ICRC

TO SERVE AND TO PROTECT

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Human Rights and Humanitarian Law for Police and Security Forces

1998

INTERNATIONAL COMMITTE OF THE RED CROSS

TO SERVE
AND
TO PROTECT

Human Rights
and Humanitarian Law
for Police and Security Forces

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ICRC

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Geneva, February 1998
C. de Rover

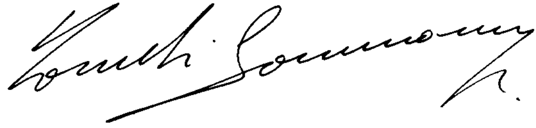
Preface

The International Committee of the Red Cross (ICRC) is no doubt best known for its humanitarian protection and assistance activities in situations of armed conflict – as well as for its relentless attempts to promote an active respect for the rules of international humanitarian law. ICRC attempts to promote adherence to International Humanitarian Law have, perhaps inevitably, focused primarily on members of the Armed Forces world wide. However, the ICRC is aware that the nature of situations of armed conflict is changing. The majority of present-day armed conflicts are of a non-international character (i.e. they are taking place within the territory of one state). Most of these situations are not formally recognized as non international armed conflict — to which certain rules of international humanitarian law legally apply. The key actors in present day conflicts frequently include members of the Police and Security Forces as well as the Armed Forces. A complication is created through a blurring of the absolute distinction between tasks typically belonging to the armed forces and those typically belonging to the police and security forces — with one readily taking on apparent responsibilities of the other. Contemporary situations of armed violence characterize themselves through a widespread and systematic disregard of fundamental principles of humanity. The right to life, liberty and security of the civilian population are frequently not respected and by consequence there are many victims requiring protection and assistance.

The ICRC has recognized that in order to ensure adequate protection and assistance to victims of situations of armed violence it is important — indeed essential — to focus attention on members of police and security forces as well as on members of the Armed Forces. The best protection that can be offered to (potential) victims of armed violence is in ensuring respect for fundamental principles of humanity in the conduct of operations not only of the armed forces but also of the police and security forces. Those fundamental principles of humanity can be drawn from both international humanitarian law and international human rights law.

This Manual compiles the relevant rules and principles of International Humanitarian law and International Human Rights Law and places them in the context of operational situations in which they must be respected and applied by members of armed forces and of police and security forces alike. The manual will be used in ICRC's dissemination activities to armed and

security forces. It also seeks to provide information and support to all those involved in the development of professional, ethical and protective law enforcement structures and practices.



Cornelio Sommaruga
President of the ICRC
Geneva, February, 1998

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Who can use the Manual?

The Manual has been written with those responsible for the training and education of members of police and security forces in mind. Its contents should enable them:

1. to prepare theoretical instruction on one or more of the topics contained in the following chapters, in order to impart the knowledge and understanding of human rights and humanitarian law required for adequate task performance by law enforcement officials of all ranks and levels;

2. to conceptualize new techniques and tactics — and to adapt those that already exist — in order to equip law enforcement officials of all ranks and levels with the skills necessary to ensure their adequate task performance;

3. subsequently, to incorporate principles of human rights and humanitarian law in existing training curricula or to create new training curricula, both at the theoretical level (knowledge/understanding) and practical level (skills/application) in order to secure continuity of education and training in this field.

However, it has not been compiled exclusively for the purpose of theoretical instruction to members of police and security forces. Its contents may prove equally valid and useful to members of the armed forces where they perform law enforcement functions (e.g. in the maintenance of public order). Members of the armed forces in general, as well as members of police and security forces, may find it a useful reference text. As such, it might also be of interest to members of the judiciary, to students of public international law with a particular interest in the field of law enforcement, or in general to practitioners in the field of human rights and humanitarian law.

How is the Manual organized?

The *Manual* consists of sixteen chapters devoted to various aspects of law enforcement and grouped under six main headings. An attempt has been made to write each chapter as a self-contained entity. Each begins with a brief explanation of the place occupied by its particular subject matter in the overall structure of the *Manual*. In addition, each chapter contains cross-references to other chapters where appropriate. Consequently, the *Manual* can be used following the sequence through from the first chapter to the last. However, it is also possible to enter directly into the subject

matter of a particular chapter of interest, or to combine any number of chapters.

Format of the Manual

Each chapter has been written in the same format, which is explained below:

Chapter Outline:

Under this heading the first page of each chapter provides a quick, one-page overview of the subject matter covered.

Key Questions for Law Enforcement:

A series of *key questions for law enforcement officials* at the beginning of each chapter prepares the reader for important issues that will be discussed in it. These questions also give an impression of the chapter's scope and purpose.

Fundamental Principles:

Each chapter addresses the *fundamental principles* of human rights and humanitarian law that are of particular relevance to the subject matter of that chapter. These fundamental principles are italicized and defined where they first appear in the text.

Applications:

Applications are practical examples designed to help readers understand the practical implications of international human rights law, or international humanitarian law, for law enforcement. Where possible, they have been used as an additional means of explaining and/or clarifying the subject matter of each chapter.

Managerial Practices:

Managerial practices represent the real-world practices of law enforcement agencies that respect human rights and/or humanitarian law. These practices are prominently placed in boxes at relevant points in the text of certain chapters.

Chapter Highlights:

One page of *chapter highlights* is presented at the end of each chapter, providing a one-page overview of its key points.

Study Questions:

At the end of each chapter there is a section listing *study questions*. These are meant to help readers assess their acquired levels of knowledge and understanding of the subject matter of each chapter. Instructors can use the questions under this heading for group discussions, exercises, or in any other form that suits their particular needs. Study questions are grouped under the headings:

- knowledge;
- understanding;
- application.

Selected References:

The chapter outline preceding each chapter contains a heading *"Selected References"* drawing attention to *Annex III,* which lists books (or parts thereof), articles and other publications relevant to the *Manual's* subject matter. As far as possible texts from the various geographical regions of the world — as well as information of specific regional importance — have been included. The first part of Annex III lists all of the treaties, declarations and resolutions referred to throughout the *Manual*. It contains their official title (citation), and other generally available sources where the texts may be found (such as volumes of international legal documents). The remainder of it lists the relevant books, articles and other publications mentioned above, and follows the overall structure of the *Manual*. It is accordingly divided by chapter and, where practicable, by the sub-sections within each chapter. The annex contains both general and specific references. General references are those sources which broadly address the subject matter of a particular chapter. Specific references are sources which cover particular elements of the general subject matter of the chapter concerned. For example, a general reference for the chapter entitled *Basic Concepts of International Law* would be a book on public international law. A specific reference for that chapter would be a publication on the role of "custom" in public international law.

Annexes

The *Manual* has three *annexes*:

Annex I: *Transparencies*, grouped by chapter

Transparencies for overhead projection provide didactic support for instructors. They address key points of the respective chapters, either by means of text or through graphs.

Annex II: *Bibliography*

In the bibliography all documents, books, articles and other publications are listed that have been used in preparing this *Manual*.

Annex III: *Selected references,* as presented above.

Footnotes

Footnotes are used in the *Manual* only where absolutely necessary. In general, however, the sources for information contained in the various chapters have not been indicated in the text where to do so would have been appropriate. This has been done for purely practical reasons and to make the *Manual* more user-friendly. However, all sources that have been consulted during its compilation are listed in Annex II.

List of Abbreviations

ABC weapons	Atomic, bacteriological and chemical weapons
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
Art./Arts.	Article/Articles
Beijing Rules	United Nations Standard Minimum Rules for the Administration of Juvenile Justice
Body of Principles	Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment
BP	Basic Principle
BPUFF	Basic Principles on the Use of Force and Firearms
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCLEO	Code of Conduct for Law Enforcement Officials
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
Charter (the)	Charter of the United Nations
CHR	Commission on Human Rights
CRC	Convention on the Rights of the Child
CRSR	Convention Relating to the Status of Refugees (1951)
Diplomatic Convention	The Vienna Convention on Diplomatic Relations (1961)
DP	Declaration on the Police (Council of Europe, 1979)

ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECOSOC	Economic and Social Council of the United Nations
GC	Geneva Convention
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide
Hague Convention	The Hague Convention for the Pacific Settlement of International Disputes (1907)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDP	Internally displaced person
IHL	International humanitarian law
ILC	International Law Commission
ILO	International Labour Office
League (the)	The League of Nations
Montevideo Convention	Montevideo Convention on the Rights and Duties of States (1933)
Movement (the)	The International Red Cross and Red Crescent Movement
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
OAS	Organization of American States

OAU	Organization of African Unity
OP	Optional Protocol
Riyadh Guidelines	United Nations Guidelines for the Prevention of Juvenile Delinquency
SMR	Standard Minimum Rules for the Treatment of Prisoners
Sub-Commission	Sub-Commission for the Prevention of Discrimination and the Protection of Minorities
Tokyo Rules	United Nations Standard Minimum Rules for Non-Custodial Measures
Turku Declaration	(Draft) Declaration of Minimum Humanitarian Standards
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	Office of the United Nations High Commissioner for Refugees
UNRPJ	United Nations Rules for the Protection of Juveniles Deprived of their Liberty
USA	United States of America
Victims	Declaration Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
Vienna	Convention Vienna Convention on the Law of Treaties (1969)
Womens	Convention see under CEDAW

LEGAL FRAMEWORK

Chapter 1

BASIC CONCEPTS OF INTERNATIONAL LAW

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Key Questions for Law Enforcement Officials

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- *What are the sources of international law?*
- *Who/what has legal personality under international law?*
- *What is State jurisdiction?*
- *What criminal jurisdiction do States have?*
- *What is State immunity?*
- *When can States claim immunity?*
- *What is diplomatic immunity?*
- *What is meant by State responsibility?*
- *How are treaties made?*
- *How do treaties enter into force?*
- *What is the validity of treaties?*
- *What is the role of arbitration in the settlement of disputes between States?*
- *What is the role and position of the International Court of Justice in this regard?*
- *What is the role and position of international criminal tribunals in international law?*
- *What is the position of human rights and humanitarian law in international law?*

Introduction

The classic *definition of international law is "that body of rules that governs the relations between States"*. This definition today cannot be taken as an adequate and complete description of the intents, purposes and scope of international law, nor can its suggestion that international law is a matter of concern solely to States be upheld. International law does consist of rules that govern relations between States, but it also comprises rules that relate to the functioning of international institutions or organizations, their relations with each other and their relations with States and individuals. Furthermore, certain rules of international law extend to individuals and non-State entities insofar as their rights or duties are the concern of the international community of States. International law *inter alia* lays down rules concerning the territorial rights of States (relating to land, sea and space), the international protection of the environment, international trade and commercial relations, the use of force by States, and human rights and humanitarian law.

For the intents and purposes of this *Manual* it is not necessary to address all aspects of international law. The present chapter therefore focuses on those aspects of international law that are of direct relevance for the human rights and humanitarian law topics contained in this *Manual*, and is no more than an introduction to international law.

The Sources of International Law

Introduction

There are many different theories regarding the origin and subsequent evolution of international law. Theories relating to concepts of "natural law", "moral postulates" and "the doctrine" of international law have all influenced the development of what is international law today. However, these theories do not come into consideration when the question arises as to what is law in a dispute between States. The Statute of the *International Court of Justice* (ICJ) states in its Article 38.1, which is widely accepted as listing the "sources" of international law, that:

> *1. The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
>
> *a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;*
>
> *b. international custom, as evidence of a general practice accepted as law;*
>
> *c. the general principles of law recognized by civilized nations;*
>
> *d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

Paragraphs *a. – c.* constitute the principle "sources" for the establishment of what is international law; paragraph *d.* is of secondary importance, as indicated by the use of the wording *"subsidiary means"*. From this wording it must be understood that the existence of principal means (*a. – c.*) is required, and that the subsidiary means (*d.*) will have only a (further) qualifying and/or clarifying effect. Article 38.1 creates an exclusiveness as to the sources of international law and does not allow for the consideration of law-making processes of any of the other aforesaid theories underlying international law in general. The ICJ is bound to take into consideration only those asserted rules of law that are claimed to have their basis in one or more of the three law-creating processes mentioned under *a. – c.* above.

It would certainly be excessive, for the purposes of this *Manual*, to consider in equal depth all the sources or law-creating processes mentioned in Article 38.1 of the ICJ Statute. Attention will therefore be centred here on "custom" and on "treaties" as principal sources of international law. The other processes have been placed under the heading of "Additional Sources", as they are of lesser importance for the practical use of this *Manual*.

Custom

Article 38.1b of the ICJ Statute defines *international custom* as *"evidence of a general practice accepted as law"*. This definition requires closer analysis to be properly understood. The first requirement for the establishment of "custom" is the existence of a "general practice" in the relations between States. Examples of the existence of such "general practice" can be found in bilateral relations between States as well as in multilateral relations. A *"general practice"* needs to be of a *consistent (habitual) nature* for it to be recognized as such. Consistency in this sense means an existing frequency of repetition, as well as a time period over which the practice has occurred between States. However, the existence of a "general practice" in itself is insufficient to conclude that customary international law on a specific point actually exists. Crucial for the recognition of such a "general practice" as being part of customary international law is the existence of a belief of legal obligation on the part of the acting State(s) underlying that practice. This required legal belief is better known by its Latin description *"opinio juris sive necessitatis*". The combination of a regularly recurring practice (between States) with the underlying belief (of States) that the practice as well as its recurrence are the result of a compulsory rule is what constitutes customary international law.

Proof of the existence of "general practices" of States can be found *inter alia* through closer examination of acts or declarations of heads of State and diplomats, opinions of legal advisers to governments, bilateral treaties, press releases or official statements of government spokespersons, State laws, decisions of State courts, and State military or administrative practices.

Treaties

Article 38.1a of the Statute of the ICJ states, with regard to disputes submitted to it, that it shall apply:

> *"international conventions, whether general or particular, establishing rules expressly recognized by the contesting States".*

The term "international conventions" used here can be taken as synonymous to "treaties".

The Vienna Convention on the Law Of Treaties (Vienna Convention, 1969) defines in its Article 2.1 "treaties" as follows:

> *"1. For the purposes of the present Convention:*
>
> *(a) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation..."*

The nature of a treaty is either bilateral (between two States) or multilateral (between more than two States). The particular designation of a treaty (i.e. whether it is called "Covenant", "Convention", "Protocol" or "Charter") is only of relative interest. What is important however, is that a treaty, whether bilateral or multilateral, creates legally binding obligations for the States that are party to the treaty. When a dispute arises between States over the subject matter of a specific treaty between them, the provisions of that treaty — concerning the rights and obligations of States Parties — will serve as the primary source of law for the settlement of the dispute. More particular information as to treaties and the Vienna Convention can be found below under the heading *The Law of Treaties*.

Additional Sources

"Custom" and "treaties" are not the exclusive sources of international law, but for the purposes of this *Manual* on human rights and humanitarian law for law enforcement officials they are without doubt the most important. Nevertheless it is useful briefly to mention the subsidiary sources of international law, without entering into further detail about them.

Those subsidiary sources are:

- *general principles of law as accepted by civilized nations;*
- *judicial decisions of international courts and tribunals;*
- *the teachings of the most highly qualified publicists of various nations;*
- *resolutions of the General Assembly of the UN**

* The legal significance of resolutions of the UN General Assembly is increasingly a topic of discussion. Where the internal working of the UN is concerned, those resolutions have full legal effect. The question remains, however, as to how far they are binding upon member States, especially member States that have voted against them. Important criteria for the

determination of that question lie in the degree of objectivity surrounding their adoption and, even more important, in how far a resolution can be regarded as expressing the juridical conscience of humanity as a whole. The latter is even more important than a mere majority of States adopting a resolution. The position of General Assembly resolutions as a subsidiary means of determining rules of law is receiving more and more support among eminent writers and publicists.

The Relationship between International Law and National Law

In general, as long as a State carries out its obligations under international law, *how* it does so is not the concern of international law. In some instances however, States have agreed to carry out their obligations in a particular way. This is often the case in the area of human rights where States have undertaken to make certain conduct (e.g. torture and genocide) a crime and to punish such conduct through their national legal systems.

Not all States agree on the precise relationship between national and international law. In most States, international and national law are considered to constitute one legal system. One result of this is that a norm of international law (once it has been defined as such) will automatically become part of the national law to be applied by the courts. Many such States adhere to a principle of *superiority* of international law, i.e. international law will prevail in the event of a conflict between a rule of international law and a rule of national law. Other States see international law and national law as two separate systems — although each can incorporate parts of the other, they are separate entities. In those States, an international rule (whether in the form of an agreement or a customary norm) will not be considered as part of the national law until it has been formally incorporated into that State's legal system (usually through enactment by the legislature).

The way in which a State views the relationship between international law and national law will have some impact as regards the implementation of international obligations at the domestic level. However, from an international perspective, it is important to bear in mind the fact that international law is binding on all States. As will be explained below, the State is held responsible if international law is violated by one of its agents or institutions. The responsibility of States also extends to ensuring that their government, their constitution and their laws enable them to carry out their international obligations. Most importantly, *a State cannot invoke*

provisions in its constitution or national law as an excuse for failing to discharge its obligations under international law.

Personality

General Comments

The question as to who or what are *subjects* of international law, or in different words, who or what has *legal personality* (i.e. the legal competence to act) in international law is of crucial importance. The answer to this question gives an insight into the actual scope of international law in terms of defining whether and the extent to which natural and legal persons are (or can be) bound by its content, or can refer to it for the protection of their particular interests. International law defines which entities will have legal capacity and what the extent of that capacity will be in terms of competence to perform certain acts. From this proposition it follows logically that the legal competences of individual entities may differ.

States

International law is primarily concerned with the rights, duties and interests of States. In fact it has been held, until very recently, that only *States* have legal personality and only they can therefore be *subjects of international law*. This term "subjects of international law" refers to what was considered the exclusive capacity of States, namely to be:

- *a holder of rights and duties under international law;*
- *the holder of a procedural privilege of prosecuting a claim before an international tribunal;*
- *the possessor of interests for which provision is made by international law; and*
- *competent to conclude treaties with other States and international organizations.*

These qualifying characteristics are not necessarily cumulative; the possession of merely one of them by an entity (e.g. a State) is sufficient to qualify that entity as a subject of international law. When viewing those characteristics in connection with existing international human rights law, it becomes evident that the thesis of their exclusiveness to States cannot be upheld. International human rights law defines natural persons as subjects of international law, giving them rights and duties, enabling them to pursue claims before international tribunals or to be brought before such tribunals

themselves. Closer consideration will be given to "other legal persons" or subjects of international law below.

States are clearly subjects of international law. This requires, however, a clear definition of what exactly are the identifying criteria for a "State". Article 1 of the *Montevideo Convention on the Rights and Duties of States (1933)* reads as follows:

> *The State as a person [i.e. subject] of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.*

The Montevideo Convention is commonly accepted as reflecting, in general terms, the requirements of statehood in customary international law. Some argue that these requirements have been supplemented by others of a more political or moral character — i.e. independence which has been achieved (i) in accordance with the principle of self-determination, and (ii) not in the pursuance of racist policies. In history the example of the former Southern Rhodesia and the practices of the former *apartheid* regime in South Africa, combined with the subsequent reactions of the UN Security Council and General Assembly respectively, strongly support this argument. In the case of Southern Rhodesia the Security Council imposed economic sanctions following a declaration of independence in 1965 by Southern Rhodesia and "[called] upon all States not to recognize this illegal racist minority regime". No State recognized Southern Rhodesia as a State, although it could have claimed to have achieved the technical requirements set for statehood in the Montevideo Convention. This example serves as a clear indication of the fact that *independence must be achieved in accordance with the principle of self-determination*, which requirement as such is taken to be *an additional requirement of statehood*. Similarly the General Assembly in 1976 strongly condemned the declaration of "independence" of Transkei (as part of the *apartheid* politics of South Africa) and declared it invalid, while at the same time calling upon all governments to "[deny] any form of recognition of the so-called independent Transkei and to refrain from having any dealings with the so-called independent Transkei..." Subsequently no State recognized Transkei as a State (except for South Africa). The interpretation of State practice on this point meant that Transkei, as *an entity created directly pursuant to a fundamentally illegal policy* of *apartheid, is for that reason, and irrespective of its degree of formal or actual independence, not a State*.

The current situation of Somalia (with its lack of a government), as well as the situation of the former Yugoslavia (with its *de facto* territorial division)

prior to the Dayton agreement, might offer more recent examples as to the issue of (additional) requirements of statehood and the responses thereto of the international community through the UN.

The requirements of statehood under the Montevideo Convention merit closer examination and definition. With regard to *population and territory*, it is important to know that there is no lower limit in terms of size. Neither is there a necessity for State boundaries to be clearly defined or undisputed. It is enough that the territory has sufficient cohesion, even though the boundaries have not yet been accurately delimited. Israel, which is undoubtedly a State although its boundaries have never been definitely settled, may serve as a practical example to this end. The existence of a *government* is another requirement for statehood. It entails the existence of a stable form of political organization as well as the capacity of public authorities to assert themselves throughout the territory of the State. (Would Somalia currently meet this technical requirement of statehood?) State practice on this point suggests that the requirement of a "stable political organization" in control of the territory of the State does not apply in situations of armed conflict after a State has established itself. The required *capacity to enter into relations with other States* is a direct reference to the independence of States. Independence in this sense must be understood as meaning the existence of a separate State that is not subject to the authority of any other State or group of States. This situation can also be described as *external sovereignty*, which means that a State has no other authority over it than that of international law. From what has been said above about the declaration of independence of Transkei, the important conclusion must be drawn that *recognition* as a State (by other States) is another major additional requirement for statehood.

Other Legal Persons

It has already been established above that State practice has abandoned the doctrine that States are the sole subjects of international law. The international practice of States has extended the range of subjects of international law far beyond that of States only, to include:

- *Public international organizations* (e.g. UN, NATO, the European Union (EU), OAS, OAU, Council of Europe, etc.)

Such organizations, generally created by a multilateral treaty, have *international personality* to varying degrees in that they have a capacity (i.e. competence) to conclude treaties, they enjoy certain privileges and immunities, they are capable of possessing international rights and duties

and they have a capacity to prosecute claims before international tribunals. This does not make such organizations equal to States, nor does it make their rights and duties the same as those of States.

- *Individuals*

The capacity of individuals to be holders of rights and duties under international law, as well as their capacity to bring claims before international tribunals, are thoroughly recognized in the practices of States. These capacities are for instance included in various human rights treaties. *It is part of customary international law that the obligations of international law bind individuals directly, regardless of the law of their State.* The Nuremberg Tribunal (set up after the Second Word War in order to prosecute war criminals) reaffirmed this principle as one which is imperative for the effective operation of international law. The Tribunal held that:

> *"Crimes against international law are committed by men [and women], not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".*

The General Assembly of the United Nations, in its resolution of 11 December 1946, expressed adherence to the principles of the Nuremberg Charter and judgment.

While there can be no doubt as to whether individuals are subjects of international law, it is a fact that for the most part individuals remain *objects of international law*, rather than subjects.

- *Other Entities*

An example of such an "other" entity would be *The Holy See and the Vatican City*. The Holy See is a non-territorial institution, the Vatican City is internationally recognized as a State. However, the absence of a defined territory has proved no obstruction to granting the Holy See international personality or to recognizing the exclusive sovereignty and jurisdiction of the Holy See over the Vatican City.

State Jurisdiction

General Comments

International law lays down rules that define the powers of individual States to govern persons and property. Taken together, those rules define what is called *State jurisdiction*. The powers of individual States include

powers of legislation (prescriptive jurisdiction) as well as powers of enforcement (enforcement jurisdiction), in both the executive and judicial sense of the word. Naturally it follows that State power and authority as to legislation include both civil and criminal domains. The actual rules of international law that define *State jurisdiction* identify the persons and the property within the permissible range of a State's law and its procedures for enforcing the law. The actual content of a State's law is beyond the scope of international law except insofar as it aims to subject a person to its jurisdiction or to prescribe procedures to enforce its jurisdiction. For the purposes of this *Manual* it is not necessary to focus extensively on all aspects of State jurisdiction, but a brief survey of specific issues related to this topic is justified.

Criminal Jurisdiction

When States claim criminal jurisdiction in a particular situation, they tend to invoke one or more of the following five principles:

- *the territorial principle;*
- *the nationality principle;*
- *the protective principle;*
- *the universality principle;*
- *the passive personality principle.*

The *territorial principle* determines jurisdiction by reference to the place where the offence was committed, or where its constituent effects took place. The *nationality principle* determines jurisdiction with reference to the nationality or national character of the person committing the offence. The *protective principle* determines jurisdiction by reference to the national interest injured by the offence. The *universality principle* determines jurisdiction by reference to the place of custody of the person committing the offence. The *passive personality principle* determines jurisdiction by reference to the nationality or national character of the person injured by the offence.

The first three of those principles are most widely applied and accepted. The fourth principle is regarded as the basis for an auxiliary competence, except (of course) for the offence of piracy, for which it is the generally recognized principle of jurisdiction. The fifth principle is truly to be considered of secondary character, and it should be noted that its use by States does not go uncontested by others. Admittedly it is not an essential principle for any State if the ends are adequately served by other principles.

State Immunity

It used to be a rule in international law that States enjoyed absolute immunity from being brought before the courts of another State without their consent. With the entrance of States into areas such as trade and commerce, they in fact performed acts that could equally be performed by private persons and therefore *de facto* acted as private persons. Such private acts by States are referred to as acts *jure gestionis,* as opposed to those performed by States in a public capacity and which could not equally be performed by private persons. Examples of such *public acts,* also referred to as acts *jure imperii*, include:

- internal administrative acts, such as expulsion of an alien;
- legislative acts, such as nationalization;
- acts concerning diplomatic activity
- public loans.

Characteristic of such public acts (*jure imperii*) is not just that the purpose or motive of the act is to serve the purposes of the State, but that the act is, by its own nature, a governmental act, as opposed to an act which any private citizen can perform. In their current practice today most States follow a doctrine of restrictive immunity, whereby a foreign State is allowed immunity for acts *jure imperii* only. It is the distinguishing criterion of acts *jure imperii* that will be used by a court to decide on questions of alleged immunity by a State.

Diplomatic Immunity

The Vienna Convention on Diplomatic Relations (Diplomatic Relations Convention, 1961) sets out the privileges and immunities granted to diplomatic missions to ensure the efficient performance of their functions as representing States. The Diplomatic Relations Convention distinguishes between members of the staff of a mission belonging to the diplomatic staff, to the administrative and technical staff or to the service staff (Article 1). The Convention further stipulates that the *premises of the mission shall be inviolable* (Article 22). Under "premises of the mission" is to be understood the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission (Article 1(i)). Equally, the premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution (Article 22.3). The official correspondence of the

mission (i.e. all correspondence relating to the mission and its functions) is inviolable (Article 27.2). The diplomatic bag shall not be opened or detained (Article 27.3), but may only contain diplomatic documents or articles intended for official use (Article 27.4).

The person of a diplomatic agent (i.e. the head of the mission or a member of the diplomatic staff — Article 1(e)) shall be inviolable (Article 29); such persons cannot be liable to any form of arrest or detention. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State (Article 31.1). This provision, however, does not exempt the agent from the jurisdiction of the sending State (Article 31.4). Sending States may waive the immunity from jurisdiction of their diplomatic agents (Article 32.1) Such waiver must always be express (Article 32.2). States tend to waive immunity of their diplomatic agents where this does not impede performance of the functions of the mission and in order to maintain good relations with the receiving State. Quite often States use the principle of reciprocity in this respect and will grant privileges and immunities to a sending State to the extent that this State has done so as the receiving State for diplomatic agents of the other. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any [other] member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable (Article 9.1). In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his [or her] functions with the mission.

History provides numerous examples of persons seeking diplomatic asylum within the premises of a diplomatic mission in their country. This issue has (deliberately) not been addressed in the Vienna Convention, because States did not want to recognize a general right to diplomatic asylum. Nevertheless, where such incidents do occur, countries tend to grant such asylum to political refugees only and based on motives of humanity in cases of instant or imminent or personal peril, and of course to their own nationals in times of danger. A *de facto* situation of asylum leaves the receiving State with an insoluble dilemma. Assuming that the State of refuge will not surrender the refugee, the territorial State can only apprehend that person by violating the immunity of the diplomatic premises as expressed in Article 22 of the Diplomatic Relations Convention, or by breaking off diplomatic relations. Generally this price to be paid for apprehension of the refugee will be considered too high.

It has been (unsuccessfully) argued that the premises of a diplomatic mission were to be considered as part of the territory of the sending State. If

this had truly been the view of the parties to the Diplomatic Relations Convention, it would undoubtedly have been formulated in the Convention and there would have been no need to set out the immunities of the diplomatic mission as has been done in Article 22.

State Responsibility

General Comments

What happens if a State fails to honour a treaty to which it is a party? What happens if a State violates the territorial sovereignty of another State? What happens in the case of mistreatment by a State of nationals of another State, or of violation of diplomatic immunity?

In any legal system there must be liability for failure to observe obligations imposed by its rules. Municipal law distinguishes between civil and criminal liability based upon deliberate or negligent acts or omissions that constitute an offence under that law. In international law such liability is known as *responsibility*. Responsibility arises for the breach of any obligation owed under international law.

The Theory of Responsibility

The International Law Commission[1] (ILC) is currently in the process of drafting a treaty on the issue of State responsibility. The draft articles which have been developed so far specify that every *internationally wrongful act* of a State entails the international responsibility of that State. Such an internationally wrongful act is held to exist when:

(a) conduct consisting of an action or omission is attributable (imputable) to the State under international law; and

(b) that conduct constitutes a breach of an international obligation of the State.

Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.

[1] The International Law Commission is a body of experts established under Article 13.1(a) of the UN Charter to work on the "codification and progressive development of international law". The Commission is composed of 34 members "who shall be persons of recognized competence in international law". Members sit as individuals and not as members of their governments. They are elected by the General Assembly of the UN which "shall bear in mind that ... in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured".

It is a basic principle of international law that any breach of an engagement entails an obligation to make reparation. Reparation is the indispensable complement of a failure to apply a treaty, and there is no necessity for this to be stated in the treaty itself.

Certain internationally wrongful acts result from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole. Such *international crimes* may result, *inter alia*, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or the sea.

It is now firmly established that States can be held responsible for both civil and criminal wrongful acts. Liability exists not only in cases where the State itself is the perpetrator, but also in situations where the conduct of a person or body can be imputed to the State. The conduct of a State body will be considered as an act of that State under international law, whether that body belongs to the constituent, legislative, executive, judicial or other authorities, whether its functions are of an international or internal character and whether it holds a superior or a subordinate position in the organization of the State.

In relation to acts performed by public servants, whatever their capacity, the most important considerations of which account must be taken are the character of the acts alleged to have resulted in injury to persons or property, or the nature of the functions performed whenever a question is raised as to their proper discharge. If the acts in question are performed in the official (public) capacity of the person(s) concerned, irrespective of their nature and their lawfulness, then the State is responsible for such actions.

That responsibility exists even in situations where actions are directly contrary to orders given by superior authorities. The State concerned cannot take refuge behind the notion that, according to the provisions of its legal system, those actions or omissions ought not to have occurred or ought to have taken a different form. Only where the acts committed can be said to have been performed by public servants acting in their private capacity can those acts not be imputed to the State. Similarly the State is not responsible under international law for the conduct of a person or group of persons who do not act on behalf of that State.

