STRENGTHENING INTERNATIONAL HUMANITARIAN LAW AT THE NATIONAL LEVEL

Memorandum by the Commonwealth Secretariat and paper by The ICRC Advisory Service on International Humanitarian Law

The establishment of the International Criminal Court following the recently concluded Treaty of Rome has helped to sharpen the focus of the international community on the various Geneva Conventions and their Protocols which both complement and supplement existing national laws to ensure that certain crimes such as genocide do not go unpunished. The establishment of the Court is the end result of years of effort to galvanise international opinion behind the need to punish serious violations of international law, including crimes which are now generally recognised as crimes against humanity.

2. Under the Geneva Conventions and their Protocols, members have a duty to implement their obligations to the fullest extent possible. Generally, this requires the enactment of national legislation as well as appropriate regulations. To facilitate this process, some states have set up National Humanitarian Law Committees to advise and assist their governments in the implementation and dissemination of international humanitarian law.

3. In preparing the accompanying paper, the ICRC Advisory Service on International Humanitarian Law has provided a summary of the position of each Commonwealth member country in relation to ratification and implementation of the various Conventions.

4. Ministers may wish to take this opportunity to share views and experiences on this subject and to take stock of the state of their ratification and implementation of these Conventions.

March 1999

STRENGTHENING INTERNATIONAL HUMANITARIAN LAW AT THE NATIONAL LEVEL

Implementation is the major challenge facing international humanitarian law today. The problem of translating States' legal obligations into action is common to all areas of international law. There is, however, a particularly acute contrast between humanitarian law's highly developed rules, many of which enjoy nearly universal acceptance, and the repeated violations of those rules in conflicts around the world.

While a number of international mechanisms have been developed to promote compliance with humanitarian law, it is States themselves which have the primary responsibility for implementation. Under the 1949 Geneva Conventions and their 1977 Additional Protocols, States have clear obligations to ensure that humanitarian law is implemented and respected, and to this end to adopt a range of national legislative and administrative measures.

It is in order to help States discharge their international obligations, and to promote these national implementing measures, that the ICRC has established an Advisory Service on International Humanitarian Law. The Advisory Service was established upon the recommendation of States and National Red Cross and Red Crescent Societies at the 26th International Red Cross and Red Crescent Conference in 1995.

This year, 1999, marks the turn of the century and the fiftieth anniversary of the Geneva Conventions. The 27th International Red Cross and Red Crescent Conference will be held in 1999 (Geneva, 1-6 November). It is time for examining the level of implementation of humanitarian law. The shared legal heritage of many Commonwealth States provides a common basis on which to exchange expertise and promote the adoption of national legislation and other measures.

Document prepared by the
ICRC Advisory Service on
International Humanitarian Law
(January 1999)

for the Commonwealth
Law Ministers' Meeting
(Port of Spain, Trinidad, 3-7 May 1999)

TABLE OF CONTENTS

Annexes:

1. Strengthening Implementation of International Humanitarian Law at the National Level: Introduction and Objectives

The purpose of this session and this document is to explain why States need to take measures to implement international humanitarian law, the principal implementation measures (legislative and administrative) required, the approach to implementation in common law States, and the assistance which the International Committee of the Red Cross (ICRC) – more particularly, the ICRC Advisory Service on International Humanitarian Law – may provide to States in their efforts to implement their obligations under international humanitarian law treaties.

This document covers three separate topics:

- Information on international humanitarian law (IHL)

  Sections 2, 3, 4 and 6 explain IHL, the crucial importance of implementation of IHL, and the measures States must take to implement IHL. Section 7 lists criteria for assessing a State's performance in implementing IHL.

- Information on the role of the ICRC and the ICRC Advisory Service on IHL

  Section 5 explains the reasons prompting establishment of the ICRC Advisory Service on IHL. Sections 5, 6 and 10 outline the objectives and activities of the Advisory Service and show how the Advisory Service can assist States in adopting national measures for the implementation of IHL.

- Overview of ratification and implementation of IHL in the Commonwealth

  Sections 8 and 9 summarize the state of ratification and implementation of IHL in Commonwealth Member States, with a particular focus on legislation for the punishment of grave breaches of the Geneva Conventions and their Additional Protocols, legislation to give effect to the Ottawa Convention, legislation to regulate use of the protective symbols established by the Geneva Conventions and their Additional Protocols (e.g., the red cross emblem, the red crescent emblem, the civil defence sign, electronic signals for medical transports), and national IHL committees.

2. What is international humanitarian law?

International humanitarian law is a set of rules which, for humanitarian reasons, seeks to limit the effects of armed conflict. It protects those who are not, or are no longer, taking part in fighting and restricts the means and methods of warfare. International humanitarian law ("IHL" for short) is also called the "Law of War" and the "Law of Armed Conflict".

A Fact-Sheet explaining the essential rules of IHL is attached, together with Fact-Sheets on the principal IHL treaties, that is -

- the 1949 Geneva Conventions and their 1977 Additional Protocols;
- the 1954 Hague Cultural Property Convention and its Protocol;[1]
- the 1980 Conventional Weapons Convention and its four Protocols;
- the 1997 Ottawa Convention; and
- the 1998 Statute of the International Criminal Court.

3. The importance of implementation of international humanitarian law

Implementation is the major challenge facing international humanitarian law today. The problem of translating States' legal obligations into action is common to all areas of international law. There is, however, a particularly acute contrast between humanitarian law's highly developed rules, many of which enjoy nearly universal acceptance, and the repeated violations of those rules in conflicts around the world.

While a number of international mechanisms have been developed to promote compliance with humanitarian law, it is States themselves which have the primary responsibility for implementation. Under the 1949 Geneva Conventions and their 1977 Additional Protocols, States have clear obligations to ensure that humanitarian law is implemented and respected, and to this end to adopt a range of national legislative and administrative measures.

4. What is implementation of international humanitarian law?

Implementation of IHL covers all those measures which must be taken to ensure that the rules of IHL are fully respected. It is not only necessary to apply these rules once fighting has begun. There are also measures which must be taken outside areas of conflict and in times of peace to ensure that -

- all people, both civilian and military, are familiar with the rules of IHL;
- the structures, administrative arrangements and personnel required for the application of IHL are in place; and
- violations of IHL are prevented and, where necessary, punished.

The principal implementation measures which States must adopt are set out in section 6 below (as well as in the Advisory Service Fact-Sheet, "Implementing International Humanitarian Law: From Law to Action", at Annex 1). Section 7 lists criteria to consider to determine how a State "performs" in the area of implementation of IHL.

[1] There is no Fact-Sheet about the 1954 Hague Cultural Property Convention.

5. The role of the International Committee of the Red Cross (ICRC) and the ICRC Advisory Service on International Humanitarian Law

In 1995, the ICRC established a special unit, the Advisory Service on IHL, to advise governments on the national measures necessary to fully implement their obligations under IHL. The creation of the Advisory Service was prompted by the recommendation of the Intergovernmental Group of Experts for the Protection of War Victims (Geneva, January 1995) – subsequently endorsed by the 26th International Conference of the Red Cross and Red Crescent (Geneva, December 1995) – that the ICRC strengthen its capacity to advise and assist States in their efforts to implement and disseminate IHL.

Since its establishment, the Advisory Service's three main priorities have been to promote ratification of IHL treaties, to promote national implementation of obligations under these treaties and to collect and facilitate the exchange of information regarding national implementation measures.

In the field of implementation of IHL, which is the focus of this document, the Advisory Service has concentrated on -

- legislation for the punishment of grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I;
- legislation to regulate use of the red cross and red crescent emblems and the other protective signs and signals provided for in the Conventions and Protocols; and
- establishment of national IHL committees to advise governments on ratification and implementation of IHL.

6. Implementation of IHL – a brief description

As indicated in section 4 above, implementation of IHL requires a variety of measures. First, IHL treaties must be incorporated into domestic or national law. In common law States, this usually requires the enactment of implementing legislation.

Second, States must ensure that their criminal law provides for punishment of –

- grave breaches of the Geneva Conventions and their Additional Protocol I;
- misuse of the emblem (the emblems, designations, signs and signals protected by the Conventions and Protocol I and the Cultural Property Convention);
- violations of the 1954 Cultural Property Convention;
- violations of the 1997 Ottawa Convention;
- wilfully killing or causing serious injury to civilians through violations of amended Protocol II (landmines) of the 1980 Conventional Weapons Convention.

Third, States must adopt a variety of other implementation measures to give effect to their obligations under IHL treaties, for example:

- translation of these texts into national languages;
- dissemination of the Conventions and Protocols within the armed forces and generally;
- identification of protected persons and places;
- protection of fundamental and procedural guarantees;
- appointment and training of persons qualified in IHL, including legal advisers within the armed forces;
- establishment of National Societies, civil defence organizations and national information bureaux.

To assist with the measures described above, many States have founded national IHL committees to advise the government on implementation and dissemination of IHL. Such committees – bringing together representatives of the various ministries concerned with the application of IHL, the National Society, civil defence organizations, academics, the health profession, etc. – are recommended as a means to further implementation of IHL. For further information on the composition and functions of these committees, see the Fact-Sheet, "National Committees for the Implementation of Implementation of Humanitarian Law" at Annex 1.

Other measures which the Advisory Service has promoted to further the implementation of IHL are:

- national implementation studies – the purpose of these studies, ordinarily undertaken by a local lawyer engaged specifically for this purpose by the ICRC, is to determine the state of implementation (legislative and administrative) in the country;
- national seminars on implementation of IHL – the purpose of these seminars, which bring together representatives of relevant ministries, the National Society, civil defence and other relevant bodies, is to consider the state of implementation and make recommendations as to what needs to be changed (and perhaps also recommendations as to ratification of IHL treaties and establishment of a national IHL committee);
- establishment of a database of implementation measures – the purpose of this database, which will appear in the ICRC's homepage, is to make information concerning national implementation readily accessible to States and others.

7. Implementation of IHL – criteria for assessment

To determine how a State "performs" in the area of implementation of IHL, the essential criteria (drawn from section 6) are the following:

1. Has it incorporated the IHL treaties to which it is a party into domestic law?
2. Is its criminal law adequate (emblem, grave breaches, mines)?
3. Has it introduced the other implementation measures required?

Additional factors which might improve the State's IHL "performance" include the following:

1. Does it have a national IHL committee?
2. Has a national implementation study been undertaken (so the State knows the current situation and the areas where improvement is required)?
3. Has there been a national seminar on implementation (so recommendations leading to an "Implementation Plan of Action" can be adopted)?

