permit inspection. Medical aircraft must obey any such order.

The aircraft may be seized if the inspection discloses that it:

a) is not a medical aircraft;

b) has been used to acquire a military advantage over the enemy (for example, intelligence, armament);

c) has flown without or in breach of a prior agreement.

The seized aircraft will be considered a prize of war.

If the seized aircraft had been assigned as a permanent medical aircraft, it may only be used thereafter for this purpose.

XXII. Foreign vessels

Attacks at sea must be strictly limited to vessels considered to be military objectives.

Examples of military objectives, in addition to vessels belonging to the enemy fleet, include:

a) vessels in convoy;
b) vessels carrying military materials;
c) vessels carrying enemy troops;
d) vessels breaching a blockade.

In the past, flags were used to indicate the nationality of warships. Today, identification of nationality is based on other criteria (for example, type and class of vessel).

The following types of vessels may not be captured or attacked:

a) hospital ships and their lifeboats and small craft;
b) coastal rescue craft;
c) cartel vessels, that is, vessels sailing under special agreements;
d) vessels granted safe conduct;
e) small coastal fishing vessels;
f) vessels on religious, scientific or philanthropic missions;
g) other vessels of no military interest.

The instruments, equipment, gear and cargoes of these vessels are subject to capture.

When there is doubt as to whether or not a vessel is a military objective, it may be captured and searched to verify its status. If it refuses to stop or to be boarded for inspection, it may be destroyed following the relevant notification.

Neutral warships are not, in principle, considered to be military objectives for the warring parties, unless they become such according to the above criteria.

XXIII. Hospital ships

Hospital ships (and their lifeboats and small craft) and coastal rescue craft may not be captured or attacked.

Hospital ships and coastal rescue craft must not hamper the movements of combatants in any way. During combat, they operate at their own risk.

Any hospital ship in a port that falls into the hands of the enemy must be allowed to leave.

Medical transports by sea on large ships often involve supplies and assistance similar to those available at medical establishments on land.

The parties to the conflict must be notified of the names and descriptions of hospital ships and coastal rescue craft before they are employed (ten days' notice, for example). The characteristics which must appear in the notification include registered gross tonnage, the length from stem to stern and the number of masts and funnels.

The outer surfaces of the hospital ships must be painted white, with one or more dark red crosses painted as large as possible on each side of the hull and on the horizontal surfaces, in such a way as to afford the greatest possible visibility from the sea and from the air.

A party to the conflict may notify any adverse party as far in advance of sailing as possible of the name, description, expected time of sailing, course and estimated speed of the medical ship or craft, particularly in the case of ships of over 2,000 gross tons, and may provide any other information which would facilitate identification and recognition. The adverse party must acknowledge receipt of such information.

If the tactical situation so requires, the parties to the conflict may order hospital ships off, make them take a certain course, control the use of their wireless and other means of communication and even detain them for up to seven days from the time of interception. The parties to the conflict may refuse the assistance of hospital ships and coastal rescue craft.

Any warship on the surface able to immediately enforce its command may order other medical ships or craft to stop, order them off or make them take a certain course. These vessels must obey any such commands. They may not be diverted in any other way from their medical mission so long as they are needed for the wounded, sick and shipwrecked on board.

Ships chartered to transport medical materials are authorized to transport materials exclusively intended for the treatment of wounded and sick members of

armed forces or for the prevention of disease, provided that the adverse party has been notified of the particulars of the voyage and accepted them. The adverse party preserves the right to board the carrier ships, but not to capture them or seize the equipment carried. These vessels do not have the status of medical ships or craft and cannot be marked with the distinctive signs and emblems denoting medical service.

NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

Romaric Ferraro*

International humanitarian law seeks to protect the victims of armed conflict and regulate the means and methods of warfare used. In order to give full effect to this set of rules, States must adopt a series of national implementation measures in peacetime. These measures are preventive in nature and are designed to adapt domestic legislation to the provisions of international treaties.

The situation in the Americas presents a mixed picture.[1] Most of the main international humanitarian law treaties have been ratified by the region's States, although many of the measures required to fulfil obligations arising from these instruments have not yet been taken.

This article seeks to explain why it is important to adopt national measures to implement international humanitarian law, describe significant national measures adopted to date and present the most important advances achieved in this field in the Americas in recent years.[2]

I. Importance of national measures for the implementation of international humanitarian law

It can be observed in international practice that States have adopted many instruments underlining the importance of implementing international humanitarian law, in particular the adaptation of national law to the rules of international humanitarian law.

In Resolution 1265 on the protection of civilians in armed conflict, the United Nations Security Council emphasizes that implementing measures to give domestic effect to international humanitarian law treaties is one of the best ways of protecting civilians from the effects of armed conflict.[3] The resolution also

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1 Report 2006, Advisory Service on International Humanitarian Law of the International Committee of the Red Cross, Unit for Latin America and the Caribbean, "Participation in relevant international humanitarian law treaties and their national implementation."

2 On the implementation of international humanitarian law in the Americas, see Cristina Pellandini, "Retos actuales en materia de adopción de medidas nacionales para la aplicación del derecho internacional humanitario", in Gabriel Valladares, *Derecho humanitario internacional y temas de áreas vinculadas*, *Lecciones y ensayos*, No. 78, Lexis Nexis Abeledo Perrot/ICRC, Buenos Aires, 2003, pp. 361-389.

3 United Nations (UN) Document S/RES/1265. 17 September 1999. Para. 5: "Calls on States which have not already done so to consider ratifying the major instruments of international humanitarian, human rights and refugee law, and to take appropriate legislative, judicial and administrative measures to implement these instruments

urges States to take appropriate measures to ensure the prosecution and punishment of those who commit war crimes.[4] The United Nations General Assembly has also adopted a series of resolutions on the "Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts", in which it stresses the importance of adopting national measures as a means of ensuring respect for international humanitarian law.[5]

The importance of adopting national measures to implement international humanitarian law has also been recalled on numerous occasions at the International Conference of the Red Cross and Red Crescent Movement, in which the 194 States party to the Geneva Conventions participate. Specifically, at the 28th Conference, the Movement stressed "the need to reinforce implementation of and respect for international humanitarian law."[6]

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domestically, drawing on technical assistance, as appropriate, from relevant international organizations including the ICRC and United Nations bodies."

[4] *Ibid*. Para. 6: "Emphasizes the responsibility of States to end impunity and to prosecute those responsible for genocide, crimes against humanity and serious violations of international humanitarian law, affirms the possibility, to this end, of using the International Fact-Finding Commission established by Article 90 of the First Additional Protocol to the Geneva Conventions, reaffirms the importance of the work being done by the ad hoc Tribunals for the former Yugoslavia and Rwanda, stresses the obligation of all States to cooperate fully with the Tribunals, and acknowledges the historic significance of the adoption of the Rome Statute of the International Criminal Court which is open for signature and ratification by States."

[5] UN Document A/RES/61/30. Resolution adopted by the United Nations General Assembly on 4 December 2006. The General Assembly regularly adopts resolutions on the status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts. Previous resolutions on this subject are: Resolution 32/44 of 8 December 1977, 34/51 of 23 November 1979, 37/116 16 December 1982, 39/77 of 13 December 1984, 41/72 of 3 December 1986, 43/161 of 9 December 1988, 45/38 of 28 November 1990, 47/30 of 25 November 1992, 49/48 of 9 December 1994, 51/155 of 16 December 1996, 53/96 of 8 December 1998, 55/148 of 12 December 2000, 57/14 of 19 November 2002 and 59/36 of 2 December 2004.

[6] Resolution 1 "Adoption of the Declaration and Agenda for Humanitarian Action" of the 28th International Conference of the Red Cross and Red Crescent, point (B) (2). In this same point, it is noted that "all States must take national measures to implement international humanitarian law, including training of the armed forces and making this law known among the general public, as well as the adoption of legislation to punish war crimes in accordance with their international obligations." See also resolution 1 "Adoption of the Declaration and the Plan of Action" of the 27th International Conference of the Red Cross and Red Crescent, 1999, in particular the plan of action for the years 2000-2003, final goal 1.2 on creating an effective barrier against impunity through the combination of relevant international treaties and national laws concerning the repression of violations of international humanitarian law, and the examination of an equitable system of reparations; see also final goal 1.3 on the universal acceptance of international humanitarian law and the adoption of all necessary measures by States at the national level to ensure the implementation of their obligations under international law. See also resolution 1 "International humanitarian law: from law to action. Report on the follow-up to the

The General Assembly of the Organization of American States (OAS) has adopted a series of resolutions inviting member States to ratify international humanitarian law treaties and adopt national measures to implement them.[7] The most recent resolution on this subject, adopted on 6 June 2006 (AG/RES. 2226 (XXXVI-O/06) and entitled "Promotion of and respect for international humanitarian law"[*]), provides a detailed list of national legislative, regulatory and practical measures for prevention.[8]

In short, it is clear that States, in international multilateral and regional forums, have repeatedly reaffirmed that it is essential to adopt national measures to fulfil obligations arising from international humanitarian law treaties, because they ensure better protection for the victims of armed conflicts. Literature on this subject has gone so far as to suggest that a failure to adopt national measures can cost human lives.[9]

International Conference for the Protection of War Victims" adopted at the 26th International Conference of the Red Cross and Red Crescent in 1995.

