

**RULES OF INTERNATIONAL  
HUMANITARIAN LAW  
GOVERNING THE CONDUCT  
OF HOSTILITIES  
IN NON-INTERNATIONAL  
ARMED CONFLICTS**

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## 1. INTRODUCTION

The 14th Round Table on international humanitarian law was held on 13 and 14 September 1989 at the International Institute of Humanitarian Law in San Remo. Its theme was "Rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts".

In view of the large number of participants (about 150), it was decided to form two working groups and divide the Round Table topic into two sub-topics. The Round Table was to study first the general rules governing the conduct of hostilities in non-international armed conflicts (sub-topic A) and then the prohibitions and restrictions on the use of certain weapons in non-international armed conflicts (sub-topic B).

It was agreed that each group would examine, in turn, some questions dealing with sub-topic A and questions dealing with sub-topic B.

The discussions were based on two reports, one written by Professor Konstantin Obradovic (for sub-topic A) and the other by Professor Horst Fischer (for sub-topic B). The reports were presented orally in plenary session. The subsequent discussions of the two working groups were chaired by Professor L. R. Penna and Professor Dietrich Schindler, and there was a panel consisting of two experts and the rapporteurs for sub-topics A and B. One of the experts in each group commented on the relevant report before opening the discussions.

Discussions were conducted and conclusions drawn up on all the rules studied by the working groups, with the exception – for lack of time – of the rule relating to the protection of medical zones and other places of refuge set up by agreement of parties to an armed conflict.

A summary of each group's conclusions was presented in plenary session by the general rapporteur, Mr. René Kosirnik. In the course of a brief discussion which followed, it was suggested and accepted that the conclusions of the Round Table and their commentary be submitted for approval to the Council of the International Institute of Humanitarian Law.

On 7 April 1990, the Council of the International Institute of Humanitarian Law approved the present conclusions as well as their commentary and adopted the Declaration annexed hereto.

## 2. CONCLUSIONS AND COMMENTARY

### I. Preliminary remarks

The 14th Round Table dealt with the general rules governing the conduct of hostilities in non-international armed conflicts independently of the existence of treaty provisions adopted expressly for this type of conflict, as well as with the prohibitions and restrictions on the use of certain weapons in such conflicts.

The Judgment of the International Court of Justice of 27 June 1986 on the case concerning military and paramilitary activities in and against Nicaragua states that the rules defined in Article 3 common to the 1949 Geneva Conventions "in the event of international armed conflicts, also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and that they are rules which (...) reflect what the Court in 1949 called "elementary considerations of humanity".<sup>1</sup> The general rule of international humanitarian law is therefore seen as a standard of behaviour expressing a general, basic principle of conduct which underlies all international humanitarian law.

The first attempts to codify humanitarian rules governing the conduct of hostilities were made towards the end of the nineteenth century and resulted in particular in the Regulations Concerning the Laws and Customs of War on Land annexed to the Hague Convention No. II of 1899 and later to the Hague Convention No. IV of 1907 (hereinafter: The Hague Regulations); these give important indications on the content of general rules governing the conduct of hostilities since they laid down the rules which are the foundation of the whole body of international humanitarian law and gave a normative content to the principle of humanity.

The resolutions of the United Nations General Assembly, especially Resolution 2444 (XXIII) relative to the Respect for Human Rights in Armed Conflicts, adopted on 19 December 1968 (hereinafter: Resolution 2444 (XXIII), of 19 December 1968), and Resolution 2675 (XXV) which summarizes the Basic Principles for the Protection of Civilian Populations in Armed Conflicts, adopted on 9 December 1970 (hereinafter: Resolution 2675 (XXV), of

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<sup>1</sup> International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders*. Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, p. 114, para. 218.

9 December 1970), confirm the general character of certain rules governing the conduct of hostilities.

When seeking evidence of legal instruments dealing with such rules, international human rights law should also be taken into consideration. The development of this branch of law is particularly interesting as regards non-international armed conflicts: by moving towards greater international competence in the field of the relations of a State with its own nationals, it facilitates the acceptance of restrictions on the choice of methods and means of warfare in such conflicts. In addition, defending the same fundamental values as international humanitarian law, it further helps to establish the general character of some of the rules of international humanitarian law.