A further criterion – useful for better implementation of IHL generally, rather than implementation in a particular State – is whether information has been included in the ICRC's database on national implementation measures (soon to be included in the ICRC's website).

8. Ratification and implementation of IHL in the Commonwealth

In preparation for the Commonwealth Law Ministers' Meeting, the Advisory Service on IHL has reviewed ratification and implementation of IHL in Commonwealth Member States. The map at Annex 2 shows the level of ratification of the Geneva Conventions and Additional Protocols world-wide. The table at Annex 3 shows the level of ratification of the more important IHL treaties by Commonwealth Member States. A list of these treaties, showing the number of States party to each treaty (world-wide), appears at Annex 4.

On the basis of the information available in the Advisory Service Documentation Centre, the Advisory Service has prepared, for each State, a sheet summarizing the state of ratification and implementation of the principal IHL treaties. Each State will find, attached to this document, a copy of the ratification/implementation sheet which the Advisory Service has prepared in relation to it (Annex 5). The Advisory Service welcomes any comments which States may have on the information contained in the ratification/implementation sheet. Comments should be sent by fax or E-mail to Ms Anna Segall, Legal Adviser, Advisory Service on IHL, ICRC, at **41 22 733 2057** or **asegall.gva@icrc.org** (under the heading Commonwealth Law Ministers' Meeting).

9. Implementation of IHL in the Commonwealth – an overview

Details of the state of implementation in relation to each Commonwealth Member State are contained in the ratification/implementation sheet which has been prepared in relation to each State. It is useful, in addition, to make some general comments in relation to the state of implementation in the Commonwealth. Again, these comments are based on information presently available to the ICRC Advisory Service, and may need to be up-dated.

9.1 Incorporation of Conventions and Protocols into domestic law

In common law States, treaties do not become part of the domestic or national law until implementing legislation is enacted. Many common law States achieve this through a Geneva Conventions Act which -

- provides for punishment of grave breaches of the Geneva Conventions (and Additional Protocol I, where applicable);
- specifies trial procedures for protected persons; and
- regulates use of the red cross and red crescent emblem (and the civil defence sign and electronic signals established by Additional Protocol I, where applicable) and creates an offence of misuse of these emblems, sign and signals.

The ICRC Advisory Service has prepared a background information note on the Geneva Conventions Act approach (Annex 6).

On the basis of information available to the ICRC Advisory Service, it appears that 22 Commonwealth States have followed the Geneva Conventions Act approach.[2] Of these States, only five have amended their Geneva Conventions Act to give effect to their ratification of the Protocols.[3]

In summary then, it would appear that only 13 of the common law States in the Commonwealth have legislation which adequately incorporates the Conventions and, where applicable, the Protocols into domestic law.[4] In relation to Cameroon and Mozambique, which do not have a system based on the common law, the ICRC Advisory Service does not have sufficient information to assess whether or not these States have incorporated these treaties into their domestic or national law.

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[2] Australia, Botswana, Britain, Canada, India, Kenya, Malawi, Malaysia, New Zealand, Nigeria, Papua New Guinea, the Seychelles, Singapore, Uganda, Vanuatu, Zimbabwe have adopted a Geneva Conventions Act. The UK *Geneva Conventions Act 1957* applies to Fiji, Kiribati, the Solomon Islands, Trinidad and Tobago, and Tuvalu; the New Zealand *Geneva Conventions Act 1958* applies to Samoa.

Bangladesh and Pakistan each have a *Geneva Conventions Implementing Act, 1936*, which pre-dates the Geneva Conventions and does not, therefore, incorporate the Conventions (and in the case of Bangladesh, the Additional Protocols) into domestic law. It appears that the United Kingdom Geneva Conventions Act, 1911 may continue to apply in South Africa, but this also pre-dates the Geneva Conventions and their Additional Protocols and does not, therefore, incorporate the Conventions and Protocols into domestic law.

[3] Australia, Britain, Canada, New Zealand and Zimbabwe have amended their Geneva Conventions Acts to give effect to ratification of the Additional Protocols. Botswana, Malawi, Nigeria, Samoa, the Seychelles, the Solomon Islands, Uganda and Vanuatu have not yet taken this step.

[4] Australia, Britain, Canada, Fiji, India, Kiribati, Malaysia, New Zealand, Papua New Guinea, Singapore, Trinidad and Tobago, Tuvalu and Zimbabwe.

9.2 Emblem legislation

The Advisory Service has information which shows that 50 of the Commonwealth Member States have legislation relating to the emblem.[5] It should be noted that the mere existence of emblem legislation does not ensure the fulfilment of a State's obligations. Of the States with emblem legislation, it would appear that only 12 have adequate legislation which gives effect to their obligations under the Conventions and, where applicable, the Protocols.[6]

The remaining States have legislation which is outdated, which protects the red cross or the red crescent but not both, which protects the emblems under the Conventions but not the civil defence sign and signals of Protocol I, or, which is plainly wrong or inadequate. Further information in relation to the adequacy of the legislation in individual States is contained in the ratification/implementation sheet at Annex 5.

9.3 Legislation for the punishment of grave breaches

Of the Commonwealth Member States, only one third have adequate legislation for the punishment of grave breaches of the Geneva Conventions and, where applicable, the Additional Protocols.[7]

9.4 Legislation for the Ottawa Convention

As at 31.01.99, there are 22 Commonwealth States which are party to the Ottawa Convention; a further 22 States have signed but not yet ratified the Convention. Of the Commonwealth States party to the Convention, it appears that only Britain and Canada have adopted implementing legislation.

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5 The ICRC Advisory Service on IHL is not aware of any legislation regulating use of the red cross and red crescent emblems in Dominica, the Maldives or Mozambique. Nauru has no emblem legislation, but it is not yet a party to the Geneva Conventions.

6 Australia, Britain, Fiji, India, Kiribati, Malaysia, New Zealand, Papua New Guinea, Singapore, Trinidad and Tobago, Tuvalu and Zimbabwe.

7 The 22 States which have adopted a Geneva Conventions Act (Australia, Botswana, Britain, Canada, Fiji, India, Kenya, Kiribati, Malawi, Malaysia, New Zealand, Nigeria, Papua New Guinea, Samoa, the Seychelles, Singapore, Solomon Islands, Trinidad and Tobago, Tuvalu, Uganda, Vanuatu and Zimbabwe) provide punishment for grave breaches of the Conventions. Of these States, 13 have ratified the Additional Protocols, but only five of them have amended their legislation to provide for punishment of grave breaches of Protocol I (Australia, Britain, Canada, New Zealand and Zimbabwe). Botswana, Malawi, Nigeria, Samoa, the Seychelles, the Solomon Islands, Uganda and Vanuatu have not yet taken this step.

In Cameroon and Mozambique, which have not followed the Geneva Conventions Act approach, there are certain provisions in the criminal law which prohibit conduct which may constitute grave breaches within the meaning of the Geneva Conventions and their Additional Protocol I. The legislation has not been examined to determine whether it complies with the requirements of the Conventions and Protocols.

The ICRC is not aware of legislation providing for the punishment of grave breaches in Antigua and Barbuda, the Bahamas, Bangladesh, Barbados, Brunei Darussalam, Cyprus, Dominica, Gambia, Ghana, Grenada, Guyana, Jamaica, Lesotho, the Maldives, Malta, Mauritius, Namibia, Pakistan, South Africa, Sri Lanka, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Swaziland, Tanzania, Tonga and Zambia. Nauru has no grave breach legislation, but it is not yet a party to the Geneva Conventions.

9.5 Other implementation measures and national IHL committees

Apart from the legislative measures referred to above, States party to the Conventions and Protocols are required to disseminate the obligations under the Conventions and Protocols and undertake a variety of other administrative measures (see section 5 above). The focus of this document is on the legislative implementation measures required by IHL and on the creation of national IHL committees (see section 9.6 below)

9.6 National IHL committees

According to information in the Advisory Service, there are 5 States in the Commonwealth with relatively formal national IHL committees (Australia, Canada, Namibia, New Zealand, Zimbabwe). In Britain, the relevant authorities have *ad hoc* meetings; in South Africa, a committee was established in 1995 to prepare for the International Red Cross and Red Crescent Conference. Britain, Cameroon, Ghana, Mozambique, Sri Lanka and Zambia are considering formal establishment of a national IHL committee.

10. Assistance from the ICRC Advisory Service on IHL and National Red Cross and Red Crescent Societies

As can be seen from sections 8 and 9 of this document, the level of implementation of IHL treaties within the Commonwealth could be strengthened. The shared legal heritage of many Commonwealth States provides a common basis on which to exchange expertise and promote the adoption of national legislation and other measures. The ICRC Advisory Service on IHL exists to assist States in their efforts to implement IHL at the national level. In many States, the National Red Cross or Red Crescent Society is also able to provide assistance or expertise.

The ICRC Advisory Service on IHL hopes that 1999, a year which marks the turn of the century and the fiftieth anniversary of the Geneva Conventions, will see progress in the implementation of IHL treaties in Commonwealth States.

The ICRC, National Societies and their International Federation, and States party to the Geneva Conventions will be meeting in Geneva from 1 to 6 November 1999 for the 27th International Red Cross and Red Crescent Conference. At that time, States, National Societies and the ICRC will report on progress in relation to national implementation of IHL.

COMITÉ INTERNATIONAL DE LA CROIX-ROUGE

WHAT IS INTERNATIONAL HUMANITARIAN LAW?

What is International Humanitarian Law?

International humanitarian law is a set of rules which, for humanitarian reasons, seeks *to limit the effects of armed conflict.* It protects those who are not, or are no longer, taking part in fighting and restricts the means and methods of warfare. International humanitarian law ("IHL" for short) is also called the "Law of War" and the "Law of Armed Conflict".

Where Does International Humanitarian Law come from?

International humanitarian law is part of international law. This governs relations between States. International law is found in agreements concluded between States – often called treaties or conventions – and in general principles and practices which States accept as legal obligations.

The origins of international humanitarian law can be found in the codes and rules of religions and cultures around the world. The modern development of the law began in the 19th century. Since then, States have agreed to a series of practical rules, based on the bitter experience of modern warfare, which represent a careful balance between humanitarian concerns and States' military requirements. As the international community has grown so has the number of States around the world who have contributed to the development of international humanitarian law. Today it may be regarded as a truly universal system of law.

Where can you find International Humanitarian Law?

A major part of international humanitarian law is found in the four Geneva Conventions of 1949. *Nearly every State in the world has agreed to be bound by the Conventions.* The Conventions have been developed and supplemented by two further agreements – the Additional Protocols of 1977.