[7] Resolutions adopted concerning the promotion and implementation of international humanitarian law are the following: AG/RES. 1270 (XXIV-O/94) of 10 June 1994, AG/RES. 1335 (XXV-O/95) of 9 June 1995, AG/RES. 1408 (XXVI-O/96) of 7 June 1996, AG/RES. 1503 (XXVII-O/97) of 5 June 1997, AG/RES. 1565 (XXVIII-O/98) of 2 June 1998, AG/RES. 1619 (XXIX-O/99) of 7 June 1999, AG/RES. 1706 (XXX-O/00) of 5 June 2000, AG/RES. 1770 (XXXI-O/01) of 5 June 2001, AG/RES. 1771 (XXXI-O/01), AG/RES. 1904 (XXXII-O/02) of 4 June 2002, AG/RES. 1944 (XXXIII-O/03) of 10 June 2003, AG/RES. 2052 (XXXIV-O/04) of 8 June 2004 and AG/RES. 2127 (XXXV-O/05) of 7 June 2005.

[*] *Editor's note:* after the course had taken place, the OAS General Assembly adopted resolution AG/RES. 2293 (XXXVII-O/07) in June 2007, "Promotion of and respect for international humanitarian law."

[8] The General Assembly also adopted a whole series of resolutions on specific issues relating to international humanitarian law and national implementation. See, for example, the following resolutions adopted in June 2006 in the course of the thirty-sixth regular session of the OAS General Assembly: Resolution AG/RES. 2175 (XXXVI-O/06) on the right to the truth, AG/RES. 2176 (XXXVI-O/06) on the promotion of the International Criminal Court, AG/RES. 2179 (XXXVI-O/06) on the Inter-American Convention against the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials, AG/RES. 2180 (XXXVI-O/06) on the Americas as an antipersonnel-land-mine-free zone, AG/RES. 2181 (XXXVI-O/06) on support for action against antipersonnel mines in Ecuador and Peru, AG/RES. 2229 (XXXVI-O/06) on internally displaced persons, AG/RES. 2231 (XXXVI-O/06) on persons who have disappeared and assistance to members of their families, AG/RES. 2233 (XXXVI-O/06) on the study of the rights and the care of persons under any form of detention or imprisonment, AG/RES. 2238 (XXXVI-O/06) on protecting human rights and fundamental freedoms while countering terrorism.

[9] Cristina Pellandini, *op.cit.*

II. Main measures required for the implementation of international humanitarian law

Many of the articles in the main international humanitarian law treaties contain provisions on measures that must be taken both in peacetime and wartime.[10] In this regard, "the term implementation covers all measures that must be taken to ensure that the rules of international humanitarian law are fully respected."[11] They include a wide range of measures from the adoption of internal legislation to repress war crimes[12] to the protection of cultural property in the event of armed conflict.[13]

A. Repression of war crimes

The four Geneva Conventions each contain a provision whereby States undertake to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article."[14] The respective article in each of the Conventions describes the acts that must be established as criminal offences in domestic legislation.[15] Additional Protocol I of 1977 extended the list

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[10] See the fact sheet prepared by the ICRC Advisory Service on International Humanitarian Law "Implementing international humanitarian law: from law to action" available at the ICRC website (www.icrc.org). It contains a synoptic table showing the key articles of the Geneva Conventions of 1949, the Additional Protocols of 1977 and the Hague Convention of 1954 for the protection of cultural property in the event of armed conflict and its Protocols, which require national implementation.

[11] *Ibid.*

[12] See the fact sheet prepared by the ICRC Advisory Service on International Humanitarian Law "Penal repression: punishing war crimes" available at the ICRC website (www.icrc.org). See also the information kit "National enforcement of international humanitarian law" prepared by the ICRC Advisory Service on International Humanitarian Law and available at the ICRC website (www.icrc.org).

[13] See the fact sheet prepared by the ICRC Advisory Service on International Humanitarian Law "1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict and its Protocols" available at the ICRC website (www.icrc.org).

[14] Article 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Article 50 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), Article 129 of the Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), Article 146 of the Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).

[15] Article 50 of the First Geneva Convention, Article 51 of the Second Geneva Convention, Article 130 of the Third Geneva Convention, Article 147 of the Fourth Geneva Convention. The acts listed in these articles include wilful killing, torture or inhuman treatment, biological experiments, wilfully causing great suffering or serious injury to body or health and extensive appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or a person protected under the Fourth Geneva Convention to serve in the forces of the hostile Power, wilfully depriving a prisoner of war or a protected person of the rights of fair and

of punishable criminal acts[16] and established provisions for the prosecution of war crimes.[17] Article 8 of the Rome Statute of the International Criminal Court contains a list of war crimes that does not coincide on all points with those contained in the Geneva Conventions and Additional Protocol I.[18] When adapting domestic legislation to the provisions of international humanitarian law treaties on war crimes, it is therefore of vital importance to evaluate not only the provisions of the Geneva Conventions, but also those contained in the Rome Statute and other relevant treaties.[19] States must also ensure that domestic legislation provides

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regular trial prescribed in the Conventions, unlawful deportation, transfer or confinement of a protected person and hostage taking.

[16] Articles 11 and 85 of Protocol I additional to the Geneva Conventions. The following acts are considered grave breaches, when committed wilfully and causing death or serious injury to body or health: making the civilian population or individual civilians the object of attack; launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; making non-defended localities and demilitarized zones the object of attack; making a person the object of attack in the knowledge that he is *hors de combat*; and the perfidious use of the distinctive emblem of the red cross, red crescent or other protective signs. The following acts are considered grave breaches, when committed wilfully and in violation of the Conventions of Protocol I: the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; unjustifiable delay in the repatriation of prisoners of war or civilians; practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination; making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, the object of attack, causing as a result extensive destruction thereof, when such objects are not located in the immediate proximity of military objectives or used by the adverse Party in support of the military effort; and depriving a person protected by the Conventions or Protocol I of the rights of fair and regular trial.

[17] Article 86 of Addition Protocol I concerning omissions and responsibilities of superiors, Article 87 concerning the duty of commanders and Article 88 concerning mutual assistance in criminal matters.

[18] This is the case, in particular, for certain violations of the laws and customs of war established in Article 8 (2) (b), violations of Article 3 common to the four Geneva Conventions and all violations of the laws and customs of war committed in non-international armed conflicts stipulated in Article 8 (2) (e) of the Rome Statute, which do not figure as war crimes in the Geneva Conventions or in Additional Protocol I. On the other hand, some acts criminalized in Additional Protocol I are not included in the Rome Statute of the International Criminal Court, for example, unjustifiable delay in the repatriation of prisoners of war or civilians.

[19] In addition to the war crimes included in the Geneva Conventions, Additional Protocol I and the Rome Statute of the International Criminal Court, there are other international humanitarian law treaties that contain provisions concerning the criminal prosecution of violations of these treaties. This is the case of the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (Article 28)

for the exercise of universal jurisdiction[20] and the non-applicability of statutory limitations to war crimes.[21]

In conclusion, adapting national criminal law to international humanitarian law treaties constitutes one of the main responsibilities of States with regard to the implementation of humanitarian law. The main idea behind this is that States, by exercising their jurisdiction over those suspected of war crimes in national courts, are warning war criminals that there is no place where such crimes will go unpunished.[22] The existence of a national system to prosecute and punish serious violations and grave breaches of international humanitarian law must act as a deterrent to potential war criminals.

B. Protection of emblems

The red cross, red crescent and red crystal[23] emblems are protected under international law as the visible representation of the impartial humanitarian assistance provided to those who suffer the effects of armed conflict.[24]

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and its 1999 Protocol (Article 15), the Convention of 1993 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Article VII), the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Article 14), and the Convention of 1997 on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Article 9).

[20] Universal jurisdiction permits the prosecution of any person who has committed a war crime, regardless of his or her nationality, the nationality of the victim and the place where the crime was committed. For a recent example of the application of universal jurisdiction, see judgement STC 237/2005 of 26 September 2005 rendered by the Constitutional Court of Spain.