As regards the relation between customary and treaty law applicable to non-international armed conflicts, it should be remembered that about half the States making up the international community have ratified or acceded to Protocol II additional to the 1949 Geneva Conventions. As for Article 3 common to the 1949 Geneva Conventions, that binds 166 States, if at the outset it aimed to protect persons in enemy hands, it is today interpreted as applying also to the protection of individuals against the effects of hostilities.

The legal instruments under consideration here are thus taken as expressions of the States' shared conviction with respect to rules governing the conduct of hostilities in non-international armed conflicts.

## **II. General rules governing the conduct of hostilities and prohibitions and restrictions on the use of certain weapons in non-international conflicts**

### **A. GENERAL RULES GOVERNING THE CONDUCT OF HOSTILITIES APPLICABLE IN NON-INTERNATIONAL ARMED CONFLICTS**

#### ***1. Distinction between combatants and civilians***

*The obligation to distinguish between combatants and civilians is a general rule applicable in non-international armed conflicts. It prohibits indiscriminate attacks.*

COMMENTARY:

The rule obliging actors to an armed conflict to distinguish between combatants and civilians in the conduct of military operations is one of the fundamental principles of international humanitarian law on the conduct of hostilities.

This rule, an indispensable corollary to the principle of immunity of the civilian population, can be found in the earliest texts of international humanitarian law. The 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 grammes Weight (hereinafter: the St. Petersburg Declaration) lays down the principle that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”. Article 25 of the Hague Regulations stipulates that “the attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited” (1907 version). The rule imposing the distinction between combatants and civilians was also reaffirmed in Resolutions 2444 (XXIII), of 19 December 1968 and 2675 (XXV), of 9 December 1970, and is implied in the terms of Article 13, paragraph 2, relative to the protection of the civilian population, of the 1977 Protocol II. The protection of the life and person of those taking no active part in the hostilities, stipulated in paragraph 1(a) of Article 3 common to the Geneva Conventions, also implies respect for the rule on the distinction between combatants and civilians.

Acts violating this rule include, in particular, indiscriminate military attacks – in other words, attacks launched at or affecting the civilian population without discrimination.

## ***2. Immunity of the civilian population***

*The prohibition of attacks against the civilian population as such or against individual civilians is a general rule applicable in non-international armed conflicts. Acts of violence intended primarily to spread terror among the civilian population are also prohibited.*

COMMENTARY:

The protection of the civilian population against the effects of hostilities implies the prohibition of attacks against that population as such or against individual civilians, and is part of the rule on the distinction between combatants and civilians.

This rule, too, appears in the earliest texts of international humanitarian law, such as The Hague Regulations (Article 25). Of the more recent texts, Resolution 2444 (XXIII), of 19 December 1968, states expressly in its paragraph 1(b) that “it is prohibited to launch attacks against the civilian population as such”, while Resolution 2675 (XXV), of 9 December 1970, reaffirms the rule, stipulating in its paragraph 4 that “civilian populations as such should not be the object of military operations”. Protocol II, for its part, states that the “civilian population as such, as well as individual civilians, shall not be the object of attack” (Article 13, paragraph 2, first sentence). Lastly, such attacks are incompatible with the rule on the protection of the life and person of those taking no active part in the hostilities, as set out in paragraph 1(a) of Article 3 common to the 1949 Geneva Conventions.

The rule prohibiting attacks designed primarily to spread terror among the civilian population is set forth in Article 13, paragraph 2, second sentence of the 1977 Protocol II, though the underlying principle goes as far back as the Draft Rules of Air Warfare prepared in The Hague in 1923 (Article 22). Such attacks are contrary to the concept that the purpose of military attacks should be to weaken the enemy’s military forces. The rule aims to protect the morale of the civilian population which, like its physical integrity, should not become the object of military operations.

It appears, however, that not all forms of conduct proscribed by Article 13, paragraph 2, second sentence of Protocol II fall within the scope of the general rule as specified above; indeed, it has not been established that the rule covers also the *threat* of violence.