For the intents and purposes of this *Manual* the above-mentioned rules as to State responsibility are the most relevant. They make it clear that where law enforcement officials are concerned, their actions, when performed by them in their official capacity, are imputable to the State and are therefore a matter of State responsibility. It has also been made clear that this responsibility does not cease to exist merely because internal laws proscribe the commission or omission of certain facts (by law enforcement officials), or because of the existence of superior orders with a different intent.

The essential principle inherent in the notion of an illegal act is that reparation must, as far as possible, eliminate all the consequences of the illegal act and restore the situation which would, in all probability, have existed if that act had not been committed. Therefore, where a State is held to have committed an internationally wrongful act, it is under an obligation to attempt to remedy the consequences of it. Such reparation can take the form either of restitution in kind, or of the payment of a sum equal to the restitution in kind where such restitution is impossible. In addition a State can be required to pay compensation for damages or loss sustained by the injured party.

The Law of Treaties

General Comments

As explained above under The Sources of *International Law*, existing bilateral and multilateral treaties form an important basis for the determination of rights and obligations of States that are party to them. The treaty construction is frequently used for the conduct of international transactions of various kinds, but it is also used to impose binding rules of precision and detail in various areas of international law (e.g. human rights, environment, humanitarian law). Another characteristic of many treaties is that they can be seen as codifying, clarifying and supplementing customary international law. International law as to treaties themselves is set out in the

Vienna Convention on the Law of Treaties (Vienna Convention, 1969). This Convention represents a codification of rules of customary international law with regard to treaties and is uncontested in that respect. It has been said that most of the Convention is "lawyers' law" over which the political interests of States do not clash. The importance of the Convention for the day-to-day transactions between States is self-evident and accepted as such by States, leaving as the only likely area for dispute, if any, that of treaty interpretation between them.

This chapter will consider only those parts of the law of treaties that have a direct bearing upon and relevance for the subject matter of this *Manual*. It is therefore not exhaustive.

The Making of Treaties

The Vienna Convention defines *a treaty* as:

> *"an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation..." (Article 2.1(a)).*

Every State possesses capacity to conclude treaties (Vienna Convention, Article 6). This capacity in itself is evidence of statehood as prescribed in the Montevideo Convention mentioned above. How a State wants to organize the exercise of its treaty-making powers is its own concern. Treaties are usually concluded in the form either of *agreements between States*, of *agreements between heads of State*, or of *inter-governmental agreements*.

Articles 7 and 8 of the Vienna Convention clarify which persons can represent their State for the purpose of adopting or authenticating the text of a treaty, or for the purpose of expressing the consent of the State to be bound by a treaty. Generally this competence rests with a person who produces appropriate *full powers* (Article 7.1(a)), i.e. a document originating from the competent authority of a State designating a person to represent the State for any particular act in connection with the treaty.

Heads of State, heads of government and ministers for foreign affairs are considered to represent their State by virtue of their functions and without having to produce full powers (Article 7.2(a)). Limited powers to adopt the text of a treaty on behalf of their State can be given to the heads of diplomatic missions (Article 7.2(b)) or to representatives accredited by States to an international conference or international organization or one of its organs. The Vienna Convention lays down rules for the adoption of the text of a

treaty (Article 9). There are different ways in which States can express their will to be bound by the contents of a treaty. Which specific way is applicable depends on what is agreed upon in the treaty itself. *The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed* (Article 11). Accession is the traditional method by which a State, in certain circumstances, becomes a party to a treaty to which it is not a signatory. During the nineteenth century, ratification was considered the means of verification and confirmation by a sovereign that his or her representative had truly acted with full powers. Today ratification constitutes a separate act which finally binds a State to a treaty, and which is required whenever a treaty so prescribes.

It is a rule of customary international law — reiterated in the Vienna Convention — that a *State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:*

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed (Vienna Convention, Article 18).

Sometimes it happens that a State does not want to become party to a treaty in its entirety but wishes to be bound only by parts of it. In that case the State concerned will formulate one or more *reservations to that treaty* when signing, ratifying, accepting, approving, or acceding to it. International human rights law provides many examples of this desire and practice. Such reservations are allowed unless:

"(a) the reservation is prohibited by the treaty;

(b) the treaty stipulates that only specific reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling provides sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty (Vienna Convention, Article 19)."

The International Law Commission (ILC) is of the opinion that the majority of reservations relate to a specific point which a particular State for one reason or another finds difficult to accept. Their effect on the general integrity of the treaty is often minimal; and the same is true even if the reservation in question relates to a comparatively important provision

of the treaty, so long as the reservation is not made by more than a few States. The integrity of a treaty would be affected materially only if a reservation of a somewhat substantive kind were to be formulated by a number of States. Today the United Nations is composed of some 187 member States, with differing social, economical, cultural and political backgrounds. The key to success, according to the ILC, lies in multilateral treaties to which a large number of States subscribe, accepting the bulk of their provisions. It considers that failure on the part of negotiating States to take the necessary steps to become party to multilateral treaties is a greater obstacle to the development of international law through the medium of treaties than the possibility that the latter's integrity may be unduly weakened by the liberal admission of reserving States as parties to them. However, attention must be drawn to the practice of reservations in respect of human rights treaties, where it is in all honesty difficult to maintain that reservations made by States to certain treaties (see for instance the Women's Convention) are in fact not defeating the object and purpose of such treaties. This question could be resolved only if the ICJ were to be asked for an advisory opinion on it. Such a request has not been made to date (except in one limited case regarding the Genocide Convention). The issue of reservations to human rights treaties will be dealt with in greater detail in the chapter on human rights.

A treaty enters into force in such a manner and upon such date as it may provide or as the negotiating States may agree (Vienna Convention, Article 24). Every treaty in force is binding upon the parties to it and must be performed by them in good faith (Article 26). This rule — *pacta sunt servanda* — is a fundamental principle of international law and of the law of treaties. As already observed in the section on State responsibility, a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty (Vienna Convention, Article 27). The exception to the rule of Article 27 is laid down in Article 46 and is limited to those situations where the *violation* (of the internal law in consenting to be bound by the treaty) *was manifest and concerned a rule of its internal law of vital importance*. A violation is manifest if it would be objectively evident to any State conducting itself in the matter with normal practice and in good faith.

Jus Cogens

Article 53 of the Vienna Convention states that:

> *"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the*

> *present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."*

There is a long-standing discussion as to which norms (of general international law) can be considered to be *peremptory norms* of that law. In the grammatical sense the word "peremptory" is *inter alia* synonymous with "commanding", "compelling", "mandatory", "imperative" and "irrefutable" and is indicative of norms that have to be taken as being fundamental and untouchable. This is further expressed by the fact that a peremptory norm (of general international law) can be modified only by a subsequent peremptory norm (also of general international law). Peremptory norms of general international law are also referred to as *jus cogens*. In the drafting of the Vienna Convention there was distinct hesitancy on the part of the ILC to include examples of rules of *jus cogens* in the Convention. This was mainly because the mention of some cases of *jus cogens* might, even with the most careful drafting, lead to misunderstanding as to the position with regard to other cases. This hesitancy is not limited to the ILC, but appears to be a more general attitude evidenced throughout the available literature. There are even those who maintain that there are no rules of *jus cogens*, because even the most general rules still fall short of being universal. However, sufficient arguments can be found to state that the rules of *jus cogens* include the prohibition of the use of force by States (as contained in the UN Charter) and the prohibitions of genocide, slavery, racial discrimination and torture, and assert the right to life of all persons. *Jus cogens* or peremptory norms of general international law are those norms from which no derogation is allowed. Treaties concluded between States must not conflict with such norms, and where they do, those treaties become void. Arguments can be put forward as to whether an entire treaty needs to be considered void when only one of its provisions is incompatible with rules of *jus cogens,* especially when such a provision can be excised from the treaty.

Article 64 of the Vienna Convention states that *if a new norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.*

Usage of the word "emerges" must be understood as a reference to a "new" rule of *jus cogens* that was previously a rule of customary international law or a rule embodied in a multilateral treaty. In this sense reference is made to the constantly ongoing process of evolution of general rules of interna-

tional law, whereby a usage between States can become customary international law and a rule of customary international law can evolve to the level of a peremptory norm from which no derogation is allowed. The absolute prohibition of torture may serve as an example of a rule that evolved along those lines. It could easily be argued that any treaty advocating or permitting torture would be void under Article 64 of the Vienna Convention.

Termination, Suspension, Withdrawal

Article 42.2 of the Vienna Convention states that:

> *"The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty."*

The Vienna Convention set forth the requirements as to termination, suspension and withdrawal in Articles 54 to 79. It is not necessary for the purposes of this *Manual* to go into detail on this particular aspect of treaties. It is important, however, to be aware of the possibility of such steps, as well as of the general rule of Article 42.2. Treaties in the field of human rights law and humanitarian law tend to include provisions that deal with termination, suspension and withdrawal, which then have full legally binding effect upon States Parties. See for example Article 63 of the First Geneva Convention of 1949, or Article 12 of the Optional Protocol to the ICCPR.

Arbitration and Settlement of Disputes

General Comments

Relations between States are not always friendly and based upon shared opinions or agreements reached by consensus. Disputes between States do arise and can basically be of any kind, including disputes that arise out of treaty relations between States. The settlement of such disputes, not only from the point of view of furthering friendly relations between States, constitutes an interesting area of international law. Generally it can be held true that States will seek to settle their disputes through negotiation or mediation, sometimes with third-party assistance in the form of good offices, or through conciliation or the conduct of fact-finding inquiries. Rarely will States take their differences to court. The third-party assistance mentioned above is sometimes provided through the United Nations, or

through one of the regional organizations such as the OAS or OAU This form of peaceful settlement of disputes leaves open options for agreement that are not necessarily based on international law, but that do have the support of the parties to a particular dispute. Settlement through arbitration or through proceedings before a court necessarily involves the application of rules of international law, which limits the options for solution and settlement of the dispute. Another problem at the international level is the absence, in most cases, of a compulsory jurisdiction for the settlement of disputes between States, or for cases of non-observance of general rules of international law. For the purposes of this *Manual* the focus will be on arbitration and on the International Court of Justice. Recent events in relation both to Rwanda and to the former Yugoslavia warrant a closer consideration of the phenomenon of international criminal tribunals.

Arbitration

The Hague Convention for the Pacific Settlement of International Disputes (Hague Convention No. I, 1907) defines the *object of arbitration as being the settlement of disputes between States by judges of their own choice and on the basis of respect for law* (Article 37). The ILC defined arbitration as a procedure for the settlement of disputes between States by a binding award on the basis of law and as a result of an undertaking voluntarily accepted. The only difference remaining between arbitration and judicial settlement is that of selection of the members of those judicial bodies. Whereas in arbitration this is done on the basis of agreement between the parties, judicial settlement presupposes the existence of a standing tribunal with its own bench of judges and its own rules of procedure which parties to a dispute must accept. Arbitration tribunals can consist of a single arbitrator or they may be collegiate bodies — essential is the consensus of States party to the dispute as to their composition.

The predecessor of the aforesaid 1907 Hague Convention, a convention of 1899 that bore the same name, provided for the establishment of the *Permanent Court of Arbitration*, which took place in 1900. The Court still exists, but does not have much of a reputation, nor are many cases referred to it. The Statute of the Court contains formulations for the establishment of arbitration tribunals on the basis of agreement between States, while at the same time offering solutions for those situations where votes are equal. The Court has not many achievements on record, but it can nevertheless be considered to have had an influence in the area of pacific settlement of disputes by moulding modern law and the practice of arbitration, especially in the early years of this century.

The outcome of an arbitration, "the award" by the tribunal, is binding upon the parties to the dispute, although history shows that a State may decide not to accept it.

The International Court of Justice

The International Court of Justice (ICJ) must be considered as the most important international court currently in existence. Admittedly there are other international courts such as the Inter-American Court of Human Rights, the European Court of Human Rights and the European Court of Justice of the European Communities. Each of those three courts, however, has only limited jurisdiction for the adjudication of inter-State complaints submitted to them under the treaties that establish them.

The ICJ is the principle judicial organ of the United Nations and was established in 1946 on the basis of Article 92 of the UN Charter. The ICJ is organized in accordance with its Statute (which is part of the UN Charter) and has traditionally always had its seat at The Hague in the Netherlands. The judges of the ICJ are elected by the Security Council and the General Assembly according to a complicated procedure (see Articles 4 to 14 of the ICJ Statute). Their appointment is usually a highly politicized exercise. The current understanding as to the distribution of the fifteen seats on the ICJ (in terms of nationality and power blocs) corresponds with the membership of the Security Council. This means, *inter alia,* that the ICJ has on its benches a national of each of the five permanent members of the Security Council (USA, Great Britain, France, China and Russia). The ICJ delivers a single judgment, but allows for judges to give their views. The judgment of the ICJ is binding upon States party to the dispute.

The jurisdiction of the ICJ relates to the deciding of contentious cases and to providing advisory opinions, neither of which powers it can exercise of its own volition. That jurisdiction comprises all cases which the parties refer to it and all matters specially provided for in the UN Charter or in treaties and conventions in force (Article 36.1 of the Statute). *States can at any time declare that they accept the compulsory jurisdiction of the ICJ in all legal disputes concerning:*

a. *the interpretation of a treaty;*

b. *any question of international law;*

c. *the existence of any fact which, if established, would constitute a breach of an international obligation;*

d. the nature or extent of the reparation to be made for the breach of an international obligation (Statute, Article 36.2).

Such a declaration may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time (Statute, Article 36.3). Article 38 of the Statute (presented at the beginning of this chapter) specifically and exhaustively sets out the different instruments at the disposal of the Court to determine the rules of law applicable to a specific case brought before it.

In addition to its jurisdiction over cases brought by States under Article 36 of its Statute, the ICJ may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the UN to make such a request (Statute, Article 65.1). The Security Council and the General Assembly are authorized "by" the UN Charter (Article 96.1) to request advisory opinions of the Court. ECOSOC and the Trusteeship Council have been authorized "in accordance" with the UN Charter to do so, as have thirteen of the fourteen United Nations specialized agencies (Article 96.2 of the Charter). The remaining principal organ of the UN — the Secretariat — has not been authorized to request the advisory opinion of the Court. The opinions of the Court are binding upon the requesting body and the tendency is that they are also accepted and adhered to by States concerned, although history provides examples of cases to the contrary. States do not have the capacity to request advisory opinions of the Court, although by virtue of Articles 66.2 and 66.4 of the Statute, they do have a right to take part in the proceedings before the Court and to express their particular views as well as any comments they may have on views expressed by others.

International Criminal Tribunals

The first international criminal tribunals to be organized were the Nuremberg Tribunal and the Tokyo Tribunal, both created soon after the Second World War. The Military Tribunal of Nuremberg came into being on 8 August 1945, when representatives of the Soviet Union, the United Kingdom, the United States, and the provisional government of the French Republic signed the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, otherwise known as the London Agreement. The agreement set forth the Charter of the International Military Tribunal, which laid down the substantive and procedural rules to be applied by it. The Tokyo Tribunal (the International Military Tribunal for the Far East) was established by special proclamation of the Allied Supreme Commander in the Pacific on 19 January 1946. Until

very recently, these were the only international criminal tribunals ever to have been established by the international community of States.

The outrages against humanity constituted by the atrocities and acts of genocide committed in Rwanda in 1994 and the acts of genocide, war crimes and crimes against humanity committed in the territory of the former Yugoslavia have led to the establishment of two separate International Criminal Tribunals with the duty of bringing responsible individuals to trial. The exact mandate of each of these Tribunals is not especially important in the present context. It is of greater interest and significance to consider the legal basis for their creation. The principal question facing the United Nations was whether they were to be established by means of a multilateral treaty, or through a Security Council resolution. It was clear that the elaboration of a treaty would take a long time. In addition there was doubt as to whether such a treaty would be ratified by all those States whose efforts would be required for its successful implementation. These considerations led to both Tribunals being established by a resolution of the UN Security Council. In enacting those resolutions the UN Security Council drew its authority from Chapter VII of the UN Charter. In the context of Chapter VII, the resolutions establishing the Yugoslavia and Rwanda Tribunals must be seen as measures ... to *maintain or restore international peace and security* (UN Charter, Article 39). *Prerequisite* to such measures is that the Security Council, by resolution, determines *the existence of any threat to the peace, breach of the peace, or act of aggression...* (UN Charter, Article 39). In previous resolutions the Security Council had already made the "determination" required by Article 39 of the Charter to justify "recommendations" or "measures" as further defined in Chapter VII thereof.

This approach to the establishment of an international criminal tribunal had never been taken before, but it has distinct consequences. Member States of the UN are legally required to comply with the decisions that established both Tribunals (see Articles 2.5, 25 and 48 of the UN Charter, in connection with its Article 49). This obligation to comply is perceived to be of crucial importance in order to physically bring indicted persons before the Tribunal. One of the obligations incumbent upon member States, set out in the Statutes of the Tribunals, is the duty to comply with any orders of the Tribunal relating to the arrest or detention of persons.

A number of States have objected to the way in which the Tribunals were established (through a resolution of the Security Council based on Chapter VII of the Charter). These objections relate to the alleged lack of legal

capacity on the part of the Security Council to perform such acts, as well as to the undue infringement of national sovereignty constituted by the establishment of the Tribunals in any other way than by treaty. The latter argument of course highlights the fact that technically speaking, member States are left with no choice but to accept and implement the Security Council resolution. The Defence Counsel for the first person (Dusko Tadic) to be brought before the Yugoslavia Tribunal contested the legal powers of the Security Council to establish a criminal tribunal as an expression of a "measure" taken within the meaning of Article 39 of the Charter, especially considering that the specific measure of establishment of the tribunal is not mentioned in Articles 40 to 42 of the Charter's Chapter VII. The Appeals Chamber of the Tribunal came to the conclusion that, although not specifically mentioned, the *establishment of a criminal tribunal falls squarely within the powers of the Security Council under Article 41 of the Charter*. In the view of the Appeals Chamber, the argument that the creation of the Tribunal (endowed with judicial powers) is an act beyond the capacity of the Security Council, since it lacks such judicial powers, was untenable since it resulted from a fundamental misunderstanding of the constitutional set-up of the Charter. The creation of the Tribunal must be seen as a measure towards the restoration of peace and security, not as an act by which the Security Council delegated some of its own powers or the exercise of some of its functions.

Another important issue concerning international criminal tribunals is *subject matter jurisdiction*. With regard to the Yugoslavia Tribunal the decision was taken that it should apply rules of international humanitarian law which are beyond doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. The issue of subject matter jurisdiction was another heavily contested issue in the above-mentioned Tadic case, but it was decided by the Appeals Chamber of the Tribunal that under the Tribunal's Statute such jurisdiction can be held to exist for acts committed in the territory of the former Yugoslavia.

Human Rights and Humanitarian Law

General Comments

Human rights and humanitarian law form an integral part of international law — with both types of law designed to protect individual as well as collective and fundamental rights and freedoms. Under the heading of human rights law the standards are set for State responsibility with regard

to the rights and freedoms of individuals and peoples. Humanitarian law provides the applicable standards for protection of victims of war and the conduct of hostilities. In both fact and application the two types of law are complementary and compatible, regardless of existing rules as to their legal applicability. As separate chapters are devoted to human rights and humanitarian law below, this section will be confined to a brief introduction of both types of law and an attempt to show their place within the broader framework of international law.

Position within International Law

Without any doubt the horrors of the Second World War made it painfully clear that the existing rules and measures for the protection of the individual against the consequences of armed conflicts were hopelessly inadequate. At the same time the believed existence of guarantees for national sovereignty and the inviolability of national territory was shown to be a fallacy by the transgressions of both, committed in particular by the Nazis throughout Europe and later by the Japanese in Asia. One immediate outcome of the Second World War was a shared desire on the part of all States that any recurrence of those terrible events must be prevented. With the founding of the United Nations and the creation of the UN Charter, *the protection of international peace and security and the promotion and encouragement of respect for human rights and fundamental freedoms* became, *inter alia*, *prime purposes of the United Nations* (UN Charter, Article 1).

The *Universal Declaration of Human Rights* (1948) is today the single most important document ever adopted by the General Assembly of the United Nations. Although it did not take the form of a treaty, its history has made it more than an instrument merely offering authoritative guidance. The absence for many years of other reference texts (it took until 1976 for the two major Covenants to enter into force) has given the Universal Declaration an authority beyond dispute, and it can now be successfully argued that some of its provisions form part of customary international law. Every other human rights treaty ever drafted makes reference to the Universal Declaration and formulates its provisions as deriving from the provisions originally contained therein. Many national constitutions incorporate key provisions of the Universal Declaration.

International humanitarian law is that body of law which covers the protection of victims of armed conflict and lays down the international rules for the conduct of hostilities. The four Geneva Conventions of 1949 with their Additional Protocols of 1977 provide an extensive body of codified rules to that end. A cursory examination of the two bodies of law

— human rights and humanitarian law — will reveal many differences between the two. What both types of law have in common is *inter alia* the problem of transforming legal requirements into adequate and appropriate action. At the same time this transformation process can be seen as marking the boundary between international responsibility and subsequently required national action, and thus giving rise to all kinds of frequent sovereignty-related discussions.

It cannot be said that human rights and humanitarian law form a separate, specialized area of international law without any bearing on other aspects of international law. Both types of law and the maintenance of respect for the principles that they advocate must be seen as a fundamental prerequisite for the creation, existence and consolidation of lasting friendly relations between States. Examples such as South Africa, Somalia, Rwanda, Burundi, Angola, Yugoslavia, Nigeria, Iraq and many others have shown time and again that where the peaceful coexistence of people at the national level cannot be guaranteed (with all due respect for fundamental rights and freedoms), the position of a State as an accepted member of the international community of States is simultaneously cast in doubt. Respect for the rule of law as stipulated by human rights and humanitarian principles is not an ornamental appendage of international law, but its very foundation.

For a detailed review of human rights law and international humanitarian law, see the chapters under those headings below.

Study Questions

Knowledge

1. What is international law?
2. What are the sources of international law?
3. What is customary international law?
4. What is a treaty?
5. What other sources of international law exist?
6. Who/what has legal personality under international law?
7. Which principles are used by States to decide upon questions of criminal jurisdiction?
8. For which acts do States enjoy immunity before national courts?
9. What are the basic rules of diplomatic immunity?
10. What is the definition of State responsibility?
11. What are the formal requirements for statehood?
12. Which additional requirements for statehood now exist?
13. What is understood by the term *jus cogens*?
14. What is the significance of signing a treaty?
15. When are reservations to a treaty permissible?
16. What is the difference between arbitration and judicial settlement?
17. What is the competence of the ICJ?
18. Who can request an advisory opinion of the ICJ?
19. What is the legal basis for the creation of the Yugoslavia Tribunal?
20. Which disputes can be submitted to the ICJ?

Understanding

1. What is the position of human rights law in international law?
2. What are fundamental rights and freedoms?
3. How does your answer relate to your views on *jus cogens*?
4. What is your opinion on the relative theory of State immunity?
5. What is the purpose of granting diplomatic agents immunity in a receiving State?
6. What is your opinion on diplomatic asylum?
7. What is your definition of a State?

8. What is meant by “the international community”?
9. How does State responsibility relate to national sovereignty?
10. What is your view on reservations made to human rights treaties?
11. What is more important: the level of ratification, or the object and purpose of the treaty?
12. Why do you think that the Permanent Court of Arbitration has so little work to do?
13. What do you think of the ICJ’s significance for the development of international law?
14. What is your opinion on the legal basis for the Yugoslavia Tribunal?
15. Why would defence counsel attack the subject matter jurisdiction of the Tribunal?
16. Why is the task of such tribunals not given to the ICJ?
17. Why are human rights law and humanitarian law two sides of the same coin?
18. Do you agree as to the fundamental importance of them both for international relations?
19. How do you see the future development of international relations between States

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Chapter 2

HUMAN RIGHTS LAW

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Key Questions for Law Enforcement Officials

- *What are human rights?*
- *What is the place of human rights in international law?*
- *What was the League of Nations?*
- *What were the reasons for founding the United Nations?*
- *What are the main human rights standards?*
- *What is the International Bill of Rights?*
- *What is the role of the UN in human rights?*
- *What are the main bodies of the UN and what is their role?*
- *What are treaty-monitoring bodies and what is their role and function?*
- *What are gross violations of human rights?*
- *What investigative procedures does the UN have at its disposal?*
- *What kinds of complaints mechanisms exist and how do they work?*
- *What kind of arrangements on human rights exist in the various parts of the world?*
- *What is the relationship between regional arrangements and global instruments?*

Introduction

A right is an entitlement. It is a claim which one person can bring against another to the extent that by exercising that right, he or she is not preventing someone else from exercising theirs. "Human rights" are legal entitlements which every person, as a human being, possesses. They are universal and belong to everyone, rich or poor, male or female. Such rights may be violated but they can never be taken away.

Human rights are legal rights — this means that they are part of the law. This chapter and the ones that follow will explain in detail the various international instruments which guarantee specific rights and which provide for redress should such rights be violated. It is also important to note that human rights are, in addition, protected by the constitutions and domestic laws of most countries of the world.

The fundamental principles which underlie the modern laws of human rights have existed throughout history. However, as explained in greater detail below, it was not until this century that the international community realized the need to develop minimum standards for the treatment of citizens by their governments. The reasons for this realization are best expressed in the Preamble to the Universal

Declaration of Human Rights, adopted by the newly established United Nations in 1948:

> *"recognition of the inherent dignity and ... equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ... disregard and contempt for human rights have resulted in barbarous acts ... it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law ..."*

In order to explain the role which law enforcement officials must play in the promotion and protection of human rights, it is necessary to put human rights in context. This calls for an explanation of the origin, status, scope and purpose of human rights (and, in the case of armed conflicts, of humanitarian law). Law enforcement officials must be made to understand how international human rights law affects their individual task performance. This in turn requires additional explanations of the consequences for domestic law and practice of a State's obligations under international law.

Historical Overview

General Comments

It is important to realize that the history of human rights is older than a first glance at the chapter outline might give reason to believe. Consideration for principles of humanity in the conduct of States at the national and international level can be traced back over the centuries. However, the purpose of this Manual is not to give a detailed study of the history of human rights, but rather to present the realities that are of significance for current situations and future developments. To put those realities into their proper context it is sufficient to go back in time until just after the First World War.

The League of Nations

The First World War formally ended with the Treaty of Versailles concluded at the Paris Peace Conference of 1919. This treaty also created the League of Nations and the International Labour Office. The main objective of the League was "to promote international co-operation and to achieve international peace and security". The instruments that were to serve this objective were based on notions of disarmament; pacific settlement of disputes and the outlawing of war; collective guarantees of

the independence of each member; and sanctions against breaches of these principles. The League had three principal organs: the Council, the Assembly and the Secretariat. Without entering into too much detail about the actual organization of the League it suffices to say that the Council was an organ of limited membership, that the Assembly was the plenary organ of the League including States signatories to the Versailles Treaty, while the Secretariat was the servicing organ. The League's disarmament programme failed completely to achieve its objectives. As for the other instruments at the disposal of the League, a brief examination of its activities reveals that it was not the quality of the instruments available that rendered its overall performance ineffective. Its failure to act according to its obligations where so required was due to the apathy and the reluctance of the member States, rather than the apparent inadequacy of the treaty provisions. The League of Nations never managed to acquire a universal character, as was foreseeable from the outset because of the non-participation of the USA. It consequently remained mainly a European organization with at one time a maximum membership of fifty-nine States. Its success in the field of economics, finance, public health, mandates, transport, communications and social and labour problems was overshadowed by its inability to prevent the Second World War, a failure for which individual member States can more correctly be held responsible. The League was formally dissolved on 18 April 1946; by that time the United Nations, established on 24 October 1945, was nearly six months old.

The International Labour Office

As explained above, the ILO was established under the Treaty of Versailles as an organ of the League of Nations. Created to monitor and promote "fair and humane conditions of labour for men, women and children", it has survived its parent body and is currently one of the specialized agencies of the United Nations. Since it came into being, the ILO has promulgated almost 180 conventions, a large number of which are directly related to human rights. They include conventions concerning forced and compulsory labour, freedom of association and the right to organize, discrimination, and equal remuneration for men and women workers for work of equal value, and touch upon civil and political rights as well as economic, social and cultural rights. The role of the specialized agencies of the UN in general (and that of the ILO in particular) in the promotion and protection of human rights will not receive detailed consideration in this *Manual*, as it is only of limited interest for the role and functioning of law enforcement officials.

1945: United Nations

Where as eminent writers and private organizations had for years advocated the creation and development of an international organization dedicated to the maintenance of international peace, it took a world war for States to agree to the establishment of the League of Nations. But whatever the terrors of the First World War, they were not fearsome enough to convince States of the necessity on their part to act decisively in the interest of international peace and security. The actions of individual States, such as the withdrawal of Germany, Japan and Italy from the League of Nations, and their activities, though a clear and present threat to international peace and security, were not enough to induce member States of the League to act within the powers entrusted to them by the Treaty of Versailles. At the end of the Second World War it was the Allied powers that decided to create one worldwide international organization devoted to the maintenance of international peace and security. The formulation of definite plans for such an organization took shape in stages, at Teheran in 1943, at Dumbarton Oaks in 1944 and at Yalta in 1945. Finally, at the San Francisco Conference in June 1945, fifty governments participated in the drafting of the Charter of the United Nations. It is not only the founding instrument of the UN, but also a multilateral treaty which sets out the legal rights and duties of the UN member States. It formally entered into force on 24 October 1945, the day which is celebrated as the UN's official birthday. With the creation of the UN, the Charter has not established a "super State" nor has it created something that resembles a world government. The prime concern of the United Nations is international peace and security. Its structure has been made subordinate to that objective, and it is heavily dependent on effective cooperation between member States for its achievement. The United Nations has no sovereign powers, which logically means that the organization has no competence in matters within the domestic jurisdiction of a State (see UN Charter, Article 2.7). A more detailed description of the UN and its main bodies and functions can be found below; for the purposes of this *Manual* it is centred on the promotion and protection of human rights through the UN system.

International Human Rights Standards

General Comments

Since the end of the Second World War the international community, under the auspices of the United Nations, has engaged in an extensive exercise of human rights standard-setting in an attempt to create a legal

framework for their effective promotion and protection. In general such standards have been set by developing multilateral treaties which create legally binding obligations upon member States. Parallel to this activity the international community, through the UN, has adopted numerous instruments for the promotion and protection of human rights that fall into the category of so called "soft law". The latter constitutes a category of instruments that can be understood at best as giving recommendations to member States of the UN or as providing authoritative guidance on specific issues relating to human rights and freedoms. This section will present an overview of the most important existing instruments of both categories, with particular reference to instruments relevant for the administration of justice. Some thoughts will be expressed on the issue of reservations to human rights treaties as a practice of States, from both a legal and a political perspective.