There are also several agreements prohibiting the use of certain weapons and military tactics. These include the Hague Conventions of 1907, the 1972 Biological Weapons Convention, the 1980 Conventional Weapons Convention and the 1993 Chemical Weapons Convention. The 1954 Hague Convention protects cultural property during armed conflict.

Many rules of international humanitarian law are now accepted as customary law – that is, as general rules which apply to all States.

What does International Humanitarian Law cover?

Internationa humanitarian Law covers two areas:

(1) The ***protection*** of those who are not, or are no longer, taking part in fighting.

(2) Restrictions on the ***means of warfare***, notably weapons, and the ***methods of warfare***, such as military tactics.

What is Protection?

International humanitarian law ***protects*** those who do not take part in the fighting such as civilians and medical and religious personnel. It also protects those who no longer take part in the fighting such as those who have been wounded or shipwrecked, who are sick, or who have been taken prisoner.

Protected people must not be attacked. They must be spared from physical abuse and degrading treatment. The wounded and sick must be collected and cared for. Detailed rules, including the provision of adequate food and shelter and legal guarantees, apply to those who have been taken prisoner or detained.

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Certain places and objects, such as hospitals and ambulances, are also protected and must not be attacked. International humanitarian law sets out a number of clearly recognisable emblems and signals which can be used to identify protected people and places. These include the ***red cross*** and ***red crescent***.

What are the restrictions on Weapons and Tactics?

International humanitarian law prohibits all ***means and methods of warfare*** which:

(a) fail to discriminate between those taking part in the fighting and those, such as civilians, who are not taking part in the fighting;

(b) cause superfluous injury or unnecessary suffering;

(c) cause severe or long-term damage to the environment.

International humanitarian law has thus banned the use of many weapons including exploding bullets, chemical and biological weapons and laser-blinding weapons.

When does International Humanitarian Law apply?

International humanitarian law only applies to armed conflicts. It does not cover internal disturbances such as isolated acts of violence. Nor does it regulate whether a State may actually use force: this is governed by an important, but distinct, part of international law contained in the United Nations Charter. International humanitarian law only applies once a conflict has begun and applies equally to all sides regardless of who began the fighting.

International humanitarian law distinguishes between ***international armed conflict*** and ***internal armed conflict***. International armed conflicts are those in which at least two States are involved. They are subject to an extensive range of rules including those contained in the four Geneva Conventions and the first Additional Protocol. A more limited range of rules apply to internal armed conflicts – notably those set out in Article 3 of each of the four Geneva Conventions and in the second Additional Protocol. However in an internal armed conflict, just as in an international armed conflict, all sides must comply with international humanitarian law.

It is important to differentiate between international humanitarian law and ***human rights law***. While some of their rules are similar, these two bodies of law have developed separately and are contained in different treaties. In particular, human rights law, unlike international humanitarian law, applies in peacetime and many of its provisions may be suspended during in an armed conflict.

Does International Humanitarian Law actually work?

Tragically there are countless examples of violations of international humanitarian law in conflicts around the world. Ever-increasingly the victims of warfare are civilians. However, there are important cases where international humanitarian law has made a difference in protecting civilians, prisoners, the sick and wounded and in restricting the use of barbaric weapons. Given that it applies during times of extreme trauma, the application of international humanitarian law will always pose severe difficulties: its effective application remains as urgent as ever.

A number of measures have been drawn up to promote respect for international humanitarian law. States are obliged to educate their armed forces, and the general public, about the rules of international humanitarian law. They must prevent and, where necessary, punish all violations of international humanitarian law. In particular they must enact laws to punish the most serious violations of the Geneva Conventions and Additional Protocols which are regarded as ***war crimes***. Measures have also been taken at the international level. Tribunals have been created to punish acts committed in two recent conflicts and consideration is now being given to a permanent international court which will be able to punish war crimes.

Whether through Governments and organizations or as individuals, we can all make an important contribution to the application of international humanitarian law.

COMITÉ INTERNATIONAL DE LA CROIX-ROUGE

PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 FOR THE PROTECTION OF WAR VICTIMS

International humanitarian law protects the victims of armed conflicts and limits the choice of methods and means of warfare. It applies in situations of international and non-international armed conflict.

The main instruments of international humanitarian law are the ***Geneva Conventions of 12 August 1949 for the protection of war victims***. These treaties, which are universally accepted, protect the wounded, the sick, prisoners of war and civilians in enemy hands. They also protect medical services, namely medical personnel, medical units and establishments, and medical means of transport.

Although the four Geneva Conventions of 1949 are very comprehensive, they do not cover the full range of human suffering caused by war. There are gaps in important areas, for instance in the provisions relating to the behaviour of combatants and the protection of civilians from the effects of the hostilities.

To remedy these shortcomings, two Protocols were adopted in 1977. They supplement, but do not replace, the Geneva Conventions of 1949. They are the

Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I);

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

* * * * *

Why was Protocol I applicable in situations of international armed conflict adopted?

Protocol I imposes constraints on the way in which military operations may be conducted. The obligations set forth in this instrument do not ask too much of those in charge of military operations, as they do not encroach upon the right of each State to defend itself by any legitimate means.

This treaty came into being because new methods of combat had been developed and the rules applicable to the conduct of hostilities had become outdated. Civilians are now entitled to protection from the effects of war.

What new elements does Protocol I contain?

Protocol I gives a reminder that the right of the parties to a conflict to choose ***methods and means of warfare*** is not unlimited and that it is prohibited to

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employ weapons, projectiles and any other device that may cause superfluous injury or unnecessary suffering.

Protocol I defines legitimate targets in case of military attack. Furthermore it

a) ***prohibits***

- indiscriminate attacks and attacks or reprisals against
- the civilian population and individual civilians,
- objects indispensable to the survival of the civilian population,
- cultural objects and places of worship,
- works and installations containing dangerous forces,
- the natural environment;

b) ***extends***

the protection accorded under the Geneva Conventions to all medical personnel, units and means of transport, both civilian and military;

c) ***establishes***

an obligation to search for missing persons;

d) ***reinforces***

the provisions concerning relief supplies for the civilian population;

e) ***affords***

protection for the activities of civil defence organizations;

f) ***specifies***

measures to be taken by States to facilitate the implementation of humanitarian law.

Violations of the prohibitions listed in sub-paragraph ***a)*** above are deemed to be grave breaches of humanitarian law and are classified as ***war crimes***.

Article 90 of Protocol I provides for the establishment of an ***International Fact-Finding Commission*** to investigate all alleged grave breaches or other serious violations of the Conventions and of Protocol I. All States Parties may accept the competence of the Commission, which has meanwhile been set up.

Why was Protocol II applicable to non-international armed conflicts adopted?

Most conflicts since the Second World War have been non-international. The only provision in the Geneva Conventions of 1949 applicable in this type of conflict is ***Article 3 common*** to all four Conventions which, although very detailed, is insufficient to resolve the serious humanitarian problems caused by internal conflicts.

The humane principles already introduced by common Article 3 into non-international conflicts are reinforced by Protocol II. In so doing, it in no way restricts the right of States or the means available to them to maintain or restore law and order on their national territory. Compliance with the provisions of Protocol II therefore does not imply recognition of any status for dissident armed forces.

What new elements does Protocol I contain?

Protocol II applies only to internal armed conflicts of a certain intensity in which dissident armed forces, under responsible command, exercise control over a part of the national territory.

Protocol II

a) ***sets forth***

the fundamental guarantees to which all persons not, or no longer, taking part in hostilities are entitled;

b) ***establishes***

the rights of persons whose liberty has been restricted, and the judicial guarantees of a fair trial;

c) ***accords***

protection to the civilian population and to civilian objects;

d) ***prohibits***

intentional starvation and forced displacement.

Protocol II also stipulates that the wounded must be protected and cared for, and that medical personnel and transports must be protected and respected. The red cross and red crescent emblem must likewise be respected, and its use must be restricted to those persons duly authorized to display it.

* * * * *

Additional Protocols I and II of 1977 are binding on a large number of States, but it is essential that they attain universal recognition, for only when all States have pledged compliance with their humanitarian rules, and are clearly aware of their mutual commitments, will it be possible to ensure equal protection for all the victims of all armed conflicts.

COMITE INTERNATIONAL DE LA CROIX-ROUGE

SUMMARY OF PROVISIONS OF THE 1980 UN CONVENTION ON CERTAIN CONVENTIONAL WEAPONS (CCW)

The 1980 CCW Convention applies two general customary rules of international humanitarian law to specific weapons. These customary rules are (1) the prohibition of the use of weapons which are by their nature indiscriminate and (2) the prohibition of the use of weapons which cause unnecessary suffering or superfluous injury. The CCW Convention is a framework to which are added individual Protocols governing the use of specific weapons. New Protocols may be added when deemed appropriate by States Parties. The CCW Convention, while applying customary rules to specific weapons, does not reduce the obligation of States to refrain from the use of weapons not mentioned which would nonetheless violate the rules of international humanitarian law.

The "framework" Convention

The official title of this legally binding international instrument is 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"*. Its primary purposes are to protect civilians from the effects of weapons and to protect combatants from the infliction of suffering which exceeds that necessary for the achievement of a legitimate military objective.

The Convention and three of its four Protocols apply in international armed conflicts. Protocol II was amended in 1996 to apply also to non-international armed conflicts. States become party to the Convention six months after adhering to at least two of its Protocols. States Parties may initiate amendments to the Convention or its Protocols and may propose the addition of new Protocols. The first Review Conference of States Parties met in late 1995 and 1996 and adopted an amended Protocol II on Mines, Booby Traps and Other Devices and a new Protocol IV on Blinding Laser Weapons. A second Review Conference is to be held not later than 2001.

Protocol I — Non-Detectable Fragments

The use of any weapon the primary effect of which is to injure by fragments which are not detectable in the human body by X-rays is prohibited.

Protocol II — Mines, Booby Traps and Other Devices

This Protocol, as amended on 3 May 1996, applies in both international and non-international armed conflicts *(art. 1)* and *restricts* the use of landmines (both anti-personnel and anti-tank), booby traps and certain other explosive devices.