### ***3. Prohibition of superfluous injury or unnecessary suffering***

*The prohibition of superfluous injury or unnecessary suffering is a general rule applicable in non-international armed conflicts, it prohibits, in particular, the use of means of warfare which uselessly aggravate the sufferings of disabled men or render their death inevitable.*

#### COMMENTARY:

The prohibition of superfluous injury or unnecessary suffering is set forth explicitly in the first legal instruments governing the conduct of hostilities: the St. Petersburg Declaration contains a provision stating that “the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable” would be

“contrary to the laws of humanity”, revealing the direct link between this rule and the principle of humanity.

The prohibition of unnecessary suffering is also to be found in Article 23(e) of The Hague Regulations. It is compounded by the rule providing that the right of the actors of a conflict to adopt means of warfare is not unlimited, laid down, *inter alia*, in Resolution 2444 (XXIII), of 19 December 1968. The prohibition is, consequently, at the origin of all the prohibitions or restrictions on the use of certain weapons.

In the more recent legal texts, such as Article 35, paragraph 2 of the 1977 Protocol I, and Article 6, paragraph 2, of the Second Protocol of the Convention on the use of certain conventional weapons of 10 October 1980, the French term “*maux superflus*” covers both notions of “unnecessary suffering” and “superfluous injury”.

The legal effect of the prohibition of superfluous injury or unnecessary suffering primarily covers the means of warfare, though it also applies to certain methods of warfare (cf., for example, Articles 40 to 42 of the 1977 Protocol I). In the former instance the prohibition of superfluous injury or unnecessary suffering protects all persons who are affected by an attack, whereas in the latter only combatants are covered.

The prohibition of superfluous injury or unnecessary suffering is closely related to the principle of proportionality. However, the protection of civilians against attacks which violate this principle is not within the scope of the prohibition since, as mentioned above, in such cases only combatants are covered. The rules applicable in such situations would be those prohibiting indiscriminate attacks (see Section 1 above).

Since the general rule prohibiting superfluous injury or unnecessary suffering protects persons taking no active part in the hostilities (with respect to means of warfare) or no longer taking an active part in them (with respect to methods of warfare), it sets out more explicitly the provisions of Article 3 common to the Geneva Conventions which prohibits violence to life and person.

#### **4. Prohibition of perfidy**

*The prohibition to kill, injure or capture an adversary by resort to perfidy is a general rule applicable in non-international armed conflicts; in a non-international armed conflict, acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or*



*is obliged to accord, protection under the rules of international law applicable in non-international armed conflicts, with intent to betray that confidence shall constitute perfidy.*

COMMENTARY:

Article 23(b) of The Hague Regulations already contained the prohibition on “treacherously” killing or wounding enemy soldiers. The prohibition of such conduct is at the junction of several principles: good faith, chivalry, as well as the principle restricting the parties’ choice of methods of warfare. In legal writings, the prohibition of perfidy is seen as a rule of customary law applicable in non-international armed conflicts.

The elements making up the general rule include inviting a person’s confidence, the intent to betray that confidence, and the existence of protection accorded by international law applicable in armed conflicts, the betrayal consisting in leading the adversary to believe that the perpetrator of the perfidious act is entitled to such protection.

In non-international armed conflicts, the prohibition of perfidy consists essentially in forbidding conduct which, combining the above elements, destroys the protection granted under international humanitarian law applicable in non-international conflicts. In the context of such conflicts, perfidy is defined as consisting in acts inviting the confidence of an adversary to lead him, with intent to betray him, to believe that the perpetrator of the perfidious act is entitled to receive protection under the rules of international humanitarian law applicable in non-international armed conflicts, similarly, to lead the adversary to believe that he is obliged to grant such protection to the perpetrator of the perfidious act.

In non-international armed conflicts the prohibition of perfidy is of particular interest as regards respect for the emblem since it includes the prohibition of its perfidious use.

***5. Respect for and protection of medical and religious personnel and of medical units and transports***

*The obligation to respect and protect medical and religious personnel and medical units and transports in the conduct of military operations is a general rule applicable in non-international armed conflicts.*

COMMENTARY:

Article 3 common to the Geneva Conventions lays down the general principle on the protection of persons not taking an active part in the hostilities or placed *hors de combat* as a result of illness or injury, as well as the specific obligation to collect and care for the sick and wounded. Moreover, Articles 9 and 11 of Additional Protocol II set forth the obligation for the actors of a non-international armed conflict to respect and protect medical and religious personnel and medical units and transports in the conduct of military operations.