Customary Law

Customary international law has been defined in the previous chapter as "evidence of a general practice accepted as law" (see under the heading *The Sources of International Law*). It refers to a practice between States of a recurring nature that stems from a conviction of legal obligation on the part of the acting States. Customary international law is one of the sources of international law used by the International Court of Justice (ICJ) to determine the rights and obligations of States party to a dispute. Although discussion is possible as to how widespread and accepted a practice must be to become customary international law, at some stage consensus between States is achieved, allowing new rules of customary international law to emerge. A customary norm is binding for all States, including those that have not recognized the norm, so long as they have not expressly and persistently objected to its development. It can successfully be argued that certain human rights and freedoms are part of customary international law. These include the prohibition of genocide, slavery and the slave trade, torture and racial discrimination, as well as the prohibition of the arbitrary deprivation of life.

The UN Charter

Already during the drafting of the UN Charter there was great discussion as to how much should actually be said about "human rights" and in what form. Initial fervour for the inclusion of a complete bill of rights in the Charter rapidly diminished to the mere inclusion of a general statement on human rights, and even that compromise did not go uncontested by several

of the major Allied powers. The lobbying capacity of NGOs pleading for more explicit and elaborate attention to human rights (as well as for a UN role in countering human rights abuses) was influential in persuading reluctant States to include them in the Charter. Article 1 of the UN Charter reads:

> *"The Purposes of the United Nations are: To maintain international peace and security ... To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion ..."*

Articles 55 and 56 of the Charter establish the primary human rights obligations of all UN member States. Article 55 reads:

> *"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:*
>
> > *a. higher standards of living, full employment, and conditions of economic and social progress and development;*
> >
> > *b. solutions of international economic, social, health and related problems; and international cultural and educational co-operation; and*
> >
> > *c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."*

Article 56 reads:

> *"All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."*

These are the only provisions of the Charter that directly address the issue of human rights. However, as already explained under the heading *International Criminal Tribunals* in the previous chapter, there are other provisions of relevance for the promotion and protection of human rights. The establishment of the Yugoslavia Tribunal is of course a measure taken under Article 41 of the Charter and aimed at restoring international peace and security. But it also constitutes a measure to follow up flagrant human rights abuses committed within the territory of the former Yugoslavia.

The International Bill of Human Rights

The International Bill of Human Rights is the term used as a collective reference to three major human rights instruments and one optional protocol, namely:

- the Universal Declaration of Human Rights (Universal Declaration);
- the International Covenant on Civil and Political Rights (ICCPR);
- the International Covenant on Economic, Social and Cultural Rights CESCR)
- the First Optional Protocol to the ICCPR.

The Universal Declaration is today the single most important human rights instrument. Adopted by the General Assembly in 1948, it is not a treaty but was intended to be a framework document that would give guidance and interpretation as to the human rights provisions and obligations contained in the UN Charter. It is the subsequent history of human rights law-making that has in fact helped to establish the remarkable position of the Universal Declaration in international human rights law today. The Universal Declaration was adopted in 1948, but it was not until 1966 that the Commission on Human Rights completed the drafting of the two major Covenants and the Optional Protocol. It then took a further ten years — until 1976 — for those major human rights treaties to enter legally into force. For a period of 28 years the international community of States had no other reference point for the interpretation of matters relating to or within the field of human rights than the Universal Declaration. Furthermore, there is not a single human rights instrument drafted since its adoption that is not built on the provisions contained therein or does not make active reference to those provisions in its text. In addition, many of the provisions of the Universal Declaration have found their way into the Constitutions and national laws of UN member States. The general practice of States in the field of human rights since 1948 has been based on it, and certain of those practices can be said to have gained *opinio juris* on the part of States, a belief of legal obligation. Certain provisions of the Universal Declaration (i.e. the prohibition of racial discrimination, the prohibition of torture, the prohibition of slavery) can consequently be considered to form part of customary international law. It is those elements that have contributed to the undisputed position occupied by the Universal Declaration today and the respect shown for it within the international community of States.

The two major Covenants address the two broad areas of human rights: civil and political rights, and economic, social and cultural rights. Both documents, built on the provisions contained in the Universal Declaration, are multilateral treaties. As at December 1997, 141 States had ratified or acceded to the ICCPR and 138 had ratified or acceded to the ICESCR. Of those States, 93 had ratified or acceded to the Optional Protocol to the ICCPR, thereby recognizing the jurisdiction of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of a violation, committed by a State Party, of rights set forth in the Covenant (see below). Only 32 States had ratified or acceded to the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty.

Other Major Human Rights Treaties

Taking the Bill of Rights as a starting point and reference, the international community has continued to draft treaties focused on specific areas or topics within the field of human rights. These instruments can be referred to as specialized instruments. Like the two Covenants they are treaties which create legally binding obligations for States that are party to them. Where such treaties restate general principles of international law or rules of customary international law, they legally bind all States, including those that are not party to them (at least insofar as provisions recognized as general principles or "custom" are concerned). Treaties that are drafted along the lines set out above are subject to interpretation in accordance with the relevant rules in the *Vienna Convention on the Law of Treaties*.

The most important major specialized treaties include the following:

- *Convention on the Prevention and Punishment of the Crime of Genocide;*
- *Convention relating to the Status of Refugees;*
- *Protocol relating to the Status of Refugees;*
- *International Convention on the Elimination of All Forms of Racial Discrimination;*
- *Convention on the Elimination of All Forms of Discrimination Against Women;*
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;*
- *Convention on the Rights of the Child;*
- *Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty.*

The two Covenants, as well as the Conventions relating to racial discrimination, torture, discrimination against women, and the rights of the child, each have a committee that is charged with overseeing the effective implementation of their provisions by States Parties. These committees are generally referred to as "treaty-monitoring bodies". Their role and function is described in more detail below under the heading *Enforcement Mechanisms and Machinery*.

Reservations to Human Rights Treaties

The *Vienna Convention on the Law of Treaties* reads:

> *'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State ... (Article 2.1(d)).*

The Convention also stipulates that *a State may ... formulate a reservation unless:*

> *(a) the reservation is prohibited by the treaty;*
>
> *(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or*
>
> *(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty* (Article 19).

The effect of a reservation is to modify relations between the reserving State and other States Parties to the treaty to the extent of the reservations. When a State Party objects to a reservation made by another State, but does not oppose the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation (Vienna Convention, Article 21.3).

In November 1994, the Human Rights Committee issued a General Comment, in accordance with its power under Article 40 of the ICCPR, criticizing the increasing number of reservations that States are making to human rights treaties before consenting to ratify them[2]. After noting that,

[2] Human Rights Committee, *General Comment No 24*, UN Doc. CCPR/C/21/Add. 6 (1994).

as of 1 November 1994, 46 out of 127 parties to the ICCPR had entered between them a total of 150 reservations, the Committee concluded that "[t]he number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States Parties". The Committee did acknowledge that reservations "serve a useful function" by enabling States that might otherwise have difficulty guaranteeing all the rights in the Covenant to ratify it nonetheless, but stressed its desire that States accept the full range of obligations imposed by the treaty.

The problem here is that action against (excessive) reservations made by States Parties must primarily be taken by other States Parties. In that connection States will often consider much more than the mere object and purpose of the treaty at hand. Politics do play an important role in the field of human rights, including in the area of reservations to human rights treaties. First of all, States easily allege interference in domestic affairs where international human rights norms (threaten to) assert influence at the national level. Secondly, an individual objection to a reserving State's intentions might well trigger a reciprocal response in the future as to a reservation the now objecting State might wish to make for itself.

The Administration of Justice

The main focus of this *Manual* is on the human rights instruments related to the administration of justice. Few of those are treaties. Most of them are instruments that offer authoritative guidance to States. They offer guidance as to the interpretation of certain treaty obligations, set standards for the conduct of law enforcement officials in specific situations, or state principles for the treatment of specific categories or groups of persons falling within the scope of law enforcement responsibility. Where appropriate, those instruments will be cited in the text of the chapters relating to law enforcement. It should be noted at the outset that as a specialized training tool, this *Manual* must not be taken as representing a complete overview of the entire field of human rights.

Under the heading *Selected References*, books, articles and documents are listed that can help readers to broaden their knowledge and understanding of human rights in general and in particular in relation to the administration of justice.

The United Nations and Human Rights

General Comments

The UN Charter has effectively established human rights as a matter of international concern. The United Nations itself regards the promotion and protection of human rights as one of its principal purposes, and embarked upon this task through the extensive standard-setting exercise described above. The promulgation of a multitude of international instruments related to human rights was intended to clarify the human rights obligations of UN member States. At the same time, however, all those instruments require implementation as well as certain forms of monitoring and control over their application at the national level, where disputes over the interpretation of treaty obligations frequently arise. The description of the UN given below will be limited to those of its organs that are of direct and primary importance to the field of human rights. The mechanisms and machinery at their disposal to ensure promotion and protection of human rights will be presented after this description.

Security Council and General Assembly

The *Security Council and the General Assembly are both principal organs of the United Nations*, established in accordance with Article 7.1 of the Charter. *Both have the capacity to establish such subsidiary organs as they deem necessary for the performance of their functions* (Articles 22 and 29 of the Charter).

The *Security Council* consists of fifteen members of the UN. The Republic of China, France, Russia, the UK and the USA are the Council's five permanent members. The other ten seats are allocated on a non-permanent basis for a term of two years (by the General Assembly), with due regard for the contribution of members of the UN to the maintenance of international peace and security and to the other purposes of the organization, as well as for equitable geographical distribution (Article 7.1 and 2 of the Charter). The Council acts on behalf of member States and in order to ensure prompt and effective action by the United Nations, with a primary responsibility for international peace and security. The member States agree (under Article 25 of the Charter) to accept and carry out the decisions of the Security Council in accordance with the present Charter. The Council is the executive organ of the United Nations and works on a permanent basis.

The *Security Council has a voting procedure* that is stated in Article 27 of the Charter:

> *1. Each member of the Security Council shall have one vote.*
>
> *2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.*
>
> *3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.*

One of the main problems with this voting procedure is that no clear distinction is made under the Charter as to what are to be considered "procedural matters" and "all other matters". This distinction is, of course, of great importance with regard to the "veto right" granted to each of the permanent members under Article 27.3 of the Charter. Generally the question of what is "procedural" will be answered with reference to the Charter itself (NB: the heading "procedure" is given to various articles throughout Chapters IV, V, X and XI). Furthermore, the rules of procedure of the Security Council give its President the power to rule a matter "procedural", provided such a ruling is supported by nine of its members.

As mentioned above, the primary responsibility of the Security Council lies in the area of international peace and security. The Security Council is obliged to work towards the *pacific settlement of such international disputes as are likely to endanger international peace and security*. However, should peaceful settlement fail or be impossible, the Security Council is able, under certain circumstances, to *take enforcement action*. The specific powers and authorities with regard to those two approaches are set out in Chapters VI and Chapter VII respectively of the UN Charter. As to enforcement action, the determination (by the Council) of a "threat to the peace, breach of the peace or act of aggression" under Article 39 of the Charter must precede the use of the enforcement powers under Articles 41 and 42. As seen in the previous chapter with respect to international criminal tribunals, the competence and power of the Security Council have proved to be far-reaching in practice and certainly not limited to measures explicitly mentioned in the Charter under Articles 41 and 42.

Much has been said and written about the effectiveness of the Security Council in maintaining international peace and security. In the past, East-West tensions and other political factors have prevented the Council from

taking effective action, because one (or more) of its permanent members would make such action impossible by casting their veto. Accordingly, history can come up with only very few examples of "enforcement action" instigated by the Security Council. Political obstruction of the Council's work was also the reason why the *General Assembly* passed the resolution on "Uniting for Peace" (3 November 1950). This resolution enables the Assembly to determine the existence of a "threat to peace, breach of the peace, or act of aggression" in those cases where the Security Council (because of a lack of unanimity) fails to exercise its primary responsibility for the maintenance of international peace and security. A second consequence of the relative weakness of the Council was the development of powerful regional security systems outside the UN, such as NATO. The third development is that of *"peacekeeping"* operations that can, technically speaking, be set up under either Chapter VI or VII, or both.

The *General Assembly* is the plenary organ of the UN, consisting of all member States, each with one vote and each with permission to have a maximum of five representatives in the Assembly (UN Charter, Article 9). It is a deliberative body which proceeds via recommendation rather than binding decision. It cannot legislate directly for the member States. The powers of the Assembly are stated in Chapter IV of the Charter and include the power to "discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter" (Article 10). Although this creates a general supervisory role for the Assembly, its powers as to the domain of the Security Council are limited to those instances where the Council either requests the opinion of the Assembly (Article 12.1) or refers an issue to it (Article 11.2), or in the implementation of the *Resolution "Uniting for Peace*". The Assembly does have the right to discuss any questions relating to international peace and security and to make recommendations to the Council on the principles of disarmament and the regulation of armaments (Article 11.1). The Assembly also has the right to discuss any questions relating to the maintenance of international peace and security (Article 11.2). Where action is considered necessary the question must be referred to the Council by the Assembly, either before or after discussion.

The *voting procedure* of the Assembly is laid down in Article 18 of the Charter. It consists essentially of one vote for each member, with decisions on "important questions" being taken by a two-thirds majority of the members present and voting, and decisions on "other questions" by a simple majority of the members present and voting. An indication as to the *definition of "important questions"* can be found in the remainder of

Article 18.2, which stipulates that these questions shall include: *"recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1(c) of Article 86, the admission of new members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions."* The Assembly has the power (Article 18.3) to identify, by majority vote, additional categories of questions to be decided by a two-thirds majority.

It is mainly because of the demonstrated inability of the Security Council to accomplish the purposes of the Charter and act in accordance with the principles thereof that the General Assembly has assumed more and more political power. The Assembly has sought to justify these developments by reference to those principles and purposes. In this process it has not necessarily abided by the strict legal interpretation of articles of the Charter.

The Economic and Social Council

Like the Security Council and the General Assembly, the *Economic and Social Council* (ECOSOC), established under Article 7 of the Charter, is one of the principal organs of the United Nations. ECOSOC is composed of 54 members, elected by the General Assembly by "staggered" elections so as to ensure some continuity. In these elections an attempt is always made to represent a variety of social, economic, cultural and geographical interests. Unlike the Security Council, ECOSOC does not recognize permanent membership as a right, although by tacit agreement the five major powers are always elected. *It has the power to set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions* (Charter, Article 68). The voting procedure of ECOSOC is by simple majority vote of members present and voting, with each of the members having one vote. It operates under the responsibility of the General Assembly (Charter, Article 60).

Articles 62 to 66 of the UN Charter set out the functions and powers of ECOSOC, which include the *initiation of studies* and reports with respect to international economic, social, cultural, educational, health, and related matters and the *making of recommendations* with respect to any such matters to the General Assembly, to the members of the UN and to the

specialized agencies concerned. *ECOSOC may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all* (Charter, Article 62). It may *draft Conventions* for submission to the General Assembly on matters falling within its competence, and it may call *international conferences* on those matters. Other main functions of ECOSOC are to assist other UN organs, States and specialized agencies; to coordinate work with and between the specialized agencies; and to maintain relations with other inter-governmental and non-governmental organizations.

Under Article 68 of the Charter, ECOSOC has established a number of subsidiary organs, required for the performance of its functions. These subsidiary organs include:

- the Commission on the Status of Women;
- the Commission on Human Rights; and
- the Committee on Economic, Social and Cultural Rights (see further details under "treaty-monitoring bodies" below.

The aforesaid subsidiary organs are specifically mentioned here because of their direct relevance to the subject matter of this *Manual.*

The Commission on Human Rights

The Commission on Human Rights (CHR) was set up by ECOSOC in 1946 and has met annually (at six-week meetings held each spring in Geneva) ever since. The CHR currently consists of 53 members elected by ECOSOC for three-year terms. As its name suggests, the CHR is the most important UN body concerned with human rights. It may initiate studies and fact-finding missions, prepare draft conventions and declarations for approval by higher bodies, discuss specific human rights violations in public or private sessions, and put forward suggestions for improving the UN's human rights procedures. The CHR has established a number of mechanisms for the study, investigation and amelioration of situations of gross and widespread violations of human rights, which will be discussed in greater detail below. Only the members of the Commission have the right to vote. To facilitate the effective performance of its activities, the CHR has made use of its powers to establish subsidiary organs. These include the Sub-Commission on Prevention of Discrimination and Protection of Minorities, as well as working groups on various human rights topics (some of which will be considered more closely below).

The Sub-Commission on Prevention of Discrimination and Protection of Minorities

The Sub-Commission was established in 1947 during the first session of the CHR as a subsidiary organ. The tasks envisaged for the Sub-Commission were "(a) to undertake studies, particularly in the light of the Universal Declaration of Human Rights, and to make recommendations to the CHR concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, religious and linguistic minorities; and (b) to perform any other functions entrusted to it by ECOSOC or by the CHR." There are 26 members on the Sub-Commission, elected by the CHR for a term of four years. The members of the Sub-Commission are elected on the basis of their personal qualities and expertise, rather than as representatives of their respective governments. The Sub-Commission has established four different working groups which assist it in the performance of its tasks during its annual session. There is the Working Group on Communications, which examines all communications (received by the UN) containing allegations of violations of human rights — with the purpose of bringing to the attention of the Sub-Commission those communications that appear to reveal *a consistent pattern of gross and reliably attested violations of human rights*. The Working Group on Contemporary Forms of Slavery studies slave-like practices such as forced labour and exploitation through prostitution. The Working Group on Indigenous Peoples and Minorities studies developments and problems relating to the human rights of those two categories of peoples. The Working Group on the Administration of Justice and Compensation, the fourth working group, devotes its attention to the field of crime and effective remedies. Each of the working groups reports regularly to the Sub-Commission, which either decides on matters itself by adopting resolutions or decisions, or refers draft resolutions and decisions for consideration by the Commission or ECOSOC.

The Commission on the Status of Women

The Commission on the Status of Women was established by ECOSOC in 1946 and is composed of representatives from 45 UN member States, elected by ECOSOC for four-year terms. Its functions are to prepare recommendations and reports for ECOSOC on promoting women's rights in political, economic, civil, social and educational fields. It may also make recommendations to ECOSOC on problems in the field of women's rights that require immediate attention. Although the Commission has a procedure for receiving confidential communications on human rights

violations, it is not very often used. This is mainly due to the fact that the procedure as such is not very efficient, nor has it been very well publicized. Additional information on the Commission on the Status of Women may be found in the chapter *Women*.

The Office of the High Commissioner for Human Rights

The United Nations Secretariat is composed of international civil servants whose function it is to service its various organs, agencies and procedures. The Human Rights Secretariat is located within the Office of the High Commissioner for Human Rights (OHCHR) — formerly the Centre for Human Rights.

The OHCHR is located in Geneva. It has a small liaison office in New York and an increasing number of temporary field offices which are established to monitor the human rights situation in a particular country and/or to provide technical assistance to its government. The Office currently employs approximatley one hundred professionals at it's Headquarters — primarily international lawyers and political scientists. The main tasks of the OHCHR are to: (i)service the Commission on Human Rights and its Sub-Commission; (ii) support the various investigatory, monitoring and research procedures which have been established by the General Assembly and the Commission; (iii) service the treaty-monitoring bodies; (iv) conduct research into various human rights topics as requested by the Commission and the Sub-Commission; and (v) implement a programme of technical assistance whereby governments are given help to implement human rights at the national level (through, inter alia, training, legislative assistance and information dissemination). The Head of the Office is the High Commissioner for Human Rights (see below).

The High Commissioner for Human Rights

It was not until after the World Conference on Human Rights, held in Vienna in 1993, that the issue of appointment of a High Commissioner for Human Rights was pursued with a little more vigour than during the cold war era. The Conference recommended that the General Assembly consider the subject "as a matter of priority". In 1994 the General Assembly adopted the resolution that created the position of High Commissioner for Human Rights and appointed Mr. Jose Ayala Lasso from Equador as the first High Commissioner. The General Assembly stated that the High Commissioner is the "United Nations official with principal responsibility for United Nations human rights activities under the direction and responsibility of the Secretary General" (G.A. Res. 48/148, 1994). In discharging his responsibilities the

High Commissioner operates "within the framework of the overall competence, authority and decisions of the General Assembly, the Economic and Social Council and the Commission on Human Rights" (Ibid). The powers of the High Commissioner are far reaching and basically permit him or her to take on any contemporary human rights problem and to be actively engaged in efforts to prevent human rights violations around the world. This power is stated in paragraph 4f of the last mentioned resolution of the General Assembly and empowers the High Commissioner "to play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in preventing the continuation of human rights violations throughout the world." In late 1997, the appointment of Mary Robinson, former President of Ireland, as the new High Commissioner was confirmed by the General Assembly.

Enforcement Mechanisms and Machinery

Treaty-Monitoring Bodies

There are six major human rights treaties that each have a committee to oversee their respective effective implementation by States Parties. Those treaties are the:

- *International Covenant on Civil and Political Rights (ICCPR);*
- *International Covenant on Economic, Social and Cultural Rights (CESCR);*
- *International Convention on the Elimination of all Forms of Racial Discrimination (CERD);*
- *Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW);*
- *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);*
- *Convention on the Rights of the Child (CRC).*

Each of the existing Committees (with the exception of the first) carries the name of the Convention or Covenant of which it oversees the implementation:

- *ICCPR: Human Rights Committee;*
- *CESCR: Committee on Economic, Social and Cultural Rights;*
- *CERD: Committee on the Elimination of Racial Discrimination;*
- *CEDAW: Committee on the Elimination of Discrimination against Women;*

- *CAT:* *Committee against Torture;*
- *CRC:* *Committee on the Rights of the Child.*

The legal basis for the establishment of each of those Committees lies in the relevant Covenant or Convention, with one exception: the Committee on Economic, Social and Cultural Rights. This Committee was established as one of the subsidiary organs of the Economic and Social Council and charged with the task of overseeing the implementation of the CESCR by States Parties. Its position is hence less secure than that of the other Committees, since ECOSOC can, in principle, decide at any moment it considers appropriate to terminate the existence of any of its subsidiary organs, including the said Committee. States party to Covenants and/or the Conventions are required to submit regular reports to the Committee overseeing the particular international instrument concerned, stating the progress and problems encountered in fulfilling the obligations stemming from it.

Each Committee consists of a number of independent experts, proposed and elected by States party to the relevant instrument. For the ICCPR, CESCR and CERD the number of experts on the respective Committees is set at 18; for CEDAW the number is 23; and for the CAT and the CRC the number is 10.

Whereas all six instruments mentioned above set out a system of State-Party reporting, there are only three instruments that contain provisions allowing States Parties to make complaints about the failure of other States Parties to discharge their obligations under the treaty, namely the ICCPR, CERD and CAT. The mechanism of inter-State complaints will be considered in more detail below. The same three instruments also contain provisions for individual complaints about alleged violations of rights by States Parties. These, too, are considered in greater detail below. Each of the Committees (also referred to as treaty-monitoring bodies) is "serviced" by the Office of the High Commissioner for Human Rights in Geneva, except for the CEDAW Committee, which is serviced by the Division for the Advancement of Women, in New York.

Gross Violations of Human Rights

Since its inception, the United Nations has been swamped with complaints alleging violations of fundamental rights and freedoms. In certain situations, such communications are of sufficient volume and weight to create an image of systematic and mass violations of human rights committed in a particular region of the world or of a particular kind. It was not until 1967 that the UN started to give some form of coordinated

attention to such communications. (Prior to that time the Commission on Human Rights was of the opinion that it had no power to take any action with regard to any complaints concerning human rights. This opinion, given in 1947, was subsequently confirmed by the Economic and Social Council in 1959.) At present both the Commission on Human Rights and its Sub-Commission are authorized by the Economic and Social Council, through *ECOSOC Resolution 1235* (XLII) of 6 June 1967:

> *"to examine information relevant to gross violations of human rights and fundamental freedoms ... contained in the communications listed ... pursuant to ... resolution 728F (XXVIII) of 30 July 1959."*

The scope and purpose of ECOSOC resolutions addressing the issue of gross violations of human rights will now be examined more closely.

ECOSOC Resolutions 728F, 1235 and 1503

ECOSOC Resolution 728F (XVIII) of 30 July 1959 served to consolidate the practices of the UN *vis-à-vis* individual communications alleging violations of human rights to date. The Economic and Social Council (ECOSOC) approved the statement made by the Commission on Human Rights in 1947 that it had no power to take any action with regard to any complaints concerning human rights. Thereafter the Secretary-General was requested to compile a list of all communications received and to prepare a confidential list of those communications addressing human rights issues, for subsequent distribution to the members of the Commission on Human Rights. In short, what this resolution established was an internal administrative procedure to deal with individual communications, but which proved utterly ineffective in addressing the issue of human rights violations. It has more than once been referred to as the most elaborate waste paper basket in the world.

On 6 June 1967 ECOSOC adopted *Resolution 1235 (XLII)*, which *"welcomed the decision of the Commission on Human Rights to give annual consideration to the item entitled "Question of the violation of human rights and fundamental freedoms... in all countries..."* The ECOSOC then went on to authorize the Commission on Human Rights and its Sub-Commission *"to examine information relevant to gross violations of human rights and fundamental freedoms... contained in the communications listed... pursuant to... ECOSOC resolution 728F (XXVIII) of 30 July 1959."* ECOSOC also decided that in appropriate cases and after careful consideration of the information made available to it, *the Commission on Human Rights may make*

a thorough study of situations which reveal a consistent pattern of violations of human rights ... and report, with recommendations thereon, to the ECOSOC.

On 27 May 1970, ECOSOC proceeded to adopt Resolution 1503 (XLVIII) setting out the procedure for dealing with communications relating to violations of human rights and fundamental freedoms. The resolution authorizes the Sub-Commission on Prevention of Discrimination and Protection of Minorities to appoint a working group which on its behalf may *"consider all communications, including the replies of Governments thereon, received by the Secretary-General under ECOSOC resolution 728F (XXVIII) of 30 July 1959 with a view to bringing to the attention of the Sub-Commission those communications ... which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission".* ECOSOC subsequently entrusted the Sub-Commission with the responsibility of devising "*appropriate procedures for dealing with the question of admissibility of communications* received by the Secretary-General under ECOSOC Resolution 728F (XXVIII) and in accordance with ECOSOC Resolution 1235 (XLII) of 6 June 1967". The Sub-Commission adopted a resolution on 13 August 1971, Resolution 1 (XXIV), setting out the procedures for dealing with the said question of admissibility: the Sub-Commission, by majority vote, will refer to the Commission on Human Rights those communications which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission. The Commission has to decide, concerning the situations referred to it by the Sub-Commission, whether it requires a *thorough study* as provided for by ECOSOC Resolution 1235, or *investigation by an ad hoc committee* to be appointed by the Commission. *All actions envisaged in the implementation of ECOSOC Resolution 1503 by the Sub-Commission or the Commission shall remain confidential until such time as the Commission may decide to make recommendations to the Economic and Social Council.* This confidentiality provision is probably the greatest defect of the procedure and is implemented to such extremes that petitioners are not kept informed of the status of the communication beyond the initial acknowledgement of its receipt. The Commission on Human Rights has however developed a practice whereby it can decide no longer to consider a situation under the confidential regime of the 1503 procedure, but "to go public" by transferring it to consideration under the 1235 procedure.

The following page provides a schematic overview of the procedures under Resolution 1503, including those procedures for dealing with the question of admissibility of communications received under Resolution 728F and in accordance with Resolution 1235.

1503 PROCEDURE

Individual Communications received by the Secretary General of the U.N. under ECOSOC RESOLUTIONS 728 F (XXVIII) 30 July 1959 and in accordance with Resolution 1235 (XLII) of 6 June 1967.

Working Group of Communications of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities.

→ Admissible communications may originate from a person or group of persons who, …, are victims of *such violations*, any person or group of persons who have a direct and reliable knowledge of those violations, or N.G.O.'s acting in good faith, …, and having direct and reliable knowledge of those violations.

→ …to consider all communications, including replies of governments thereon, …, to bringing to the attention of the Sub-Commission those communications, …, Which appear to reveal a consistent pettern of gross and reliably attested violations of human rights and fundamnetal freedoms within the terms of reference of the Sub-Commission.

PRE-ADMISSIBILITY STAGE

→ Anonymous communications shall be inadmissible; …, the author of a communication, …, must be clearly identified.

→ Communications shall not be inadmissible solely because the knowledge of the individual author is second hand, provided that they are accompanied by clear evidence.

→ The object of the communication must not be inconsistent with the relevant principles of the Charter, of the U.D.H.R. and of the other applicable instruments in the field of Human Rights.

→ Communications shall be admissible only if, …, there are reasonable grounds to believe that they may reveal a consistent pattern of gross and reliaby attest violations of human rights and fundamental freedoms.

ADMISSIBILITY STAGE

→ A communication will not be admissible if:

- it does not contain facts, states the purpose of the petition and of the rights that were violated;
- if its language is essentially abusive;
- if it has manifestly political motivations anf its subject is contrary to the provision of the U.N. Charter;
- if it appears to be based exclusively on reports disseminated by mass media;
- if their admission would prejudice the functions of specialized U.N. agencies;
- if viable domestic remedies have not been exhausted;
- if they relate to cases settled by the States concerned in accordance with the principles of the U.D.H.R. or other human rights instruments;
- if they are not submitted within a reasonable time after the exhaustion of domestic remedies.

Sub-Commission consideration

Discontinue

Commission on Human Rights consideraton

A thorough study by the Commission on the basis of paragraph 3 of ECOSOC Resolution 1235 (XLII) of 6 June 1967. (paragraph 6(a) 1503)

Investigation by an ad-hoc committee on the basis of paragraph 6(b) of ECOSOC Resolution 1503 (XLVIII) of 27 May 1970.

Investigative Procedures

Resolution 1235 (XLII) mentioned above grants the Commission on Human Rights (CHR) authority to investigate information relating to gross violations of human rights and fundamental freedoms for all countries. The CHR has developed two types of practices, which can be classified as being either *"country-specific"* or *"thematic"*, to exercise this investigative authority. For the country-specific procedures the CHR will appoint a *Country Rapporteur* (in the form of a **special rapporteur, a special representative, a working group, experts, or a special envoy**) charged with collecting and analysing information on human rights violations in a particular country. These Country Rapporteurs subsequently prepare (annual) reports to the CHR (or to the General Assembly if so requested); they may obtain their information from individuals, groups, organizations and/or governments and will often also try to obtain relevant information by visiting the country concerned. Usually the country under investigation will give the rapporteur access. However, there have been a number of cases in which such access has been denied and rapporteurs have been forced to rely on external sources of information only.