[21] The non-applicability of statutory limitations to war crimes is established by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 and Article 29 of the Rome Statute of the International Criminal Court.

[22] Supreme Court of Canada (R. v. Finta, [1994] 1 S.C.R. 701): "Extraterritorial prosecution is thus a practical necessity in the case of war crimes and crimes against humanity. Not only is the state where the crime took place unlikely to prosecute; following the cessation of hostilities or other conditions that fostered their commission, there also is a tendency for the individuals who perpetrated them to scatter to the four corners of the earth. Thus, war criminals would be able to elude punishment simply by fleeing the jurisdiction where the crime was committed. The international community has rightly rejected this prospect."

[23] Resolution 1 adopted at the 29th International Conference of the Red Cross and the Red Crescent on 22 June 2006 determined that the additional distinctive emblem adopted in Additional Protocol III should be designated the 'red crystal'. The Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) was adopted on 8 December 2005 and came into force on 14 January 2007. For further information on the issue of the emblems, see François Bugnion, "Towards a Comprehensive Solution to the Question of the Emblem", ICRC, March 2006, available at the ICRC website (www.icrc.org).

The use of the emblems must therefore be strictly regulated by enacting specific national legislation in peacetime. Such legislation must contain provisions on the identification and definition of the emblem(s) recognized and protected, the national authority that has the power to regulate the use of the emblems, the entities authorized to use the emblems and the uses for which authorization is granted.[25] The law must also establish criminal and civil sanctions for the improper use of the emblems in peacetime. During armed conflict, the perfidious use of the emblems to hide or shelter combatants or military equipment is a war crime and must be established as such in national legislation.

C. Protection of cultural property

In recent armed conflicts, cultural property has been the object of deliberate attacks. It can be said that the destruction of cultural property is an attempt to annihilate all aspects of the existence of the enemy.[26]

The Hague Convention of 1954 for the protection of cultural property in the event of armed conflict and its Protocols of 1954 and 1999 provide the legal framework to prevent such property from suffering the effects of armed conflict.[27]

Specifically, the Second Protocol of 1999 establishes preparatory measures that States can take in peacetime to safeguard cultural property against the effects of any armed conflict that may arise. Article 5 of the Protocol establishes that such measures include preparing inventories of cultural property, planning emergency measures for the protection of cultural property against fire or structural collapse, preparing for the removal of movable cultural property or providing for adequate *in situ* protection of such property and designating competent authorities responsible for safeguarding cultural property.[28] It is worth

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[24] See the fact sheet prepared by the ICRC Advisory Service on International Humanitarian Law on "The protection of the Red Cross/Red Crescent emblems" available at the ICRC website (www.icrc.org).

[25] The ICRC has drafted a model law on the use of the red cross and red crescent emblems, which is freely available. It was published in issue no. 820 of the *International Review of the Red Cross* in August 1996 (pp. 526-535). It was updated in 2007 following the adoption of Addition Protocol III, and the new version is available at the ICRC website (www.icrc.org).

[26] On the subject of the destruction of cultural property in Afghanistan and Iraq, see "Facing History: museums and heritage in conflict and post-conflict situations", UNESCO, *Museum International*, no. 219-220, December 2003.

[27] The Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict, the Protocol of The Hague of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict and the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, signed in The Hague on 13 May 1999 (UNESCO Doc. HC/1999/7 of 26 March 1999). As at 22 January 2007, the Convention had been ratified by 116 States, the Protocol of 1954 by 93 States and the Second Protocol of 1999 by 42 States.

[28] In addition to the fact sheet (see footnote 13) on the protection of cultural property in the event of armed conflict, the ICRC Advisory Service on International Humanitarian Law has published some "Practical advice for the protection of cultural property in the event of armed conflict" in the report on the meeting of experts on national

noting that the measures indicated in the Protocol are also effective in protecting cultural property from other social phenomena, such as tensions and disturbances, and natural phenomena, such as earthquakes and hurricanes.[29]

The Second Protocol also lists five acts that States must establish as criminal offences in their domestic legislation[30] and creates a system of enhanced protection for cultural property.[31]

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implementation of the rules for the protection of cultural property in the event of armed conflict, edited by María Teresa Dutli *et al*., ICRC, Geneva, February 2002 (available at the ICRC website: www.icrc.org).

[29] Recommendations of the regional seminar "The protection of cultural property in the event of armed conflict: a challenge and an opportunity for Latin America and the Caribbean", organized by the Argentine Ministry of Foreign Affairs and UNESCO, with the support of the ICRC, Buenos Aires, 2-4 March 2005. Recommendation 3 (b): "Taking into account that the Convention and its Protocols codify part of customary international law on this subject, the resulting standard of protection commonly applicable in international or internal armed conflict (not of an international character) can prove equally valid and appropriate in other situations, for example, internal disturbances and natural disasters. By the same token, experience acquired during natural disasters can be used to design strategies and legislation for the protection of cultural property in the event of armed conflict."

[30] Article 15 "Serious violations of this Protocol." 1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts: a) making cultural property under enhanced protection the object of attack; b) using cultural property under enhanced protection or its immediate surroundings in support of military action; c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; d) making cultural property protected under the Convention and this Protocol the object of attack; e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention. 2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

[31] Article 10 of the Second Protocol "Enhanced protection." Cultural property may be placed under enhanced protection provided that it meets the following three conditions: a) it is cultural heritage of the greatest importance for humanity; b) it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection; c) it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used. Enhanced protection is granted by the Committee for the protection of cultural property in the event of armed conflict, as provided in Article 24 of the Second Protocol. According to Article 27 of the Second Protocol, the Committee has the following functions, "a) to develop Guidelines for the implementation of this Protocol; b) to grant, suspend or cancel enhanced protection for cultural property and to establish, maintain and promote the List of cultural property under enhanced protection; c) to monitor and supervise the implementation of this Protocol and promote the identification of cultural property under enhanced protection." The twelve members of the Committee for the protection of cultural property in the event of armed conflict were elected on 25 October 2005 during the first

D. Missing persons

Uncertainty about the fate of people who have gone missing or are unaccounted for is a harsh reality for countless families. Relatives and loved ones become victims too, because not knowing whether their missing family members are alive or dead means that they are unable to obtain closure on the violent events that have disrupted their lives, which makes it very difficult for them to get back to normal and obstructs the process of rehabilitation and reconciliation at the personal and community level.[32]

With a view to addressing this problem, the ICRC initiated a process aimed at resolving the difficult problem of people who are unaccounted for as a result of armed conflict or internal violence and assisting their families. This process included the drafting of an ICRC report on the missing and their families and the organization of an International Conference of Governmental and Non-Governmental Experts in Geneva from 19 to 21 February 2003. The conference produced a series of observations and recommendations to comprehensively address the problem of the missing and their families, which were taken into account in the Agenda for Humanitarian Action adopted by the International Conference of the Red Cross and Red Crescent.

At the International Conference of the Red Cross and Red Crescent,[33] the United Nations General Assembly[34] and the OAS General Assembly,[35] States have pledged to adopt national measures to clarify the fate of people who are unaccounted for, assist their families and prevent future disappearances.

These measures include ensuring notification of detention and the right of those deprived of their freedom to remain in contact with their families, providing some form of personal identification, making enforced disappearance a criminal offence in national legislation, establishing a national information office,

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meeting of the States party to the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict held in Paris.

[32] ICRC report: The missing and their families: Summary of the Conclusions arising from Events held prior to the International Conference of Governmental and Non-Governmental Experts (19-21 February 2003) (ICRC/TheMissing/01.2003/EN/10).

[33] Resolution 1 "Adoption of the Declaration and Agenda for Humanitarian Action" of the 28th International Conference of the Red Cross and Red Crescent held from 4 to 6 December 2003. The Agenda for Humanitarian Action establishes the following final goals: (1.1) Prevent persons from becoming missing, (1.2) Ascertain the fate of missing persons, (1.3) Manage information and process files on missing persons, (1.4) Manage human remains and information on the dead, (1.5) Support families of missing persons.

[34] Resolution 59/189 adopted by the United Nations General Assembly on 20 December 2004 concerning missing persons, which called upon States involved in an armed conflict to take all appropriate measures to prevent the disappearance of persons in connection with armed conflict and to determine the identity and fate of persons reported missing in such situations. It also reaffirmed the right of families to be informed of the fate of their relatives reported missing in connection with armed conflict.

[35] Resolution AG/RES. 2134 (XXXV-O/05) "Persons who have disappeared and assistance to members of their families", adopted on 7 June 2005 and Resolution AG/RES. 2231(XXXVI-O/06) "Persons who have disappeared and assistance to members of their families", adopted on 6 June 2006.

clarifying the fate of people unaccounted for and ensuring the proper management of human remains.