In this context, “to protect” means “to spare”, not “to attack”, whereas “respect” means “to come to someone’s defence, to lend help and support”.

According to the Commentary on Additional Protocol II, Article 9 covers the following categories of medical personnel:

1. medical personnel of a party to the conflict, whether military or civilian (including those assigned to medical tasks of civil defence);
2. medical personnel of Red Cross and Red Crescent organizations recognized and authorized by a party to the conflict;
3. medical personnel of other aid societies recognized and authorized by a party to the conflict and located within the territory of the Contracting Party where the conflict is taking place.<sup>2</sup>

According to the same source, religious personnel includes military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached either:

1. to the armed forces of a party to the conflict;
2. to medical units or medical transports of a party to the conflict;
3. to medical units or medical transports of relief societies authorized by a party to the conflicts; or
4. to civil defence organizations of a party to the conflict.<sup>3</sup>

The general – even peremptory – nature of the rules is not contested and requires no special comment.

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<sup>2</sup> *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, eds., ICRC, Martinus Nijhoff Publishers, Geneva, 1989, pp. 1419-1420, paras. 4665 *et seq.*, especially para. 4665.

<sup>3</sup> *Ibid.*, pp. 1420-1421, paras. 4670-4671.

## **6. Prohibition of attacks on dwellings and other installations used only by the civilian population**

*The general rule prohibiting attacks against the civilian population implies, as a corollary, the prohibition of attacks on dwellings and other installations which are used only by the civilian population.*

### COMMENTARY:

Resolution 2675 (XXV), of 9 December 1970, states in its paragraph 5 that "Dwellings or other installations that are used only by civilian populations should not be the object of military operations". Similar rules can be found in the first legal instruments containing provisions on the conduct of hostilities: the 1880 Oxford Manual (Article 32(c)) and The Hague Regulations (Article 25) prohibit attacks on undefended places, while the Draft Rules of Air Warfare, prepared in The Hague in 1923, prohibit "the bombardment of cities, towns, villages dwellings or buildings not in the immediate neighbourhood of the operations of land forces" (Article 24, paragraph 3).<sup>4</sup>

Independently of the origin of the rule set out in Resolution 2675 (XXV), of 9 December 1970, the prohibition of attacks on dwellings and other installations used by the civilian population stems from the principle of immunity of the civilian population.<sup>5</sup>

Indeed, attacks on dwellings and other installations used only by the civilian population run counter to the principle according to which the sole purpose of military operations should be to weaken the enemy's military strength.

## **7. Protection of objects indispensable to the survival of the civilian population**

*The general rule prohibiting attacks against the civilian population implies, as a corollary, the prohibition to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population.*

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<sup>4</sup> *The Laws of Armed Conflicts*, Dietrich Schindler and Jiri Toman (Ed.), Martinus Nijhoff Publishers, Henry Dunant Institute, Geneva, 1988, No. 24, p. 207.

<sup>5</sup> Bothe, Michael, Partsch, Karl Josef and Solf, Waldemar A., *New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949*, Martinus Nijhoff Publishers, The Hague, 1982, p. 657.

## COMMENTARY:

Article 14 of Additional Protocol II lays down specific rules regarding the protection of objects indispensable to the survival of the civilian population.

This issue often features prominently among the concerns of the International Committee of the Red Cross; it was mentioned, for example, in the context of the armed conflict in El Salvador<sup>6</sup> and on several occasions with respect to the conflict in Rhodesia/Zimbabwe, one of them being the appeal for the respect of international humanitarian law, launched on 20 March 1979.<sup>7</sup>

As stated in the Commentary on the Additional Protocols of 1977, the prohibition on attacking, destroying, removing or rendering useless any objects indispensable to the survival of the civilian population "is really only a specific application of common Article 3, which imposes on parties to the conflict the obligation to guarantee humane treatment for all persons not participating in hostilities, and in particular prohibits violence to life".<sup>8</sup> This rule develops the principle under which the civilian population must be protected against the effects of hostilities and must not become the object of military operations.