In the course of its *thematic procedures* the CHR has thus far proceeded to appoint *working groups, special rapporteurs and special representatives*, allowing them to seek and receive information on human rights violations around the world of a specific nature. The objective of such thematic procedures is to identify and analyse particular "issues" or "practices" which contravene human rights and to work towards their resolution. The thematic rapporteurs, whatever their particular designation, have the authority to receive and act upon information of human rights violations. This authority is not confined to situations of gross violations of human rights and freedoms. The rapporteurs make recommendations to governments and report annually on their activities in a public report to the Commission on Human Rights. At the moment there are fourteen different thematic procedures, consisting of three working groups, ten special rapporteurs, and one special representative. Their exact designations are:

- *Working Group on Enforced or Involuntary Disappearances;*
- *Working Group on Arbitrary Detention;*
- *Working Group on the Right to Development;*
- *Special Rapporteurs on:*
    - *Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;*

  - *Extrajudicial, Summary or Arbitrary Executions;*
  - *Religious Intolerance;*
  - *Mercenaries;*
  - *the Sale of Children, Child Prostitution and Child Pornography;*
  - *Contemporary Forms of Racism, Racial Discrimination and Xenophobia;*
  - *Freedom of Opinion and Expression*
  - *the Independence of Lawyers and Judges;*
  - *Violence against Women;*
  - *Toxic Waste; and*
- *The Special Representative on Internally Displaced Persons.*

Complaints Mechanisms

The procedures set out under Resolutions 1235 and 1503 and discussed above generally focus on those situations that appear to involve gross violations of human rights. International human rights law, however, also offers procedures for violations of human rights that do not necessarily amount to what is described as a pattern of gross and reliably attested violations of human rights. There are two kinds of procedures in operation, one for *inter-State complaints* and another for *individual complaints*.

Inter-State complaints are possible only under the ICCPR, CERD and CAT regimes. The procedure under CERD is mandatory for all States party to that particular Convention; the procedure for inter-State complaints under the other two instruments is optional. States Parties that wish to accept this procedure must make a declaration that they recognize and accept the authority of the Human Rights Committee or the Committee against Torture to receive and consider inter-State complaints. If a State Party claims that another State Party is not fulfilling its obligations under the ICCPR, CERD or CAT, the respective Committees consider only those communications by States Parties that have accepted the jurisdiction of the Committee (except for CERD, of course). When States Parties do not succeed in reaching a friendly solution between them and the Committee has ascertained that domestic remedies have been exhausted, it may tender its good offices to the parties with the aim of bringing about an amicable settlement.

Individual complaints procedures likewise exist only under the ICCPR, CERD and CAT. The procedure (whereby individual persons may complain

of violations of treaty obligations committed by a State Party) is optional for States Parties, i.e. in situations where a State Party has not accepted the competence of the relevant Committee to receive and consider individual communications, such communications are inadmissible. Individual communications submitted under these instruments are addressed to the Committee concerned. In the case of the *ICCPR,* only communications *from individuals claiming to be the victim* of a violation of the ICCPR provisions will be considered by the Human Rights Committee. For the CAT the provision is similar, although the communication, addressed to the Committee against Torture, can also be submitted *on behalf* of the individual claiming to be a victim of a violation of that Convention. Under the CERD, only communications from individuals or groups of individuals claiming to be victims of violations of the CERD may be considered by the Committee on the Elimination of Racial Discrimination.

As to the admissibility of individual petitions, the three Conventions lay down specific criteria:

- *the competence of the Committee needs to be recognized* (ICCPR, Optional Protocol, Art. 1; CAT, 22.1; CERD, 14.1);
- *exhaustion of domestic remedies* (ICCPR/OP Arts 2 and 5.2(b); CAT, 22.5(b); CERD, 14.7);
- *no anonymous communication, no abuse* (ICCRP/OP Art. 3; CAT, 22.2; CERD, 14.6);
- *compatibility (ratione temporis, personae, loci, materiae) with provisions of the Convention* (ICCPR/OP Art. 3; CAT, 22.2);
- *no current examination of the matter under another international procedure* (ICCPR/OP Art. 5.2(a));
- *no past or current examination of the matter under another international procedure* (CAT, Art. 22.5(a);
- *substantiation of allegations (*prima facie *case)* (ICCPR/OP Art. 2; CAT, 22.1).

When a complaint is considered admissible, the Committee will proceed to bring the complaint to the attention of the State Party concerned. Within six months, the receiving State must submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State. (ICCRP/OP Art. 4; CERD, Art. 14.6(b), but restricted to three months; CAT, Art. 22.3).

The subsequent considerations of the Committee will be based upon the information made available to it by (“or on behalf of”, CAT, Art. 22.1) the

petitioner and the State Party concerned. (ICCPR/OP Art. 5.1 OP/ICCPR; CAT Art. 22.4; CERD, Art. 14.7(a)). Following these considerations, which take place in closed meetings, the Committee forwards its views to the State Party concerned and to the individual (ICCPR/OP Art. 5.3, 5.4; CAT, Art. 22.6, 22.7; CERD, Art. 14.7(a) and (b) — no indication is given that meetings of this Committee in this respect are closed meetings).

All Committees must present an annual report of their activities under the Protocol (ICCPR) or under the Convention (CAT and CERD) to the Commission on Human Rights.

Regional Arrangements

General Comments

Thus far only the global instruments, mechanisms and machinery in the field of human rights have been considered. This does not provide a complete picture, as various regional systems and arrangements in that field have also been established and deserve closer examination. Although regional arrangements such as the European system, the OAU or the OAS clearly go beyond human rights, this Manual will confine itself to exploring the main features of those systems only insofar as they relate to human rights. It is important for instructors in human rights and humanitarian law to be familiar with the existing regional systems to which a State can be party at the same time as being a party to one of the global instruments mentioned above.

Africa

The African Charter on Human and Peoples Rights was adopted by the Organization of African Unity (OAU) in 1981 and entered into force in 1986. The OAU is a regional intergovernmental organization which was established in 1963 and has 53 member States. It functions through a Permanent Secretariat, various Ministerial Conferences, a Council of Ministers and the Assembly of Heads of State and Government. The Assembly meets once a year and is the highest policy-making body of the OAU. The African Charter has some characteristics that make it quite different from, for instance, the European Convention on Human Rights (see below): the Charter proclaims not only rights (e.g. the right to life, liberty and security of the individual) but also duties (e.g. duties towards family and society, duty to respect and consider fellow beings without discrimination), and codifies not only individual rights but also rights of

peoples (e.g. equality, right to existence, right to self-determination, etc.). In addition to civil and political rights, the African Charter also contains economic, social and cultural rights. The way in which it has been drafted leaves open the possibility for States parties to place (extensive) restrictions and/or limitations on protected rights (see for instance its Articles 6 to 12).

The African Charter provides both for inter-State complaints and for individual communications. Both procedures are mandatory to the States Parties. The competence to consider inter-State complaints rests with the African Commission on Human and Peoples' Rights, established under Article 30 of the Charter; with respect to "other communications" (see Article 55 of the Charter), the Commission may decide by majority vote of its eleven members which of those communications it will consider. For the category of "other communications" the criteria of admissibility clearly resemble those specified in the international instruments mentioned above.

The Americas

The inter-American human rights system has two distinct legal sources. One has evolved from the Charter of the Organization of American States (OAS). The other is based on the American Convention on Human Rights. The OAS has 35 members comprising all sovereign States of the Americas. It performs its functions through various organs, including the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, and the Permanent Council. The General Assembly meets once a year in regular session and as many times in special sessions as necessary. It is the supreme policy-setting organ of the OAS. Each member State is represented in it and has one vote. The Meeting of Consultation of Ministers of Foreign Affairs is the forum in which problems of an urgent nature are discussed, and can be convened by the Permanent Council. The latter, a plenary body subordinate to the Assembly and the Meeting of Consultation, is composed of the permanent representatives of the Member States to the OAS. The Council's role includes supervision of the Secretariat, collaboration with the UN and other international organizations, and the fixing of budget quotas and formulation of statutes for its own subsidiary organs.

The OAS human rights system is based on the 1948 OAS Charter and its subsequent amendments of 1967 and 1985, which had a major impact in the human rights field. The amendments led to the establishment of the *Inter-American Commission on Human Rights* as a Charter-based organ, with the principal function *"to promote the observance and protection of human*

rights ...". They also strengthened the normative character of the *American Declaration of the Rights and Duties of Man*, the instrument which embodies the authoritative interpretation of the "fundamental rights of the individual" proclaimed in Article 3(k) of the OAS Charter. In an advisory opinion the Inter-American Court of Human Rights found that "for member States of the Organization, the Declaration is the text that defines the human rights referred to in the Charter" ... [T]he Declaration is for these States a source of international obligations related to the Charter of the Organization. The Court found strong support for its argumentation in the human rights practice of the OAS and its member States, which it reviewed in considerable detail in its advisory opinion.

With the entry into force of the *American Convention on Human Rights,* the expanding roles and responsibilities of the Inter-American Commission on Human Rights (provided for by the Convention) required the OAS General Assembly to adopt a new Statute for the reconstituted Commission. The Commission has retained the powers and authorities assigned to it by the OAS Charter, which binds all member States, and has additional powers and competences under the Convention, which are binding only for the States party to that instrument. By virtue of its Charter-based competences the Commission may conduct *country studies and on-site investigations* and receive *individual petitions* alleging violations of rights contained in the Declaration. Under the Convention it can examine inter-State complaints and individual petitions. Acceptance of the Commission's jurisdiction for individual petitions is mandatory. However, for its jurisdiction as to inter-State complaints an additional acceptance by States concerned is required.

Cases may be referred to the *Inter-American Court of Human Rights* by both the Commission and interested States whenever a friendly settlement cannot be reached. Individuals do not have the right to refer a case to the Court. The Court has contentious jurisdiction and the jurisdiction to give advisory opinions (Article 64 of the Convention). In contentious cases the judgment of the Court is final and not subject to appeal. States party to the Convention undertake to comply with the judgment of the Court in any case to which they are parties (Article 68(1)). The Court is empowered to award financial compensation for injured rights and/or freedoms, as well as to order remedy of the situation that constituted the breach of such right or freedom (Article 63(1)). The American Convention is the only major human rights treaty that expressly authorizes the issuance (by the Court) of *temporary restraining orders* (see Article 63(2)), in cases pending before it and in cases that have been lodged with the Commission but not yet

referred to the Court. This authority is *limited to cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons*.

Europe

The human rights system in Europe is often described as the most complete and effectively functioning system currently in existence. In 1950 the Council of Europe, the organization composed of all European member States, promulgated the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), which came into force in 1953. The ECHR created two important bodies for the implementation of human rights and fundamental freedoms, the *European Commission of Human Rights, and the European Court of the ECHR*. Since the entry into force of that Convention, the Council of Europe has elaborated some eleven Protocols which sought to expand the protection provided by the Convention. The eleventh Protocol, which has not yet entered into force, seeks to create a Unified European Court of Human Rights in order to replace the currently existing Commission and Court procedures. The ECHR does not contain provisions on economic, social and cultural rights; these are laid down in the *European Social Charter* and its Additional Protocol. In addition to these instruments, there is also the *European Convention for the Prevention of Torture and of Inhuman or Degrading Treatment or Punishment*.

By ratifying the ECHR, a State is deemed to have accepted the jurisdiction of the Commission to deal with inter-State complaints. For the admissibility of individual petitions, an additional declaration of acceptance of the jurisdiction of the Commission by States Parties concerned is required. In the European system, there are criteria for admissibility of petitions of individuals similar to those under the global instruments. In addition to those, the petition must be filed within six months after the exhaustion of domestic remedies. The European Court of Human Rights has contentious jurisdiction (which requires an additional specific acceptance by States Parties). The Court has also been granted advisory jurisdiction with the entry into force of Protocol 2 to the Convention. An advisory opinion of the Court can be requested only by the Committee of Ministers — the governing body of the Council of Europe. The power is limited to "legal questions concerning the interpretation of the Convention and the Protocols thereto" (Protocol 2, Article 1.1). The advisory opinions requested may not deal with any question relating to the content or scope of the rights or freedoms defined in the Convention, or with any other question which the Commission, the Court or the

Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention (Protocol 2, Article 1.2).

Asia

"Asia and the Pacific" is the only UN-defined geographical region without its own human rights system. One obvious reason for this is the fact that it does not have a regional political grouping such as the OAS in the Americas, the EC in Europe and the OAU in Africa. In all these regions, it is the political grouping which has given the impetus for the creation and supervision of a human rights system. Other factors put forward to explain the absence of a human rights system in the Asia-Pacific region are its vastness and diversity. The Asian and Pacific countries do not share a common religious, political, social, cultural or historical background. There is no real foundation of commonality upon which "Asia" can carve out a separate identity for itself. The United Nations has made considerable efforts to encourage the development of a regional arrangement in this part of the world. However, it is unlikely that such efforts will bear fruit — at least not in the foreseeable future. Some commentators argue that sub-regional arrangements (e.g. South-East Asia, West Asia) are more realistic and should therefore be encouraged. Others see the struggle to create a human rights system in that part of the world as a futile exercise and one which, even if successful, is likely at best to result in the emergence of a very weak and ineffective structure.

The League of Arab States

The Pact that established the Arab League entered into force in 1952 and formally established a regional arrangement in the sense of Chapter VIII of the UN Charter (cooperation between sovereign States aiming for regional peace and security, in accordance with the Charter's principles). The League has very broad aims. The main one is to coordinate the political programme of members "in such a way as to effect real collaboration between them, to preserve their independence and sovereignty..." Consequently, the main areas of cooperation are of an economic nature, or relate to financial affairs, customs, currency, agriculture, communications, industry, and social and health affairs. The League has a Council which comprises all member States, headed by a Secretary-General. The Council aims for consensus decision-making as a general rule. In the case of a consensus decision, members are obliged to implement any such decision

within the framework of their respective constitutions. A consensus decision is required for issues of peace and security threatening the League. Other issues (such as budget, personnel, etc.) can be decided by majority vote.

Study Questions

Knowledge

1. What is the role of the UN Charter?
2. What is included in the Bill of Human Rights?
3. When are reservations to treaties allowed?
4. What is the role of the Security Council?
5. How is the Security Council composed?
6. What is the role of the General Assembly?
7. What is the role of the Commission on Human Rights?
8. What is the role of the Sub-Commission on Human Rights?
9. What are treaty-monitoring bodies?
10. What are gross violations of human rights?
11. Describe the 1503 procedure.
12. Describe the 1235 procedure.
13. What is the main difference between the two procedures?
14. Which investigative procedures does the Commission on Human Rights currently have?
15. What possibilities are there for individuals to file complaints about human rights abuse?
16. Which regional arrangements exist relevant to the field of human rights?

Understanding

1. What is the legal authority of the Security Council?
2. Which enforcement action can the Security Council undertake?
3. What requirements need to be fulfilled before the Council can do so?
4. What is your opinion on the value of the 1503 procedure?
5. What is your opinion on the effectiveness of country reporting?
6. Why would countries prefer to be subject to the 1503 rather than the 1235 procedure?
7. What do you think of the position of the ECSCR Committee as a treaty body?
8. What do you think constitutes exhaustion of domestic remedies?
9. Why are so many reservations made to human rights treaties?

10. Do you think countries have a legal right to refuse to cooperate with a 1235 procedure?
11. What can the Commission on Human Rights do against de facto refusal to cooperate?
12. What do you think of all the admissibility criteria for individual petitions?
13. What is the position of regional arrangements, compared with the UN system?
14. What do you think of the institution of High Commissioner for Human Rights?

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HUMANITARIAN LAW

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Key Questions for Law Enforcement Officials

- *What is the history of humanitarian law?*
- *What is the object and purpose of humanitarian law?*
- *What are the main legal instruments of humanitarian law?*
- *Why is humanitarian law important for law enforcement officials?*
- *What is understood by "the Law of Geneva"?*
- *What is understood by "the Law of the Hague"?*
- *What is the meaning of humanitarian law for the conduct of military operations?*
- *What levels of protection are offered by humanitarian law and to whom?*
- *When is humanitarian law legally applicable?*
- *What is the role of the International Red Cross and Red Crescent Movement during war?*
- *What is the mandate of the International Committee of the Red Cross?*
- *What is the relationship between humanitarian law and human rights law?*
- *What are the main similarities and differences between the two types of law?*

Introduction

Origin and Development

Rules restricting the right of belligerents to inflict injury on their adversaries have existed in nearly all civilizations since ancient times, and especially since the Middle Ages. Laws for the protection of certain categories of persons during armed conflict can be traced back through history in almost any country or civilization in the world. Those categories of persons have included women, children and elderly people, disarmed combatants and prisoners of war. Attacks against certain objects — places of worship, for example — and treacherous means of combat, such as the use of poison in particular, were prohibited.

However, it was only in the nineteenth century — when wars were waged by large national armies employing new and more destructive weapons and leaving a terrifying number of wounded soldiers lying helpless on the battlefield — that a "law of war" based on multilateral conventions was developed. It was not just a coincidence that this development took place at a time when States became increasingly interested in common principles of respect for the human being. This general trend was given decisive

momentum by the *Geneva Convention of 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field.* It expressed with clarity the idea of a generally applicable humanitarian principle, by requiring the High Contracting Parties to treat their own wounded and those of the enemy with equal care. Another key event was the drafting of the *Lieber Code (1863),* which embodied in a long and self-contained instrument all the laws and customs of war and also underscored certain humanitarian principles that had not been so clear beforehand. This Code was even more important to the development of international humanitarian law (IHL) in general than the 1864 Geneva Convention.

The steady increase in human suffering caused by situations of armed conflict has led to a permanent evolution in the codification of rules relating to the conduct of hostilities and the protection of victims of armed conflict. This statement implies that international humanitarian law is always one war behind. For example, the four Geneva Conventions of 1949 did not offer adequate solutions to problems raised by subsequent armed conflicts or provide sufficient protection to new categories of victims created by them. The drafting of the 1977 Protocols additional to the 1949 Conventions was a direct result of those armed conflicts.

Thus, the circle of persons protected by international humanitarian law has gradually widened. One current characteristic of IHL which has emerged over the years is the well-defined categories of persons protected by it: the wounded, the sick, the shipwrecked, prisoners of war, and civilians in the hands of the enemy. The latest developments in the codification of IHL tend towards protection of *all* persons who are not participating or have ceased to participate in hostilities. However, it must be said that such rules already existed in the Lieber Code (1863).

Law of War — A Short Overview

The law of war is not a product of the futile thinking of some enlightened humanist who decided to render war more humane. On the contrary, it was born on the battlefield and was moulded through the experience of war itself. In reality, the laws of war are as old as war itself, and war is as old as life on earth. The law of war, although of relatively recent date in its present form, has a long history. Even in the far distant past, military leaders sometimes ordered their troops to spare the lives of captured or wounded enemies, to treat them well, and to spare the enemy civilian population and their belongings. Often, when hostilities ended, belligerent parties agreed to exchange the prisoners in their hands. In the course of time, these and

similar practices gradually developed into a body of customary rules relating to the conduct of war.

The treaty-making process to codify the rules of warfare dates back to the 1860s. On two separate occasions, an international conference was convened to conclude two treaties — each dealing with one specific aspect of the law of war. One conference was held in Geneva in 1864 on the fate of wounded soldiers on the battlefield, and the other in St Petersburg in 1868 to prohibit the use of explosive projectiles under 400 grammes weight. These two international conferences marked the *starting point of the codification of the law of war in modern times.* They were followed by two Peace Conferences held in 1899 and 1907 in The Hague. The main purpose of these gatherings was to regulate the methods and means of warfare. Since then, the resulting bodies of law have been known as the Law of Geneva and the Law of The Hague. The latter governs *covers the conduct of military operations, whereas the Law of Geneva covers the protection of war victims.*

The intrinsic relationship between the military world and that of the Red Cross can also be retraced through the historical events and developments that have left their mark upon civilization in the present century. In the mid-nineteenth century the fate of wounded soldiers on the battlefield left almost everything to be desired. Worst of all, besides the lack of resources to care for the thousands of casualties, was the fact that in warfare at the beginning of the century the customary practice of sparing the enemy's field hospitals and leaving the medical personnel and the wounded unharmed was no longer respected. Instead, field hospitals were shelled and doctors and stretcher-bearers on the battlefield were open to attack. The situation of thousands of captured combatants, who were left without appropriate treatment, was disastrous.

It was amidst the horrifying conditions on the battlefield of Solferino that the idea of the Red Cross was born. Soon after, the first steps for the protection of victims of armed conflicts were taken: private aid organizations were set up in various countries to assist *the military medical services* in a task the latter were not equipped to perform; the *neutral status (inviolability) of medical personnel and medical establishments and units was formally declared; and the symbol of a red cross on a white ground to identify and protect medical activities was introduced.*

Since then, the law of war has been constantly developed so as to enlarge the scope of protection for the victims and adapt it to the reality of new conflicts. Civilian and military people alike have joined what became the *International Committee of the Red Cross* in its efforts to improve the

protection of the victims of war. The laws contained in *the four Geneva Conventions of 1949 protecting the wounded, the sick, the shipwrecked, prisoners of war and civilians, and their two Additional Protocols of 1977* are tangible results of those efforts. Especially relevant to military commanders are the rules governing the use of methods and means of combat contained in *the Hague Conventions and in the said two Protocols, as they set limits intended to avoid unnecessary suffering and destruction.*

After the traumatic experience of the Second World War, *recourse to armed conflict was actually outlawed by the international community (in 1945) in the Charter of the United Nations, making it illegal for States to wage war other than in self-defence or for the maintenance of collective security under the authority of the United Nations Security Council:* "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" (Charter of the United Nations Art. 2.4). But reality unfortunately shows that wars and conflicts continue to be fought and that the laws to limit violence and alleviate suffering have become more important than ever.

Law of War versus Military Necessity

The role of the armed forces has changed. Their main function is in fact to prevent war through dissuasion. Should war nevertheless break out, their duty is to keep the conflict under control and try to prevent its escalation. No armed conflict can be humanitarian. In the best of cases, an armed conflict can be conducted rationally, in other words professionally, by respecting tactical principles within the framework of the law of war. Respect for the law of war and its rules is not only a dictate of common sense, but the most important tool at the disposal of the military commander to avoid chaos.

The law of war does not ask the military commander to follow rules that he cannot respect. It asks him to carry out his mission by weighing up the military and humanitarian factors prevailing at the time of decision-making. Action taken to fulfil the requirements of military necessity must not be excessive in relation to the direct military advantage expected from the planned operation.

Military necessity and humanitarian considerations for the victims of warfare are often opposite forces in war, each moderating the influence of the other.

On the one hand, there is the requirement to win and the consequent tendency to use all possible means to secure victory; on the other, there is the creditable awareness that life has value, that torture is inhumane, and that war is an abnormal state of affairs — fought not to destroy a civilization, but to achieve a better peace. To the sceptical, war by its very nature is beyond the control of law. It represents the breakdown of law. *Despite this opinion there is a strong natural argument, based on self-interest, for the observance of humanitarian rules: the threat of retaliation.* Furthermore, if the bitterness caused by inhumanity lingers on after the end of hostilities, it may be in one's own interest to act with restraint. Clemency is often in the interest of the victor as much as it is to the benefit of the vanquished.

Law of War versus Tactics

The law of armed conflict is not an obstacle to military efficiency. *The law of war and tactical principles are compatible*. Tactical principles are a guide for the commander to concentrate on the essential. War is a complex phenomenon in which multiple factors influence each other, and as the law of war has also become a complex body of some 800 rules, all of which the commander cannot know, we must make that law simple. Simplicity is necessary because the commander must be able to analyse, organize, plan and sometimes simultaneously conduct an ongoing military operation in the midst of chaos. This is why tactical principles concentrate on the essential; this is why the decision-making process must become a matter of routine. This is why the law of war must be condensed to the strict minimum.

The essence of the law of war can be summed up in three phrases:

1. *attack only military objectives;*

2. *spare protected persons and objects that do not contribute to the military effort;*

3. *do not make use of more force than needed to fulfil your military mission.*

There is a convergent effect between well applied tactics and the goal of the law of war. The law of war is a barrier against exaggeration. It weakens the enemy's potential until he submits or surrenders. Likewise, the art of tactics pursues the same goal. Tactical principles tell the commander how to organize his means to defeat the enemy without exposing his own forces.

International Humanitarian Law

International humanitarian law (IHL) is a branch of public international law — applicable in armed conflict — which is designed to ensure respect for human beings insofar as compatible with military requirements and public order, and to attenuate the hardships caused by hostilities.

International humanitarian law is divided into two branches: the Law of Geneva and the Law of The Hague.

Basically the *"Geneva-type law"* deals with the protection of war victims, be they military or civilians, on land or on water. It protects all persons *hors de combat*, i.e. not or no longer taking part in hostilities: the wounded, the sick, the shipwrecked and POWs.

On the other hand the *"Hague-type law"* is more concerned with regulation of the methods and means of combat and concentrates on the conduct of military operations. The Hague-type law is therefore of capital interest for the military commander on land, at sea and in the air.

However, there remained a slight problem: as mentioned, the Law of Geneva had evolved over time whereas the Law of The Hague had remained unchanged since 1907. The rules laid down in the Hague Conventions were nevertheless of fundamental importance and it was essential to avoid their becoming obsolete. The ICRC accordingly considered it indispensable that they be included in the draft Protocols additional to the Geneva Conventions of 1949; this was fully approved by government representatives at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, held in Geneva from 1974 to 1977.

There is thus a third "type" of law, the so-called *"mixed law"* containing provisions dealing both with the protection of war victims and with more operational concepts. This "fusion" of Geneva-type and Hague-type law is found mainly in the said two Additional Protocols, adopted in 1977.

The Law of Geneva

The object of the "Law of Geneva" is to safeguard the victims of situations of armed conflict — members of the armed forces who are *out of action,* whether they are wounded, sick shipwrecked or prisoners of war, as well as the civilian population and generally all persons not or no longer taking part in the hostilities.

The four Geneva Conventions of 12 August 1949 constitute the body of these rules of protection. Today, with 188 States Parties, they are universally recognized. These Conventions have been *amplified and supplemented by adoption of the two Additional Protocols of 10 June 1977* (Protocol I relating to international armed conflicts, and Protocol 00II relating to non-international armed conflicts), which had been ratified at 31 March 1997 by 147 and 139 States respectively.

The Law of Geneva and the Red Cross have the same origin. On the evening of the bloody battle of Solferino (Italy) in 1859, Henry Dunant, aghast at the suffering of the wounded who lay helplessly dying without medical care, sought a way to prevent such suffering in future wars. His ideas, which were to give rise both to the Red Cross and to international humanitarian law, were expressed in his famous book *A Memory of Solferino*. They met with a favourable response throughout Europe and especially in his own country, Switzerland, and were rapidly put into practice. They can be summarized as follows:

a) the creation, in time of peace, of societies capable of aiding wounded soldiers in times period of conflict and thereby remedying as auxiliaries the inadequacies of the armed forces' medical services. These relief societies were to become the National Red Cross Societies;

b) the foundation of the "International Committee for Relief to Wounded Soldiers", a neutral organization to give assistance in times of armed conflict. This Committee, which was set up in Geneva in 1863 by Henry Dunant together with four citizens of that city (Mr Moynier, General Dufour, Dr Appia and Dr Maunoir), was the origin of the International Committee of the Red Cross (ICRC); and

c) the convening by the Swiss government of a Diplomatic Conference attended by sixteen States, which adopted, in 1864, the "Convention for the Amelioration of the Condition of the Wounded in Armies in the Field". This Convention lays the cornerstone of contemporary international humanitarian law: it stipulates that wounded or sick members of the armed forces shall be aided and cared for without adverse distinction, irrespective of the side to which they may belong, that medical personnel, establishments and equipment shall be respected, that they shall be marked with a distinctive emblem — a red cross on a white ground, and that medical action in time of conflict is neutral — it is not an expression of support for one or the other belligerent.

International humanitarian law has developed in several stages since 1864. The circle of legally protected persons has grown as a result of harsh

experience which, like the battle of Solferino, revealed the inadequate protection of the victims. This protection was accordingly extended in 1899 and 1906 to shipwrecked members of the armed forces. In 1929, the protection of prisoners of war — already protected by customary law and the Hague Conventions — was enhanced.

In 1949, after the Second World War, the existing Conventions were revised and supplemented in the form of the First, Second and Third Conventions. The Fourth Convention extended the protection conferred by international humanitarian law to a new and important category of victims, namely civilians, although civilians in occupied territory had already been mentioned in the Hague Convention (IV) of 1907.

The Geneva Conventions transpose matters of moral and humanitarian concern into the international legal system. They incarnate the Red Cross ideal. The ICRC is their inspirer and promoter. *In addition, these same Conventions establish the legal basis for the ICRC's humanitarian mandate of protection and assistance*. The ICRC is a neutral and private organization whose members (of its governing body, the Committee proper) are all Swiss. As a neutral intermediary, it contributes to the application of international humanitarian law by providing medical assistance to the wounded, sick and shipwrecked, seeking to improve the conditions of detention of prisoners of war, tracing missing persons and transmitting family messages. If necessary, it also organizes relief operations on behalf of the civilian population by arranging for supplies of food, medicine and clothing.

The Law of The Hague

The "Law of The Hague" determines the rights and duties of belligerents in the conduct of military operations and limits the means of inflicting damage on the enemy. These rules are contained in *the Hague Conventions of 1899, revised in 1907, and since 1977 in the Protocols additional to the Geneva Conventions as well as in various treaties prohibiting or regulating the use of weapons*. Although some of the Hague treaties have lost their legal significance, the rules relating to the conduct of hostilities are still valid today. In an armed conflict, the object sought by either side is to gain a decisive advantage by weakening the military potential of the enemy. But the choice of methods or means of harming the enemy is not unlimited and all use of force that causes excessive suffering or destruction in relation to the military advantage of an operation is prohibited. The laws of warfare are formulated to take military necessities into account, but their

inspiration is also humanitarian, as unresolved humanitarian problems are often a source of conflict.

The Hague Conventions were drawn up by two successive International Peace Conferences held in The Hague in 1899 and 1907. The first Conference adopted six conventions and declarations, and the second, fourteen, all of which fall into the following *three categories:*

a) The first category includes conventions aimed at avoiding war as far as possible, or at least laying down very strict conditions to be fulfilled before the opening of hostilities.

Examples include:

(i) the *"Convention for the Pacific Settlement of International Disputes";*

(ii) the *"Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts";* and

(iii) the *"Convention relative to the Opening of Hostilities"*.

This category has now become totally obsolete. The aforesaid conventions are reflections of a time when recourse to war was still not considered illegal, whereas today the situation has changed entirely since the adoption of the Charter of the United Nations which forbids recourse to war except in self-defence. There is now no sense in saying that hostilities cannot begin without warning; according to the Charter, they must not begin at all.

b) *The second category* of legal instruments adopted in The Hague *includes conventions specifically protecting victims of war, such as:*

(i) the *"Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864",* adopted in 1899;

(ii) *Section II of the Regulations annexed to the "Hague Convention (II) with respect to the Law and Customs of War on Land",* adopted in 1899. Chapter II of Section I of these Regulations already dealt with prisoners of war.

(iii) *the "Hague Convention (IV) of 18 October 1907 respecting the Laws and Customs of War on Land",* which replaced the earlier Hague Convention (II) of 1899.

The two kinds of victims protected by this second category of instruments (i.e. the wounded, sick and shipwrecked, and prisoners of war) have since been covered more extensively and in greater detail by the Geneva Conventions which have superseded the Hague instruments and rendered them progressively obsolete, like the first category, although some

important chapters like the one on military occupation or the one on the treatment of spies and parliamentarians, for instance, are still valid.

c) *The third and last category comprises conventions laying down a few elementary rules for the conduct of war.*

This third category is still of particular interest for the military today. One might even go as far as to say that these rules — being the only ones of the Hague Conventions that have retained their strength and applicability — are almost all that actually remains of those Conventions in the minds of many international lawyers.