E. Weapons

There are many treaties concerning prohibitions and restrictions on certain types of weapons, which oblige States to take national measures to ensure that they are enforced. For example, States must destroy any stockpiles of biological weapons, chemical weapons and anti-personnel mines and establish mechanisms to prevent their development, production, stockpiling, acquisition and retention.[36] These national measures also must include the establishment of penal sanctions.[37] States party to the Protocol on Explosive Remnants of War must clear all areas where such remnants may be located by removing or destroying them.[38]

In addition to the specific obligations arising from each treaty with regard to certain weapons, States are under an obligation to determine whether the use of a new weapon, means or method of warfare would be prohibited by any other rule of international humanitarian law.[39]

As Protocol I does not specify how to determine the legality of weapons, means and methods of warfare, it is the responsibility of States to adopt the administrative, regulatory and other measures needed to fulfil their obligations under Article 36.[40]

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[36] Article 4 of the Convention of 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction; Article VII of the Convention of 1993 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction; and Article 9 of the Convention of 1997 on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.

[37] See, for example, Article 14 of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 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.

[38] Article 1 of the Protocol on Explosive Remnants of War (also known as Protocol V to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects). This protocol has been ratified by thirty-six States.

[39] Article 36 of Additional Protocol I: "New Weapons. In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party."

[40] See the fact sheet prepared by the ICRC Advisory Services on International Humanitarian Law "New weapons" available at the ICRC website (www.icrc.org).

F. Integration of international humanitarian law

Dissemination is an essential part of national implementation efforts that States must pursue in peacetime. They must spread knowledge of the contents of international humanitarian law treaties to ensure that they are respected in the event of armed conflict.[41]

This obligation involves the incorporation of international humanitarian law by the armed forces, which means that international rules must be translated into specific mechanisms to guarantee the protection of people and property. In order to ensure that the members of the armed forces act according to international humanitarian law, it must be incorporated in military doctrine, handbooks, instruction, training, manoeuvres, standard operating procedures and instructions on weapon choice.[42]

In order to facilitate the process of disseminating international humanitarian law among the armed forces, States must have adequately trained legal advisers.[43] These advisers have a dual role: they are responsible for ensuring that the appropriate theoretical and practical instruction is given in international humanitarian law and for advising military commanders on the correct application of the rules of this branch of law.[44]

International humanitarian law must also be disseminated among the civilian population. It is important that it be taught at universities, particularly at faculties of law, political science, international relations and journalism, as the graduates of these faculties may eventually be in a position to play an important role in disseminating and implementing international humanitarian law.[45]

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[41] Many provisions of conventional international law refer to the obligation to spread knowledge of this right: Article 47 of the First Geneva Convention, Article 48 of the Second Geneva Convention, Article 127 of the Third Geneva Convention, Article 144 of the Fourth Geneva Convention, Article 83 of Additional Protocol I and Article 19 of Additional Protocol II, among others.

[42] See the fact sheet prepared by the ICRC Advisory Services on International Humanitarian Law "The obligation to disseminate international humanitarian law" available at the ICRC website (www.icrc.org).

[43] Article 82 of Additional Protocol I "The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject."

[44] See the fact sheet prepared by the ICRC Advisory Services on International Humanitarian Law "Legal advisers in armed forces" available at the ICRC website (www.icrc.org).

[45] On the inclusion of international humanitarian law in university study programmes, see Marco Sassoli and Antoine Bouvier, "Un droit dans la guerre?", ICRC, Geneva, 2003.

III. Implementation of international humanitarian law in the Americas

The implementation of international law is a legal obligation and a great challenge. States must adopt numerous measures in a broad range of areas, as can be seen in the examples above.

The American States have taken giant strides towards implementing international humanitarian law. Proof of this is their extensive participation in the treaties relating to this branch of law.[46] Some States have recently enacted criminal legislation to fulfil the obligation of providing for the prosecution and punishment of war crimes in domestic law.[47] They have enacted laws to protect the red cross emblem,[48] adopted measures to protect cultural property in the event of armed conflict[49] and prohibited certain weapons under national law.[50] They have also undertaken great efforts to disseminate international humanitarian law in the armed forces and academic circles.[51]

However, there is still a long way to go. Some American States have still to ratify important treaties and there are many draft bills and bills on the repression of war crimes that have not yet been passed by national legislatures. There have

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[46] The Geneva Conventions have been ratified by thirty-five American States, Additional Protocol I by thirty-four and Additional Protocol II by thirty-three. The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction has been ratified by thirty-two American States, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction by thirty-two and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction by thirty-three.

[47] Argentina, Canada, Colombia, United States, Trinidad and Tobago and Uruguay have enacted national criminal legislation for the repression of war crimes.

[48] The following countries have specific legislation to protect the red cross emblem: Bolivia, Chile, Colombia, Costa Rica, Cuba, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay and Uruguay.

[49] Examples of such measures include the following: in El Salvador in May 2006, its Comité Interinstitucional de Derecho Internacional Humanitario published "La Guía para la Fase Inicial del Proceso de Señalización de los Bienes Culturales de El Salvador, con el Emblema de Protección en Caso de Conflicto Armado - Convención de la Haya de 1954", a guide that describes the extensive experience of the authorities of El Salvador in marking cultural property and which also constitutes an effective means of disseminating the 1954 Hague Convention. In Peru, Supreme Decree 011-2006-ED, published on 1 June 2006 in the Official Gazette "El Peruano", adopted the implementing regulations of the Cultural Heritage Act (Act 28296), published on 22 July 2004 in the Official Gazette. The contents of Decree 011-2006-ED, featuring nine articles concerning the protection of cultural property in the event of armed conflict, were published as an annex on 2 June 2006.

[50] The following States have specific legislation on the prohibition of anti-personnel mines: Belize, Brazil, Canada, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Peru, Saint Vincent and the Grenadines and Trinidad and Tobago.

[51] For an account of activities undertaken by States to disseminate international humanitarian law, see Report 2006, ICRC Advisory Service on International Humanitarian Law, *op.cit.* (footnote 1).

been few measures adopted at the national level to resolve the problem of missing people and, where they have, they are often poorly coordinated.

In order to address the complexities involved in national implementation and meet the challenges it poses, many American States have decided to create national committees for the implementation of international humanitarian law.[52]

Such committees are interministerial bodies formed by public entities directly involved in the implementation of international humanitarian law. Members generally include the ministries of foreign affairs, defence, justice, interior, culture, education and other relevant ministries or public institutions. Universities, bar associations and National Red Cross Societies are also often represented on these committees. The fact that the committees include representatives from different faculties, authorities and areas of expertise permits an interdisciplinary approach that facilitates the processes required to implement international humanitarian law nationally.[53]

Finally, it is important to highlight the essential role that the OAS plays in the implementation and dissemination of international humanitarian law. As mentioned above, the OAS General Assembly adopts resolutions each year on this subject. Starting in 1999, the Committee on Juridical and Political Affairs, with the support of the ICRC, has been organizing a special working session on international humanitarian law and its implementation. For the first time in 2007, the Committee decided to organize a course on international humanitarian law aimed at the Permanent Missions of the OAS member States and the staff of its bodies. Various other Inter-American system bodies also hold special events to spread knowledge of international humanitarian law. Examples include the Inter-American Juridical Committee, which holds a summer course on international law, the Inter-American Institute of Human Rights, which runs an interdisciplinary course on human rights and the General Secretariat of the OAS, which organizes workshops on international law through its Department of International Legal Affairs.[54] In addition, the Inter-American Court of Human Rights meets regularly with the ICRC to address relevant international humanitarian law issues.

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[52] The following American States have set up a national committee on international humanitarian law: Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Trinidad and Tobago and Uruguay. In Honduras, the Comisión Hondureña de Derecho Internacional Humanitario was created by government decree 08-2005, signed by the President of the Republic on 8 March 2007 and now pending publication.

[53] For an evaluation of the work carried out by the national committees on international humanitarian law in the Americas, see the report "Meeting of national committees for the implementation of international humanitarian law of the Americas", organized by the ICRC and the OAS in Mexico in 2003.

[54] These workshops are organized in fulfilment of the "Declaration of Panama on the Inter-American Contribution to the Development and Codification of International Law" adopted by the General Assembly by resolution AG/RES.12 (XXVI-0/96) and the Inter-American Program for the Development of International Law adopted by resolution AG/RES. 1471 (XXVII-0/97).