The objects identified as being indispensable to the survival of the civilian population and listed as such in Article 14 of Protocol II are foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works. The list serves as an illustration only, and is not exhaustive.

Acts prohibited by the above rule also fall within the scope of the prohibition of starvation as a method of warfare if they are carried out with that object in mind or result in it.

### **8. *Precautionary measures in attack***

*The general rule to distinguish between combatants and civilians and the prohibition of attacks against the civilian population as such or against individual civilians implies, in order to be effective, that all feasible precautions have to be taken to avoid injury, loss or damage to the civilian population.*

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<sup>6</sup> International Committee of the Red Cross, *Annual Report 1985*, p. 36.

<sup>7</sup> *International Review of the Red Cross*, No. 209, March-April 1979, p. 88.

<sup>8</sup> *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, op. cit.*, p. 1456, para. 4794.

COMMENTARY:

The rule imposing the obligation to distinguish between combatants and civilians, as well as that prohibiting attacks against the civilian population as such or against individual civilians, require that during various phases of the attack all feasible precautions be taken to avoid affecting the civilian population.<sup>9</sup>

This rule is also set out in paragraph 3 of Resolution 2675 (XXV), of 9 December 1970: "In the conduct of military operations during armed conflicts, every effort should be made to spare civilian populations from the ravages of war, and all precautions should be taken to avoid injury, loss or damage to civilian populations".

Compliance with the rule on the protection of life and person, set out in Article 3 common to the Geneva Conventions, likewise requires, by inference, that necessary measures be taken to avoid harming the civilian population in the event of military attacks.

As regards the actual measures that should be taken, Article 57 of Additional Protocol I contains some very useful information.

***B. PROHIBITIONS AND RESTRICTIONS ON THE USE OF CERTAIN WEAPONS IN NON-INTERNATIONAL ARMED CONFLICTS***

***1. Chemical and bacteriological weapons (1925 Protocol)***

*The customary rule prohibiting the use of chemical weapons, such as those containing asphyxiating or vesicant agents, and the use of bacteriological (biological) weapons is applicable in non-international armed conflicts.*

COMMENTARY:

The prohibition of chemical weapons dates back to the first codified rules on the conduct of hostilities prohibiting the use of poison, such as the Lieber Code of 1863 (Article 70) and The Hague Regulations (Article 23(a)). In 1899 chemical weapons were expressly

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<sup>9</sup> *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, op. cit.*, p. 1449, para. 4772. Cf. also Cassese, Antonio, "The Spanish Civil War and the Development of Customary Law concerning Internal Armed Conflicts", in: *Current Problems of International Law: Essays on U.N. Law and on the Law of Armed Conflict*, Milano, Dott. A. Guiffrè Editore, 1975, pp. 287-318, at p. 310.

prohibited by The Hague Declaration banning “the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases” (first paragraph of the Declaration).

With regard to international armed conflicts, the 1925 Geneva Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of combat is still in force. Since the prohibition of chemical weapons is generally considered to be a customary rule, it should be determined whether it applies also to non-international armed conflict and, if so, what is its scope of application.

The resolutions on the protection of persons against the effects of hostilities, applicable in all armed conflicts, expressly mention the prohibition of the use of toxic gases. Resolution XXVIII adopted by the Twentieth International Conference of the Red Cross (Vienna, 1965) calls on all Governments to accede to the 1925 Geneva Protocol; this appeal was also included by the United Nations General Assembly in Resolution 2444 (XXIII), of 19 December 1968.

In Resolution 3318 (XXIX) of 14 December 1974 on the protection of women and children in emergency and armed conflict, the General Assembly stated that “The use of chemical and bacteriological weapons in the course of military operations constitutes one of the most flagrant violations of the Geneva Protocol of 1925, the Geneva Conventions of 1949 and the principles of international humanitarian law”.