The *main rules* in this third category — and most important to us today — are contained *in the Convention (IV) with respect to the Laws and Customs of War on Land* adopted in 1899 and revised in 1907, and especially in Section II of its annexed Regulations. This section, entitled "Hostilities", *lays down some of the most important principles of the Law of War, integrated since 1977 into Part III of Additional Protocol I* to the Geneva Conventions of 1949. Most outstanding are the fundamental clauses whereby "*the right of belligerents to adopt means of injuring the enemy is not unlimited";* and the ban on employing poison or poisonous weapons; on perfidy; on killing or wounding an enemy who — having laid down his arms or no longer having any means of defence — has surrendered; on declaring that no quarter will be given; on employing arms, projectiles or material likely to cause unnecessary suffering; on making improper use of a flag of truce, of the national flag or the military insignia and uniform of the enemy, or of the distinctive badges of the Geneva Convention (in the singular, since only the 1906 Geneva Convention existed in 1907). Mention must also be made of the rules forbidding pillage and the chapter devoted to spies and flags of truce.

These elementary rules are quite familiar. There is a twofold explanation for this: first, most of them have been included and developed in Additional Protocol I, and second, their long years of existence and fundamental importance have made them part of customary international law. However, the Hague Conventions themselves apply in only a very limited number of cases. The political map of the world has changed completely since 1907. Many States that were party to these Conventions quite simply no longer exist, whereas other more recent nations have never bothered to ratify them, considering their rules to be part of customary international law. It is therefore almost impossible today to say which States are or consider themselves formally bound by the Hague Conventions. Moreover, these Conventions used to apply only if all the parties involved in a conflict were formally bound by them. Consequently, if a State not bound

by the Conventions intervened in a conflict, none of the parties had any obligation to respect them any more. Nowadays, this rule called *"clausula si omnes"*, no longer applies, whereas the rules (of the Law of The Hague) have either become part of customary international law or are contained in the Protocols additional to the Geneva Conventions.

In short, *the interest of the Hague Conventions is that they contain the most important general principles for what has increasingly been called the "the law of armed conflict". These general principles, having acquired the force of customary international law and being recognized as such, are applicable to all States*. This technical detail is of fundamental importance today, since it means that States not yet party to Protocol I additional to the Geneva Conventions of 1949 are bound by the original rules contained in the early Hague Conventions. Moreover, many resolutions of the United Nations General Assembly on "respect for human rights in periods of armed conflicts" have referred to the Hague Conventions as still being applicable.

Other Hague Conventions and Declarations

Other Hague Conventions include the "Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land", the corresponding Convention (XIII) relative to war at sea and seven other conventions relating to maritime warfare. Of particular interest is also *Section III of the Regulations annexed to the said "Convention (IV) respecting the Laws and Customs of War on Land"* which includes rules relating to the "military" authority over the occupied territory of the hostile State. Most of these rules have been included in the Fourth Geneva Convention of 1949.

In this examination of the Hague Conventions three more documents, also signed in that city, must be mentioned. These are not conventions but declarations, all three of which are still of vital importance in present-day conflicts. They are:

a) The *"Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons"*

It was signed at The Hague in 1907. Its title may seem incongruous today, but it is nevertheless remarkable how right its authors were in foreseeing, at a time when aviation was still in its infancy, the dangers inherent in air warfare and the dreadful havoc it was going to wreak. If the prohibition contained in it had been respected, maybe the bombings of Warsaw, London, Dresden, Hiroshima or Hanoi could have been avoided.

Unfortunately, however, the declaration remained a dead letter, but its *spirit has been revived in the provisions of Protocol I* on the protection of the civilian population.

b) The *"Declaration (IV, 2) concerning Asphyxiating Gases"*

It was signed at the Hague in 1899 and was the very first attempt to forbid the use — in war — of gas, which is a particularly treacherous and cruel form of weapon. The Contracting Powers agreed in it "to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases". This declaration was not respected during the First World War, but *its contents were included in the "Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare"* signed at Geneva in 1925. This very early Protocol is still in force today and is one of the rare treaties of this type to have been respected during the Second World War. Considering the exceedingly toxic nature of certain poisonous gases stockpiled by several powers today, one cannot but shudder at the thought that this Protocol of 1925 may no longer be observed. In this connection reference is also made to the *Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction* as well as to the *Chemical Weapons Convention of 1993* (entered into force on 6 May 1997).

c) The *"Declaration (IV, 3) concerning Expanding Bullets"*

This was signed at the Hague in 1899 and completed the Declaration of St Petersburg, which dates back to 1868. The 1868 Declaration forbade the use "of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances", whereas the 1899 declaration states that the Parties agree to abstain from the use of bullets which expand or flatten easily in the human body (e.g. dum-dum bullets). These old texts, the wording of which is in such ironic contrast to weapons employed today, actually laid down an essential principle of the Hague Conventions, namely, *the prohibition of the use of weapons, projectiles or substances likely to cause superfluous injury and unnecessary suffering*. Law specialists and government experts have still not succeeded in determining which weapons are nowadays covered by this principle and whose use should therefore be forbidden. Presumably, this is a task that will never be completed, for law experts spend their time trying to catch up with the evolution of military technology. Unfortunately the law is unable to prevent the invention of new methods and means of warfare, but it does try to limit the cruel effects of certain weapons as far as possible.

Mixed Type of Law

The Red Cross and Red Crescent Movement in general and the ICRC in particular are concerned first and foremost with the Law of Geneva. However, since the adoption of the Additional Protocols, *the ICRC is also concerned with respect for international humanitarian law as a whole, conceived as being the entire body of legislation applicable in situations of armed conflict*. Without an international legal framework of this kind, the protection of the victims would not receive the appropriate support that such an undertaking requires. As the initiator of international humanitarian law, the ICRC has been, and still is, striving to develop that law to ensure that it keeps pace with the changing pattern of conflicts. It does so in successive stages as and when the revision of existing instruments appears to it to be necessary and feasible.

Protocols additional to the Geneva Conventions of 1949

In 1965, the ICRC felt that the time was ripe for such further development, for although the 1949 Geneva Conventions had not — and still have not — lost any of their relevance and value, they had proved insufficient to protect the victims of modern armed conflicts. Indeed, new types of conflicts and means of warfare have emerged during the past thirty years: wars of liberation, guerrilla tactics and the use of sophisticated and indiscriminate weapons such as incendiary weapons and fragmentation projectiles. The civilian population, often compelled to accept combatants in its midst, had thus become more vulnerable. It was therefore important to frame legal rules to provide adequate protection. The ICRC consequently held consultations on the feasibility of filling the gaps in the existing law, not by revising the 1949 Conventions — since a revision might have involved a risk of the States reversing the progress achieved in 1949 — but by supplementing them with protocols.

The convening of the enlarged international community, comprising the States newly established after 1949, helped to overcome the feeling that the provisions of the four Geneva Conventions mainly reflected a European way of thinking. The elaboration of new legal instruments conceived by all modern States served to promote a new universal willingness to implement such rules.

On 8 June 1977, at the end of a Diplomatic Conference which had opened in Geneva in 1974, two Protocols additional to the Conventions were signed. *These Protocols are intended to supplement the Conventions by developing*

the protection of civilians in time of war and extending the criteria for the application of humanitarian law to cover new types of conflict.

Protocol I applicable in international armed conflicts, including wars of national liberation, ensures the protection of civilians against the effects of hostilities (particularly bombardment), whereas the Geneva Conventions of 1949 are limited to protection against abuse of authority. To this effect, various rules concerning the behaviour of combatants and the conduct of hostilities were taken over from the Hague Conventions. Relief supplies for the civilian population are a subject of great interest to the Red Cross, and this was dealt with in unmistakable terms by the provision that the civilian population's needs must be met by the parties to conflict. If they are unable to do so, they must allow unimpeded passage for all relief supplies essential for its survival. This rule applies in all circumstances, even for the benefit of an enemy population or the population of an occupied territory. Action in this respect must include facilities for relief organizations and protection of specialized relief personnel. Moreover, under Protocol I civilian medical personnel, transport and hospitals now enjoy the same protection already provided by the Conventions to military medical personnel and facilities. Civil defence organizations are also protected. Prisoner-of-war status has been granted to categories of combatants which had not previously been included, such as irregular combatants, provided they comply with certain rules (e.g. respect the laws and customs of war, carry their arms openly, etc.). Other provisions improved the means of monitoring the implementation of humanitarian law.

Protocol II supplements Article 3 common to all four Geneva Conventions, with more detailed rules applicable in situations which are not covered by Protocol I, i.e. internal armed conflicts of a certain magnitude. Of particular significance are the fundamental guarantees of protection for all persons who do not or have ceased to take part in hostilities, the general principle that the civilian population must be protected and the rules pertaining to the wounded, sick and shipwrecked and to medical facilities and personnel. These provisions, simplified and adapted to the specific context of non-international armed conflicts, are based on those contained in Protocol I.

Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 1954

The underlying principle of this Convention is that cultural objects such as churches, temples, museums, etc., must be spared as much as possible, provided that they are not being used for military purposes. Article 19 of

the Convention stipulates that even in the event of a non-international armed conflict, "each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property".

The Convention distinguishes between two levels of protection. States are required to prepare, in time of peace, for the safeguarding of cultural property within their territory against the foreseeable effects of an armed conflict. To this end, they may for instance, construct shelters, or make preparations for transport to a safe place, or mark cultural property with a distinctive emblem. An object "of very great importance" may furthermore be given increased protection by entering it in the "International Register of Cultural Property under Special Protection", which is kept by the Director General of the United Nations Educational, Scientific and Cultural Organization (UNESCO).

Other Conventions and Declarations on the Conduct of Hostilities

Apart from the so-called *ABC weapons* (atomic, bacteriological and chemical), there are numerous weapons described as conventional which may also have indiscriminate or excessively cruel effects. They include incendiary weapons (such as napalm and flame-throwers); fragmentation weapons such as cluster bombs; small calibre, high velocity projectiles — which may have effects like those of dumdum bullets; and finally, such perfidious weapons as landmines, booby traps, and delayed-action bombs which endanger relief efforts.

In preparing for the 1974 Diplomatic Conference, the ICRC did not include in its proposals the prohibition or limitation of specific weapons, since it felt that this subject was particularly sensitive because of its political and military implications; the task in hand was to reach agreement on restrictions on the use of specific weapons, many of which had long formed part of the armament of armed forces and, indeed, had been in common use in many wars. Some governments, however, asked the Conference to consider it. The ICRC convened a Conference of Government Experts to that effect, which met in Lucerne in 1974 and Lugano in 1976. The 1974 Diplomatic Conference reached no conclusions on the subject, but recommended that another conference be called to deal with it. This conference met under the auspices of the United Nations in 1979 and 1980, and on 10 October 1980 adopted 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". Even though the field covered by this Convention was relatively narrow, it nevertheless constituted a remarkable and almost unhoped-for success. Its importance lies in the fact that it has laid *the legal foundation for further limitations and prohibitions on the use of weapons developed in the future and causing superfluous injury or unnecessary suffering*. It will in fact be the cornerstone for additional protocols dealing with other specific weapons.

The Convention itself contains rules of procedure and specifies its scope of application and its relations with other agreements. The basic provisions are contained in four (with the amendment of the second Protocol there are in fact now five) annexed Protocols, at least two of which must be ratified by a State before it can become party to the Convention.

Protocol I prohibits the use of any weapon the primary effect of which is to injure by fragments which cannot be located in the human body by X-rays. This relates mainly to the despicable invention of fragmentation bombs filled with fragments made of plastic or glass.

Protocol II prohibits the use of mines, booby-traps and other devices against the civilian population or in such an indiscriminate manner as to cause incidental injury to civilians which is excessive in relation to the concrete and direct military advantage sought. This refers, in particular, to mines placed outside military zones. The Protocol also outlaws, in all circumstances, booby-traps designed to cause superfluous injury or unnecessary suffering. It specifically forbids placing booby-traps in apparently harmless objects; it includes "children's" toys in the list thereof. It also requires that the location of landmines be recorded with the purpose of protecting the civilian population. This Protocol was amended on 3 May 1996 during the Review Conference. The most important amendments include the extension of its scope of application to non-international armed conflicts; the duty to clear mines imposed upon those who use them; a prohibition on the use of non-detectable anti-personnel mines; and an encouragement to use only anti-personnel mines with a self-destruction mechanism. As States must give notice to the UN Secretary-General of their "consent to be bound" by these amendments, it could be argued that *de facto* a new (fifth) protocol has been created, since the original Protocol II has not lost its force of law for States party to it.

Protocol III made a great step forward by restricting the use of incendiary weapons. The prohibition of their use in all circumstances against civilians is confirmed and is extended to include even military objectives located within concentrations of civilians and to forests and other types of plant

cover, except when such natural elements are used to conceal combatants or military objectives.

Protocol IV on Blinding Laser Weapons, adopted on 13 October 1995 at the Review Conference, prohibits the use and the transfer (to States and non-State entities alike) of laser weapons "specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices".

Finally, the Conference passed a *resolution concerning dangerous developments in the field of small-calibre weapon systems*, asking governments to carry out further research on their effects and to exercise the utmost care in their further development.[3]

The International Red Cross and Red Crescent Movement and War

The International Red Cross and Red Crescent Movement consists of the *International Committee of the Red Cross* and the *International Federation of Red Cross and Red Crescent Societies*, both of which have their headquarters in Geneva, and *more than 160 National Red Cross and Red Crescent Societies* all over the world. New National Societies are still being formed. The two international institutions each have their own specific character, and their activities, though very different, are complementary.

The International Committee of the Red Cross (ICRC), which came into being in 1863, is an independent and neutral institution. It is the founding body of the Red Cross and promoter of the Geneva Conventions. In times of armed conflict — international conflicts, civil wars and internal disturbances — it provides protection and assistance to the military and civilian victims, be they prisoners of war, civilian detainees, war wounded or civilian populations in occupied or enemy territory; it also visits political detainees. The mandate of the ICRC (for its activities during conflicts) is based on the four Geneva Conventions of 1949 and their Additional Protocols of 1977, as well as its own Statutes (right of initiative in situations

[3] This section includes information taken from the following documents:
- Sylvie Stoyanka-Junod, *Protection of Victims of Armed Conflicts - Falkland-Malvinas Islands (1982): international humanitarian law and humanitarian action*, ICRC, Geneva, 1984.
- Yves Sandoz, Jean-Jacques Surbeck, *The Hague Conventions and the Geneva Conventions,* Lecture paper, 1979.

other than armed conflicts). The ICRC works to develop the aforesaid international treaties, to promote and monitor their implementation and to disseminate knowledge of them throughout the world.

The International Federation of Red Cross and Red Crescent Societies, which was founded in 1919 and until very recently was known as the League, works to facilitate the development of the member Societies at the national level, to coordinate their activities at the international level, and to encourage the creation of new National Societies. It organizes, coordinates and directs international relief operations in the event of natural disasters, and encourages the humanitarian work of the National Societies with a view to preventing and alleviating human suffering, thus also contributing to the promotion of peace.

The National Red Cross and Red Crescent Societies, too, each have their own specific character. Their activities range from emergency relief to medical services and social work, first aid, the training of nurses, blood transfusion, and youth programmes. In times of armed conflict, the National Societies act as auxiliaries to the armed forces' medical services and come to the aid of civilian and military victims. To obtain their recognition by the ICRC and be admitted to membership of the Federation, the National Societies must meet precise conditions. They must, in particular, respect the *Fundamental Principles of the Red Cross and Red Crescent Movement,* prominent among which are impartiality and neutrality. The independence that must be granted to them enables them to act without consideration of race, religion or political opinion.

The International Conference of the Red Cross and Red Crescent is the supreme deliberative body of the International Red Cross and Red Crescent Movement. It meets in principle every four years and assembles the representatives of States party to the Geneva Conventions, representatives of the duly recognized National Societies, and representatives of the ICRC and the Federation.

The Movement and War

The Red Cross *was born of war, or rather of the horror of war. Its founder, Henry Dunant, was appalled to see the battlefield of Solferino, and the thousands of young people dying from their wounds when they could have been saved if there had been sufficient doctors and nurses to take care of them, i.e. if the medical services of the belligerents' armed forces had been able to cope with the situation. For Dunant, it was vital that "bounds be set once and for all to this tragedy of war, a thousand times repeated"*. But how could this be

achieved? In his book *A Memory of Solferino* Dunant put forward two ideas: the first was to *create, in times of peace, a relief society in each country to assist the armed forces' medical services in times of war;* the second idea was to formulate an *international convention, inviolate in character, for the relief of the wounded on the battlefield.* However, to set up a body of volunteers to help wounded soldiers on the battlefield could not be done as a half measure: such volunteers had to be protected in giving assistance and be clearly distinguishable from the combatants. Hence the idea of a *sign that was both indicatory and protective: the emblem of the red cross on a white ground.* And that is where the second idea came in: *the desire to render medical assistance on the battlefield* — neutrally — required the acknowledgement by States of some generally recognized principles known to and applied by all. This was to become the first Geneva Convention of 1864.

The original goal of the Red Cross was therefore to render war less inhumane by working to alleviate the suffering of the victims: those who are not, or are no longer, taking part in the hostilities (civilians, the wounded and prisoners of war) must be spared and respected; those who bring help to them must be protected. Such is the challenge to which the Red Cross wanted to respond by coming to the aid of all victims under the protection of that first Geneva Convention.

The role of the International Committee of the Red Cross as an impartial humanitarian organization and neutral intermediary becomes paramount within the International Red Cross and Red Crescent Movement in the event of war. Recognized as such by the States party to the Geneva Conventions, it has that very task of protecting and assisting the civilian and military victims of armed conflicts.

The ICRC's vocation is thus to represent and to defend the cause of humanity in war. True to its motto "*inter arma caritas*" and with the support of the other components of the Movement, it does so more than any other institution. Since its foundation over 130 years ago, it has been able to help millions of people in distress.

The International Committee of the Red Cross

Role of the ICRC

Essentially, the ICRC acts in time of *war, civil war or internal disturbances or tensions, protecting and assisting* civilian and military victims. There are three facets to this role.

1. The ICRC first helped to improve the status of the victims of war through law, as it was the author of the Geneva Conventions which codified the rules stipulating how the parties to conflicts should treat enemies who fall into their hands.

Promoter of the Geneva Conventions

The ICRC works for the development and application of international humanitarian law and for its understanding and dissemination. It carries out the duties incumbent upon it under the Geneva Conventions and their Additional Protocols, tries to ensure that the latter are applied and stands ready to increase their scope when necessary.

2. But there must be an intermediary between States, which have certain duties, and the victims of war, who have certain rights. This is where the ICRC steps into *action*.

Neutral Intermediary

In time of war, civil war or internal disturbances or tensions, the ICRC acts as a neutral intermediary between the parties to conflict or other adversaries, and endeavours to ensure that the civilian and military victims receive protection and assistance. To do so, the ICRC takes any humanitarian *initiative* which corresponds to its role as a specifically neutral and independent institution.

3. Moreover, the ICRC has a special role to play within the Movement, that of:

Guardian of the Fundamental Principles

The ICRC makes sure that the Fundamental Principles are upheld within the Movement. It also decides on the recognition of National Societies, which are then admitted to membership of the International Federation of Red Cross and Red Crescent Societies and officially become part of the International Red Cross and Red Crescent Movement. Its decision is based on whether the National Society has met the conditions laid down by the International Conference of the Red Cross and Red Crescent.

The ICRC in Brief

The ICRC is active throughout the world protecting and assisting civilians and military victims of armed conflicts, internal disturbances and tensions, and promoting international humanitarian law and its dissemination. It is not

a multinational organization; it is a *private and independent institution* with its headquarters in Geneva, Switzerland, but is international in terms of its activities, which are *worldwide*. It is *independent of all governments*, and its *actions and decisions* are based entirely on *humanitarian considerations*. In situations of international war the ICRC, on the basis of the Geneva Conventions of 1949*, acts as a neutral intermediary between belligerents on behalf of the victims of war:* prisoners of war, civilian internees, the wounded and sick, displaced persons or persons living in occupied territory. In other situations of conflict such as civil wars or internal disturbances or tensions, it may offer its humanitarian services on the basis of its *right of initiative* recognized by States.

The ICRC has four *sources of finance:* contributions from the States party to the Geneva Conventions, contributions from the National Red Cross and Red Crescent Societies, private contributions, and various gifts and legacies.

Its activities essentially consist of: protecting prisoners of war, the wounded and civilian internees, and visiting them wherever they are (camps, prisons, hospitals, labour camps, etc.); providing material and moral support to the detainees visited, to civilians in enemy hands or in occupied territories, to displaced persons or to refugees in combat zones; in situations which are not covered by the Geneva Conventions (internal disturbances and tensions), visiting persons who have been detained for security reasons and who could be victims of arbitrary treatment; re-establishing contact between families separated as a result of a conflict situation and encouraging the development and implementation of international humanitarian law.

In any circumstances, the ICRC applies the same criteria to its *activities for detainees, whether prisoners of war or "political detainees".*

- its delegates must be allowed to have *access to all prisoners* (or detainees) and to *speak to them freely and privately;*
- they must be granted *access to all places of detention and be allowed to repeat the visits;*
- they must be given lists *of all persons to be visited* (or be able to establish such lists on the spot).

ICRC visits are concerned only with the *material and psychological conditions of detention and the treatment* received from the time of arrest or capture. The ICRC does not enquire about the reasons for the detention. As a neutral and impartial institution, it refrains from expressing any views

on the causes of the conflicts or situations in which it intervenes. *The reports drawn up by the ICRC* following visits to places of detention *are confidential* and as such, they are handed over to the *detaining authorities only, or in the case of prisoners of war, to the detaining power and to the power(s) on which the prisoners depend.*

The activities of the ICRC are not limited to visiting captives in armed conflicts or caring for those wounded in the fighting. It is often called upon to organize material and medical assistance programmes to ensure the survival of certain *vulnerable categories of people affected by the events* (civilians, displaced persons, refugees in combat zones).

Other essential activities are carried out by the ICRC's Central Tracing Agency. Tracing persons who are missing or who have not been heard from by their next-of-kin; reuniting families separated by events; transmitting mail when normal communications have broken down; making it possible for stateless persons, refugees or other persons no longer having identity papers to go to a country of asylum or to be repatriated; issuing certificates of death or captivity: these have been the main responsibilities of the Tracing Agency for over a century.

Role

The role of the ICRC (Article 5 of the Statutes of the International Red Cross and Red Crescent Movement) shall be in particular:

Article 5.2:

a) to maintain and disseminate the Fundamental Principles of the Movement, namely humanity, impartiality, neutrality, independence, voluntary service, unity and universality;

b) to recognize any newly established or reconstituted National Society, which fulfils the conditions for recognition set out in Article 4 [of the Statutes], and to notify other National Societies of such recognition;

c) to undertake the tasks incumbent upon it under the Geneva Conventions,[*] to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law;

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[*] In the present Statutes the expression "Geneva Conventions" also covers their Additional Protocols for the States Parties to these Protocols.

d) to endeavour at all times — as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife — to ensure the protection of and assistance to military and civilian victims of such events and of their direct results;

e) to ensure the operation of the Central Tracing Agency as provided in the Geneva Conventions;

f) to contribute, in anticipation of armed conflicts, to the training of medical personnel and the preparation of medical equipment, in cooperation with the National Societies. the military and civilian medical services and other competent authorities;

g) to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof;

h) to carry out mandates entrusted to it by the International Conference of the Red Cross and Red Crescent (The International Conference).

Article 5.3:

The ICRC may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution

The ICRC's Mandate

Initially the ICRC's mandate was limited to fostering the creation of relief societies in each country and encouraging the States to respect and ensure respect for the provisions of the 1864 Geneva Convention. This document had been drafted by the then "Geneva Committee", subsequently to become known as the International Committee of the Red Cross. In other words the ICRC could be viewed from the beginning as the promoter and guardian of international humanitarian law. This task has remained paramount throughout the years; the most important illustration in recent history is the preparation of the 1974-1977 Diplomatic Conference that adopted the two Additional Protocols on the basis of draft texts submitted to government experts by the ICRC.

The main concern of the ICRC, however, has always been to assist the victims of armed conflicts. Its tasks are victim-oriented. This means that

it takes any initiative it considers appropriate to fulfil this self-chosen mandate. Over the years the governments have come to understand the importance of the existence of a neutral body taking care of war victims without taking sides. This understanding has been given tangible expression in the right of initiative conferred by the governments upon the ICRC in the four Geneva Conventions and their Additional Protocols and in its Statutes. *By virtue of this right of initiative, the ICRC has the right to offer its services.* To be more specific, the ICRC has a recognized right of initiative for each of the conflict situations in which it acts.

In international armed conflicts (war between States)

The ICRC's treaty-based right of initiative is laid down in Article 9 of the First, Second and Third Conventions and in Article 10 of the Fourth Convention:

> *"The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains (First Convention) / of wounded, sick and shipwrecked (Second Convention) / of prisoners of war (Third Convention) / of civilian persons (Fourth Convention) and for their relief."*

Article 81 of Additional Protocol I strengthens this right of initiative as follows:

> *"The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned."*

In the specific case of prisoners of war and civilian internees the ICRC is granted a special right, namely *the right to act* laid down in Article 126 (cited below) of the Third Geneva Convention, and in the equivalent Article 143 of the Fourth Convention as concerns civilians:

> *"Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly*

to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners... The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives..."

In this case, the ICRC has an express *mandate: the right to visit prisoners and civilian internees*. In other words, the States cannot prohibit the ICRC from acting on behalf of these people.

In non-international armed conflicts (war within States)

Article 3 common to the Four Geneva Conventions stipulates that the ICRC has a *treaty-based right of initiative:*

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

In the case of so-called high-intensity non-international armed conflict, not only Article 3 common to the Four Geneva Conventions of 1949 applies, but also Additional Protocol II of 1977. In the latter's Article 18 it is stipulated that *"relief societies located in the territory of the High Contracting Party, such as Red Cross ... organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict".*

In internal disturbances and tensions

The ICRC has another right of initiative laid down *not in the Conventions but in the Movement's Statutes*, which enable it to act in situations falling short of war and therefore not covered by international humanitarian law. This statutory right of initiative is specified in Article 5, paragraph 3 of the Statutes and is worded as follows:

"The International Committee may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution."

Where the ICRC has a right of initiative, no matter what the situation, *the States can turn down its offer of services* — which the ICRC can renew. If the States affected by a conflict accept the offer of services, the resulting agreement constitutes the legal basis for ICRC activities.

The ICRC and Disturbances and Tensions

The ICRC's practice of offering its services for the protection and assistance of persons affected by internal disturbances or tensions is well rooted in its own tradition. It is confirmed in resolutions of the International Conferences of the Red Cross and Red Crescent and the Statutes of both the International Red Cross and Red Crescent Movement and the ICRC itself. States have never questioned the actual principle on which this practice is based: the basis for ICRC action in the event of internal disturbances and tensions has thus acquired a *customary nature* and the offer of the International Committee's services in such situations does not constitute interference in the internal affairs of a State. However, there is no corresponding obligation on the part of governments to accept such offers in those situations which are, by definition, not covered by the Geneva Conventions.

The various violations of essential rules of humanity which take place in internal disturbances and tensions fully justify the humanitarian reasons the ICRC has for taking action in such situations: indiscriminate violence, acts of terrorism, hostage-taking, rules of law which are violated by individuals or by the State, forced disappearances, poor conditions of detention, torture, etc. The classic spiral of violence and repression often leads to situations in which the individual in fact — if not in law — loses the protection of the State, either because the government is no longer capable of maintaining order, or because in maintaining that order it also violates humanitarian principles. In such circumstances, the ICRC's activities may take many forms:

Improving the conditions of detention and treatment of incarcerated persons

The traditional task of the ICRC in cases of internal disturbances and tensions is to visit places of detention in order to improve conditions of detention.

In virtually all situations of internal disturbances and tensions, certain categories of persons are imprisoned by the authorities. All these individuals have one thing in common: what they have done, said or written is considered by the authorities to constitute opposition of such magnitude to the existing political system that it must be punished by depriving them of their liberty. The legal intent of such detention measures may be punitive or preventive, aimed at re-education or at reintegration. The sentences may be pronounced under laws normally in force or under

emergency legislation or jurisdiction; alternatively, they may result from administrative measures in force for a limited or unlimited period. Sometimes, arrest may be a general and indiscriminate measure affecting large groups of persons.

The ICRC, in its concern to preserve the confidence of all parties through its neutrality, does not get involved in the political problem at the root of the disturbances or tensions, nor does it comment on the motives for detention; it essentially concerns itself with the material and psychological conditions of detainees.

Experience has shown that even where the government of a country wishes its detainees to receive humane treatment, the everyday reality of prison life often could and should be improved. Detainees tend to be viewed as "enemies" by officials in direct contact with them. There is often no practical way for them to communicate their grievances to national authorities who would be both able and willing to ensure humane and dignified treatment. Thus, both during the period of interrogation as well as afterwards — when the only security involved is that of the place of detention itself — ICRC delegates have frequently been made aware of the great need for improvement in prison conditions. ICRC activities consist of various steps. Periodical and thorough visits to places of detention and persons detained are carried out by appropriately trained ICRC delegates. These visits are followed by discussions at all levels with those in charge of detention. Confidential reports are then written and are sent exclusively to the detaining authority, generally at the highest level. These reports take into account the particular social, economic and cultural contexts in the respective country and describe, in an objective and detailed manner, the conditions of detention and treatment of the detainees. Specific and practical suggestions for improvement are made. The reports are not meant for publication: the ICRC makes public only the place, date and number of persons seen and the fact that its delegates were able to interview the detainees privately. It never comments publicly on the material or psychological conditions observed. (However, should the detaining authority publish a part of its reports, the ICRC reserves the right to publish the reports concerned in their entirety).

If the need arises and the authorities agree, the ICRC often provides material assistance to the detainees.

In order to perform their task of protection effectively, ICRC delegates ask to visit all persons detained in connection with an event, to interview freely and privately the detainees of their choice and to return to the places

of detention on a regular basis or as the needs require. This procedure generally brings very positive results and governments which have chosen to make use of ICRC services are generally grateful. Furthermore, no State has complained to the ICRC that its security had been jeopardized by such visits or that the legal status of persons visited had been affected. This is worth mentioning when one recalls that, since 1918, the ICRC has visited over half a million such detainees in more than one hundred countries.

The fight against torture and ill-treatment

As is well known, *torture is prohibited in all circumstances by both international law and national legislation.* However, among the many problems relating to the treatment of "political detainees", the ICRC considers that the problem of their torture deserves special attention both because of its gravity and because of the frequency with which it occurs, and resolutely confronts it. *For the ICRC, protection means safeguarding not only an individual's physical integrity, but also his or her psychological integrity.* During interviews in private with detainees, ICRC delegates have noted countless forms of ill-treatment that had been practised on them. In addition to the various forms of physical torture, delegates have recorded a whole range of methods to inflict moral and mental suffering as well as psychological pressure which destroy the detainee's personal identity. Also, the material conditions of detention are sometimes so poor that if they are intentional, they, too, can be considered as torture. The interrogation phase, periods of solitary confinement and the uncertainty caused by detention without legal basis figure prominently among the concerns of ICRC delegates.