IV. Conclusion

This brief paper lists the most important measures required to implement international humanitarian law nationally. It can be seen that most of these measures involve a thorough review of national legislation and its adaptation to the rules of international law. In order to assist States in this vital task of adapting national law to reflect obligations arising from international humanitarian law treaties, the ICRC has a unit specialized in this area of expertise called the Advisory Service on International Humanitarian Law. The main priorities of this unit[55] are to encourage ratification of international humanitarian law treaties, hold bilateral meetings with the national authorities concerned, issue legal opinions on the compatibility of national bills with international obligations, support the work of national committees on international humanitarian law, organize meetings of experts on subjects related to national implementation in cooperation with States and the OAS[56] and provide a freely available database on the national measures taken by States.

If measures are not taken in peacetime to ensure that those who commit war crimes will be prosecuted and punished under national law and to establish laws and other regulatory and practical provisions to protect persons not, or no longer, taking part in hostilities, it will be very difficult to enforce international humanitarian law in the event of armed conflict. The adoption of national measures to implement international humanitarian law is a key factor in ensuring respect for the rules of this body of law, and if they are not respected "human suffering becomes all the more severe and the consequences become all the more difficult to overcome."[57]

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[55] In the Americas, the ICRC has legal advisers specialized in the implementation of international humanitarian law in the cities of Buenos Aires, Bogotá, Caracas, Guatemala City, Mexico City, Port of Spain and Washington.

[56] The OAS and the ICRC have organized various meetings for all the States of America on the implementation of international humanitarian law: in 2001 in San José, Costa Rica; in 2003 en Antigua, Guatemala, with a special focus on the work of national committees for the implementation of international humanitarian law in the Americas; and in 2004 in Mexico on adapting national criminal law to international humanitarian law treaties.

[57] "International humanitarian law and the challenges of contemporary armed conflict", report prepared by the ICRC, a document of the 28th International Conference of the Red Cross and Red Crescent (03/IC/09).

THE ROLE OF NATIONAL COMMITTEES IN THE IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

Eugenia Gutiérrez Ruiz*

International humanitarian law (IHL), like other branches of international law, requires a strong commitment from States and society in general and the creation of operational mechanisms to ensure that programmatic provisions and those establishing principles and ideals permeate through to the domestic legal framework and are implemented and put into practice in accordance with the specific circumstances existing in each country.

This process is naturally a gradual one. The first stage in implementing the provisions of IHL is the adaptation of domestic legislation to the precepts of this special law. IHL treaties are adopted and ratified in accordance with the domestic procedure established for this purpose. The next step, a task requiring the in-depth study and careful examination of the issues involved, is to produce new legislation or amend existing laws to give domestic effect to international treaty obligations.

In a subsequent or parallel process, the State Party that has undertaken to respect and ensure respect for IHL, government bodies and agencies and other actors must carry out specific measures and actions to effectively implement international provisions that seek to limit or prevent the adverse effects of armed conflict. This involves formulating plans and carrying out activities to fulfil a series of objectives ranging from the dissemination of the contents of IHL to the effective promotion of the importance of the law of armed conflict and its formula for implementation among institutions and civil society.

It is clear that States, as signatories of international treaties, are primarily responsible for formulating, adopting and carrying out the main IHL implementation measures. However, it is also evident that full implementation of IHL cannot be achieved by simply adapting legislation and training officials and is certainly not restricted to just one or two areas of application. In fact, IHL covers a broad range of issues and involves a great many actors. It is therefore necessary to organize the actors concerned, which are mainly government departments and bodies and other collaborating and facilitating entities, to ensure that the mechanisms established to implement and enforce IHL provisions operate smoothly, effectively and efficiently.

Today's event comes in response to this need, providing an opportunity to examine the mechanisms that have been created throughout the world and in Latin America in particular to implement IHL. These mechanisms are national committees on international humanitarian law.

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I. Background

The 26th International Conference of the Red Cross and Red Crescent, which brings together representatives of the States party to the Geneva Conventions, National Red Cross and Red Crescent Societies and the International Committee of the Red Cross (ICRC), adopted the Final Declaration of the International Conference for the Protection of War Victims of 1993 and the recommendations of the Intergovernmental Group of Experts for the Protection of War Victims of 1995, which strongly urged States to adopt international and national IHL implementation measures and called on the ICRC to strengthen its capacity to provide advisory services to States to help them carry out this task.

Resolution 1 "From law to action" adopted at the 26th International Conference (1995) and the Plan of Action adopted at the 27th International Conference (1999), the resolutions of the General Assembly of the Organization of American States (OAS) on IHL and the conclusions of other conferences encourage countries that have not yet created national IHL committees to do so.

At the Governmental Experts' Meeting jointly organized by the ICRC and the OAS in 2001, it was observed that, as IHL is a dynamic body of law that is constantly evolving, ongoing, coordinated study, analysis and action is crucial to avoid falling behind in the process of implementation.[1] This highlights the vital importance of national committees in monitoring developments in IHL and ensuring implementation in accordance with the specific circumstances of each country.

II. National IHL committees

There are already some eighty national IHL committees around the world.[2] In Latin America, there are sixteen such committees tasked with incorporating the provisions of IHL into their domestic legislation and implementing them nationally. Two new committees were recently created, the Comisión Nacional para la Aplicación Nacional del Derecho Internacional Humanitario in Ecuador and the Comisión Hondureña de Derecho Internacional Humanitario in Honduras, further proof of the region's commitment to fulfilling the international obligations arising from this particular branch of law.

The importance of national committees can be appreciated in the fact that actors involved in or concerned with IHL implementation repeatedly call for the creation of national committees in countries that do not yet have one and the strengthening and improvement of the functions and operation of existing committees. One such appeal is to be found in OAS Resolution AG/RES. 2293 (XXXVII-O/07) of 5 June 2007. Paragraph 17 of the resolution reads as follows:

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[1] ICRC – OAS. *National Implementation of International Humanitarian Law and related Inter-American Conventions.* Report of the Governmental Experts' Meeting, San José, Costa Rica, 6-8 March 2001. August 2002.

[2] ICRC. *Table of National Committees and other national bodies on international humanitarian law.* Advisory Service on International Humanitarian Law, 31 January 2007.

> "To invite member states to continue to support the work of national committees or commissions responsible for the dissemination and implementation of international humanitarian law; and to urge states where such bodies do not exist to consider establishing them as a means of strengthening conflict prevention and the role those bodies play in times of peace."

This paragraph reflects ideas that, while simple, are substantial in content. The responsibilities mentioned in this paragraph require a comprehensive approach by national committees and cover a broad range of issues that would ideally be part of their day-to-day work, particularly the concepts of '*conflict prevention'* and *'the role those bodies play in times of peace'*.

This last aspect is particularly relevant in the case of national committees operating in situations where there is no armed conflict in the traditional sense of the term, which is the general scenario prevailing today in Latin America. Broadly speaking, the region can be said to be in peacetime, and it is in this context that national committees for the implementation of IHL are and have been operating in recent years.

However, although the majority of countries in the region seem to be experiencing a similar situation, in fact each national committee faces specific challenges. Each individual committee therefore has particular needs and requires solutions individually tailored to the interests of each State.

This paper aims to provide an overview of the creation, organization, objectives, operation, areas of work, actions and achievements of the region's national committees and the common challenges they face. Although it is not possible here to examine any of these committees in great detail, examples will be given to illustrate certain issues.

III. Organization and operation of national committees in the Americas

As mentioned above, the organization and objectives of a national committee will depend on the dynamics of each individual country. However, since the ultimate purpose of such committees is to further the implementation and promote knowledge of IHL at the national level, the ICRC has established a series of features that these bodies should have.

The ICRC recommends that national committees should possess the following characteristics:

- "It should be able to evaluate existing national law in the light of the obligations created by the Conventions, Protocols, and other instruments of IHL.
- It should be in a position to make recommendations for further implementation, to monitor the law and ensure it is applied. This may involve proposing new legislation or amendments to existing law, coordinating the adoption and content of administrative regulations, or providing guidance on the interpretation and application of humanitarian rules.

- The committee should play an important role in promoting activities to spread knowledge of IHL. It should have the authority to conduct studies, propose activities, and assist in making IHL more widely known. The committee should therefore be involved in instructing the armed forces in this domain, teaching it at various levels of the public education system and promoting the basic principles of IHL among the general population."[3]

The different national committees and bodies created in the Americas to implement IHL follow this basic model. However, while they have all adopted a similar form of organization in general terms, some differences can be observed in the way they operate, not so much in substance as in the approach adopted to address specific needs.

Some of the characteristics of a national committee can be considered *sine qua non* requirements or at least prerequisites that facilitate its work and increase its effectiveness, as a result of its role as an advisory or consultative body usually to the State's executive branch. The structure of IHL committees is therefore normally based on interministerial coordination and organization, with the inclusion of one or more institutions from outside the central administration. This is the ideal on which most of the national committees are based.