In the amended Protocol II "mines" are defined as munitions which are *designed* to be exploded by the presence, proximity or contact of the victim, whether a person or vehicle. "Anti-personnel mines" are those which are specifically designed to injure or kill persons. "Booby traps" are devices which are designed or adapted to kill or injure when a person disturbs or approaches an apparently harmless object (such as a door or vehicle). Anti-tank mines are regulated under the amended Protocol

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II's general rules and as mines "other than anti-personnel mines". "Other devices" refers to hand-emplaced munitions, including improvised explosive devices, which are designed to kill or injure and are activated either by hand, by remote control or by a timing device. *(see definitions art. 2)*

1. **General rules** which apply to all mines, booby traps and other devices include the following:

- It is prohibited to "direct" these weapons against civilians or civilian objects *(art 3.7)*
- The indiscriminate use of these weapons is prohibited *(art. 3.8)*.
- The use of these weapons, if of a nature to cause unnecessary suffering or superfluous injury, is prohibited *(art. 3.3)*.
- Precautions, including advance warning, must be taken to protect civilians from the effects of these weapons *(art. 3.10 & 3.11)*.
- Parties which use these weapons are responsible to maintain protective measures to exclude civilians or to clear them at the end of hostilities *(arts. 3.2 & 10)*.
- The location of these weapons must be recorded and records kept of their location *(art. 9 and technical annex)*.

2. All **anti-personnel mines must be detectable** using commonly available mine detection equipment *(art. 4)*, so that mined areas can be more easily cleared and returned to civilian use. To this end all such mines must contain the equivalent of 8 grams of iron[1] *(technical annex)*.
   All anti-personnel mines must *(art. 5 & technical annex)* either
   (a) be kept within marked and fenced minefields which are monitored by military personnel for the purpose of keeping civilians out, or
   (b) be equipped with self-destruct and self-deactivating mechanisms to ensure they do not pose a long-term threat to the civilian population. Such mines must be sufficiently reliable so that at least 90% will have destroyed themselves within 30 days and no more than 1 in 1000 will be capable of functioning as a mine within 120 days[2].
3. All **remotely-delivered anti-personnel mines** must have self-destruct and self-deactivating features of the type described above *(art. 6)*[3].
4. To the extent feasible **remotely-delivered anti-tank or vehicle mines** must be equipped with an effective self-destruction or self-neutralisation mechanism and a back-up self-deactivation feature *(art. 6)*.
5. **Transfers** of prohibited mines, namely non-detectable anti-personnel mines, are prohibited. No mine may be transferred to a non-State entity and anti-personnel mines may not be transferred to States which are not bound by the Protocol, unless the non-party agrees to apply the Protocol *(art. 8)*.
6. The use and transfer of **mines which explode when detected** by electromagnetic detectors is prohibited *(art. 3.5 and 8)*.
7. States parties are to facilitate the fullest possible **exchange of technology and information** required for the implementation of the Protocol including, in particular, technologies for humanitarian mine clearance *(art. 11)*.
8. United Nations missions and peacekeeping forces, missions of the International Committee of the Red Cross and certain missions of other humanitarian agencies are to be afforded specific types of **protection from the effects of mines and minefields** *(art. 12)*.
9. States Parties are to impose domestic **penal sanctions** on those who violate the Protocol and in so doing cause civilian death or serious injury *(art. 14)*.
10. From its entry into force Parties are to hold regular **annual meetings** to review the operation of the Protocol, as amended, and to consider further improvements *(art. 13)*.

Protocol III - Incendiary Weapons

Weapons primarily designed to injure through flame or heat may not be aimed against civilians or against military objectives which are located within a concentration of civilians. Neither may such weapons be used against forests or vegetation, unless these are being used to conceal combatants or military objectives.

Protocol IV - Blinding Laser Weapons

Laser weapons specifically designed to cause permanent blindness may not be used or transferred. Precautions shall be taken when using laser systems for other purposes in order to avoid causing permanent blindness.

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[1] All anti-personnel mines produced after 1 January 1997 must be detectable.

[2] The detectability and self-destruction/deactivation requirements under paragraphs 2 and 3 of the technical annex may be deferred for a period of up to 9 years from entry into force of the amended Protocol if such deferral is declared at the time of adherence. Use of non-compliant mines must be minimized.

[3] If implementation of self-destruction/deactivation requirements is deferred, such mines must either be self-destructing or self-deactivating.

COMITÉ INTERNATIONAL DE LA CROIX-ROUGE

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

The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction ("The Ottawa Treaty") is part of the international response to the widespread suffering caused by anti-personnel mines. The Convention is based on customary rules of international humanitarian law applicable to all States. These rules prohibit the use of weapons which by their nature do not discriminate between civilians and combatants or cause unnecessary suffering or superfluous injury. The Convention was opened for signature in Ottawa from 3 to 4 December 1997.

Why a ban on anti-personnel mines?

Anti-personnel mines cannot distinguish between soldiers and civilians and usually kill or severely mutilate their victims. Relatively cheap, small and easy to use, they have proliferated by the tens of millions, inflicting untold suffering and wreaking social and economic havoc in dozens of countries throughout the world. Because it is far easier to lay than to remove them, it has been difficult or impossible to use this weapon in accordance with the rules of international humanitarian law in most of the conflicts where they have been employed. In December 1996, 157 States supported a United Nations General Assembly resolution calling for the urgent negotiation of a legally binding ban on these weapons.

What are the basic obligations contained in the Ottawa Treaty?

States adhering to this treaty must *never under any circumstances use, develop, produce, stockpile or transfer anti-personnel mines* or help anyone else to do so. They must also *destroy existing anti-personnel mines*, whether in stockpiles or in the ground, within a fixed time period. A small number of these mines may be retained for the sole purpose of developing mine clearance and destruction techniques and training people in their use.

Which mines are affected by this treaty?

Anti-personnel mines are *designed to be placed on or near the ground and detonated by the presence, proximity or contact of a person.* It was the understanding of the negotiators that "improvised" devices produced by adapting other munitions to function as anti-personnel mines are also banned by the treaty. The Ottawa Treaty prohibits anti-personnel mines only. It does not affect (a) anti-tank or anti-vehicle mines (regulated by the 1980 UN Convention on Certain Conventional Weapons and the general rules of international humanitarian law); (b) "anti-handling devices" attached to an anti-vehicle mine to prevent its removal or (c) "command-detonated" munitions which can only be triggered manually by a combatant and cannot be detonated simply by the presence, proximity or contact of a person.

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When and how will existing anti-personnel mines be destroyed?

Stockpiled anti-personnel mines must be destroyed within four years of entry into force of the Convention for a particular State. As for mines in the ground, whether in minefields or elsewhere, they must be destroyed within 10 years after entry into force. Pending such destruction every effort must be made to identify mined areas and to have them marked, monitored and protected by fencing or other means to ensure the exclusion of civilians. If a State cannot complete the destruction of emplaced mines within 10 years it may request a meeting of the States Parties to extend the deadline and to assist it in fulfilling this obligation.

How will the treaty help mine victims?

The treaty is a comprehensive response to the landmines crisis. Not only are States Parties prohibited from using anti-personnel mines, but those able to do so agree to provide assistance for mine clearance, mine awareness programs and the care and rehabilitation of mine victims. Mine affected States have a right to seek and receive such assistance directly from other Parties to the treaty and through the United Nations, regional or national organizations, components of the International Red Cross and Red Crescent Movement or non-governmental organizations. These cooperative aspects of the Convention will play as great a role as the ban it imposes in providing an effective international response to the suffering caused by these weapons.

How will compliance with the treaty be monitored?

The Ottawa Treaty includes a variety of measures designed to promote confidence that its provisions are being respected and to deal with suspected violations. States are required to report annually to the United Nations Secretary-General on all stockpiled anti-personnel mines, mined areas, mines retained for training purposes, destruction of mines and measures taken to prevent civilians from entering mined areas. To facilitate mine clearance, States must also provide detailed technical information about mines they have produced in the past.

If there are concerns about a State's compliance with the treaty, clarification may be sought through the UN Secretary General and if necessary a meeting of States Parties may be held. This meeting can decide to send an obligatory fact-finding mission to relevant territory of the State concerned for up to 14 days. On the basis of the mission's report the meeting of States Parties may propose corrective actions or legal measures in accordance with the UN Charter.

What must a country do to implement the Ottawa Treaty?

Until its entry into force, States may sign the treaty in Ottawa or at UN Headquarters in New York and then express their consent to be bound by transmitting a ratification (or similar) instrument to the treaty depositary, the UN Secretary General. States which have signed the treaty must not take any action which would undermine its purpose. The treaty enters into force six months after the fortieth State has expressed its consent to be bound. Before or after entry into force States may adhere directly to the treaty, without signing, by transmitting an instrument of accession to the depositary.

The treaty also requires governments to take national legal and administrative measures, including the imposition of penal sanctions, to ensure respect for its provisions by persons or on territory under their jurisdiction or control. This may involve the adoption of criminal legislation. It may also require administrative instructions to armed forces and changes in military planning.

Can a State ban anti-personnel mines and adhere to other agreements which permit mine use?

Earlier rules regulating the use of anti-personnel mines are contained in Protocol II to the 1980 UN Convention on Certain Conventional Weapons. This regulates the use of all types of mines and similar devices, including mines used against tanks. States which adhere to the Ottawa Treaty are advised to adhere also to the 1980 Convention. This Convention's three other Protocols provide important rules on the use or prohibition of other arms, such as blinding laser weapons. Adherence to the 1980 Convention will enable a State to invoke its provisions, such as those requiring a party which uses mines to remove them at the end of hostilities, in any conflict with a State which has adhered to the 1980 Convention but not to the Ottawa Treaty.

Ratification kits for both the Ottawa Treaty and the 1980 Convention are available from the ICRC.

COMITÉ INTERNATIONAL DE LA CROIX-ROUGE

IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW: FROM LAW TO ACTION

International humanitarian law, also called the law of war, sets out detailed rules which seek to limit the effect of armed conflict. In particular, it protects those who are not, or are no longer, taking part in the fighting, and sets limits on the means and methods of warfare. Humanitarian law is a universal set of rules. Its principal instruments have been accepted by nearly every State in the world. However adhering to these instruments is only a first step. Efforts must be made to implement humanitarian law - to turn the rules into action.

What is implementation?

Implementation covers all those measures which must be taken to ensure that the rules of international humanitarian law are fully respected. However, it is not only necessary to apply these rules once fighting has begun. There are also measures which must be taken outside areas of conflict and in time of peace as much as in time of war. These measures are necessary to ensure that:

- all people, both civilian and military, are familiar with the rules of international humanitarian law;
- that the structures, administrative arrangements and personnel required for the application of humanitarian law are in place;
- that violations of humanitarian law are prevented and, where necessary, punished.

Such measures are essential to ensure the effective application of international humanitarian law.

Who should implement?

All ***States*** have a clear obligation to adopt and apply measures implementing humanitarian law. These measures may need to be taken by one or more government ministries, the legislature, the courts, the armed forces, or other State organs. A role may also be played by professional and educational bodies, voluntary organizations and the National Red Cross or Red Crescent Society.