It is equally clear that there are grave consequences for the whole of the society in which torture develops. Wherever it is practised, delegates notice that it affects not only the person tortured but also his or her family and social group — not to mention the torturer himself or herself who is morally sullied and often psychologically unbalanced by his or her deeds. Obviously, *the primary responsibility in the fight against torture lies with governments.* It is up to them to take measures (legislative, judicial or disciplinary) to prevent and repress acts of torture. In this respect, the confidential reports which the delegates draw up and send to the authorities following their regular visits and interviews without witness should enable willing governments, through constant dialogue with the ICRC, to meet their responsibilities and, together, put an end to such unacceptable practices.

Humanitarian Law and Human Rights Law

Introduction

The indiscriminate use of the terms "peoples' rights, human rights and humanitarian law...", all lumped together, has led to great confusion and even scepticism with respect to these ill-known concepts, which certain people take to be a recent creation of international politics, when in fact they belong primarily to legal systems. This makes it essential to specify the nature of international humanitarian law and that of human rights law and to keep in mind the similarities and differences between these two branches of public international law. It is likewise absolutely essential for those responsible for spreading information about international humanitarian law and/or human rights law to be able, on request, to give clear, simple explanations on the subject. This in the best interest of persons protected by both types of law, but also facilitates the task of those (State) officials responsible for that protection.

Although international humanitarian law and human rights law are both based on the protection of the person, there are specific differences in scope, purpose and application between them. International humanitarian law is applicable in cases of armed conflict, whether international or internal. It consists, on the one hand, of standards of protection for conflict victims, the so-called Law of Geneva and, on the other, of rules relating to means and methods of combat and the conduct of hostilities, also known as the Law of The Hague. At present, these two sets of rules have mostly been merged and brought up to date in the two Protocols additional to the Geneva Conventions, adopted in 1977.

Human rights law, in contrast is aimed at guaranteeing that the rights and freedoms — whether civil, political, economic, social or cultural — of every individual are respected at all times, so as to ensure that he or she can develop fully in the community and to protect him or her where necessary against abuse by the responsible authorities. These rights hinge on domestic law and the most fundamental of them are found in the constitutions of States. However, human rights law is also concerned with the international protection of human rights, or international law of human rights, i.e. the rules which States agree to observe with regard to the rights and freedoms of individuals and peoples.

It can be held that international humanitarian law is designed specifically to safeguard and maintain the fundamental rights (to life, security, health, etc.) of victims and non-combatants in the event of armed conflict. It is

emergency law, dictated by particular circumstances, whereas human rights, which flourish best in times of peace and stability but do not cease to exist in times of armed conflict, relate mainly to the harmonious development of every individual.

After the Second World War

The Universal Declaration of Human Rights of 1948 does not refer in any of its provisions to the question of respect for human rights in armed conflicts. Similarly, the 1949 Geneva Conventions, which were drafted at more or less the same time, made no mention of human rights. Nonetheless, a link was unintentionally established between those two branches of international law: the Geneva Conventions and the human rights conventions. On the one hand, a tendency may be detected in the Geneva Conventions of 1949 for their provisions to be considered not only as obligations to be discharged by the High Contracting Parties, but also as individual rights of the protected persons covered by those agreements. An article in each of the four Conventions stipulates that protected persons may not renounce the rights secured to them by the Conventions (Article 7 of the First, Second and Third Conventions, and Article 8 of the Fourth). Furthermore Article 3 common to all four Conventions obliges the Parties to apply, as a minimum, certain humanitarian rules in an armed conflict not of an international character. It thus lays down the relations between the State and its own nationals and, consequently, extends over into the traditional sphere of human rights.

On the other hand, some of the international human rights treaties contain provisions for their implementation in time of war. Article 15 of the 1950 European Convention on Human Rights provides that in time of war or public emergency threatening the life of the nation, certain rights contained in the Convention may be derogated from, except for certain inalienable rights which constitute a "hard core" (life, liberty, security, legal personality, torture, racial discrimination and slavery). Similar provisions are to be found in Article 4 of the United Nations International Covenant on Civil and Political Rights and Article 27 of the American Convention on Human Rights. The international human rights treaties must thus also be applied in the event of armed conflicts. Where a conflict does not threaten the life of the nation (and a state of emergency has not formally been declared) all provisions of the human rights conventions remain applicable, side by side with those originating from international humanitarian law.

For a long time no attention was paid to the relations between these two branches of international law. It was only in the late 1960s, with the

outbreak of a series of armed conflicts — wars of national liberation in Africa, the Middle East conflict, the wars in Nigeria and Viet Nam — simultaneously involving aspects of the Law of War and human rights considerations, that people became aware of a relationship between the two. At the International Conference on Human Rights, convened in 1968 by the United Nations in *Teheran*, a link was officially established between human rights and international humanitarian law. In its Resolution XXIII adopted on 12 May 1968 and entitled *"Respect for human rights in armed conflicts"*, the Conference urged a stricter application of existing conventions in armed conflicts and the conclusion of further agreements. This resolution initiated action by the United Nations on international humanitarian law, as may be seen in the Secretary-General's annual reports and the resolutions adopted every year by the UN General Assembly.

Human rights law had an impact on the contents of the two 1977 Protocols additional to the Geneva Conventions of 1949, for example, Article 75 of Protocol I (fundamental guarantees) and Article 6 of Protocol II (penal prosecutions), are directly derived from the United Nations International Covenant on Civil and Political Rights.

The convergence of international humanitarian law and human rights shows that war and peace, civil wars and international conflicts, international law and national law, all increasingly overlap. It follows that humanitarian law and human rights law can be legally applicable at the same time side by side, in a cumulative or complementary manner.

Humanitarian Law and Law Enforcement

While humanitarian law is legally applicable in situations of armed conflict, the principles of humanitarian law — related to care for and the protection of victims of armed conflict situations — are equally relevant for situations other than armed conflict which can be best characterized as disturbances and tensions.

Situations of armed conflict do not erupt spontaneously. They are a product of a deterioration of the state of law and order in a country for which law enforcement organizations bear a primary responsibility. The practical involvement, by the very nature of their duties, of law enforcement officials in situations of violent demonstrations, disturbances and tensions that may escalate towards civil war requires them to be aware — and capable — of integrating the principles of humanitarian law and human rights into their operations and training. Therefore, for their own

correct task performance a certain level of knowledge of humanitarian law is indispensable for law enforcement officials.

Although the law enforcement function may be temporarily suspended during situations of armed conflict, the question of subsequent investigation of (grave) breaches of the Law of War will naturally entail a law enforcement responsibility. This may be taken as a further reason why law enforcement officials need to be familiar with humanitarian law.

Wherever appropriate in this *Manual*; reference will therefore be made to relevant provisions of humanitarian law that might (or must) have an impact on law enforcement practice.

INTERNATIONAL PROTECTION OF FUNDAMENTAL RIGHTS

* CERD = Convention on the Elimination of All Forms of Racial Discrimination
** CEDAW = Convention on the Elimination of All Forms of Discrimination Against Women
*** Genocide Convention = Convention on the Prevention and Punishment of the Crime of Genocide

RIGHTS PROTECTED	GLOBAL H.R. INSTRUMENTS: UDHR	ICCPR	REGIONAL H.R. INSTRUMENTS: ECHR	ACHR	ACHPR	SPECIALIZED H.R. INSTRUMENTS	I.H.L. INSTRUMENTS NIAC	IAC
THE RIGHT TO LIFE, LIBERTY AND SECURITY OF PERSON.	3	6, 9	2, 5	4, 7	4, 6		I-IV, 3 PII, 4	IV, 68, 75 PI, 40-42, 51, 75
THE PROHIBITION ON TORTURE, CRUEL, INHUMAN, DEGRADING TREATMENT OR PUNISHMENT	5	7	3	5.2	5	Convention Against Torture	I-IV, 3 PII, 4	IV, 27, 31, 32 PI, 75
THE PROHIBITION ON DISCRIMINATION	1, 2	1, 3	14	1	2	C.E.R.D.* C.E.D.A.W**	I-IV, 3 PII, 2.1, 4	IV, 13, 27 PI, 9.1,75, 85.4
THE PROHIBITION ON ON ARBITRARY ARREST OR DETENTION	9	9	5	7.3	6		X	IV, 41, 49, 71, 79
THE PRESUMPTION OF INNOCENCE	11	14.2	6.2	8.2	7.1b		PII, 6.2(d)	PI, 75.4(d)
THE RIGHT TO- AND MINIMUM GUARANTEES FOR A FAIR TRIAL	10	14.1, 14.3	6	8	X		I-IV, 3.1(d) PII, 6	IV, 64-75 PI, 75
THE PROHIBITION ON ARBITRARY INTERFERENCE WITH PRIVACY, FAMILY, HOME OR CORRESPONDENCE	12	17	8	11.2	X		X	IV, 27 PI, 76, 77
THE RIGHT TO HUMANE TREATMENT FOR PERSONS DEPRIVED OF THEIR LIBERTY	X	10.1	X	5.2	X		I-IV, 3.1 PII, 4	IV 5.3, 27.1, 100; PI, 75.1
THE RIGHT TO FREEDOM OF MOVEMENT	13	12	AP 4	22	12	Convention Relating to the Status of Refugees	PII, 17.2	IV, 35, 48, 49, 73
THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION	19	19	10	13	9.2		I-IV, 3.1 PII, 2.1	IV, 13.1 PI, 9.1
THE RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION	18	18	9	12	8		I-IV, 3.1 PII, 2.1	IV, 13.1, 27.1 PI, 9.1, 75.1
THE RIGHT TO FREEDOM OF ASSEMBLY AND ASSOCIATION	20	21	11	15, 16	10, 11		X	X
PROHIBITION ON WAR PROPAGANDA AND INCITEMENT TO NATIONAL, ETHNIC OR RELIGIOUS HATRED	X	20	X	13.5	X	GENOCIDE CONVENTION***, Art. III c	X	X
MEASURES OF DEROGATION DURING PROCLAIMED STATES OF EMERGENCY	X	4	15	27	X		X	X

Numbers refer to corresponding articles of the instrument

DD/FAS/1997/CdR

Study Questions

Knowledge

1. What is understood by "the Law of Geneva"?
2. What is understood by "the law of The Hague"?
3. What was the reason for founding the Red Cross?
4. What is the object and purpose of humanitarian law?
5. What is the essence of the Law of War?
6. What was the reason for the adoption of the Additional Protocols of 1977?
7. What is the most fundamental rule for the conduct of hostilities?
8. What is the objective of rules limiting the methods and means of warfare?
9. What are the basic rules for the protection of cultural property?
10. What is the mission of the ICRC?
11. What is meant by ICRC's "right of initiative"?
12. When must parties to a conflict accept the ICRC's mission?
13. Why does the ICRC want to visit detainees?
14. What does the ICRC do during such visits?
15. What is the role of the ICRC's Central Tracing Agency?
16. What is the role of the ICRC during disturbances and tensions?

Understanding

1. Indicate the legal applicability of humanitarian law and human rights treaties.
2. What is your opinion on the relationship between the two types of law?
3. Which conventions and protocols are applicable in non-international armed conflict?
4. Why should humanitarian principles be observed during disturbances and tensions?
5. What is the role of law enforcement organizations in promoting and upholding humanitarian law?
6. What do you think of the high ratification rate of humanitarian law treaties as compared to certain human rights treaties?

7. Why would the ICRC refrain from publishing reports on its protection work for detainees?
8. How can law enforcement organizations contribute to peace and stability?
9. How much should law enforcement officials know about the law of war?
10. What is your opinion on military forces assuming law enforcement responsibility?
11. What is your opinion on law enforcement officials carrying out military operations?
12. What is your view on incorporating law enforcement officials into the armed forces and turning them into combatants?
13. What is the role of law enforcement organizations in the investigation of war crimes?
14. What is the role of law enforcement organizations in the protection of civilians during situations of armed conflict?
15. What do you think of the relationship between the ICRC and national law enforcement organizations?

BASIC PREMISES OF LAW ENFORCEMENT

Chapter 4

LAW ENFORCEMENT IN DEMOCRATIC STATES

Chapter Outline

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Key Questions for Law Enforcement Officials

- *What is a democracy?*
- *What is meant by "the rule of law"?*
- *What is the origin of the law enforcement function?*
- *What are the powers and authorities of law enforcement organizations?*
- *What distinguishes law enforcement from the armed forces?*
- *What are the tasks and duties of law enforcement officials?*
- *What is the relevance of international law for law enforcement?*
- *What can be said about the relation between law enforcement and human rights?*
- *What is the relevance of humanitarian law for law enforcement?*
- *What is the role and position of law enforcement in protection of rights and freedoms?*
- *What is the place of the law enforcement function in society?*

Introduction

Law and order and peace and security are matters of State responsibility. Most States have chosen to entrust the operational responsibilities in this area to a law enforcement organization, be it a civil, military, or paramilitary organization. This chapter sets out to examine the role and position of law enforcement in democratic societies as well as its role and significance in the promotion and protection of human rights.

Democracy and the Rule of Law

Article 25 of the International Covenant on Civil and Political Rights (ICCPR) states:

> *Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*
>
> *a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*
>
> *b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
>
> *c) To have access, on general terms of equality, to public service in his [or her] country.*

Although it is difficult to precisely identify a right to democratic governance, provisions of the ICCPR (such as Article 25 above) clearly protect the individual's right to take part in the conduct of public affairs. This right creates the obligation for States not only to refrain from certain actions, but also to take specific steps that guarantee people the free and equal exercise of this right.

It is equally difficult to give one universally satisfying definition of "democracy". The attempt to define democracy is more likely to result in establishing characteristics of democratic governance that can be considered common denominators, irrespective of the particular system operational in a given State. Such characteristics include a democratically elected government that is representative of — and accountable to — the people of the State; the existence of — and respect for — the rule of law; and respect for human rights and freedoms. Article 21 of the Universal Declaration of Human Rights (UDHR) states that *"The will of the people shall be the basis of the authority of government..."* Free and fair elections, held at regular intervals, are of critical importance to the establishment of democratic government. It is the responsibility of the State to ensure such elections and to guarantee all persons their right to vote or to be elected, free from coercion or pressure of any kind.

Representative government not only implies adequate representation of the will of the people, it also implies that the government, in its composition, reflects the composition of society. Equal representation of men and women, as well as proportional representation of members of national minorities, are the means by which the objective of representative government will be achieved.

Existence of and respect for the rule of law implies a situation where rights, freedoms, obligations and duties are laid down in the law for all people in all equality and with the guarantee that people will be treated equally in similar circumstances. One fundamental aspect of this right can also be found in Article 26 of the ICCPR, which states that *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law..."* The existence of laws in this sense serves to create a feeling of assurance with regard to rights and duties, as those rights and duties are laid down in positive law. Whenever so required, people can learn about their rights and duties under the law as well as acquire protection of the law against unlawful and/or arbitrary interference with their rights and freedoms by others.

It should be noted that the characteristics set out above — democratic representative government, rule of law and respect for human rights —

form the basic requirements for States that aspire to membership of the Council of Europe. At this moment in time it can be said that the majority of States adhere to a form of democratic governance and agree, at least in principle, to the three characteristics presented above.

The Law Enforcement Function

Origin and Organization

The need for enforcement of national laws, in terms of ensuring respect for the law and of consequences for offences against those laws, is probably as old as law itself. In certain areas, sanctions for non-observance of the law are imposed as a result of mainly administrative procedures, as for instance in tax laws. There is no highly visible law enforcement component in such laws. In other areas, however, specifically those that touch upon public life and public order, most States over time have come to establish a law enforcement body. In the majority of States those law enforcement bodies are of a civilian origin and nature, and are usually attached to the Ministry of Justice or of the Interior. There are also States that entrust law enforcement responsibility to military or paramilitary bodies, which operate under the responsibility of their Ministry of Defence.

As for the organization of law enforcement bodies, it is generally true that most of them are strictly hierarchical, closed-system types of organizations. Their structures are often quasi- military, as is their system of ranks. Law enforcement organizations usually operate under a rigid chain of command with strict separations of power and authority, in which most decision-making processes are of the "top-down" variety. The capacity of this type of law enforcement organization to respond to outside stimuli is limited to reactive patterns of response with little or no capacity for proactive anticipation of current and future developments outside the system. The closed-system type of law enforcement organization will invariably experience difficulties in establishing and maintaining effective relations with the public. It will also have difficulties in determining the wants, needs and expectations of the public at any given time. The gradual change of the "closed-system" organization towards more open-system organizations in the area of law enforcement is fairly recent. "Community policing" has become a recognized slogan with in its emphasis on decentralization of the law enforcement organization, de-specialization of specific law enforcement functions and abolition of the abundance of functional levels within the law enforcement structure. The objective of "community policing" is to (re)create proximity and mutual understanding between the population

and its law enforcement organization, starting out from the fundamental premise that law enforcement is a shared responsibility of State players and members of the public, and not of the law enforcement organization alone. Key words in democratic law enforcement, as in democratic governance itself, are "responsive", "representative" and "accountable".

Tasks and Duties

Responsibilities of law enforcement organizations, irrespective of their origin, structure or attachment, are generally linked to:

- *maintenance of public order;*
- *aid and assistance in emergencies of all kinds; and*
- *prevention and detection of crime.*

Although the majority of demands on the law enforcement organization relate either to the maintenance of public order or to aid and assistance in emergencies, the management of law enforcement organizations tends to give priority to the prevention and detection of crime. Within this area, the majority of resources available are spent on the detection of crime. This emphasis may be perceived as peculiar, given the limited success and effectiveness of law enforcement agencies in this particular field. Crime solution rates are disappointingly low in every country, as are the efforts directed towards development and implementation of tactics of (more) effective prevention of crime and the interest shown in such work. There is little doubt that this situation is part of the legacy of the era in which the closed-system type of organization prevailed. A salient feature of that era was the strict internalization of decision-making with respect to allocation of resources and the determination of law enforcement priorities. "To catch criminals" is, in most cases, still the first priority for law enforcement officials and their organizations. Service to the community, protection of victims and the prevention of further victimization present challenges to law enforcement that appear to have less appeal than the traditional game of cops and robbers.

Powers and Authorities

Law enforcement officials are given a variety of powers that can be used to achieve lawful law enforcement objectives. Among those most commonly known and used are the powers of arrest and detention and the authority to use force where such is necessary for the achievement of legitimate law enforcement objectives. The legal authority to use force — including the

obligation to use force when to do so is unavoidable — is unique to the law enforcement organization. Arrest, detention and the use of force and firearms are topics to which separate chapters in this *Manual* have been devoted. For a more detailed account of the implications of each of those topics for law enforcement practices, please consult the chapters under those specific headings.

In addition to the powers of arrest, detention and the use of force, a variety of other powers and authorities are vested in law enforcement officials for the effective performance of their tasks and duties. A number of those powers relate to the prevention and detection of crime and include powers of entry, search and seizure: entry to places, localities and homes where crimes were committed or have left traces; search in those places for evidence and the confiscation thereof for the purposes of prosecution; and seizure of persons and/or objects related to a crime committed or to be committed. Each of these powers is clearly defined in law, and must be exercised only for lawful law enforcement purposes.

Essential in connection to the use of any power or authority are the questions of legality, necessity and proportionality:

does the power or authority used in a particular situation have its basis in national law; and

is the exercise of that particular power and/or authority strictly necessary, given the circumstances of the respective situation; and

is the power or authority used in proportion to the seriousness of the offence and the legitimate law enforcement objective to be achieved?

Only in situations where all three questions can be answered in the affirmative will the use of a particular power or authority be justifiable.

Law Enforcement and International Law

The relationship between international law on the one hand and law enforcement — based on national law — on the other hand requires explanation. This is particularly true and important where human rights law and humanitarian law are concerned. For the true promotion and protection of rights and freedoms, it is essential that law enforcement officials understand the extent, implications and limitations of this relationship.

For a presentation of basic concepts of international law attention is drawn to the corresponding chapter under the heading Legal Framework. Suffice

it to say at this stage that as far as human rights law and humanitarian law are concerned, international law has direct relevance for law enforcement practices. For both types of law that relevance will be examined in more detail below.

Human Rights Law

Human rights law can for the present purposes be usefully divided into "hard law" (i.e. treaty law) and "soft law" (guidelines, principles, codes of conduct, etc.). Treaty law creates legally binding obligations for States Parties to adapt national legislation to ensure its full conformity with the treaty concerned, as well as to adopt and/or modify relevant policies and practices. Law enforcement officials form one group of State players who are expected to observe the treaty requirements in their daily work. As for the "soft law" in international human rights law, those instruments are best compared with the standing orders existing within each law enforcement organization. Although they lack a strictly binding legal character, their content is of particular relevance for law enforcement practices and for this reason their observance is highly recommended.

Humanitarian Law

Humanitarian law consists (in general terms) of two types of law, the Law of Geneva (dealing with the protection of victims of armed conflict) and the law of The Hague (dealing with the conduct of hostilities). The most well-known instruments of international humanitarian law are the four Geneva Conventions of 1949 and their Additional Protocols of 1977. These instruments represent treaty law. They are different from human rights law in that their contents are directly binding upon States Parties only in situations of armed conflict. The extent to which the Conventions and Protocols are binding depends first and foremost on the type of armed conflict. Their main objective is the protection of potential and actual victims of armed conflict situations — be they combatants in the field or at sea, prisoners of war or civilians. Crucial to humanitarian law are the principles of respect for human life, liberty and security of person, formulated both in terms of protection, care and assistance to be given to victims of armed conflict, and of rules that set out to limit the methods and means of warfare.

Principles of humanity, respect for life, liberty and security of person and principles for the protection of victims of crime and/or abuse of power, as well as special provisions for the protection of vulnerable groups (i.e.

women, children, refugees), can be found in human rights law and humanitarian law alike.

Whenever and wherever law enforcement officials exercise their powers and authorities they must respect and protect the rights and freedoms of all persons — whether expressed in human rights law or humanitarian law. The fact that a State happens to find itself in a situation of armed conflict or internal disturbances and tensions, or under a proclaimed state of emergency, does not take away that obligation, nor can such situations serve as a justification for non-observance of fundamental rights and freedoms.

Promotion and Protection

It is essential that law enforcement officials show themselves sensitive to individual rights and freedoms as well as aware of their own (individual) capacity to protect — or violate — human rights and freedoms. Law enforcement is one visible component of State practice. Actions of individual law enforcement officials are rarely viewed or evaluated as such. More often they are seen as indicative of the behaviour of the law enforcement organization as a whole. That is precisely why certain individual law enforcement actions (e.g. excessive use of force, corruption, torture) can have such devastating effects on the image of the entire organization.

As explained above, the obligations of States under international law begin, in the present context, with adapting national legislation to the provisions of the treaties concerned. Responsibility, however, does not end there, State practice vis-à-vis its citizens must prove itself to be both aware and respectful of requirements under international law (irrespective of the actual status of incorporation into national legislation). Consequently law enforcement officials are required to promote, protect and respect the human rights of all people without any adverse distinction. This obligation has clear implications for the education and training of law enforcement officials: they must acquire adequate knowledge of both national law and international human rights law and humanitarian law. However, mere knowledge as such is not enough. Law enforcement officials also need to acquire and maintain appropriate skills, techniques and tactics to ensure the adequate and constant application of requirements laid down in law, in order to respect and protect individual rights and freedoms. Limitations to personal rights and freedoms can derive only from limitations inherent in the right itself or from lawful limitations and/or derogations permissible in

times of public emergencies that threaten the life of the nation. Such limitations and/or derogations must never be the result of unlawful and/or arbitrary law enforcement practices. Such practices not only constitute breaches of national law, but are also detrimental to the public perception and individual experience of human rights and freedoms.

Law enforcement officials must be made aware of their individual and collective capacity to influence public perception and individual experience of human rights and freedoms. They must also be aware of how their actions affect the law enforcement organization as a whole. Individual responsibility and individual accountability must be recognized as key factors in the establishment of correct law enforcement practices. Programmes for education and training must take those factors into account in their focus and approach. Officials charged with monitoring, review and command responsibilities must take these factors into account when developing systems for professional guidance, monitoring and review.

Education and training of law enforcement officials is primarily a national responsibility. However, this should not exclude the possibility for international cooperation and assistance in this area, nor should it detract from the important role which international organizations in the field of human rights and/or humanitarian law can play in providing services and assistance to States. Such assistance must never be an end in itself. The objective of its provision must be to facilitate the achievement of clearly defined objectives, and should be confined to situations where the required service or assistance is not available within a requesting State.

Chapter Highlights

- Law, order, peace and stability are the responsibility of the State.
- There is no universally acceptable definition of democracy. However, true democracies share characteristics such as a democratically elected government, respect for the rule of law and respect for human rights.
- The will of the people must be the basis for the authority of government.
- All persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law.
- Everyone is entitled to take part in the conduct of public affairs, either directly or through freely chosen representatives.
- Everyone has the right to vote and to be elected at genuine periodic elections which must be held by universal and equal suffrage and by secret ballot, guaranteeing the free expression of the will of the electors.
- Everyone is entitled to access, on general terms of equality, to public service in his [or her] country.
- The origin of the law enforcement organization lies in the clear need for the enforcement of national laws.
- Tasks and duties of law enforcement organizations are linked to the maintenance of public order, to the prevention and detection of crime, and to aid and assistance in emergencies.
- To enable the effective performance of their tasks and duties, law enforcement officials are given a wide range of powers and authorities.
- Powers and authorities in law enforcement relate to arrest, detention, use of force and firearms, as well as to specific areas (e.g. prevention and detection of crime, where they include powers of entry, search and seizure).
- Key issues related to the correct use of power and authority are legality, necessity and proportionality. Police actions must find their basis in national law. They must also be necessary in the given circumstances and proportional when measured against the seriousness of the offence and the legitimate objective to be achieved.
- International human rights law and humanitarian law are directly relevant to law enforcement practice.
- Law enforcement practices must be seen as part of State practices and as such must be in full compliance with a State's obligations under international law.
- Promotion and protection of human rights and freedoms is both a collective and an individual responsibility where law enforcement is concerned.
- Law enforcement officials must understand their individual capacity to influence the image of the law enforcement organization as a whole.
- Respect for human rights and freedoms depends upon adequate knowledge and on appropriate application of such knowledge in operational law enforcement situations.
- Continuous education and training are indispensable for the acquisition of knowledge, attitudes, skills and behaviour that comply with requirements of international human rights and humanitarian law.

Study Questions

Knowledge/Understanding

1. How would you define "democracy"?
2. What is the role of law enforcement in ensuring democratic governance?
3. Explain how adverse law enforcement practices can endanger democratic governance?
4. Explain the notions of "responsive", "representative" and "accountable" in relation to law enforcement practices.
5. How does international law influence law enforcement practice?
6. How can education and training assist in the promotion and protection of human rights?
7. Would you agree that there exists a right to democracy?
8. Can law enforcement officials be allowed to be politically active?

Application

1. You would like to know what the citizens of the community that you are serving think about human rights and freedoms, based on their experience with your law enforcement agency.
   a) Develop a strategy for obtaining the information you would like to have.
   b) Supposing that the information obtained shows a negative image of your organization, what could you do to improve this image?
   c) With reference to Question b), how could you involve the public in your attempts to improve the image of your organization?

Chapter 5

ETHICAL AND LEGAL LAW ENFORCEMENT CONDUCT

Chapter Outline

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Key Questions for Law Enforcement Officials

- *What is the meaning of ethics in the context of law enforcement?*
- *Does law enforcement have a professional code of ethics?*
- *What ethical issues are associated with law enforcement practice?*
- *What do the international instruments say about ethics in law enforcement?*
- *What is the relevance of the Code of Conduct for Law Enforcement Officials?*
- *What is the relevance of ethics for management of law enforcement operations?*
- *What are the implications of ethics for education and training of law enforcement officials?*
- *What is the meaning of legality in the context of law enforcement?*

Introduction

The law enforcement function is a public service created by law, with responsibilities for maintaining and enforcing the law, maintaining public order and rendering aid and assistance in emergencies. The powers and authorities that are required for the effective discharge of law enforcement responsibilities are also granted by national law. However, these legal foundations in themselves are insufficient to guarantee lawful and non-arbitrary law enforcement practices, they merely offer a framework and create potential.

The effective and correct task performance of law enforcement agencies depends upon the quality and the performance capacities of each one of its law enforcement officials.

Law enforcement is not a profession that consists of applying standard solutions for standard problems occurring at regular intervals in time. It is rather the art of understanding both the letter and the spirit of the law, as well as the unique circumstances of a particular problem in hand. Law enforcement officials are expected to have a capacity to distinguish between innumerable shades of grey, rather than to make a simple distinction between black and white, right or wrong.

This task must be carried out in full compliance with the law and with a correct and reasonable use of the powers and authorities granted to them by law. Law enforcement cannot be founded on illegal, discriminatory or arbitrary practices on the part of law enforcement officials. Such practices

will destroy public confidence, trust and support and will serve to undermine the very authority of the law enforcement organization.

Ethics

Introduction

Law enforcement officials must not only know the powers and authorities given to them by law — they must also understand their potentially harmful (and potentially corrupting) effects. In the course of law enforcement many different situations arise in which law enforcement officials and the citizens they serve find themselves on opposing sides. More often than not law enforcement officials will be forced to act in order to prevent — or follow up — a clear breach of the law. Yet these actions themselves must be totally lawful and non-arbitrary. Law enforcement officials may, in such situations, experience or perceive a sense of imbalance or unfairness between criminal liberty and law enforcement duty. However, they must understand that this very perception is what distinguishes those who enforce the law from (criminal) offenders. If law enforcement officials were to resort to practices that are against the law or beyond the powers and authorities granted to them by the law, the distinction between the two could no longer be made. Public safety and public security would subsequently be at risk, with potentially devastating consequences for society.

The human factor in law enforcement must not endanger requirements of lawfulness and non-arbitrariness. To that end law enforcement officials must develop personal attitudes and behaviour to a level that will enable them to perform their tasks in a correct manner. Not only must law enforcement officials possess such characteristics individually, they must also work collectively to cultivate and to preserve an image of the law enforcement organization that instils trust and confidence into the society they are serving and protecting. Most societies have acknowledged the need for medical and legal practitioners to be guided by a code of professional ethics. The practice in either of these professions is subject to rules — the implementation of which is overseen by supervisory boards with judicial-type powers. The most common reason given for the existence of such codes and boards is the fact that these professions are ones of public trust. Individual citizens place their welfare and well-being in the hands of fellow human beings and require assurances and protection for doing so. Such assurances relate to correct and professional treatment or service, including the confidentiality of information, as well as protection against (possible)

consequences of malpractice or the disclosure of confidential information to third parties. Although most of these attributes apply equally to the law enforcement function, a code of professional ethics for law enforcement officials, including a supervisory board or mechanism, does not yet exist in most countries.