Therefore, national committees generally have a similar structure, although the number of members may vary from one to another. For example, Argentina's Comisión de Aplicación del Derecho Internacional Humanitario (CADIH) is formed by just four representatives from the Ministries of Foreign Affairs, Defence, Interior and Justice, while other committees, such as the Comisión Guatemalteca para la Aplicación del Derecho Internacional Humanitario (COGUADIH)[4] have a broader composition, including ministries, institutions and other collaborating entities.

National committees are generally coordinated by the President's Office and the Executive Secretariat, which are usually attached to the Ministry of Foreign Affairs. Coordination of IHL committees is seldom undertaken by other institutions. However, there are national committees that are directed by the Ministry of Defence, as in the case of Paraguay's Comisión Interministerial de Aplicación del Derecho Internacional Humanitario, or by the Ministry of Justice, as in the case of Peru's Comisión Nacional de Estudio y Aplicación del Derecho Internacional Humanitario (CONADIH).

How are these government advisory bodies created or formed? Most countries follow a similar procedure. Presidential and executive decrees are the instruments

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[3] ICRC, *National Committees for the Implementation of International Humanitarian Law*, Advisory Service on International Humanitarian Law.

[4] The COGUADIH is formed by representatives of the Ministries of Foreign Affairs, Interior, Education, Defence and Health, Presidential Human Rights Commission (COPREDEH), Secretariat for Peace, Judicial Body, Congress, Human Rights Ombudsman, Attorney General's Office, Bar Association and the Guatemalan Red Cross (ICRC/OAS. *Meeting of National Committees on International Humanitarian Law of the Americas.* La Antigua, Guatemala, 27-29 August 2003, p. 224).

most commonly used to create such bodies and grant them the authority they require to fulfil their mandate. However, there are also cases of national committees that have been created using different legal formulations, such as supreme resolutions or government orders.

It is important to note that most of these committees, as advisory bodies, are not financially or administratively independent, which can constitute an obstacle to efficient operation. Fortunately, they often receive assistance from their natural partner, the ICRC.

Most of the committees mentioned here are governed by rules of procedure that they adopt themselves. They generally formulate their own work plan in order to make efficient use of resources, fulfil objectives and establish the focus of operations.[5]

In addition to formalities relating to the establishment and regulation of the committee, there are other fundamental elements that must be addressed before or when the committee is created, basically the formulation of strategic priorities for action and the establishment of the activities and measures required to implement them.

The committees are not organized solely in accordance with the requirements of international commitments, but also in response to the specific conditions existing in each country. Therefore, depending on the spirit in which the committee was created, short, medium and long-term action is structured, the necessary institutions are incorporated and the resources required are provided.

These conditions influence how each individual committee is organized and what functions and responsibilities are assigned to it. Each committee therefore places particular emphasis on specific areas and issues as warranted by its own interests and the context it is operating in.

In many countries, the members of national IHL committees also include relief organizations, such as National Red Cross or Red Crescent Societies, depending on the region or country. In all the countries in the Americas, and specifically in Latin America, these organizations are Red Cross Societies. In a number of countries, judicial and legislative branches and bodies are also represented on national IHL committees (congress, legislative assembly, etc.).

As mentioned above, the ICRC, as a natural partner of national committees responsible for adopting domestic measures to implement IHL, often plays an essential role as an observer and in providing support and guidance to help the committees in their work.

The case of Costa Rica's Comisión Costarricense de Derecho Internacional Humanitario (CCDIH) is significant in that, from the time of its creation, it adopted a specific formula defining a strategy on which its organization and structure is based.

The CCDIH (like the COGUADIH) is formed by sixteen institutions including, in addition to the usual entities involved in the work of IHL

[5] In this regard, it should be noted that most of the national committees receive assistance form the ICRC each year to organize a meeting to formulate their work plan.

committees, *inter alia,* the Ombudsman's Office, the Bar Association, two public universities, the National Council of Rectors and the Attorney General's Office.

The committee was formed in this way in response to the need to establish strong links with influential actors in Costa Rican society and to facilitate dialogue with other nationally important bodies and mechanisms. The aim was to increase the awareness of a broad range of sectors to the importance of IHL and build a solid platform for action to make the committee a truly effective advisory body.

The functions of the committees are established in accordance with the needs of each country, although many of them organize their work according to categories of objectives or areas of activity generally corresponding to the thematic fields suggested by IHL conventions or the ICRC Advisory Service[6] and confirmed by the experience of existing national committees.

In general terms, national IHL committees in Latin America, particularly Central America, focus their work on three main themes corresponding to the three broad areas initially promoted, which require the implementation of concrete measures. These categories, in addition to others that have been gradually incorporated into the work of the committees, give rise to mechanisms for the operational implementation of some of the objectives of IHL in these three priority areas, namely: 1) legislation, 2) cultural property and 3) dissemination of IHL.

An analysis of the organization of the national committees operating in this region reveals that many of them have set up subcommittees or working groups to address the subject areas mentioned above or at least establish lines of work for them. For example, there may be a subcommittee for the review of national legislation, another for the protection of cultural property and a third focusing on the dissemination of IHL.

Some issues must necessarily be addressed when no armed conflict is in progress. Specifically, the main national measures that need to be carried out in peacetime include producing new domestic legislation or adapting existing laws to the provisions of IHL, promoting mechanisms to teach and spread knowledge of IHL and developing a plan to register and mark State or private property considered to be of cultural value. These measures would be very difficult to implement with the country in the grip of an armed conflict.

However, in some cases organizational structures may be created according to a formula adapted to specific internal situations that require a specific solution. For example, if a country is experiencing internal tensions or is in the midst of an electoral process or some other similar national scenario, the national IHL committee may establish a different approach, by creating a subcommittee to address the particular situation or by simply according it priority.

It can therefore be seen that the main lines of work undertaken by committees in the area of IHL in peacetime do not focus solely on adapting domestic legislation to include the rules of IHL, protecting cultural property, spreading knowledge of IHL and addressing other basic subjects associated with IHL, such

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[6] *Op.cit.* 3.

as restrictions on weapons and mechanisms to enforce international provisions adopted in this regard. IHL should also be addressed in each country from the point of view of promoting the mechanisms that this branch of law offers and the relevant tools available to deal with specific situations at both levels (for example, the creation of a subcommittee to analyse situations of internal tensions and disturbances within a national IHL committee).

It should also be noted that as IHL overlaps with other areas of law, national committees can also establish frameworks for action allowing for comprehensive and integrated implementation and including IHL issues that are also covered by other areas of law, such as human rights, migration, refugees, natural disasters, health, etc.

One such example is the problem of missing persons, an issue that requires particular attention and monitoring and overlaps with the areas mentioned above. States must provide an effective, integrated response through relevant bodies, commissions and committees. The issue of missing persons is related to human rights[7] and migration, among other things, and although covered by IHL, also requires the involvement of sectors other than those directly involved in IHL.

The ICRC has provided a series of basic guidelines for States on the development and implementation of domestic legislation concerning the missing.[8] This is one example of how the work of national committees contributes to simplifying the implementation of IHL in their respective countries.

As mentioned above, national committees generally act as advisers to the Executive and, because of this role, their independence and the effectiveness and efficiency of their work are often called into question. It is precisely the delimitation and often the limitation of their functions that causes their capacity for action to be doubted.

However, it is also clear that these committees play a role in formulating policy and initiatives, which in many cases they largely implement on their own. In spite of this, they are bound by the decree or order that created them and by the rules of procedure that they themselves establish according to domestic law. It is vital that State authorities show a strong political commitment to national IHL committees.

In Latin America, the role of national IHL committees has often been to implement the initiatives and mechanisms established in this area. This highlights the crucial part played by these bodies in the implementation of IHL policies in the region's countries.

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[7] The United Nations International Convention for the Protection of All Persons from Enforced Disappearance was opened for signature at the beginning of 2007. It requires States Party to ensure that enforced disappearance constitutes an offence under their criminal law.

[8] ICRC. *Recommendations for the Development of a Domestic Law on the Missing and their Families*, taken from the ICRC report "The Missing and their Families. Summary of the Conclusions arising from the Events held prior to the International Conference of Governmental and Non-Governmental Experts (19-21 February 2003).

This important role is illustrated by the Comité Interinstitucional de Derecho Internacional Humanitario in El Salvador (CIDIH-ES) and the Comisión Nacional de Estudio y Aplicación del IHL (CONADIH) in Peru. El Salvador's committee was instrumental in promoting the protection of cultural property in the country, as it was the body responsible for carrying out the project developed for this purpose, while Peru's committee implemented a series of important measures to deal with the problem of the missing.