Measures have also been taken at the ***international level*** to deal with violations of humanitarian law. An International Fact-Finding Commission has been established, and States are encouraged to use its services. Tribunals have been set up to deal with violations in Rwanda and the former Yugoslavia and the establishment of a permanent international criminal court is under discussion. However, it is States which continue to have the primary responsibility to ensure the effective implementation of international humani-tarian law, and which must first and foremost adopt measures at the ***national*** level.

What needs to be done?

International humanitarian law - in particular the ***1949 Geneva Conventions*** their ***Additional Protocols of 1977*** and the ***1954 Hague Convention on Cultural Property*** – sets out a range of measures which must be adopted. The principal measures are:

(1) to prepare national translations of the Conventions and Protocols;

(2) to disseminate the texts of the Conventions and Protocols as widely as possible - both within the armed forces and generally;

(3) to suppress all violations of the Conventions and Protocols and in particular to adopt criminal legislation punishing war crimes;

(4) to ensure that persons and places protected by the Conventions and Protocols are properly identified, located and protected;

(5) to adopt measures to prevent the misuse of the red cross, the red crescent and other signs and emblems provided for on the Conventions and Protocols;

(6) to ensure the protection of fundamental and procedural guarantees during time of armed conflict;

(7) to provide for the appointment and training of persons qualified in international humanitarian law including legal advisers within the armed forces;

(8) to provide for the establishment and/or regulation of:

- National Red Cross and Red Crescent Societies and other voluntary aid societies,
- civil defence organizations,
- national Information Bureaux;

(9) to take account of international humanitarian law in the location of military sites, and in the development and adoption of weapons and military tactics;

(10) to provide, as necessary, for the establishment of hospital zones, neutralized zones, security zones and demilitarized zones.

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The provisions of the Conventions and Protocols covering these measures are set out in the table below.

Some of these measures will require the adoption of legislation or regulations. Others will require the development of educational programmes, the recruitment and/or training of personnel, the preparation of identity cards and other materials, the establishment of special structures or units, and the introduction of planning and administrative procedures. All the measures are essential to ensure the effective implementation of humanitarian law.

How can these measures be achieved?

Careful planning and regular consultation is the key to ensuring effective implementation. Many States have established ***national international humanitarian law committees***, or similar bodies, which bring together government ministries, national organizations, professional bodies and others with responsibilities or expertise in the field of implementation. Such bodies have generally been found to be an efficient and valuable means of promoting national implementation. In some countries, the ***National Red Cross and Red Crescent Societies*** may also be able to offer assistance in the field of implementation.

The ***International Committee of the Red Cross***, through its ***Advisory Service on International Humanitarian Law***, is available to provide advice and documentation to governments on national implementation: it can be contacted through the nearest ICRC delegation or at the address given above.

KEY ARTICLES REQUIRING THE ADOPTION OF NATIONAL IMPLEMENTATION MEASURES

	Geneva Convention				Additional Protocol		Hague Convention
	I	II	III	IV	I	II	
Translation	48	49	41, 128	99, 145	84		26
Dissemination & Training	47	48	41, 127	99, 144	80, 82-83, 87	19	25
Violations							
- General	49-54	50-53	129-132	146-149	85-91		28
- War crimes	49-50	50-51	128-129	146-147	11, 85-89		
- Compensation					91		
Protection							
- Medical and religious persons	40, 41	41, 42		20	15, 18		
- Medical transport and sites	19, 36, 39, 42-44	22, 24-27, 39, 41, 43		18, 21-22	12, 18, 23, Annex I	12	
- Procedural guarantees			5, 15-17, 41, 82-90, 95-108	31-33, 35, 37, 43, 64-78, 99-101, 117-126	11, 44-45, 75-77	4-6	
- Cultural property					53	16	3, 10, 12, 17
- Dangerous forces					56	15	
- Identity cards	40, 41, Annex II	42, Annex	17, Annex IV	20	79, Annex I		
- Other cards			70-71, 120, Annex IV	106-107, Annex III			
Use/Misuse of Emblems & signals	44, 53-54	43-45			18, 37-39, 56, 66, Annex I	12	6, 10, 17
Fundamental guarantees	3, 12	3, 12	3, 13-17	3, 27-34	11, 75-77	4-6	
Specialists & Advisers							
- Qualified persons					6		25-27
- Legal advisers					82		
Organizations							
- National Societies	26, 44			63	81	18	
- Civil Defence				63	61-67		
- Information bureaux			122-124	136-141			
- Mixed Medical Commission			112, Annex II				
Military Planning							
- Weapons/Tactics					36		
- Military sites					56, 58		
Protected Zones and Localities	23, Annex I			14, 15	60, Annex I		

In addition to ensuring compliance with the rules of international humanitarian law in areas of conflict or occupation, States are required to take a number of legislative, regulatory and administrative measures. Most of these measures must be adopted or prepared in peacetime as well as in time of conflict.

COMITE INTERNATIONAL DE LA CROIX-ROUGE

STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The United Nations has considered the idea of establishing a permanent international criminal court at various times ever since the end of the Second World War. In 1993 and 1994, it set up two ad hoc tribunals to punish serious violations of international humanitarian law committed, respectively, in the former Yugoslavia and Rwanda. A series of negotiations to establish a permanent international criminal court that would have jurisdiction over serious international crimes regardless of where they were committed started up in 1994 and led to the adoption of the **Statute of the International Criminal Court (ICC)** in July 1998 in Rome. This accomplishment is the culmination of years of effort and shows the resolve of the international community to ensure that those who commit grave crimes do not go unpunished. The Statute will enter into force once it is ratified by 60 States.

Crimes within the ICC's jurisdiction

• *War crimes*

Under Article 8 of the Statute, the ICC has jurisdiction in respect of *war crimes*. These include most of the serious violations of international humanitarian law mentioned in the 1949 Geneva Conventions and their 1977 Additional Protocols, whether committed during international or non- international armed conflicts.

A number of offences are specifically identified as war crimes in the Statute, including:

- rape, sexual slavery, enforced prostitution, forced pregnancy or other forms of sexual violence;
- using children under the age of 15 to participate actively in hostilities.

Certain other serious violations of international humanitarian law, such as unjustifiable delay in the repatriation of prisoners and indiscriminate attacks affecting the civilian population or civilian objects, which are defined as grave breaches in the 1949 Geneva Conventions and 1977 Additional Protocol I, are not specifically referred to in the Statute.

There are only a few provisions concerning certain weapons whose use is prohibited under various existing treaties, and these do not apply with respect to non-international armed conflicts.

• *Genocide*

The ICC has jurisdiction over the crime of *genocide* under Article 6 of the Statute, which reiterates the terms used in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

This crime is defined in the Statute as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

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

• *Crimes against humanity*

The ICC also has jurisdiction over *crimes against humanity*. Under Article 7 of the Statute, these crimes comprise any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population:

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

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

• *Aggression*

As stated in Article 5 (2) of the Statute, the ICC will have jurisdiction over the *crime of aggression* once a provision defining this crime and setting out the conditions for the exercise of such jurisdiction is adopted.

When can the ICC exercise its jurisdiction?

As soon as a State becomes a party to the Statute, it accepts the jurisdiction of the ICC in respect of the above crimes. Under Article 25 of the Statute, the Court has jurisdiction over individuals and not States.

The ICC may exercise its jurisdiction at the instigation of the Prosecutor or a State Party, providing one of the following States is bound by the Statute:

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

A State that is not a party to the Statute may make a declaration to the effect that it accepts the Court's jurisdiction.

Under the collective security framework of Chapter VII of the UN Charter, the Security Council may refer a situation to the Prosecutor for investigation. It may also request that no investigation or prosecution commence or proceed for a renewable period of 12 months.

The exercise of jurisdiction by the ICC over war crimes is limited under Article 124 of the Statute. This provision allows a State, on becoming a party to the Statute, to declare that it does not accept the jurisdiction of the Court for a period of seven years with respect to war crimes that have allegedly been committed by its own nationals or on its own territory.

National enforcement systems and the ICC

Under the 1949 Geneva Conventions and 1977 Additional Protocol I, States must prosecute persons accused of war crimes before their own national courts or extradite them for trial elsewhere. Nothing in the ICC Statute releases States from their obligations under existing instruments of international humanitarian law or under customary international law.

By virtue of the principle of complementarity, the jurisdiction of the ICC is intended to come into play *only* when a State is genuinely unable or unwilling to prosecute alleged war criminals over which it has jurisdiction. To benefit from this principle, States will need to have adequate legislation enabling them to prosecute such criminals.

Furthermore, States party to other instruments of international humanitarian law are still required to enact implementing legislation giving effect to their obligations under those instruments.

What is needed to ensure the ICC's effectiveness?

- States should ratify the ICC Statute as soon as possible since universal ratification is essential to allow the Court to exercise its jurisdiction effectively and whenever necessary.
- States should refrain from making use of the opting-out clause (Article 124 of the Statute).
- States should carry out a thorough review of their national legislation to ensure that they can take advantage of the complementarity principle on which the ICC is founded and try individuals under their own legal systems for offences that fall within the Court's jurisdiction.
- States should assist each other and the ICC in connection with proceedings relating to crimes that come within the Court's jurisdiction. This will require the enactment or amendment of legislation to ensure any necessary transfer of those accused of such crimes.

Towards a comprehensive enforcement system

National courts will continue to play an important and primary role in the prosecution of alleged war criminals. Moreover, the establishment of the ICC does not in any way prejudice the work undertaken by the aforesaid ad hoc tribunals, namely the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, which were set up to punish crimes relating to specific situations (in the first instance, those committed in the former Yugoslavia since 1991, and in the second instance, those committed in Rwanda or by Rwandan nationals in neighbouring States in 1994).

The establishment of the International Criminal Court is a further step towards the effective punishment of persons responsible for having committed the world's gravest crimes. States are urged to ratify the Court's Statute so that these persons cease to enjoy impunity.

COMITÉ INTERNATIONAL DE LA CROIX-ROUGE

NATIONAL COMMITTEES FOR THE IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

The Geneva Conventions of 1949 and their Additional Protocols of 1977 are the principal treaties governing the care and protection of the victims of armed conflict. In order to secure the guarantees established by these instruments, it is fundamental that States implement their provisions to the fullest extent possible. Such implementation requires States to enact a number of internal laws and regulations. For example, States must adopt rules addressing the punishment of violations, the use and protection of the red cross and red crescent emblems, the fundamental rights afforded to protected persons, and other various obligations. In addition, States are bound by a duty to disseminate the Conventions and Protocols as widely as possible. Due to the broad range of issues associated with these responsibilities, comprehensive implementation of the rules of international humanitarian law (IHL) requires the co-ordination and assistance of the appropriate governmental departments and other institutions.