Definition

The term *"Ethics"* is generally understood to refer to:

> *...the discipline dealing with what is good and bad and with moral duty and obligation.... ...a set of moral principles or values... ...the principles of conduct governing an individual or (professional) group... ...the study of the general nature of morals and of specific moral choices... the rules or standards governing the conduct of the members of a profession ... ...the moral quality of a course of action; propriety.*

Personal Ethics, Group Ethics, Professional Ethics

The definitions as set out above can be applied at three different levels, with different consequences. *"Personal ethics"* means the morals, values and beliefs of the individual. It is initially the personal ethics of the individual law enforcement official that will decide the course and type of action which that official will take in a given situation. Personal ethics can be positively and negatively influenced both through experience and through education and training. Peer group pressure also plays an important part in shaping the personal ethics of the individual law enforcement official. It is important to understand that it is not enough for a law enforcement official to know that his or her action must be lawful and non-arbitrary. The personal ethics (the personal belief as to what is good and bad, right and wrong) of the individual law enforcement official need to be in consonance with the legal requirements if action taken is to be correct. Guidance, monitoring and review of performance are important instruments to that end.

The reality of law enforcement is working in groups, working with individual colleagues in sometimes difficult and/or dangerous circumstances, twenty-four hours per day, seven days per week. These factors can easily lead to the development of group behaviour, subcultural patterns (i.e. group language, rituals, "we" versus "them", etc.) and subsequent pressure on group members (especially new ones) to conform with the group culture. In that way the individual, working in accordance with his or

her personal ethics, may be confronted with established and possibly conflicting *"group ethics"* and subsequent pressure to accept or reject them. It should be clear that group ethics are not necessarily of a better moral quality than the personal ethics of the individual or vice-versa. For responsible management officials in law enforcement organizations it is therefore indispensable to monitor attitudes and behaviour in terms not only of personal ethics, but also of group ethics. Law enforcement history provides a variety of examples from different countries on how questionable group ethics can lead to the discrediting of an entire law enforcement organization. Scandals of endemic corruption, widespread involvement in organized crime, racism and discrimination are frequently shaking the foundations of law enforcement agencies around the world. Those examples may serve to demonstrate that law enforcement agencies must aim for levels of ethics amongst their personnel that effectively eradicate such unwanted behaviour.

When we go to see a doctor or a lawyer for reasons of personal and private interest, generally it doesn't cross our minds that, in fact, this act in itself is one of great confidence. We believe, and expect, that our privacy will be respected and that our case will be treated with confidentiality. What we in fact rely on is upon the existence of, and respect for a code of *"professional ethics"*, a codified set of rules of behaviour for members of a particular profession. The medical, and the legal profession are widely known to have such a code of professional ethics with standards that are more or less similar in every country of the world. The law enforcement profession is not broadly recognized to have achieved a similar position in which there is a clearly codified and universally accepted set of rules for the conduct of law enforcement officials. However, within the United Nations system, as well as within the Council of Europe, international instruments have been developed that address the issues of ethical and legal law enforcement conduct. These instruments will be discussed below.

Ethical and Legal Law Enforcement Conduct

Introduction

Law enforcement practices must conform to the basic principles of legality, necessity and proportionality. Any law enforcement practice must have its basis in law. Recourse to it must be unavoidable, given the circumstances of a particular case in hand, and its impact must be appropriate in relation to the seriousness of the offence and the legitimate objective to be achieved. The relationship between law enforcement practices and the perception

and experience of rights and freedoms and/or the quality of life in general within a society are subjects that still receive insufficient thought and attention.

Code of Conduct for Law Enforcement Officials

The issue of professional ethics for law enforcement has been given some thought in international instruments on human rights and criminal justice, and most prominently in the *Code of Conduct for Law Enforcement Officials* (CCLEO) adopted by the General Assembly of the United Nations in its Resolution 34/169 of 17 December 1979. This resolution states that the nature of the functions of law enforcement in the defence of public order, and the manner in which those functions are exercised, have a direct impact on the quality of life of individuals as well as of the society as a whole. While stressing the importance of the tasks performed by law enforcement officials, the General Assembly also underlined the potential for abuse which the exercise of such duties entails.

The CCLEO consists of eight articles. It is not a treaty but belongs to the category of instruments that offer authoritative guidance to governments on issues related to human rights and criminal justice. It is important to note that (as has been recognized by the drafters) such standards lack practical value unless their content and meaning, through education, training and monitoring, become part of the creed of every law enforcement official.

Article 1 states that: *"Law enforcement officials shall at all times fulfil the duty imposed upon them by law ..."*. In the commentary to this article the term "law enforcement officials" is defined as including all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention.

Article 2 requires law enforcement officials, in the performance of their duty, to respect and protect human dignity and maintain and uphold the human rights of all persons.

Article 3 limits the use of force by law enforcement officials to situations where it is strictly necessary, and to the extent required for the performance of their duty.

Article 4 states that matters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise.

With regard to this article, it is important to acknowledge the fact that the nature of law enforcement duties places law enforcement officials in a position where they may obtain information relating to the private life of individuals, or information that could be harmful to the interests or reputation of others. The disclosure of such information other than for the needs of justice or the performance of duty is improper and law enforcement officials must refrain from making any such disclosure.

Article 5 reiterates the prohibition of torture or other cruel, inhuman or degrading treatment or punishment.

Article 6 relates to the duty to protect the health of persons deprived of their liberty and provide medical care whenever necessary.

Article 7 forbids law enforcement officials to commit any act of corruption, and enjoins them to rigorously oppose and combat any such act.

Article 8 is the closing provision urging law enforcement officials (once more) to respect the law (and the present Code). Law enforcement officials are urged to prevent and oppose any violations of the law or the Code. In cases where a violation of the Code is (or is about to be) committed, law enforcement officials must report the matter to their superior authorities and, if necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

Council of Europe Declaration on the Police

Under the existing regional arrangements only the Parliamentary Assembly of the Council of Europe has produced an instrument which is comparable to the CCLEO: the *Declaration on the Police* (DP), appended to Resolution 690 (1979) adopted by the Parliamentary Assembly on 8 May 1979.

The DP is divided into three parts: **Part A** covers **Ethics, Part B** covers **Status**, and **Part C** covers **War and Other Emergency Situations — Occupation by a Foreign Power**. In a footnote to the instrument it is indicated that Parts A and B thereof cover all individuals and organizations, *including such bodies as secret services, military police forces, armed forces or militias performing police duties, that are responsible for enforcing the law, investigating offences and maintaining public order and state security*.

Part A, **Ethics**, covers, in greater depth than the CCLEO, the legal and moral obligations of law enforcement officials. The formulations used to

express the tasks, duties and personal responsibilities are more detailed than those used in the CCLEO. In addition to this the DP contains a number of provisions that are not included in the CCLEO, such as the obligation to disregard unlawful orders (Article 3); or to disregard orders with respect to torture, summary executions, or inhuman or degrading treatment or punishment (Article 4); personal liability of police officials for unlawful actions or omissions (Article 9); instruction as to the use of arms (Article 13); and the prohibition of actions against persons for reasons of race, religion or political belief (Article 8).

Part B, **Status**, relates to the organization of police forces and the personal and professional entitlements of police officials.

Part C, **War and Other Emergency Situations — Occupation by a Foreign Power**, is linked to provisions of humanitarian law stating the position, tasks and duties of police officials in situations of armed conflict. More information on this particular topic can be found in the chapter *Maintenance of Public Order*.

Basic Principles on the Use of Force and Firearms

The Basic Principles on the Use of Force and Firearms (BPUFF) were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, from 27 August to 7 September 1990.

Although not a treaty, the instrument aims to offer authoritative guidance to *"Member States in their task of ensuring and promoting the proper role of law enforcement officials"*. The principles set out in it *"should be taken into account and respected by Governments within the framework of their national legislation and practice, and be brought to the attention of law enforcement officials as well as other persons, such as judges, prosecutors, lawyers, members of the executive branch and the legislature, and the public"*.

The preamble to this particular instrument further recognizes the importance and complexity of the tasks of law enforcement officials, acknowledging their vital role in the protection of life, liberty and security of all persons. Particular emphasis is placed on the task of maintaining public safety and social peace, and on the importance of the qualifications, training and conduct of law enforcement officials. The preamble ends by stressing the need for national governments to take the principles enshrined in this instrument into account by adapting their national legislation and practice accordingly. Furthermore governments are encouraged to *"keep*

the ethical issues associated with the use of force and firearms constantly under review" (BP 1).

Governments and law enforcement agencies are urged to ensure that all law enforcement officials:

- are selected by proper screening procedures,
- have appropriate moral, psychological and physical qualities,
- receive continuous and thorough professional training, and are subject to periodic review of their fitness to perform their functions (BP 18);
- are trained and tested in accordance with appropriate proficiency standards in the use of force, and
- if required to carry a firearm, are authorized to do so only after special training (BP 19).

It is further stipulated that *in the training of law enforcement officials, governments and law enforcement agencies shall give special attention to:*

- issues of law enforcement ethics and human rights;
- alternatives to the use of force and firearms, including the peaceful settlement of conflicts, understanding of crowd behaviour, and methods of persuasion, negotiation and mediation with a view to limiting the use of force and firearms.

Training programmes and operational procedures are to be reviewed in the light of particular incidents (BP 20).

Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions[4]

This instrument also contains specific references to the professional ethics and personal responsibility of law enforcement officials for the way in which they discharge their responsibilities in the conduct of law enforcement operations.

Article 3 urges governments to prohibit orders from superior officers or public authorities authorizing or inciting other persons to carry out any such extra-legal, arbitrary or summary executions. It places particular stress on the right (and the duty) of all persons to defy such orders. In

[4] Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, annexed to Economic and Social Council resolution 1989/65.

addition, it states that the training of law enforcement officials must emphasize these provisions. It is therefore the responsibility of each individual law enforcement official not to become involved in the kind of practices prohibited under this instrument. To underscore this fact, Principle 19 specifically stipulates that orders from a superior officer or a public authority may not be invoked as a justification for extra-legal, arbitrary or summary executions.

The Convention against Torture

The prohibition of torture is absolute and knows no exception. There are no situations in which torture can be lawful, nor are there possibilities for a successful legal defence for acts of torture committed. A public emergency that threatens the life of the nation (see ICCPR, Article 4) does not permit a derogation from the prohibition of torture. Confirmation of this prohibition can also be found in the Geneva Conventions of 1949 and their Additional Protocols of 1977, which outlaw torture in all forms of armed conflict to which those instruments of humanitarian law apply.

The prohibition of torture is part of customary international law and has been codified in the UDHR (Article 5), the ICCPR (Article 7), the ACHPR (Article 5), the ACHR (Article 5), the ECHR (Article 3) and in the above-mentioned instruments of humanitarian law.

The *Convention against Torture* contains provisions which emphasize the personal responsibility of law enforcement officials — and again confirm that superior orders or exceptional circumstances cannot be invoked as a justification for torture (CAT, Article 2).

With regard to education and training, States party to the CAT are urged to include the prohibition of torture in training curricula for law enforcement personnel (CAT, Article 10.1) and in the rules or instructions relating to the execution of their duties and functions (CAT, Article 10.2).

Chapter Highlights

- Law enforcement is a public service, created by law, for the purposes of maintenance of public order, the enforcement of national laws and the rendering of aid and assistance in emergencies.
- "Ethics" concern what is right and wrong and what is moral duty and obligation.
- "Ethics" are the study of the general nature of morals and of specific moral choices.
- "Ethics" are the rules or standards governing the conduct of members of a profession.
- "Personal ethics" means the set of beliefs about right and wrong, good and bad, morals and duties that originate from the individual.
- "Group ethics" means the set of beliefs about right and wrong, good and bad, morals and duties that originate from a group of individuals.
- "Professional ethics" means the standards and rules that govern the conduct of all members of a specific profession
- The Code of Conduct for Law Enforcement Officials sets out to provide ethical and legal guidelines for the law enforcement profession — and hence may be considered a code of professional ethics.
- Strict observance of and respect for the law by law enforcement officials is fundamental to good law enforcement practice.
- The Council of Europe Declaration on the Police covers issues relating to ethics in law enforcement in greater depth and detail than the CCLEO. It also introduces a number of provisions that are not contained in the CCLEO.
- There are several other legal instruments that emphasize the personal responsibility of law enforcement officials for their actions and omissions.
- Neither exceptional circumstances nor superior orders may be invoked by individual law enforcement officials as a justification for unlawful behaviour.
- Governments are urged to include ethical and human rights issues in the curricula for the training of their law enforcement officials.
- The issue of correct, lawful and ethical behaviour of law enforcement officials has direct implications for officials with command, management and/or supervisory responsibilities.
- (Suspected) unlawful and/or unethical behaviour by law enforcement officials requires prompt, thorough and impartial investigation.
- (Suspected) unlawful and/or unethical behaviour, although attributable to individual law enforcement officials, reflects negatively on the entire law enforcement organization and is potentially damaging to it.

Study Questions

Knowledge

1. How would you define group ethics?
2. What is the main duty of law enforcement officials?
3. Under what circumstances are law enforcement officials allowed to use force?
4. When are law enforcement officials allowed to disclose confidential information?
5. When is a law enforcement official obliged to follow superior orders?
6. What must a law enforcement official do in cases of (suspected) unlawful behaviour?

Understanding

1. What is the significance of ethics for law enforcement operations?
2. What is your opinion on a code of ethics for the law enforcement profession?
3. What is your definition of corruption?
4. What can law enforcement officials do to oppose acts of corruption?
5. How can personal ethics be influenced through education and training?

Application

1. Draw up a standing order for your law enforcement agency which addresses, point by point, aspects of attitude, behaviour and presentation of law enforcement officials.
2. Formulate criteria that can be used to evaluate the performance of individual law enforcement officials with regard to ethics, conduct, morals, beliefs, etc.
3. You are asked to speak before an audience of citizens of the municipality where you are working as a law enforcement official. The topic of your presentation is the relevance of ethical and lawful policing for public relations.
   A. Prepare an outline for your presentation in which you indicate the main issues you will address.
   B. Elaborate five statements that you will use in your presentation on that topic.

BASIC LAW ENFORCEMENT RESPONSIBILITIES

Chapter 6

PREVENTION AND DETECTION OF CRIME

Chapter Outline

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Key Questions for Law Enforcement Officials

- *What is the role of law enforcement in the prevention and detection of crime?*
- *What are the legal boundaries for law enforcement practices in investigations?*
- *What constitutes a fair trial?*
- *What is the position of juvenile offenders in criminal investigations?*
- *What methods and means of investigation are permissible?*
- *What are the ethical implications of this topic for law enforcement?*
- *What are the rules for interrogation of suspects and witnesses?*
- *What is the position of victims of crime?*
- *What are the guarantees for the privacy of persons involved in investigations?*

Introduction

Prevention and detection of crime are among the areas of immediate interest to law enforcement agencies around the world. Crime appears to be inherent in everyday life, and although every law enforcement agency will do its utmost to eradicate the occurrence of crime from our societies, they are not likely to succeed. It is common knowledge that the number of crimes solved through law enforcement activity stands in stark contrast to the number of crimes actually committed. Furthermore, the interests of victims of crime are — at least from their own point of view — much better served when their actual victimization can be effectively prevented. Certainly, the capture and punishment of an offender is not a full or adequate remedy for the loss of personal property, the invasion of personal privacy or the violation of physical integrity. Yet, the fact that law enforcement agencies do not often manage to identify and apprehend the perpetrator(s) of a particular crime tends to aggravate the suffering of victims of such crimes.

The responsibility for the prevention and detection of crime is assigned primarily to law enforcement agencies. The full discharge of that responsibility, however, requires more than law enforcement input alone. The effective prevention and detection of crime are critically dependent upon the existing levels and quality of cooperation between a law enforcement agency and the community it serves, and are as much a private responsibility as a public one. Politicians, members of the judiciary, community groups, public and private business corporations and individuals need to join forces if the results of efforts towards the

prevention and detection of crime are to be better than the inevitably unsatisfactory results of merely attempting to enforce criminal laws.

A Legal Framework for Law Enforcement

There is no particular instrument in international human rights law that specifically deals with issues related to the prevention and detection of crime. Nor is there any one instrument setting out the roles and responsibilities of law enforcement agencies in this area. But this does not mean that there is a vacuum. The prevention and detection of crime is an issue which impinges on all aspects of law enforcement — a fact which is reflected in the chapters on *Arrest, Detention* and *Use of Force and Firearms.*

Adequate prevention and detection of crime must have its basis in lawful and non-arbitrary law enforcement tactics and practices. This chapter sets out the principles of international human rights law that delimit law enforcement practices to that end.

The Presumption of Innocence

> *"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law"* (ICCPR, Article 14.2)

A similar provision can be found in the ACHPR (Article 7.1(b)), the ACHR (Article 8.2) and the ECHR (Article 6.2). The presumption of innocence constitutes an essential principle of a fair trial. The right to be presumed innocent applies equally to persons charged with a criminal offence and to *accused persons* prior to the filing of a criminal charge. This right continues to exist right up to the moment a conviction becomes binding following final appeal. The real significance of the presumption of innocence is demonstrated in a criminal trial itself. A judge or a jury may convict a person for an offence only when there is no reasonable doubt of his or her guilt. The judge conducting the trial must do so without previously having formed an opinion on the guilt or innocence of the accused.

A primary task in law enforcement is to bring offenders to justice. However, it is not up to law enforcement officials to decide on the guilt or innocence of a person arrested for an offence. Their responsibility is to record, in an objective and correct manner, all the facts related to a particular crime committed. Law enforcement officials are charged with

fact-finding, it is the judiciary that is charged with *truth-finding* (analysing these facts in order to determine the guilt or innocence of the accused person(s)).

The Right to a Fair Trial

> *"...In the determination of any criminal charge against him [or her], or of his [or her] rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law..."* (ICCPR, Article 14.1)

Article 14.3 of the ICCPR lays down a number of *minimum guarantees* to ensure that all persons receive the fair trial to which they are entitled. The implication in the term "minimum" is that there are other additional guarantees implicit in the notion of "fair trial". These include the requirement that a hearing or trial be held *in public* (ICCPR, Article 14.1) — save in exceptional circumstances, or that *any judgement be made public* (ICCPR, Article 14.1). Both these additional requirements enhance the transparency of the administration of justice, as well as the principle of *equality before the law of all persons* (ICCPR, Article 14.1; see also ICCPR, Article 2.1, non-discrimination).

The right to a fair trial is equally protected under the ACHPR (Article 7), the ACHR (Article 8) and the ECHR (Article 6).

Article 14.3 of the ICCPR states that: *"In the determination of any criminal charge against him [or her], everyone shall be entitled to the following minimum guarantees, in full equality"*:

> *(a) To be informed promptly and in detail in a language which he [or she] understands of the nature and cause of the charge against him [or her]*

This is a responsibility that has a direct impact on law enforcement practices. At the moment of arresting a person suspected of an offence, it is the arresting law enforcement official who has the duty to inform the arrested person of the reasons for the arrest, or to inform that person about any criminal charges brought against him or her (ICCPR, Article 9.2; see also the chapter on *Arrest*). This provision of Article 14.3 (a) is of direct importance for its following provision under (b) set out below.

> *(b) To have adequate time and facilities for the preparation of his [or her] defence and to communicate with counsel of his [or her] own choosing*

This second provision also requires law enforcement practices to fulfil certain expectations. *The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Body of Principles), presented in the chapters on *Arrest* and *Detention*, sets forth the requirements for action to be taken by law enforcement officials *vis-à-vis* arrested and or detained persons in more detail: the duty promptly to inform persons under arrest and in detention about their rights and how to avail themselves of such rights (Principle 13); the entitlement to and provision of legal counsel (Principle 17); and guarantees for unimpeded consultations and communication with this legal counsel (Principle 18). Those requirements make it clear that, in the early stages of criminal proceedings, the protection of the right to a fair trial of accused persons largely depends upon lawful and non-arbitrary law enforcement practices.

(c) To be tried without undue delay;

The countdown for implementation of this particular provision begins when the suspect (accused, defendant) is informed that the authorities are taking specific steps to prosecute him or her. It ends on the date of the definitive decision, i.e. final and conclusive judgment or dismissal of the proceedings. The particular circumstances and complexity of a pending case will have to be considered when deciding what is a reasonable time, and what constitutes "undue delay".

From the outset it is clear that the investigative part of the process (which is in the hands of law enforcement agencies) must be included in the equation, as any undue delay caused by inadequate law enforcement practice may well have a negative effect on the duration of pre-trial detention of an accused person.

(d) To have the right to defence

The right to defence can be divided into a list of individual rights:

- *to defend oneself in person;*
- *to choose one's own counsel;*
- *to be informed of the right to legal counsel; and*
- *to receive free legal assistance.*

Everyone charged with a criminal offence has a primary, unrestricted right to be present at the trial and to defend himself or herself, or to choose to have a defence counsel instead. It is the obligation of the court to inform the accused person accordingly of this right. The choice of an attorney can be made by the accused person, if he or she has sufficient means to pay for legal

assistance. If not, then that person is entitled to have legal counsel assigned, if so required by the interests of the administration of justice, at no personal cost.

(e) To call and examine witnesses

The right of the accused person to call, obtain the attendance of and *examine witnesses (or have them examined) under the same conditions as witnesses brought against him [or her]* is an essential element of "equality of arms" and thus of the principle of "fair trial".

The investigation, prior to the trial in court, normally serves to identify witnesses of a particular criminal offence. The integrity of law enforcement practice is, once again, directly related to the need for objectiveness in the investigation process and for full respect of the presumption of innocence with regard to the accused person(s).

(f) To have the free assistance of an interpreter

If the accused does not speak or understand the language in which the court proceedings are conducted, he or she is entitled to the free assistance of an interpreter. This right is directly related to another provision of the ICCPR's Article 14.3, which prescribes that *information on the nature and cause of the charge must be provided in a language that the accused understands*.

From this latter provision it can be concluded that in law enforcement practice arrested and accused persons must, whenever they do not speak or understand the language spoken to them, be given the services of an interpreter to inform them of the reasons for the arrest or of the charges brought against them. Naturally, the interrogation of such persons would also need to take place in the presence of an interpreter.

(g) Not to be compelled to testify against himself [or herself] or to confess guilt

This provision also extends to the investigatory phase. Law enforcement officials must refrain from any action that can be interpreted as aiming to extract a statement from an arrested or accused person which therefore cannot be said to have been given of his or her free will. In connection with this provision it is important to note once more the absolute *prohibition of torture* (ICCPR, Article 7), and the provisions in the Body of Principles that relate to the interrogation of persons under detention or imprisonment (Principles 21 and 23).

It is the right of the accused person to refuse testimony. However, this right does not extend to witnesses of crime. They may not refuse to testify.

Other important components of the right to "fair trial" include the provision in the ICCPR's Article 14.5, which grants *everyone convicted of a crime the right to have their conviction or sentence reviewed by a higher tribunal according to law*.

Victims of miscarriage of justice have an enforceable right to compensation for their suffering, unless it is clearly established that the miscarriage of justice, on the basis of an unknown fact, can be wholly or partly attributed to the victim for non-disclosure of that fact. (ICCPR, Article 14.6)

The last paragraph of Article 14, paragraph 7, reiterates the *principle of* **ne bis in idem**. It prohibits a person from being *tried or punished again for an offence for which he [or she] has already been finally convicted or acquitted.*

The Right to Privacy

Almost every investigation conducted by law enforcement officials for the prevention or detection of crime leads to situations in which actions taken result in an invasion of the private sphere of individuals. While it is clear that in every country a code of penal procedure will stipulate the investigative powers and competences of law enforcement officials, it is also clear that the existence of adequate laws is not in itself sufficient to ensure adequate respect for the privacy of the individual.

> *"No one shall be subjected to arbitrary or unlawful interference with his [or her] privacy, family home or correspondence, nor to unlawful attacks on his [or her] honour and reputation."* (ICCPR, Article 17.1).
>
> *"Everyone has the right to the protection of the law against such interference or attacks."* (ICCPR, Article 17.2)

The second paragraph creates the obligation for States Parties to take active steps to ensure that protection for all persons. In relation to criminal investigations, this means that those actions by law enforcement officials that (might) entail an invasion of a person's privacy must be permissible under domestic law and that recourse to such actions must be in proportion to the legitimate objective to be achieved. The entering of someone's home in search of evidence and the interception and monitoring of correspondence and telephone conversations are serious intrusions into the private sphere of the individuals concerned. These actions therefore have to be

justified by the existence of an urgent need for them for legitimate law enforcement purposes.

> *Managerial Practice 1.*
>
> In many countries the permission to intercept and monitor telephone conversations can be obtained only through a judge, who will grant permission only in cases where it is clear that the suspect(s) will take part in the conversations to be monitored and that evidence against those suspects cannot reasonably be obtained otherwise.

Law enforcement practices in this particular area require strict monitoring, both internally (by those officials charged with command and/or management responsibility) and externally (by officials of the judiciary and others). Actions undertaken by individual law enforcement officials must therefore be recorded. Such records will enable a fair and impartial judgment to be made on their lawfulness and non-arbitrariness once a particular case comes to trial.

In this respect reference must also be made to Article 4 of the *Code of Conduct for Law Enforcement Officials* (CCLEO) which states that:

> *"Matters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise."*

The clear inference in this article is that in situations where a lawful and non-arbitrary interference with privacy, family, home or correspondence takes place, the executing law enforcement officials have a responsibility to respect and protect the privacy of information thus obtained. The random disclosure of information obtained through action which is in itself legitimate could still constitute an unlawful interference with someone's privacy.

Ethics in Fighting Crime

From some of the practical examples given above it is already clear that the prevention and detection of crime is an area in law enforcement that demands high standards of morality and ethics from law enforcement officials. There will always be many opportunities for the operational conduct of investigations to violate individual rights and freedoms of arrested and/or detained persons — often without such violations ever

being noticed. Prejudice on the part of investigating officials, the use of evidence obtained through unlawful practice, subtle pressure on an accused person in order to obtain testimony — all are examples of practices that are difficult to detect in retrospect. In effect this means that much of what constitutes a "fair trial" will depend upon law enforcement activity that easily remains beyond the scrutiny of the judiciary. There remains as a safeguard only the personal attitude of law enforcement officials involved and their individual standards of behaviour and, on the other hand, the mechanisms of internal monitoring and supervision.

All too easily the law enforcement official charged with duties in the area of prevention and detection of crime will experience his or her work as a form of routine, in which the majority of functions will reach a level of automatic performance. Yet another burglary, or being presented with the file of an armed robbery when six similar cases are already awaiting treatment in a drawer, can easily lead to indifference on the part of the investigating official(s). Such indifference will, however, not be understood by — nor will it be acceptable to — the victims of such crime. In terms of apprehending perpetrators, a lack of enthusiasm and commitment on the part of the investigating official will do nothing for the rights of the victim and may even assist an offender in evading justice.

Although difficult to place within rules or guidelines, these notions nevertheless need to be conveyed to law enforcement officials to make them understand the significance of individual input for collective results and the image of a law enforcement agency as a whole.

Prevention and Detection of Crime

The information given below should not be interpreted as providing practical guidance on how to conduct investigations or how to gather evidence, it is merely an attempt to put law enforcement practice in the correct legal framework of international standards.

Gathering Evidence

The effective detection of crime hinges completely on the successful gathering of evidence in relation to a particular crime committed. Two kinds of evidence are important in this respect:

- *material evidence ("silent witnesses"); and*
- *statements by witnesses.*

Material evidence can in principle be found *where a crime has been committed, or where it has left traces*. It is therefore important that the scene of a crime be located, as well as all sites where materials related to the crime have subsequently been left behind. In the case of a murder this would mean finding the actual site of the killing (if it did not occur at the place where the victim's body was found), working out the route taken by the killer to get to and away from that particular site (or those sites) and trying to identify the places where the killer might have disposed of materials related to the crime.

Before continuing on this subject, it must be recalled that *no one shall be subjected to arbitrary interference with privacy, family, home or correspondence* (ICCPR, Article 17). Where a crime has left traces in public places, this prohibition does not constitute a problem to law enforcement practice. However, if such traces have been left behind in a private home, or if indeed the crime occurred inside it, then the mere fact of that crime having been committed is not usually considered a sufficient basis for law enforcement officials to enter a private dwelling. In such a situation law enforcement officials will generally require a court order allowing them access to that home, if need be against the will of the inhabitants, for the purpose of gathering evidence. This procedure, established in most countries, seeks to protect individuals against unlawful and/or arbitrary invasions of their most private sphere.

The actual securing, collection and treatment of material evidence is work for police specialists. Subsequent analysis, in certain cases, is even left to forensic laboratories. The requirements for material evidence to be accepted as irrefutable proof in a court of law are extremely high and rigid. Such standards represent a recognition of the importance of a *fair trial,* to which all accused persons are entitled.

The second type of evidence is information obtained from the statements of witnesses. Witnesses are important to the investigation process because they can be compelled to testify, and when testifying they are obliged to tell the truth. The situation of witnesses is in direct contrast to *suspected and accused persons, who cannot be compelled to testify against themselves or to confess guilt* (ICCPR, Article 14.3(g)).

However, in order to obtain a useful statement from a witness, the law enforcement official(s) conducting the interview must focus on *"the reasons for knowing"* of each witness. What did the witness see, hear or smell of the actual events, what is direct observation, what is hearsay? The statements of witnesses will help establish factual evidence against known or unknown

perpetrators of crime. Although the rules for the interrogation of suspects or accused persons do not apply to witnesses, certain countries advise their law enforcement agencies nevertheless to observe those same rules as regards the recording of time, duration, intervals, etc. This is done to avoid subsequent criticism in a court of law that, for instance, the testimony of a witness should be deemed unreliable owing to extreme fatigue induced by the frequency and duration of interviews.

Under this heading a few words need to be said about the common practice in law enforcement of using *confidential informants* for the prevention and detection of crime, and the practice of *infiltration* for that same purpose. For both practices, the basic premise is that they may be used only when to do so is *legal and necessary for lawful law enforcement purposes*.

As the use of confidential informants often entails the payment of moneys for information given, the attention of law enforcement officials must be drawn to the potential risks of such practices, including the risk that:

- the informant, attracted by the prospect of payment, may incite others to commit crimes, of which he/she subsequently informs his law enforcement contact;
- the informant may exploit the relationship with his/her law enforcement contact for the purposes of committing crime and avoiding detection;
- the informant may be induced, by his/her law enforcement contact, to instigate crimes committed by others that subsequently enable the law enforcement agency to make an arrest;
- the money involved in the dealings with informants has a corrupting influence on law enforcement officials involved.

The term "infiltration" refers to the practice whereby either a law enforcement official or a confidential informant is brought into a criminal organization for the purpose of gathering information that cannot be obtained otherwise. This practice must be lawful and absolutely necessary for lawful law enforcement purposes. Even if those conditions are met, a number of risks will still remain. First of all, the infiltration can be highly dangerous for the person carrying it out. Secondly, as protection of the identity of this person will be an objective throughout all stages of the criminal proceedings, there is the risk of conflict with the principle of *fair trial*, and particularly the provision stating that the suspect or accused has the *right to cross-examination of witnesses brought against him or her*

(ICCPR, Article 14.3 (e)). In situations where for security reasons the identity of the infiltrator(s) is not revealed, this right can be in serious jeopardy.