IV. Conclusion

In conclusion, it can be said that national IHL committees play a crucial role not only in incorporating the provisions of IHL in national legislation and practice, but also in adapting certain conditions from the international to the national level. Moreover, national committees are the mechanisms that promote the awareness and understanding of IHL that societies require to implement this body of law in the most effective and appropriate way.

Through their work to disseminate and teach IHL, national committees also contribute to preventing conflicts and promoting peace in their countries and regions.

Financing is an important issue for many of these committees and often constitutes an obstacle to efficient operation. It is one of the main challenges facing many national committees.

It should be noted that there are some countries in Latin America where it is, or has been, easier to promote the implementation of national IHL measures, because they have experienced armed conflict and suffered its harmful effects, resulting in greater awareness and understanding of the issues involved. However, in other societies that have not experienced the realities of armed conflict, there is, perhaps, a lesser degree of awareness, which makes the task of implementing IHL more difficult.

It is clear that national IHL committees are needed in all countries to facilitate and promote the implementation of IHL nationally, by carrying out specialized work focused exclusively on this area, which involves thorough and highly specific studies and actions.

Annex: National commissions data base*

ARGENTINA			
Structure	**Date of establishment**	**Composition and operation**	**Mandate and activities**
Comisión de Aplicación del Derecho Internacional Humanitario (CADIH) c/o Ministerio de Defensa Azopardo 250, Piso 13° 1328 Buenos Aires Tel. +5411 43468877	Established: 1994 Legal basis: Executive Decree No. 933/94 of 16 June 1994 Operation: internal regulations	Representatives: Foreign Affairs, Defence, Interior, and Justice Chairmanship: rotating among the participating ministries Secretariat: Ministry of Defence	To ensure implementation of international humanitarian law by drawing up laws, regulations and other texts designed to ensure respect for international commitments in this area; to teach and disseminate international humanitarian law among the military and civilians.
BOLIVIA			
Structure	**Date of establishment**	**Composition and operation**	**Mandate and activities**
Comisión Nacional Permanente para la aplicación del Derecho Internacional Humanitario (CNPADIH) c/o Ministerio de Relaciones Exteriores y Culto Plaza Murillo, Ingavi esqu. Junín La Paz	Established: 1992 Legal basis: Decree No. 23.345 of 2 December 1992; reorganized pursuant to Resolution No. 218.456 of 17 August 1998 issued by the President of the Republic and the Ministry of Justice and Human Rights, which came into force on 30 October 1998 Operation: internal regulations	Representatives: Foreign Affairs, Justice, Defence, Interior, Sustainable Development and Planning, Supreme Court, National Congress, Bolivian Red Cross, and academic circles Chairmanship and secretariat: Ministry of Foreign Affairs	To monitor the dissemination and implementation of international humanitarian law; to examine internal regulations and any amendments required for the incorporation of provisions of humanitarian law into national legislation, and to propose their approval by the executive and legislative authorities.
CANADA			
Structure	**Date of establishment**	**Composition and operation**	**Mandate and activities**
Canadian National Committee for Humanitarian Law c/o Canadian Red Cross Society 170 Metcalfe St., Suite 300 Ottawa, Ontario K2P 2P2	Established: 1998 Legal basis: Memorandum of understanding of 18 March 1998 Operation: according to terms of reference of 18 March 1998	Representatives: Foreign Affairs, Defence, Justice, Solicitor-General (represented by Royal Canadian Mounted Police and the Canadian Red Cross Society), and Canadian International Development Agency	To recommend ratification of instruments of international humanitarian law; to facilitate the implementation of obligations arising from this body of law, in particular by reviewing and advising on national

* Source: http://www.oas.org/dil/international_humanitarian_law_national_commissions.htm. Parts of this table may require update; they are therefore intented merely as an orientation.

		Chairmanship: Department of Foreign Affairs and International Trade Secretariat: Canadian Red Cross Society	legislation and administrative measures (repression of violations of humanitarian law, protection of the emblems, guarantees for protected persons); to advise on disseminating and training in international humanitarian law in Canada (aimed at the armed forces, police, civil servants, humanitarian organizations, legal and medical professions, schools and universities, journalists and the public at large); to coordinate and stimulate activities of the government and other organizations to strengthen and disseminate humanitarian law; to recommend the adoption of measures to promote national implementation in other States drawing on the resources and expertise available in Canada; to maintain a pool of personnel with expertise in humanitarian law and ensure links with other national committees and the ICRC.
CHILE			
Structure	**Date of establishment**	**Composition and operation**	**Mandate and activities**
Comisión Nacional de Derecho Humanitario (CNDH) c/o Ministerio de Relaciones Exteriores, Dirección Jurídica Catedral 1158 3° Piso, Oficina 339 Santiago Tel. +562-6794237/8 Fax +562-699-5517	Established: 1994 Legal basis: Decree No. 1229 of 31 August 1994 Operation: internal regulations of 1 June 1995	Representatives: Foreign Affairs, Defence, Interior, Education, Health, Justice, and Culture Chairmanship and secretariat: Ministry of Foreign Affairs	To review and propose to the authorities legislative and administrative measures ensuring the practical implementation of international humanitarian law.

COLOMBIA			
Structure	**Date of establishment**	**Composition and operation**	**Mandate and activities**
Comisión Intersectorial Permanente para los Derechos Humanos y el Derecho Internacional Humanitario c/o Vicepresidencia de la República Carrera 8 No. 7-27 Bogotá Tel. +5714442120/2864126 Fax +571 2863589	Established: 2000 Legal basis: 321 of 25 February 2000 Presidential Decree No. Operation: internal regulations	Representatives: Interior, Foreign Affairs, Justice, Defence, Labour and Social Security, and High Commissioner for Peace Chairmanship: Vice-Presidency of the Republic	To orientate, encourage and coordinate the national plan of action adopted in order to promote respect for human rights and the application of international humanitarian law; to ensure the adoption of national measures and evaluate periodically the progress made; to consolidate institutional mechanisms for the protection of human rights and international humanitarian law and encourage dissemination to the public; to promote the amendment of national measures to comply with international treaties to which Colombia is a party and help carry out international commitments; to analyse the recommendations formulated by international bodies and evaluate means of implementation at the national level; to promote cooperation between the government and other organizations in order to strengthen respect for human rights and international humanitarian law.
COSTA RICA			
Structure	**Date of establishment**	**Composition and operation**	**Mandate and activities**
Comisión Costarricense de Derecho Internacional Humanitario Comisión Costarricense de Derecho Internacional Humanitario Secretaría Ejecutiva c/o Ministerio de Relaciones Exteriores y	Established: 2004 Legal Basis: Executive Decree N° 32077-RE of May 21, 2004 of the President of the Republic and the Minister of Foreign Relations and Culture, published in the Official Gazette N° 216 of	Representatives: A head representative and an alternate from the following 16 institutions: Ministry of Foreign Relations and Culture Ministry of Public	To advise the Executive Branch on issues related to the adoption, application and dissemination of International Humanitarian Law. To propose recommendations to the Executive Branch on the

Culto Dirección Jurídica Avenida 7, Calles 11 y 13 Casa Amarilla San José, Costa Rica Tel: ++506 233 6625 ++506 233 7555, ext. 243 Fax: ++506 233 6625 E-mail: ccdih@rree.go.cr	November 4, 2004. Operation: Comisión Costarricense de Derecho Internacional Humanitario (CCDIH), approved in Regular Session N° 2-05 at 10:45 on February 24, 2005.	Education Ministry of Justice Ministry of Public Security Ministry of the Presidency Ministry of Health Ministry of Culture, Youth and Sports Office of the Attorney General Supreme Court of Justice (Judicial Branch) Legislative Assembly (Legislative Branch) Ombudsman (Defensoría de los Habitantes) University of Costa Rica National University National Council of Rectors Red Cross of Costa Rica The Lawyers' Bar Association of Costa Rica Presidency: Carmen Claramunt Garro, Ministry of Foreign Relations and Culture Executive Secretariat: Eugenia María Gutiérrez Ruiz, Ministry of Foreign Relations and Culture	measures that should be taken to enforce international legal provisions that are in force related to international humanitarian law. To suggest to the Executive Branch draft laws and regulations that allow Costa Rica to comply with its international obligations with respect to International Humanitarian Law. To promote and to support the dissemination of International Humanitarian Law in state institutions and society in general, and to take the corresponding steps towards this end. To attend meetings, seminars and international conferences related to International Humanitarian Law, subject to the approval of the Executive Branch. To promote and collaborate with the country's academic authorities in the incorporation of International Humanitarian Law in study plans and the corresponding curricula content. To suggest and promote actions that contribute to the application of and respect for International Humanitarian Law.