In a declaration adopted at the close of the 1989 Paris Conference on chemical weapons, the participating States undertook not to use chemical weapons and to condemn their use by others,<sup>10</sup> without any reference being made to international armed conflicts. The work of the Ad Hoc Committee on chemical weapons, created within the framework of the Conference on Disarmament, is based on the premise of a total ban on chemical weapons, regardless of the type of conflict. Paragraph 3 of the general provisions on the scope of application of the future convention reads as follows: “Each State Party undertakes not to use chemical weapons”.<sup>11</sup>

Following the use of chemical weapons by Iraq in the region of Halabja in Iraqi Kurdistan, the ICRC reaffirmed in a press release of 23 March 1988 that “The use of chemical weapons, whether against

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<sup>10</sup> Letter addressed to the Secretary-General by the Permanent Representative of France to the United Nations, A/44/88.

<sup>11</sup> See the *Report of the Ad Hoc Committee on Chemical Weapons to the Conference on Disarmament on its Work during the period 17 January to 3 February 1989*, CD/881, 3 February 1989, Appendix I, p. 11.

military personnel or civilians, is absolutely forbidden by international law and is to be condemned at all times".<sup>12</sup>

Every analysis of the customary rules prohibiting chemical weapons invariably raises the question of their scope of application. It seems that these rules cannot as yet be extended to include riot control agents – mainly tear gas – even though such an extension appears advisable in view of the grave considerations which led to the prohibition of chemical weapons and furthermore the demands for respect for fundamental human rights.

The prohibition of the use of bacteriological (biological) weapons is laid down in the 1925 Protocol, while the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 10 April 1972 confirmed the customary – as well as general – character of the ban on the use of any biological agents for military purposes. The prohibition of the use of bacteriological weapons in non-international armed conflicts stems also from the ban on the use of poison (see Section 3 below).

Biological agents are "living organisms, whatever their nature, or infective material derived from them, which are intended to cause disease or death in man, animals or plants, and which depend for their effects on their ability to multiply in the person, animal or plant attacked".<sup>13</sup> Toxins, also listed in the 1972 Convention on bacteriological weapons, are composed of biologically produced chemical substances which act when ingested or inhaled.

The prohibition of the use of chemical and bacteriological weapons in non-international armed conflicts thus constitutes an application of the general rule prohibiting superfluous injury and unnecessary suffering.

## ***2. Bullets which expand in the human body (such as dum-dum bullets)***

*The customary rule prohibiting the use of bullets which expand or flatten easily in the human body, such as dum-dum bullets, is applicable in non-international armed conflicts.*

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<sup>12</sup> International Committee of the Red Cross, *Press release No. 1567* of 23 March 1988.

<sup>13</sup> See International Committee of the Red Cross, *Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects*, Report on the work of a group of experts, Geneva, 1973, p. 21.

COMMENTARY:

Bullets which expand in the human body belong to the category of penetrating weapons. Their use was prohibited as early as 1899 by the International Peace Conference held in The Hague: in a declaration annexed to the Final Act of the Conference (Declaration III), the participants agreed "to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions". The declaration was aimed at dum-dum bullets in particular, as evidenced by the second part of the passage quoted, though its first part seems to indicate that the prohibition is a general one and applies to all bullets which expand on impact because, inter alia, of an insufficiently hard nose.

This prohibition was reaffirmed in Article 16, paragraph 2, of the Oxford Manual on the rules of naval warfare, prepared in 1913 by the Institute of International Law.

The customary and general nature of the prohibition laid down in Declaration III of The Hague is not currently contested.

The prohibition of the use of expanding bullets in non-international armed conflicts is thus an application of the general rule prohibiting superfluous injury and unnecessary suffering.

### **3. Poison**

*The customary rule prohibiting the use of poison as a means or method of warfare is applicable in non-international armed conflicts.*

COMMENTARY:

The use of poison was formally prohibited in 1899 already, by The Hague Regulations (Article 23(a)). As mentioned in Section 1 above, this prohibition is at the origin of the ban on the use of chemical or bacteriological agents for military purposes.

The prohibition covers the use of poison both as a means and a method of warfare. Besides, even if the use of chemical or bacteriological agents is covered by specific customary prohibitions, the prohibition of poison remains appropriate because of the possible use of non-bacteriological natural substances. In fact, any substance which interferes with vital body functions constitutes poison.