In order to facilitate this process, some States have created interministerial working groups, often called National Interministerial Committees for the Implementation of International Humanitarian Law or National Humanitarian Law Committees. Their purpose is to advise and assist the government in the implementation and dissemination of international humanitarian law. The formation of such committees is recognised as an important step in ensuring the effective application of IHL, and has been advocated by the International Committee of the Red Cross, the Intergovernmental Group of Experts for the Protection of War Victims, and supported at the Twenty-sixth International Conference of the Red Cross and Red Crescent (Geneva, 1995).

The Functions of a National Humanitarian Law Committee

A national committee for the implementation of IHL need not have a specific structure. Its design and objectives are to be determined by the State at the time of the committee's formation. However, since its purpose is to further the implementation and dissemination of IHL at the national level, the committee should possess the following characteristics:

- the committee should be able to evaluate existing national law in relation to the obligations created by the Conventions, Protocols, and other IHL instruments;
- the committee should be in a position to make recommendations to further implementation as well as monitor and ensure the application of the law. This can consist of proposing new legislation or amendments to existing law, co-ordinating the adoption and content of administrative regulations, as well as providing guidance on the interpretation and application of humanitarian rules;
- the committee should play an important role in encouraging the dissemination of IHL. It should have the capacity to conduct studies, propose activities, and assist in the circulation of IHL to all segments of the population. Consequently, the committee should have an association with the instruction of IHL to the armed forces, the teaching of IHL at various levels of education, as well as the distribution of basic IHL to the population at large.

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The Composition of the Committee

In light of these functions, a national humanitarian law committee requires a wide range of expertise. Depending upon the exact role afforded by its mandate, the committee must involve representatives of the government ministries concerned with the application of humanitarian law. These may include representatives of the ministries of Defence, Foreign Affairs, Internal Affairs, Justice, Health, Finance, Education, and possibly others. In addition, representatives of legislative committees and members of the judiciary may also be of value to its work.

It is also important that such a committee include other "qualified persons." These can be individuals, not associated with government ministries, who are appointed for their legal, educational, communications, or other expertise. Thus, the committee should consider specialists with IHL knowledge from universities, especially the faculties of law, humanitarian organisations, and possibly the electronic and print medias.

The Role of the National Red Cross/ Red Crescent Society

The National Red Cross/Red Crescent Society is already likely to be involved in some of the activities and functions mentioned above. Often, the National Society will possess valuable knowledge and experience which can contribute to the committee's objectives. In some States where such committees exist, the National Society requested its establishment and thus, was instrumental in its formation. Further, in several States the National Society acts as the secretariat to the committee. In light of the position and experience of the National Society, it is important that a national committee include their representative(s) among its members.

The Establishment a National Humanitarian Law Committee

The procedure for creating a national humanitarian law committee will depend upon the structure and processes of the State. Generally, the executive power of the government will have the authority to establish such a body.

Implementing International Humanitarian Law

The creation of a national committee can be a useful and important step in ensuring the comprehensive implementation of international humanitarian law. It represents a committed effort to secure the essential guarantees afforded to the victims of armed conflict. In addition, it reflects that a State has undertaken to fulfil the fundamental obligations to respect and ensure respect for IHL.

The creation of such a committee is not mandated by the Geneva Conventions or their Additional Protocols. Its formation, functioning, and composition are issues determined by the establishing State. Consequently, there is considerable flexibility in the role and characteristics a committee may be granted. Some of the most important features have been outlined above. A State is free to consider other characteristics and functions to complement the committee's objectives.

It is important to emphasise that the full implementation of IHL is an ongoing process and is not completed solely by the adoption of laws and regulations. Comprehensive implementation involves monitoring the application and dissemination of the law, as well as keeping informed of and contributing to its development. In light of these observations, it is recommended that a national humanitarian law committee be a permanent body and not an *ad hoc* commission.

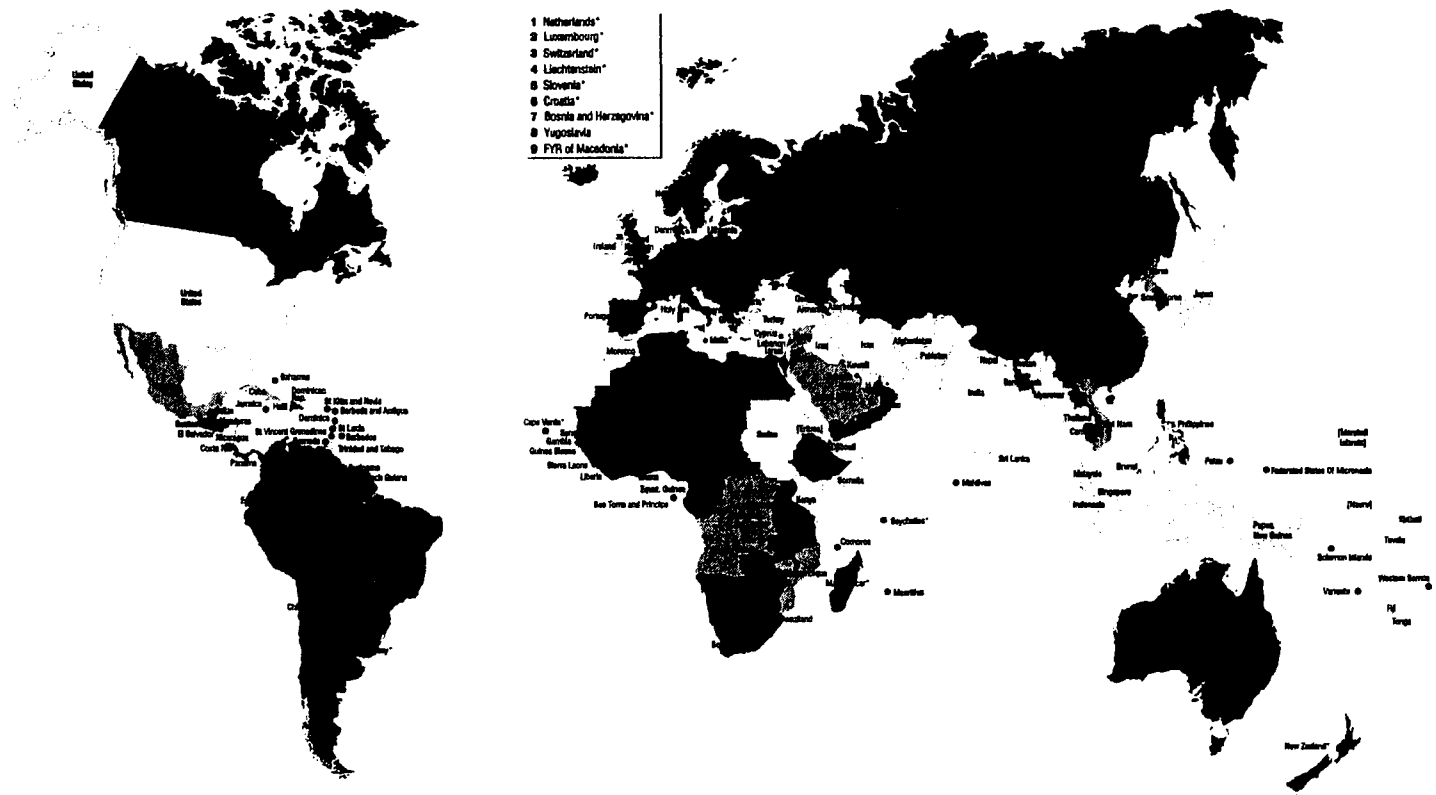
It is also recommended that, once established, a committee develop relationships with other national committees and the International Committee of the Red Cross. Representatives of the national committees should meet regularly and share information concerning current activities or past experiences. This is particularly important among States within the same geographic region or with similar political/legal systems.

For its part, the International Committee of the Red Cross plans to increase and develop its co-operation with national committees concerned with the implementation of IHL. It also stands ready to provide assistance or further information to States interested in forming such committees.

STATES PARTY TO THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS

This map shows which States were party to the 1949 Geneva Conventions and to their 1977 Additional Protocols, as at 31 December 1998. It also indicates which States had made the optional declaration under Article 90 of the 1977 Additional Protocol I, recognizing the competence of the International Fact-Finding Commission.

N.B. The names of the countries given on this map may differ from their official names.



	States party to the 1949 Geneva Conventions:	188
	States party to the 1949 Geneva Conventions and to the 1977 Additional Protocol I:	152
	States party to the 1949 Geneva Conventions and to the 1977 Additional Protocol II:	144
	States party to the 1949 Geneva Conventions and to both Additional Protocols:	142
*	States having made the declaration under Article 90 of the 1997 Additional Protocol I:	53
[ ]	*States non party to the Geneva Conventions and Protocols*	

Commonwealth Member States
IHL Treaties - participation as at 31.01.1999

	Geneva Conv. 1949	Add. Prot. I 1977	Add. Prot. II 1977	IFFC Prot. I Art. 90	CCW 1980 PI-III	CCW P IV laser	CCW P II mine	Hague Conv. 1954	Hague Prot. 1954	Ottawa Conv. 1997	ICC Statute 1998
ANTIGUA AND BARBUDA	1986	1986	1986							1997 sign.	1998 sign.
AUSTRALIA	1958	1991	1991	1992	1983	1997	1997	1984		1999	1998 sign.
BAHAMAS	1975	1980	1980							1998	
BANGLADESH	1972	1980	1980							1998 sign.	
BARBADOS	1968	1990	1990							1999	
BELIZE	1984	1984	1984							1998	
BOTSWANA	1968	1979	1979							1997 sign.	
BRITAIN	1957	1998	1998		1995					1998	1998 sign.
BRUNEI DARUSSALAM	1991	1991	1991							1997 sign.	
CAMEROON	1963	1984	1984					1961	1961	1997 sign.	1998 sign.
CANADA	1965	1990	1990	1990	1994	1998	1998	1998		1997	1998 sign.
CYPRUS	1962	1979	1996		1988			1964	1964	1997 sign.	1998 sign.
DOMINICA	1981	1996	1996							1997 sign.	
FIJI	1971									1998	
GAMBIA	1966	1989	1989							1997 sign.	1998 sign.
GHANA	1958	1978	1978					1960	1960	1997 sign.	1998 sign.
GRENADA	1981	1998	1998							1998	
GUYANA	1968	1988	1988							1997 sign.	
INDIA	1950				1984			1958	1958		
JAMAICA	1964	1986	1986							1998	
KENYA	1966									1997 sign.	
KIRIBATI	1989										
LESOTHO	1968	1994	1994							1998	1998 sign.
MALAWI	1968	1991	1991							1998	
MALAYSIA	1962							1960	1960	1997 sign.	
MALDIVES	1991	1991	1991							1997 sign.	
MALTA	1968	1989	1989	1989	1995					1997 sign.	1998 sign.