DOMINICAN REPUBLIC

Structure	Date of establishment	Composition and operation	Mandate and activities
Comisión Nacional Permanente para la Aplicación del Derecho Internacional Humanitario c/o Secretaría de Estado	Established: 1995 Legal basis: Presidential Decree No. 131-99 of 30	Representatives: Foreign Affairs, Armed Forces, Education, Culture, Health, Labour, Sports and Leisure, Public Prosecutor's Office,	To recommend appropriate measures for better national implementation of international humanitarian law;

de Relaciones Exteriores Avenida Independencia 752 Santo Domingo Tel. +1 809 535 6280 Fax +1 809 535 6848	March 1999 Operation: internal regulations	national police, legal office of the executive branch, and the Dominican Red Cross Chairmanship: Secretary of State for Foreign Affairs	to promote draft legislation and regulations for the application of humanitarian law treaties; to disseminate this body of law among State authorities; to promote the inclusion of this body of law in official teaching programmes.
EL SALVADOR			
Structure	**Date of establishment**	**Composition and operation**	**Mandate and activities**
Comité Interinstitucional de Derecho Internacional Humanitario (CIDIH-ES) c/o Ministerio de Relaciones Exteriores Edificio 3, 2da. Planta Centro de Gobierno San Salvador Tel. +503 22 24 447	Established: 1997 Legal basis: Presidential Decree No. 118 of 4 November 1997 Operation: internal regulations	Representatives: Foreign Affairs, Interior, Public Security, Justice, Education, Defense, Health, Treasury, Public Prosecutor's Office, Procurator for the Defence of Human Rights, and Salvadorean Red Cross Society Chairmanship and secretariat: Ministry of Foreign Affairs	To advise the government on measures to be adopted in order to implement, apply, and disseminate international humanitarian law at the national level.
GUATEMALA			
Structure	**Date of establishment**	**Composition and operation**	**Mandate and activities**
Comisión Guatemalteca para la Aplicación del Derecho Internacional Humanitario (COGUADIH) c/o Ministerio de Relaciones Exteriores 2 Avenida Reforma 4-47, Zona 10 Cuidad Guatemala Tel. +502 331-9610 Fax +502 331-7938	Established: 1999 Legal basis: Government Agreement No. 948-99 of 28 December 1999	Representatives: Foreign Affairs, Interior, Education, Defence, Health, Presidential Commission for Human Rights (COPREDEH), Secretariat for Peace, judiciary, Congress, Public Prosecutor's Office, Human Rights Procurator, Bar Association, and Guatemalan Red Cross Chairmanship and secretariat: Ministry of Foreign Affairs	To recommend measures for adoption by the government to ensure implementation of international humanitarian law; in accordance with this aim, to submit draft legislation and regulations to the President of the Republic for consideration; to spread knowledge of international humanitarian law within State institutions and among the general public; to inform the Ministry of Foreign Affairs of the Committee's willingness to represent Guatemala at international fora dealing

			with this body of law; to suggest other activities designed to promote respect for humanitarian law.
JAMAICA			
Structure	**Date of establishment**	**Composition and operation**	**Mandate and activities**
Ad-hoc interministerial committee created on the initiative of national Red Cross Society in 1996	-	-	Foster the implementation of international humanitarian law
NICARAGUA			
Structure	**Date of establishment**	**Composition and operation**	**Mandate and activities**
Comisión Nacional para la Aplicación del Derecho Internacional Humanitario c/o Ministerio de Relaciones Exteriores Apartado postal No. 127 Managua Tel. +505 266 6512 Fax +505 266 6512	Established: 1999 Legal basis: Presidential Decree No. 54-99 of 23 April 1999	Representatives: Foreign Affairs, Education, Health, Justice, President's Office, commissions of the National Assembly, Supreme Court, Nicaraguan Red Cross, and academic circles Chairmanship: Ministry of Foreign Affairs	To advise and provide support to the government on all issues relating to participation in international humanitarian law treaties, to incorporation of their provisions into national law, and to dissemination of their rules.
PANAMA			
Structure	**Date of establishment**	**Composition and operation**	**Mandate and activities**
Comisión Nacional Permanente para la Aplicación del Derecho Internacional Humanitario (CPDIH) c/o Ministerio de Relaciones Exteriores Altos del Cerro Ancón Edificio 95 Ciudad de Panamà Tel. +507 211 4296 Fax +507 211 4296	Established: 1997 Legal basis: Executive Decree No. 154 of 25 August 1997, amended by Executive Decree No. 165 of 19 August 1999 Operation: Resolutions No. 001-98 and No. 001-00 (internal regulations)	Representatives: Foreign Affairs, Justice, Interior, Education, President's Office, Labour, Legislative Assembly, police, Civil defence, academic circles, and Red Cross Society of Panama Chairmanship and Secretariat: Ministry of Foreign Affairs	To prepare a list of national legislation implementing international humanitarian law, to make recommendations and propose draft laws to the Executive to make effective the norms contained in that body of law; to disseminate international humanitarian law in institutions of the State and of the general public; to cooperate with the Ministry of Foreign Affairs in organizing meetings with the ICRC; to promote the incorporation of humanitarian law into university and school programmes and

			cooperate in the development of such programmes; to represent Panama in international conferences and meetings dealing with topics relating to international humanitarian law.
PARAGUAY			
Structure	**Date of establishment**	**Composition and operation**	**Mandate and activities**
Comisión Interministerial de Aplicación del Derecho Internacional Humanitario c/o Ministerio de Defensa Nacional Edificio del Ministerio de Defensa Mcal. López esquina Vicepres. Sánchez Asuncion	Established: 1995 Legal basis: Presidential Decree No. 8802 of 12 May 1995; reorganization by Presidential Decree No. 15926 of 28 December 2001	Representatives: Foreign Affairs, Defence, Interior, Justice and Employment Chairmanship and secretariat: Ministry of Defence	To consult with the public and private institutions concerned and make recommendations to the authorities on means of implementing, applying, and disseminating international humanitarian law.
PERU			
Structure	**Date of establishment**	**Composition and operation**	**Mandate and activities**
Comisíon Nacional de Estudio y Aplicación del Derecho Internacional Humanitario (CONADIH) c/o Ministerio de Justicia Scipión Llona 350 Miraflores Lima Fax +511 441 05 47	Established: 2001 Legal basis: Resolution (Resolución Suprema) No. 234-2001-JUS of 1 June 2001 Operation: Ministerial Resolution No. 240-2001-JUS of 23 July 2001 (regulations of procedure and operation)	Representatives: Justice, Foreign Affairs, Interior, Defence, and academic circles Chairmanship and secretariat: Ministry of Justice	To carry out studies and make recommendations on implementation of international humanitarian law; to contribute to the monitoring of the implementation of this body of law; to help spread knowledge of this body of law.
TRINIDAD AND TOBAGO			
Structure	**Date of establishment**	**Composition and operation**	**Mandate and activities**
Inter-Ministerial Committee on International Humanitarian Law c/o Ministry of Enterprise Development and Foreign Affairs 1 Queen's Park West Port of Spain Tel. +1 868 623 4116 Fax +1 868 624 4220	Established: 1997 (ad hoc), 2001 (ad hoc) Legal basis: Cabinet Decision No. 211 of 21 February 2001	Representatives: Foreign Affairs, Defence, Security, Education, Health, Culture, Trinidad and Tobago Red Cross Society, and Public Prosecutor's Office Chairmanship: Ministry of Foreign Affairs	To review and present to the government suitable recommendations relating to the 1954 Hague Convention for the protection of cultural property and its two protocols, and the 1980 Convention on certain conventional weapons and its four protocols.

URUGUAY			
Structure	**Date of establishment**	**Composition and operation**	**Mandate and activities**
Comisión Nacional de Derecho Humanitario (CNDH-Ur) c/o Ministerio de Relaciones exteriores, Dirección de Derechos Humanos Colonia 1206 11600 Montevideo Tel. +5982 902 7806 or +5982 902 1327 (2215)	Established: 1992 Legal basis: Executive Decrees No. 677/992 of 24 November 1992 and No. XXX/996 of 3 June 1996	Representatives: Foreign Affairs, Justice, Defence, Interior, Health, Education and Culture, Supreme Court, Uruguayan Red Cross, and academic circles Chairmanship: Ministry of Foreign Affairs	To make recommendations on dissemination of international humanitarian law at all levels of public and private education; to make recommendations on implementation of and respect for this body of law through the adoption of legislative provisions, regulations and other measures that ensure the application of this body of law.