The customary and general nature of the prohibition of poison is not contested at present.

The prohibition of poison as a means or method of warfare in non-international armed conflicts thus constitutes an application of the general rule prohibiting superfluous injury and unnecessary suffering.

#### **4. Mines, booby-traps and other devices**

*In application of the general rules listed in section A above, especially those on the distinction between combatants and civilians and on the immunity of the civilian population, mines, booby-traps and other devices within the meaning of Protocol II to the 1980 Convention on conventional weapons may not be directed against the civilian population as such or against individual civilians, nor used indiscriminately.*

*The prohibition of booby-traps listed in Article 6 of that Protocol extends to their use in non-international armed conflicts, in application of the general rules on the distinction between combatants and civilians, the immunity of the civilian population, the prohibition of superfluous injury or unnecessary suffering, and the prohibition of perfidy.*

*To ensure the protection of the civilian population referred to in the previous paragraphs, precautions must be taken to protect them from attacks in the form of mines, booby-traps and other devices.*

#### **COMMENTARY:**

The rules governing the use of mines, booby-traps and other devices are laid down in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, adopted on 10 October 1980.

In addition to delayed-action explosives such as mines and booby-traps, Protocol II deals with weapons covered by the term "other devices", which are "manually-emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time" (Article 2, paragraph 3).

The Protocol does not prohibit the use of mines, booby-traps and other devices. Only the use of certain booby-traps likely to attract civilians or children, or designed to cause superfluous injury or unnecessary suffering is prohibited (Article 6, paragraphs 1 and 2). Outside this prohibition all other uses of mines, booby-traps and other devices are subject to general and specific restrictions.

The general restrictions, set out in Article 3, prohibit directing these weapons against the civilian population as such or against individual civilians, or using such weapons indiscriminately. These provisions thus implement the rules on the immunity of the civilian population and the distinction between combatants and civilians.

The specific restrictions vary depending on the placement of the mines.

The use of remotely delivered mines, i.e. "by artillery, rocket, mortar or similar means or dropped from an aircraft" (Article 2, paragraph 1 *in fine*) is thus prohibited except in strictly regulated circumstances, namely within an area which constitutes a military objective or which contains such objectives (Article 5, paragraph 1, first sentence). The exceptions to this prohibition are subject to extremely strict conditions: remotely delivered mines may be used only within an area which is itself a military objective or which contains military objectives (Article 5, paragraph 1, first sentence), and precautionary measures must be taken to protect the civilian population (Article 5, paragraph 1(a) and (b), and paragraph 2).

The use of mines, booby-traps and other devices is furthermore prohibited in any city, town, village or other area containing a similar concentration of civilians, unless precautionary measures have been taken to protect the civilian population (Article 4, paragraph 2(b)).

The specific restrictions therefore have a wider scope than the prohibition of indiscriminate attacks or attacks directed against the civilian population.

The 1980 Convention and its Protocols are applicable only in international armed conflicts. In practice, however, limitations on mine-laying in favour of the civilian population are frequently invoked in non-international armed conflicts.

In 1937, for instance, during the Spanish Civil War, the 27 Governments which were parties to the International Committee for the Application of the Agreement regarding Non-Intervention in Spain

dispatched an appeal to both sides to abstain immediately from destroying non-military objectives by laying mines.<sup>14</sup>

The United Nations has also denounced the use of anti-personnel mines in Afghanistan. The Special Rapporteur on the human rights situation in Afghanistan, Mr. Felix Ermacora, stated on a number of occasions that this practice, attributed to the armed forces in general – without their being defined more specifically – was causing heavy losses among the civilian population.<sup>15</sup>

In his 1988 report to the Secretary-General, on the situation of human rights in El Salvador, Professor Antonio Pastor Ridruejo, Special Representative of the Commission on Human Rights, likewise recommends “especially (...) to the FMLN and the guerrilla organizations (...) that they refrain from planting contact mines in a manner incompatible with the norms of international humanitarian law applicable to the civil war in El Salvador”.<sup>16</sup>

The representations made in this connection by the ICRC in El Salvador are in line with the considerations expressed by the human rights experts. Since 1985 it has regularly informed the Salvadorean authorities of its concern about the consequences of mine-laying for the civilian population.<sup>17</sup>

The general rules on the immunity of the civilian population, the distinction between combatants and civilians, the prohibition of superfluous injury and unnecessary suffering and the prohibition of perfidy provide for no exception on the use of mines, booby-traps or other devices in non-international armed conflicts. Moreover, it is important to take also into account the obligation to take precautionary measures in order to protect the civilian population from the effects of attacks using these weapons.