Commonwealth Member States
IHL Treaties - participation as at 31.01.1999

	Geneva Conv. 1949	Add. Prot. I 1977	Add. Prot. II 1977	IFFC Prot. I Art. 90	CCW 1980 PI-III	CCW P IV laser	CCW P II mine	Hague Conv. 1954	Hague Prot. 1954	Ottawa Conv. 1997	ICC Statute 1998
MAURITIUS	1970	1982	1982		1996					1997	1998 sign.
MOZAMBIQUE	1983	1983								1998	
NAMIBIA	1991	1994	1994	1994						1998	1998 sign.
NAURU (special member)											
NEW ZEALAND	1959	1988	1988	1988	1993	1998	1998			1999	1998 sign.
[NIGERIA]	1961	1988	1988					1961	1961		
PAKISTAN	1951				1985			1959	1958		
PAPUA NEW GUINEA	1976										
SAMOA	1984	1984	1984							1998	1998 sign.
SEYCHELLES	1984	1984	1984	1992						1997 sign.	
SIERRA LEONE	1965	1986	1986							1998 sign.	1998 sign.
SINGAPORE	1973										
SOLOMON ISLANDS	1981	1988	1988							1999	1998 sign.
SOUTH AFRICA	1952	1995	1995		1995	1998	1998			1998	1998 sign.
SRI LANKA	1959										
ST KITTS AND NEVIS	1986	1986	1986							1998	
ST LUCIA	1981	1982	1982							1997 sign.	
ST VINCENT AND GRENADINES	1981	1983	1983							1997 sign.	
SWAZILAND	1973	1995	1995							1998	
TANZANIA	1962	1983	1983					1971		1997 sign.	
TONGA	1978										
TRINIDAD AND TOBAGO	1963									1998	
TUVALU (special member)	1981										
UGANDA	1964	1991	1991		1995					1997 sign.	
VANUATU	1982	1985	1985							1997 sign.	
ZAMBIA	1966	1995	1995							1997 sign.	1998 sign.
ZIMBABWE	1983	1992	1992							1998	1998 sign.

Note: Each State party to the CCW (1980) is also party to the three first Protocols of 1980

PRINCIPAL TREATIES
OF INTERNATIONAL HUMANITARIAN LAW
(and participation as at 31.01.1999)

Geneva Conventions of 1949 and their Additional Protocols of 1977

188 States party to the Geneva Conventions
152 States party to Protocol I
144 States party to Protocol II

Additional Protocol I - International Fact-Finding Commission (IFFC)

53 States have made a declaration pursuant to Article 90 of Additional Protocol I recognizing the competence of the IFFC

1954 Hague Cultural Property Convention and its Protocol

95 States party to the Convention
79 States party to the Protocol

1980 Conventional Weapons Convention and its four Protocols

73 States party to the Convention
31 States party to amended Protocol II (landmines)
34 States party to new Protocol IV (blinding laser weapons)

1997 Ottawa Convention

64 States party to the Convention (131 signatures)

1998 Statute of the International Criminal Court

74 States have signed the ICC Statute
(first ratification on 02.02.99)

COMITÉ INTERNATIONAL DE LA CROIX-ROUGE

GENEVA CONVENTIONS ACTS: BACKGROUND INFORMATION NOTE

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GENEVA CONVENTIONS ACTS: BACKGROUND INFORMATION NOTE

1. Introduction

All States who are party to the four 1949 Geneva Conventions must adopt a range of national implementation measures. In particular they must ensure that their national laws provide for the punishment of grave breaches of the Conventions, regulation of the use of the red cross, red crescent and other emblems, and the protection of the fundamental guarantees. States who are also parties to the two 1977 Additional Protocols must, in addition, take account of similar obligations arising under these treaties in their national legislation.

Most countries need to introduce specific legislation, or amendments to existing legislation, to ensure that they have complied with their obligations under the Conventions and Protocols. Even where international law is directly applied as part of the legal system, it is usually necessary to adopt implementing legislation to establish, for example, clear legal procedures and penalties for violations.

2. Geneva Conventions Acts

Many countries with a **common law** tradition have adopted a Geneva Conventions Act to provide for the implementation of their obligations under the Geneva Conventions and Additional Protocols. Over 20 countries have adopted such legislation including: Australia, Botswana, Canada, India, Ireland, Kenya, Malawi, Malaysia, New Zealand, Nigeria, Papua New Guinea, Seychelles, Singapore, Uganda, the United Kingdom and Zimbabwe. The wording and structure of each country's Geneva Conventions Act is generally similar.

Some countries, have amended their Geneva Convention Act, through a Geneva Conventions (Amendment) Act, to provide in addition for implementation of the Additional Protocols. These include: Australia, Canada, New Zealand and the United Kingdom. Countries which have adopted a Geneva Conventions Act and subsequently adhere to the Additional Protocols will need to adopt a Geneva Conventions (Amendment) Act to provide for implementation of the Protocols. Countries which are party to both the Conventions and the Protocols and have not yet adopted any legislation will need to adopt a consolidated version of the Geneva Conventions Act which includes provisions implementing the Protocols.

Attached, as examples, are Australia's original Geneva Conventions Act 1957, Geneva Conventions (Amendment) Act 1991 (providing for implementation of Additional Protocol I) and the consolidated version of the 1957 Act which takes account of the 1991 amendments and provides for implementation of both the Conventions and Additional Protocol I.

3. Provisions of the Geneva Conventions Acts

The following outline of the provisions of a typical Geneva Conventions Act refers to the consolidated version of the Australian legislation. It sets out some explanatory remarks, together with references to the relevant provisions of the Geneva Conventions ("GCI", "GCII" etc.) and the Additional Protocols ("PI", "PII"). National references in the text will clearly need to be modified as necessary if adapting the text for use in another country.

It should be stressed that it is for each State party to ensure that it has fully implemented its obligations under the Geneva Conventions and Additional Protocols, having regard to its legal system, constitution, and other legislative provisions. The attached texts of the Australian legislation and the following comments are for general guidance only. They do not indicate an endorsement of the approach followed as the most suitable means of implementing the Conventions and Protocols or an evaluation of the adequacy of the legislation in giving effect to all the relevant obligations. It should also be recalled that there are other obligations arising under the Conventions and Protocols which require implementation through administrative action.

* * *

LONG TITLE

The title refers to all four Geneva Conventions of 1949 but only to the first of the two Additional Protocols of 1977. The long titles of the Acts of a number of countries (e.g. Canada, New Zealand and United Kingdom) refer to both the First and Second Additional Protocols. While States may not always require primary legislation to implement the Second Additional Protocol, the inclusion of its name in the long title (and of its text in the schedules to the Act) is encouraged: see discussion of the Schedules at pg. 8 below.

PART I: PRELIMINARY

Section 1: Title of the act

Section 2: Date of entry into force

Where a State has become a party to the Conventions (and Protocols) it is already obliged to enact implementing legislation: the Act should therefore enter into force as soon as possible. Where a State is amending its existing Geneva Conventions Act, prior to adherence to the Additional Protocols, the amendments should enter into force as soon as the State becomes bound by the Protocols i.e. six months after depositing its instrument of ratification or accession (see PI, Article 95(2)).

Sections 3, 4 : Repealed in the Australian legislation

Section 5: Interpretation

This includes definitions of terms used in the Act including the full official titles of the Conventions and Protocol set out in the schedule. It also defines "protected prisoner of war", "protected internee" and "protecting power". These terms, which are relevant to Part III of the Act, refer in particular to GCIII Articles 4 (prisoners of war), Articles 8 and 10 (protecting powers and substitutes); GC IV Article 4 (protected persons), Articles 9 and 11 (protecting powers and substitutes); PI Article 5 (protecting powers and substitutes), Articles 44, 45 (prisoners of war).

The section also provides for the Conventions and Protocol I to be construed in accordance with any reservations and declarations made by the State at the time of ratification/accession. Where declarations or reservations are made, it is important to ensure that the court is able to take them into account in interpreting the State's obligations.

Section 6: Application

It is important to ensure that the Act applies to a State's entire territory. In relation to punishment of grave breaches it must also have extraterritorial effect (see section 7 below).

PART II: PUNISHMENT OF OFFENDERS

Section 7: Punishment of Grave Breaches

The four Geneva Conventions and their First Additional Protocol define certain serious violations, committed in relation to persons or property protected by the Conventions and Protocol, as "grave breaches". See GCI Article 50; GCII Article 51; GCIII Article 130; GCIV Article 147; PI Articles 11 (4) and 85.

States are obliged to enact criminal legislation punishing those who have committed, or ordered to be committed, grave breaches. States must search for all persons alleged to have committed such violations and either bring them for trial before their own courts or extradite them to another State party. They must do so on the basis of universal jurisdiction - that is, regardless of the nationality of the offender, or the place of the offence. See GCI Article 49; GCII Article 50; GCIII Article 129; GCIV Article 146.

The grave breaches regime is a key element in deterring and punishing serious violations of international humanitarian law. Its legislative implementation is an important obligation for all State Parties.

In many States there is a presumption that the criminal law only applies to acts committed in the territory of that State. It is therefore important to provide expressly for universal jurisdiction, making clear that the section applies both within and outside the territory (subsection 1) and regardless of nationality or citizenship (subsection 3).

Rather than setting out its own definition of grave breaches, subsection 2 refers to the definitions in the Conventions and Protocol I (as set out in the Schedules to the Act). In addition to defining the *actus reus*, these treaty provisions also refer to a *mens rea* of "wilfulness" (although there is some question as to whether this *mens rea* applies to all grave breaches).

There does not yet appear to be any case law arising under a Geneva Conventions Act as to how "wilfulness" is to be construed. Given that the term is used in an international agreement it is not clear that it should have the same meaning as in other domestic statutes or case law. The ICRC commentary on Additional Protocol I defines "wilfully" as meaning that "*the accused must have acted consciously and with intent, i.e. with his mind on the act and its consequences, and willing them ("criminal intent" or "malice aforethought"); this encompasses the concepts of "wrongful intent" or "recklessness", viz. the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered*".

It is important to ensure that the scope of offences also applies to those who order the commission of grave breaches. Subsection (1) refers to a person who "aids, abets or procures the commission by another person" of a grave breach. Under Protocol I certain omissions also constitute grave breaches and this is specified in subsection 2(e)(i).

Subsection 4 stipulates the applicable penalties. These should reflect the seriousness of the offences.

Subsection 5 has been deleted in the Australian legislation.

Subsection 6 provides that the indictment must be in the name of the Attorney General or Director of Public Prosecutions. Other Geneva Conventions Acts impose similar requirements. It should be stressed that there is a clear obligation to search for, and try or extradite, those alleged to have committed grave breaches. The requirement of the consent of the Attorney General, Director of Public Prosecutions or equivalent officer may avoid vexatious prosecutions or the bringing of actions which are not founded in law. It must not however lead to the intrusion of political considerations or a failure to comply with the obligation to search for and try or extradite an alleged offender.

Subsection 7 provides for the application of various legal safeguards set out in section 12 of the Act. This is intended to give effect to the requirement (see, e.g., GCI Article 49, paragraph 4), that those tried for grave breaches must at least have the same safeguards of proper trial and representation as are provided for prisoners of war in the Third Geneva Convention.

Internal Armed Conflicts:

The four Geneva Conventions and the First Additional Protocol regulate **international** armed conflicts and the grave breaches regimes therefore only apply to acts committed in such conflicts. **Internal** armed conflicts are regulated by Article 3 common to each Convention and Additional Protocol II. States must repress violations of these provisions but there is no obligation to enact criminal law or to do so on the basis of universal jurisdiction (i.e. regardless of the place of the offence or nationality of the offender).

Today the majority of serious violations of international humanitarian law are committed in internal conflicts. Moreover it is now accepted that States may exercise universal jurisdiction over serious violations committed in internal armed conflict. While some violations of Common Article 3 or Protocol II may be covered by general criminal law, this will usually only apply to acts committed by a national or on the State's territory; moreover general criminal law may not cover all violations. The ICRC therefore urges States to extend the scope of their Geneva Conventions Acts to cover, on the basis of universal jurisdiction, serious violations of Common Article 3 and Protocol II. Guidance on the drafting of such a provision can be provided by the ICRC's Advisory Service.

Other Violations

It has also been proposed that the following violations of Additional Protocol I should be treated as if they were grave breaches and covered in the legislation: Article 37(1) (perfidy), Article 40 (denial of quarter), and Articles 42(1) and (2) (attacks on persons parachuting from aircraft in distress or where such a person has not been given the opportunity to surrender). The violations of these prohibitions, which largely protect combatants rather than protected persons such as civilians, are not grave breaches and there is no obligation to enact legislation punishing them. However serious consideration should be given to whether they are adequately punished under other legislation or military regulations and, if not, whether they should also be covered. For further guidance, please contact the ICRC's Advisory Service. [See Meyer and Rowe: *The Geneva Conventions (Amendment) Act 1995: A Generally Minimalist Approach, International and Comparative Law Quarterly, Vol. 45 at pg. 476].*

Section 8: Proof of Application of Convention or Protocol I

In order to constitute a grave breach, an act must be committed in a situation covered by the Geneva Conventions and/or Additional Protocol I, as defined in Article 2 of each Convention and Article 1 of Protocol I. The issue of the

application of the Conventions and Protocol I may require an evaluation of international events and in particular whether there is an international armed conflict. The Geneva Conventions Acts therefore provide for the Minister of Foreign Affairs, or equivalent, to submit a certificate on matters relevant to these provisions.

Section 9: Repealed in the Australian legislation

Section 10: Jurisdiction of the Courts

This provision defines the courts which are to have jurisdiction to try the above offences. This will clearly vary from country to country but it is important to ensure that the court is of a sufficient level to treat the difficult legal and political issues which may arise and to impose penalties reflecting the seriousness of the offences.

While some acts committed by a State's military personnel may be tried by courts martial as violations of military law, most States appear to retain the option of trying the most serious offences before its ordinary courts as an alternative to court martial. It should be noted that the definition of "court" under the Act expressly excludes a court martial or service court (see section 5).

PART III: LEGAL PROCEEDINGS IN RESPECT OF PROTECTED PERSONS

Section 10A: Status as Protected Prisoner of War

Section 11: Notice of Trial of Protected Prisoner of War/Internee

Section 12: Legal Representation of Prisoners of War

Section 13: Appeals by Protected Prisoners of War/Internees

Section 14: Reducing Sentence of Protected Prisoners of War/Internees

The above five sections set out in detail the safeguards which are to apply in relation to the trial and sentencing of prisoners of war (under the Third Geneva Convention) and civilian internees (under the Fourth Geneva Convention). References to the Supreme Court, Defence Force, Commonwealth (i.e. Australia), Attorney General, solicitor or counsel will need to be modified as appropriate.

Section 10A provides for the determination of whether someone is entitled to prisoner of war status (PI, Article 45). Section 11 provides for the service of the notice of trial of a prisoner of war (GC III, Article 104) or internee (GC IV, Article 71). Section 12 sets out arrangements for the legal representation of prisoners of war (GCIII, Article 105). Consideration should be given to extending the scope of this provision to internees (see GCIV, Article 72). Section 13 set out the procedures for appeals by prisoners of war (GC III, Articles 106, 107) and

internees (GC IV, Article 73). Section 14 regulates the reduction of sentences or custody imposed on prisoners of war and internees.

PART IV: ABUSE OF THE RED CROSS AND OTHER EMBLEMS ETC.

Section 15: Use of Red Cross and other Emblems etc.

The Geneva Conventions provide for the use of the emblem of the red cross, red crescent and red lion and sun to identify protected persons, places and transports (such as medical personnel, hospitals and ambulances). The use of these emblems and their names (as well as markings or wording which may be confused with the emblems) is strictly controlled (GCI, Articles 38-44; GCII, Articles 41-44; PI, Article 38). States are obliged to take measures to prohibit and prevent any misuse (GCI, Article 53; GCII, Article 54).

Protocol I provides for the use of other protective emblems and signals (Annex I). It prohibits the misuse of all internationally recognised protective emblems, signs and signals (Article 38(1)), the protective emblem of cultural property (Article 38(1)), the UN emblem (Article 38(2)), the civil defence emblem (Article 66(8)), and the insignia and uniforms of neutral States (Article 39(1)).

Having regards to these provisions, the Geneva Conventions Act makes the misuse of the above emblems, signs, etc. a **criminal offence.**

Subsection 1 prohibits (unless there is consent of the Minister) the use of the emblem and name of the red cross, red crescent, red lion and sun, the Swiss flag, and designs or wording which may be confused with these emblems and names. It similarly prohibits the use of emblems, identity cards, signs, signals and uniforms as necessary to give effect to Protocol I.

Given the complexity of monitoring and enforcing correct use of the emblem and other signs, it is important to identify clearly the authority responsible for regulating its use. It may therefore be advisable, in the Act or in secondary legislation, to designate a specific Minister to oversee these matters.

Subsection 2 limits the Minister's right to refuse the use of the emblem or other signs to cases required under the Conventions and Protocol I. It is clearly essential to ensure that the responsible Minister or authority is familiar with the full range of restrictions under the Conventions and Protocols.

Subsections 3 and 5 deal with limited cases where rights to use the emblems and names, or other similar markings, may have been acquired before the entry into force of the Act. The application of these Sections must be in conformity with the Conventions and Protocols and in particular GCI Article 53.

It is also important that an adequate fine is imposed. To prevent misuse for commercial purposes, or repeated misuse, it is advisable, as in subsection 4 to

provide for forfeiture of goods used in the commission of the offence. It is also advisable, as in subsection 6, to enable adequate action to be taken against companies and other bodies corporate.
Subsection 7 extends the scope of the section extraterritorially to use on any ship or aircraft registered in Australia. This is strongly advised given the need to ensure comprehensive protection of the emblem.

Subsection 8 makes the institution of criminal proceedings dependent on the consent of the Attorney General. While there is no *obligation* to prosecute misuses of the emblems and other signs, it is important to ensure that adequate action is taken against violations. In some countries the National Red Cross or Red Crescent Society plays an important role in monitoring use of the emblem and other signs and informing the responsible authority when a misuse should be investigated and, if necessary, prosecuted.

PART V: REGULATIONS

Section 16: Making of Regulations

This is a general enabling provision under which regulations may be made to implement the provisions of the Act. Some countries have found it necessary or helpful to supplement the provisions of their Geneva Conventions Act with detailed regulations on the use of the emblem or the disciplinary regime applicable to prisoners of war. Where such regulations facilitate the full and proper implementation of the Conventions and Protocols they are of course to be encouraged. It is therefore advised that a such a provision providing for the making or regulations should be included.

SCHEDULES

These are the complete texts of the four Geneva Conventions and Additional Protocol I. These instruments are cited in certain sections of the Act (e.g. in sections 7 and 8) and reference to the schedules is clearly necessary in applying these provisions. In some versions of the Act, e.g. the United Kingdom's Geneva Conventions Act, the text of Protocol II is also scheduled. Given the general obligation to disseminate the Conventions and Protocols as widely as possible (GCI: Art. 47; GCII: Art. 48; GC III: Art. 127; GC IV: Art. 144; PI: Art. 83; PII: Art. 19) the publication of the texts as schedules to the Act is helpful, and the inclusion of all the Conventions and Protocols is therefore encouraged. It also ensures that the national court has before for it the entire scheme of the Conventions and Protocols in applying the Act. In some cases, it may also be necessary to refer to Protocol II in drawing up regulations on the use of the emblem (see section 16 above). Where the Act also provides for punishment of violations of Protocol II (see discussion of Internal Armed Conflicts under section 7 above) it is clearly essential to schedule the text of the Protocol.

There has been some discussion as to whether the entire texts of the Conventions and Protocols, as schedules to the Act, may be considered to be part of national law and therefore directly invoked before the courts. This will depend on the approach to legislative interpretation followed in the country concerned. It should be noted however that Geneva Conventions Acts usually only refer to certain provisions of the Conventions and Protocols (as in section 7 above) - they do not expressly provide that the entire texts are to be part of domestic law. The only judicial authority on this point is the 1967 English High Court case, Cheney v Conn [1968] 1 All ER 779 which held that the United Kingdom Geneva Conventions Act did not make the scheduled Geneva Conventions parts of domestic law.

Ref. : Geneva Conventions Act 1957 (Australia)
Geneva Conventions (Amendment) Act 1991 (Australia)
Geneva Conventions Act (Australia) (consolidated version, i.e. 1957 Act as amended)