The above rules constitute the minimum norms which must be respected with regard to the use of mines, booby-traps and other devices in non-international armed conflicts.

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<sup>14</sup> Cassese, *op. cit.*, p. 307.

<sup>15</sup> Report by the Secretary-General to the United Nations General Assembly on 31 October 1986, A/41/788, para. 42, and Report to the Commission on Human Rights of 16 February 1989, A/43/736, para. 102.

<sup>16</sup> A/43/736.

<sup>17</sup> ICRC *Annual Report* 1985, p. 36; ICRC *Annual Report* 1986, p. 37; ICRC *Annual Report* 1987, p. 40; ICRC *Annual Report* 1988, p. 43.

## 5. Incendiary weapons

*In application of the general rules listed in section A above, especially those on the distinction between combatants and civilians and on the immunity of the civilian population, incendiary weapons may not be directed against the civilian population as such, against individual civilians or civilian objects, nor used indiscriminately.*

### COMMENTARY:

Incendiary weapons are covered by Protocol III annexed to the aforesaid 1980 Convention; they are defined as “any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target” (Article 1, paragraph 1).

Like the rules relating to the use of mines, the provisions of the Protocol do not ban the use of incendiary weapons completely: they repeat the rule stipulating that civilians may not be made the object of attacks by incendiary weapons (Article 2, paragraph 1), and totally prohibit attacks by air-delivered incendiary weapons on military objectives located within a concentration of civilians (Article 2, paragraph 2), and severely restrict attacks on such objectives by means of other types of incendiary weapons (Article 2, paragraph 3). The aim of the rule is to reduce as much as possible the effects of incendiary weapons on the civilian population. As regards attacks on concentrations of civilians, the scope of the restriction is wider than that of the prohibition of indiscriminate attacks and of attacks against the civilian population.

In its Resolution XXII of 12 May 1968 covering all types of armed conflict, the International Conference on Human Rights, held in Tehran under the auspices of the United Nations, declared the use of napalm to be contrary to international norms, in the same way as the use of chemical and biological weapons.

Protocol III contains no provision according protection to combatants, but this cannot be taken to mean that incendiary weapons may be used against them. In fact, the British military manual, for instance, imposes a ban on the use of such weapons against personnel.

The general rules on the immunity of the civilian population and the distinction between combatants and civilians make no exceptions for the use of incendiary weapons in non-international armed conflicts.

As in the case of mines, booby-traps and other devices discussed in the preceding section, the above rules are the minimum standards which must be observed with regard to the use of incendiary weapons in non-international armed conflicts.

### **III. Final remarks**

It has long been established that in order to be respected, the rules of international humanitarian law must be known. As regards non-international armed conflicts, Article 19 of the 1977 Additional Protocol II imposes on States Parties to the obligation to disseminate the Protocol. Even if that provision did not exist, however, States would still be obliged to make the instrument known, by virtue of their general obligation to ensure observance of international humanitarian law by their agents.

The question remains whether the dissemination of international humanitarian law should take into account the specific characteristics of non-international armed conflicts to ensure that in such conflict the applicable rules are respected. As regards teaching the rules on the conduct of hostilities to soldiers as part of their military training, separate courses on international and non-international armed conflicts seem unnecessary since the content of rules applicable to both types of conflict is essentially the same. The distinction is more important, however, when it comes to the categories of persons to whom the rules are disseminated: since the civilian population is often much closer to the scene of hostilities in non-international than in international armed conflicts, it seems all the more advisable that civilians should be familiar with the rules of international humanitarian law and of their significance, especially those requiring that a distinction be made between combatants and civilians. Similarly, the teaching of international humanitarian law should stress the fact that the rules applicable in non-international armed conflicts must be respected by government forces and insurgents alike.

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