It is clear that both practices must be closely supervised by a competent member of the judiciary and, in order to safeguard the right to a fair trial, that their application must be made dependent on permission obtained prior to their implementation.

Interrogation

Statements by suspects or accused persons with regard to a crime that has been committed are a third important source of evidence. It should be emphasized, however, that in the investigation process law enforcement officials should not overly rely on such statements as a basis for a certain case to be presented in court. The reasons for this are simple. *A suspect has the right to remain silent, and cannot be compelled to testify against himself [or herself] or to confess guilt*. Furthermore, a suspect is entitled to withdraw or alter statements made during any stage of the proceedings. It is evident that in many situations, material evidence and witness statements will be more valuable than information obtained through interrogation of a suspect.

In relation to the interrogation of suspects and accused persons *the absolute prohibition of torture* must be stressed once again. Not only is torture forbidden by law, the results (confessions or information) obtained through torture will always be unreliable, because at no stage can it be determined beyond doubt whether a tortured person speaks the truth or merely confesses guilt in order to stop the torture. Torture is degrading both for the victim and the perpetrator. It undermines the basic principles of liberty, security and democracy upon which our societies are supposed to be built. Torture can never be justified under any circumstances.

Suspected and accused persons have a right to be *presumed innocent* until proven guilty in a court of law. Therefore the interrogating law enforcement officials do not establish innocence or guilt through their questioning — their task is to establish facts.

Their fact-finding mission starts with an investigation of the scene of the crime, as well as the sites where that crime has left traces, for the purpose of gathering material evidence in relation to the crime committed. Their subsequent attention is focused on those persons who may have witnessed the crime as it was being committed, or who may have other relevant

information. Only this dual investigative approach and an analysis of the information obtained thereby might enable them, by assembling sufficient facts, to establish a reasonable suspicion against a individual as having committed this crime (if a suspect/suspects was/were not arrested in the act).

The arrest of a suspect is again surrounded by procedural safeguards (see chapter on *Arrest*) as is their subsequent detention and interrogation (see chapters on *Arrest* and *Detention*).

The questioning of suspects requires preparation on the part of the law enforcement officials involved. These officials must have a clear picture of the facts that have been established so far, which help to determine the order of events as they happened.

The purpose of an interrogation is clarification of facts already established as well as the establishment of new facts in relation to the crime committed. Every interview must be clearly recorded. Statements by the suspect that contain a confession of guilt should be taken down as far as possible in his or her own words. The duration of the interview and the people present at it, as well as the length of time between two interviews, must also be clearly recorded.

It has already been established that torture or pressure on the suspect to compel him or her to testify can result in a false confession, given by the suspect in order to prevent further torture or pressure. It should be noted, however, that the phenomenon of *false confessions* is not limited to situations where people have been subjected to torture or ill-treatment. Law enforcement agencies around the world are familiar with individuals confessing to crimes they did not commit, often for complex personal and psychological reasons. Most agencies have chosen a tactic of not disclosing certain facts (only known to the "true perpetrator") of a crime committed, in order to enable such false confessions to be swiftly dismissed.

Disappearances and Extrajudicial Killings

There are two types of violations which, because of their gravity and their rejection of fundamental principles of democracy and the rule of law, merit particular mention in this chapter on the prevention and detection of crime. The seriousness of these human rights violations is made more acute by the fact that they are committed by State officials.

What is a "disappearance"?

The "disappeared" are people who have been taken into custody by agents of the state, yet whose whereabouts and fate are concealed, and whose custody is denied.

– Amnesty International 14-Point Programme for the Prevention of "Disappearances"

What is an extrajudicial execution?

Extrajudicial executions are unlawful and deliberate killings, carried out by order of a government or with its complicity or acquiescence.

– Amnesty International 14-Point Programme for the Prevention of Extrajudicial Executions

In the first definition the quotation marks have been used to make it clear that the persons concerned have not really vanished. The victims' whereabouts and fate, concealed from the outside world, are known by those responsible for their disappearance.

Unlawful and arbitrary deprivation of liberty and the deliberate and unlawful taking of life are the most serious crimes that can be committed by those who are in fact called upon to protect and promote the human rights of all persons. The very foundation of a democratic society is swept away whenever and wherever the State is responsible for the denial of such fundamental rights to its citizens.

Every effort must therefore be made towards the *effective prevention* of such grave violations of human rights. The recruitment, training and supervision of law enforcement officials must offer operational guarantees for an adequate lawful and non-arbitrary task performance.

Only the complete transparency of law enforcement agencies and their further evolution to open-system-type organizations will help to establish the levels of true accountability which are necessary for the effective prevention of such acts.

At the same time the seriousness of such crimes must be understood by law enforcement agencies as well as by State governments, resulting in the *prompt, thorough and impartial investigation* of any allegation of such a crime having been or being committed.

Any such investigation must ensure that due attention is given to any victims and that the results of the investigation are made public. The officials responsible must be brought to justice.

The Administration of Juvenile Justice

Through the development of a number of international instruments, the international community has acknowledged the special position of juveniles — particularly that of juvenile offenders. Because of their age *juveniles are vulnerable to abuse, neglect and exploitation* and need to be protected from such threats. In addition, and in keeping with the objective of *diverting juveniles from the criminal justice system and redirecting them towards the community*, special measures for the *prevention of juvenile delinquency* must be developed at the national level. A separate juvenile justice system does not so much constitute a different set of rights to which juveniles are entitled as it provides a set of provisions which aim to offer protection *in addition* to the rights of adult persons, which apply equally to juveniles.

Up to a certain age, a person retains the right to be treated as a juvenile and has the right to this additional protection. *The Convention on the Rights of the Child* (CRC) states in Article 1 that *"a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier"*. Given the fact that the Convention is a treaty which creates legally binding obligations for States Parties, the establishment of this age limit is important. The CRC puts the age of adult criminal responsibility at eighteen years, allowing States Parties to deviate from this age only if their national laws define a different age for reaching majority. It should be noted that States Parties are not only obliged to observe the provisions of the CRC, but also to incorporate them into their national laws.

International Instruments

The following international instruments govern matters relating to the administration of juvenile justice:

- *Convention on the Rights of the Child (CRC);*
- *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules);*
- *United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines);*
- *United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNRPJ);*
- *United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules).*

Of the instruments mentioned above, only the CRC is a treaty. The other instruments can be considered as offering authoritative guidance by setting out widely accepted principles, but their provisions do not impose legally binding obligations on States.

Purpose and Scope of Measures

The aim of the administration of juvenile justice is to enhance the well-being of the juvenile and to ensure that any reaction to juvenile offenders is proportionate to the circumstances of the juvenile and the offence which he or she has committed. Juvenile offenders should be diverted from the criminal justice system and redirected to community support services wherever possible. The instruments set out above are specifically designed to:

- protect the human rights of juveniles;
- protect the well-being of juveniles who come into contact with the law;
- protect juveniles against abuse, neglect and exploitation; and
- introduce special measures to prevent juvenile delinquency.

The Convention on the Rights of the Child is the central instrument in the juvenile justice system. It offers a wide range of measures to safeguard the direct interests of the child, including measures that protect children who come into conflict with the law.

The CRC lays down rules governing the arrest and detention of children, stating clearly that detention must be a measure of last resort and used only for the shortest appropriate period of time. (Article 37(b)). These rules are presented in more detail in the chapters on *Arrest* and *Detention*.

The CRC requires States Parties (Articles 33 to 36) to take measures to combat *abuse, neglect and exploitation* of children, namely:

- the adoption of rules to fight drug abuse by children and prevent the use of children in the trafficking of drugs (Article 33);
- protection against all forms of sexual abuse and exploitation, unlawful sexual activity, exploitation of children in prostitution or unlawful sexual practices and the exploitative use of children in pornographic performances and materials (Article 34);
- the development of national, bilateral and multinational measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form (Article 35);

- protection against all other forms of exploitation prejudicial to any aspects of the child's welfare (Article 36).

The Beijing Rules offer a refinement of those articles of the CRC dealing with topics such as arrest, detention, investigation and prosecution, adjudication and disposition and the institutional and non-institutional treatment of juvenile offenders.

The Riyadh Guidelines focus on the prevention of juvenile delinquency through the involvement of all parts of society and through the adoption of a child-oriented approach; they consider the prevention of juvenile delinquency to be an essential part of crime prevention in society. The instrument elaborates the roles of family, education, community and mass media to this end, besides setting out roles and responsibilities with regard to social policy, legislation and juvenile justice administration, and research, policy development and coordination.

An underlying premise of the guidelines is that *youthful conduct that does not conform to overall social norms is part of the maturation process and tends to disappear spontaneously with the transition to adulthood* (Article 5(e)).

The guidelines encourage the development and application of comprehensive plans for the prevention of juvenile delinquency, at every level of government. There should be close cooperation between the various levels of government, the private sector, representative citizens of the community, child care agencies, law enforcement and judicial agencies in taking action to prevent juvenile crime. Specialized personnel should exist at all levels.

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNRPJ) is an instrument which is designed to ensure that juveniles are deprived of their liberty and kept in institutions only when there is an absolute necessity to do so. Juveniles who are detained are to be treated humanely, with due regard to their status and with full respect for their human rights. Juveniles deprived of their liberty are highly vulnerable to abuse, victimization and the violation of their rights.

Rules 17 and 18 of this instrument are of particular importance to law enforcement officials, as they concern juveniles under arrest or awaiting trial.

The said rules stress once again that pre-trial detention of juveniles should be avoided as far as possible, and limited to situations of exceptional circumstances. *Where pre-trial detention is unavoidable, its duration should*

be kept to an absolute minimum by giving the highest priority to the most expeditious processing of such cases (Rule 17).

The rights stated in Article 7 of the Beijing Rules are reiterated in Rule 18 of the UNRPJ. In addition, Rule 18 also stipulates the juvenile's right to opportunities to work, with remuneration; to education and training; and to provision of educational and recreational material.

United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) is an instrument concerned with offenders in general and at all stages of the proceedings — irrespective of whether they are suspected, accused or sentenced. It formulates basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subjected to alternatives to imprisonment.

In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions.

Non-custodial measures fit in very well with the overriding objective of the juvenile justice system to divert juveniles who come into contact with the law away from the criminal justice system and to redirect them towards the community.

Non-custodial measures must of course be provided for in national legislation as a pre-condition for their lawful application.

Implications for Law Enforcement Practice

A juvenile offender is a special type of offender, requiring special protection and treatment. This is acknowledged by the existence of specialized international instruments that have been created with the protection of the specific interests of juveniles at heart.

The Beijing Rules are very explicit on the need for specialization within law enforcement agencies in relation to juveniles. Rule 1.6 states that juvenile justice services shall be systematically developed and coordinated with a view to improving and sustaining the competence of personnel involved in the services, including their methods, approaches and attitudes. Rule 12 draws attention to the need for specialized training for all law enforcement officials who are involved in the administration of juvenile justice. As law enforcement officials are the juvenile's first point of contact within the

juvenile justice system, it is most important that they act in an informed and appropriate manner. Specialized law enforcement units are therefore becoming increasingly indispensable, not only for the implementation of specific principles contained in the Beijing Rules, but more generally to improve the prevention and control of juvenile crime and the handling of juvenile offenders.

The diversion of juveniles away from the criminal justice system and their redirection towards the community requires a type of attitude and action from law enforcement officials that is rather different from those actions and attitudes appropriate for adult offenders. The establishment and maintenance of a relationship with community groups, child-care agencies and officials within the judiciary assigned to juvenile justice calls for special knowledge and skills on the part of law enforcement officials. To view of juvenile delinquency as a transitional problem, demanding guidance, understanding and preventive support measures, a more profound insight is needed than that offered in the average basic law enforcement training.

For the successful application of non-custodial measures, a thorough understanding of the juvenile is essential, as well as a capacity to apply such measures in close cooperation and coordination with other key agencies so as ensure the successful reform and rehabilitation of the juvenile offender. The objective of such measures will be to prevent recidivism rather than to inflict punishment for an offence committed. Such approaches require law enforcement officials to have broad views and a thorough understanding not only of the rights and the special position of juveniles, but also of the special position and rights of victims of juvenile crime as well as the needs for protection and satisfaction of society. These constitute a multitude of interests that require equal protection, while at the same time the particular interests of the juvenile offender cannot be made subordinate to other interests, or fail to be given priority without full justification.

Victims of Crime and Abuse of Power

In comparison with the numerous instruments that set out to protect the rights of suspects and accused persons in the areas of arrest, detention and the prevention and detection of crime, the protection afforded to victims of crime is very limited.

The *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Victims Declaration) is the only international instrument offering guidance to member States on the issue of protection and redress for victims of crime and abuse of power. It is not a treaty and

therefore — while providing guidance — does not create legally binding obligations for States.

The Victims Declaration defines as *"victims of crime":*

> *persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power* (Article 1).

In Article 18 of the Victims Declaration a definition of *"victims of abuse of power"* is given:

> *persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.*

Only very few treaty provisions create legally binding obligations for the States Parties with regard to the treatment of victims of crime and abuse of power. Such provisions include:

- *the enforceable right to compensation of victims of unlawful arrest or detention (ICCPR, Article 9.5);*
- *victims of punishment based on a miscarriage of justice must be compensated according to law (ICCPR, Article 14.6);*
- *victims of torture have an enforceable right to fair and adequate compensation (Convention against Torture, Article 14.1)*

The Victims Declaration states that a person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the relationship between the perpetrator and the victim (Article 2). The notion of victims is subsequently extended to the immediate family or dependents of the victim, as well as to persons who suffered harm intervening on the victim's behalf.

It also sets out provisions relating to *access to justice and fair treatment, restitution, compensation, and assistance*, stating the following rights which victims of crime and abuse of power should have:

- *the right to be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress (Article 4);*

- *the right to benefit from the establishment of fair, inexpensive and accessible procedures of redress, both formal and informal (Article 5);*
- *the right to be informed of the role of mechanisms conducting such procedures, the scope, timing and progress of the proceedings and the disposition of their cases, especially in cases of serious crime and where such information was requested (Article 6(a));*
- *the right to have their views presented and considered at appropriate stages of the proceedings where their personal interests are affected (Article 6(b));*
- *the right to be provided with proper assistance throughout the legal process (Article 6(c))*
- *the right to protection of their privacy, and to measures to ensure their safety and that of their families from intimidation and retaliation (Article 6(d));*
- *the right to avoidance of unnecessary delay in the disposition of their cases and the execution of orders granting awards to them (Article 6(e);*
- *the right to benefit from informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, which should be used where appropriate to facilitate conciliation and redress for victims (Article 7).*

With regard to restitution and compensation, Articles 8 to 13 set out a number of principles:

- *offenders should make restitution to their victims;*
- *States are encouraged to keep mechanisms for restitution under review and to consider their introduction into criminal law;*
- *the State should be responsible for restitution in cases where the offender is a State official;*
- *where compensation cannot be obtained from the offender or other sources, States are encouraged to provide such compensation. The establishment of particular funds to that end is encouraged.*

In addition, the Victims Declaration contains a number of provisions that relate to forms of assistance and counselling to victims, as well as to professional requirements for authorities that come into contact with victims:

- *victims should receive the necessary material, medical, psychological and social assistance (Article 14);*

- *victims should be informed about possible assistance measures available to them (Article 15);*
- *police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure prompt and proper aid (Article 16).*

In many cases law enforcement officials will have the first contact with a victim of crime. It is those initial contacts that constitute what could be described as the first-aid stage of the victim's situation. At that stage the provision of proper care and assistance for victims is extremely important. The preoccupation in law enforcement tends to be the progress and results of any investigation process. It is important to convince law enforcement officials that the welfare and well-being of the victim should be their highest priority. The crime committed cannot be reversed, but adequate help and assistance to victims will definitely help to limit the negative consequences of that crime.

Chapter Highlights

- Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.
- In the determination of any criminal charge, or of rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
- The minimum guarantees to ensure the right to a fair trial must be respected. These guarantees include the right:
  - to be promptly informed about charges;
  - to have adequate opportunity to prepare one's defence;
  - to be tried without undue delay;
  - to defend oneself or have free legal assistance to do so;
  - to call and examine witnesses;
  - to have the free assistance of an interpreter;
  - not to be compelled to testify against oneself or to confess guilt.
- No one may be subjected to arbitrary interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. Everyone has the right to protection of the law against such interference or attacks.
- Matters of a confidential nature in the possession of law enforcement officials must be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise.
- Law enforcement officials must be aware of and observe the ethical implications associated with prevention and detection of crime.
- Juveniles are vulnerable to neglect, abuse and exploitation.
- The aim of the juvenile justice system is to divert juveniles away from criminal justice and to redirect them towards the community.
- The prevention of juvenile delinquency is a joint responsibility of public and private institutions and persons.
- Where possible, the application of non-custodial measures is preferable in the disposition of cases against juveniles.
- The gathering of evidence for the detection of crime requires special knowledge and skills.
- The interrogation of suspects is subject to specific rules and requires sound preparation.
- The use of confidential informants or police infiltration are measures for exceptional circumstances. Strict rules, monitoring and supervision are fundamental requirements for such practices.
- Disappearances and extrajudicial killings are very serious crimes and human rights violations, committed by State officials. They require prompt, thorough and impartial investigation.
- Victims of crime and abuse of power are entitled to protection and redress.
- Law enforcement officials who come into contact with victims must receive additional training to prepare them adequately for this responsibility. Law enforcement agencies must develop rules and procedures for treatment of victims.

Study Questions

Knowledge

1. What are the minimum guarantees for a fair trial?
2. What are the rights of victims of crime and abuse of power?
3. What are the rights of a suspect under interrogation?
4. Which persons are entitled to free legal assistance?
5. When is interference with privacy to be considered arbitrary?
6. What is the aim of the juvenile justice system?
7. What are the rights of juvenile suspects under interrogation?

Understanding

1. What is the meaning of the principle ''equality of arms'' for a trial?
2. What is the significance of the presumption of innocence for an investigation?
3. What ethical issues can be raised in connection with the investigation of crime?
4. Why should treatment of juveniles be a specialization in law enforcement?
5. What measures can be taken to prevent disappearances and extra-judicial killings?

Application

1. Formulate a set of standing orders concerning the treatment, within your law enforcement organization, of victims of crime.
2. Formulate policy guidelines for the prompt, thorough and impartial investigation of disappearances and extrajudicial killings.
3. Formulate a code of conduct for law enforcement officials charged with tasks in the detection of crime.
4. Formulate a set of principles for the ethical and lawful interrogation of suspects.

Chapter 7

MAINTENANCE OF PUBLIC ORDER

Chapter Outline

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Key Questions for Law Enforcement Officials

- *Do people have a right to demonstrate?*
- *Do people have a right to express their opinions?*
- *Are people free to associate with whoever they want?*
- *What is the role of law enforcement in the maintenance of public order?*
- *What are "disturbances" and "tensions"?*
- *Which principles of humanitarian law are important for disturbances and tensions?*
- *What is a "state of emergency"?*
- *What are measures of derogation?*
- *Which rights can never be derogated from?*
- *What is the definition of "non-international armed conflict"?*
- *Which law(s) are applicable to internal armed conflict?*
- *What is the definition of "international armed conflict"?*
- *What is the position of law enforcement in armed conflict situations?*

Introduction

Peace, stability and security in a country are largely dependent upon the capacity of its law enforcement agencies to enforce national laws and effectively maintain public order. Policing major incidents, including assemblies and demonstrations, requires more than an understanding of the legal responsibilities of participants in such events. It also requires a simultaneous understanding of the rights, freedoms and obligations, under the law, of those people who do not participate. Granting one gathering of persons the right to exercise their legal rights and freedoms without infringing the rights of others, while at the same time assuring observance of the law by all parties, that is one description of what maintenance of public order is about.

The effective discharge of this responsibility will be much more difficult when the circumstances surrounding incidents change from peaceful to violent, or even escalate further into disturbances and tensions, states of emergency or, ultimately, situations of armed conflict. In every situation law enforcement agencies remain responsible for the maintenance of public order — unless a lawful decision is taken to the contrary.

In international law there are two types of law that are of relevance to the subject of maintenance of public order: international human rights law and international humanitarian law. This chapter will examine the different situations of, or threatening, law and order with which our societies are

confronted today. It will describe the fundamental rules of law applicable to each of the situations distinguished: assemblies and demonstrations; internal disturbances and tensions; states of emergency; non-international armed conflict; and international armed conflict. Implications for law enforcement practice will be studied throughout the chapter. Special attention will be given to the risks of abuse of power and authority by law enforcement agencies and/or armed forces, with a special focus on disappearances and extrajudicial killings.

Assemblies and Demonstrations

The phenomenon of people taking to the streets to express their feelings and opinions publicly on any topic that is close to their hearts is common enough in most countries of the world. Such events, rallies, demonstrations, or whatever they may be called, are seen as logical consequences of liberty and democracy, as well as of individual and collective freedom. Unfortunately, the occasions which tend to stand out and be remembered are those characterized by physical confrontation (between demonstrators themselves, and between demonstrators and law enforcement officials).

Fundamental Rights and Freedoms

There are a number of rights and freedoms, codified in instruments of international human rights law, which are applicable to assemblies, demonstrations, rallies and similar events. These rights, to which every person is entitled, are:

- *the right to hold opinions without interference* (ICCPR, Article 19.1);
- *the right to freedom of expression* (ICCPR, Article 19.2);
- *the right of peaceful assembly* (ICCPR, Article 21);
- *the right to freedom of association* (ICCPR, Article 22.1).

The exercise of those rights is not without limits. Restrictions can be imposed on it, provided that:

> *they are lawful;* and
>
> *necessary:*
>
> > *for respect of the rights or reputation of others; or*
> >
> > *for the protection of national security or of public order, or of public health or morals. (ICCPR, Articles 19.3, 21 and 22.2)*

Note: In addition to the above, the element of *"public safety"* can be a lawful reason for restricting the right to freedom of peaceful assembly and the right to freedom of association. (See ICCPR, Articles 21 and 22.2.)

Here the dilemma of maintenance of public order is presented in strict legal terms. People are entitled to an opinion, entitled to express that opinion, entitled to assemble peacefully or to associate with others as long as they meet their responsibilities under the law. Respect for the rights and freedoms of others or for their reputation, public order and public safety, national security and public health or morals — all these can be reasons that necessitate restrictions on the exercise of the aforementioned rights. Law enforcement officials will be called upon to put any such restriction into effect in any situation where it is deemed necessary by competent authorities. This task requires law enforcement officials to be knowledgeable as to people's rights and freedoms and skilled in the technical aspects of maintaining public order.

Article 22 of the ICCPR protects the right of all persons to freedom of association. However, it is important to note that the last sentence of its paragraph 2 states: *"This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right."* The special status and responsibility of the armed forces and the police provide a justification for the imposition of additional restrictions on the right of association of the members of those two institutions. For example, many States restrict the political activities of the police and the military in order to prevent those "arms-carrying" forces from meddling in the political affairs of the civilian constitutional organs. Note that the use of the term "police" in Article 22.2 can be interpreted to cover all law enforcement agencies (and their officials) whatever their particular designation.

Law Enforcement Practices

This *Manual* is not meant to be a tool for the elaboration and transmission of technical law enforcement tactics *vis-à-vis* assemblies and demonstrations. The presentation, under this heading, of examples of law enforcement practices with regard to demonstrations and assemblies is nevertheless justified. It also provides an opportunity to reiterate some of the international principles, presented in other chapters, with especial relevance for this topic.

It must be recognized from the start that many States have, throughout history, denied their citizens the right to assemble and to express their opinions openly. Anti-government and anti-authority protests have been particularly targeted for repression. Even today, some governments routinely order their law enforcement agencies to disperse lawful and peaceful assemblies. Such actions are in clear violation of human rights and are contrary to the legally binding obligations imposed upon States party to instruments such as the ICCPR.

In terms of law enforcement, experience with the maintenance of public order shows that many aspects of demonstrations, assemblies, etc. have a degree of predictability. Large-scale events like *demonstrations and assemblies require preparation*. Law enforcement agencies are increasingly trying to be involved in that preparation phase — i.e. to negotiate with the organizers as far as possible the itinerary for the event. The clear advantages of this procedure are that:

- organizers are familiarized with the objectives and tolerance levels of the law enforcement operation relating to their demonstration, as well as their responsibilities towards those not participating in the demonstration;
- law enforcement authorities are familiarized with the goals and objectives of the demonstration and find out about attendance, likely behaviour, timing etc.;
- both parties can subsequently work out clear agreements on marching routes, law enforcement presence, contingency arrangements, etc.;
- points of contention or potential conflict can be negotiated and resolved prior to the event, so they will not pose an actual problem when it takes place.

Another important lesson to be drawn from experience is that effective law enforcement strategies no longer wait for an actual disturbance of public order, which then needs to be restored. The *prevention of disturbances*, through preparation as mentioned above and through early *intervention aimed at individual offenders,* has proved far more effective.

The main idea behind *"early intervention"* is based upon some well-established perceptions of crowd behaviour:

1. People in crowds do not form a homogeneous mass with all persons behaving more or less in the same way;

2. People in crowds are not necessarily more likely to use violence than they would in everyday circumstances;
3. People in crowds do not necessarily have a greater tendency to engage in so-called "emotional" or "irrational" behaviour.

These perceptions justify the conclusion that people in a crowd are, and remain, individuals. This means that each person in a crowd will make decisions for him or herself. It is true that such decisions may well be influenced by the behaviour of others. However, if someone in a crowd picks up a stone to throw at law enforcement officials present on the scene, this incident does not automatically cause further violence to erupt. The act as such can trigger a decision-making process in other people present and witnessing the incident, who in their turn may also decide to pick up a stone and throw it. *However, they can also decide not to do so*. By making an *early intervention,* effective law enforcement sets out to apprehend the first individual throwing a stone (or in general individuals breaking the law) and remove them from the scene before their behaviour works as a stimulus on other people present. Such action is pinpointed and has a low impact on the demonstration, as it does not affect innocent bystanders, who can carry on without interruption.

Recognition of the fact that people in a crowd are individuals and not merely a "mass" allows for communication to take place between law enforcement officials and participants in the demonstration. Such communication does not just involve mere conversation, but can be extended to form part of the strategies and tactics of law enforcement. The use of amplification equipment to direct people in a crowd, or to warn people of the fact that force may be used, serves to allow them to make up their minds about what they want to do and where they want to go.

Law enforcement officials should be aware of a few additional facts:

- people in crowds cannot manoeuvre fast, so for a change of direction or for a march to come to a stop, the "message" needs time to be understood by each and every individual;
- people in crowds are responsible individuals who expect and deserve to be treated as such. They must not be treated as a group;
- the presence of police dogs at a demonstration is easily perceived by participants as an act of aggression on the part of law enforcement officials;
- police dogs do not distinguish between offenders and bystanders, if given a chance they will bite anyone who comes within their reach;

- the barking of police dogs is an impediment to attempts at communication between law enforcement officials and participants in a demonstration.

The *appearance* of law enforcement officials is another important factor in the maintenance of public order. People are used to seeing the uniforms which their local law enforcement officials wear for normal duties. Many countries have decided to dress their law enforcement officials in a different uniform during assemblies and demonstrations. The fear of escalation and riots, the desire to assert authority and the protection of law enforcement officials are reasons for the adoption of this tactic. So law enforcement officials wear what is called "riot gear", with protective equipment such as helmets and shields. This type of uniform is usually reserved for the exceptional circumstances described above. While law enforcement agencies may not intend to convey a *hostile impression* to demonstrators *through their appearance* — this is often exactly what happens. People find it hard to believe that the law enforcement official they see, in full riot gear and very different from the image familiar to them, is actually that very same official. It is not surprising that law enforcement officials dressed and equipped in this way find it difficult to convince the public of their peaceful intentions.

The *use of force and firearms* in relation to assemblies and demonstrations deserves closer consideration, and some of the principles presented in the chapter *Use of Force and Firearms* should also be reiterated. The Basic Principles on the Use of Force and Firearms elaborate several principles of particular importance for "policing" assemblies and demonstrations:

in dispersing UNLAWFUL but NON-VIOLENT assemblies law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict the use of force to the minimum extent necessary (BP 13);

in dispersing VIOLENT assemblies law enforcement officials may use firearms only when less dangerous means are not practicable;

AND only to the minimum extent necessary;

AND ONLY under the conditions stipulated in BP 9 (BP 14).

When studying BP 14 the initial conclusion might be drawn that it presents an additional circumstance for the legal use of firearms. This, however, is not true, for in fact it reiterates that only the conditions mentioned in BP 9, (i.e. an imminent threat of death or serious injury), warrant the use of firearms. The additional risks posed by a violent assembly — large crowds,

confusion and disorganization — make it questionable whether the use of firearms is at all practicable in such situations, in view of the potential consequences for persons who are present but not involved.

Basic Principle 14 does not allow indiscriminate firing into a violent crowd as an acceptable tactic for dispersing that crowd.

Internal Disturbances and Tensions

It is not always clear when separate incidents (such as assemblies, rallies, demonstrations, riots, isolated acts of violence) become related and, viewed together, constitute a more or less consistent pattern referred to as disturbances and tensions. What is clear, however, is that a pattern as described above poses serious problems of public safety and public order for the relevant authorities. All efforts must be focused on effective law enforcement, on the prevention and detection of crime and on the restoration of public safety. When such efforts fail, a sense of lawlessness with impunity may grow within a society, exacerbating existing levels of tension even further.

Disturbances and tensions can eventually lead to situations that threaten the life of the nation and tempt the government in power to proclaim a state of emergency. This issue will be dealt with in a separate paragraph below.

A Definition Proposed

None of the instruments of international law offers an adequate definition of what is to be understood by the term *"internal disturbances and tensions"*. Article 1, paragraph 2 of Protocol II additional to the Geneva Conventions of 1949 does mention "situations of internal disturbances and tensions", as *not* being armed conflicts. However, it does not give a definition. It does make it clear, though, that since internal disturbances and tensions are not armed conflicts, the Protocol does not apply to them.

The ICRC has attempted to define disturbances and tensions. Although its formulation is not fully recognized as a definition thereof, it does give a thorough description which serves the purposes of further study under this chapter heading. In an ICRC document entitled *ICRC protection and assistance activities not covered by international humanitarian law*, (ICRC, Geneva, 1986; also published in the *International Review of the Red Cross,* No. 262, 1988, pp. 12-13) the following description of *internal disturbances* is given:

"This involves situations in which there is no non-international armed conflict as such, but there consists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order. The high number of victims has made necessary the application of a minimum of humanitarian rules".

As for *internal tensions*, the term usually refers to:

a) situations of serious tension (political, religious, racial, social, economic, etc.) or

b) sequels of an armed conflict or internal disturbances.

In addition to those definitions the ICRC document presents a list of characteristics of internal disturbances and tensions.

1. *mass arrests;*
2. *a large number of persons detained for security reasons;*
3. *administrative detention, especially for long periods;*
4. *probable ill-treatment, torture or material or psychological conditions of detention likely to be seriously prejudicial to the physical, mental or moral integrity of detainees;*
5. *maintaining detainees incommunicado for long periods;*
6. *repressive measures taken against family members or persons having a close relationship with those deprived of their liberty mentioned above;*
7. *the suspension of fundamental judicial guarantees, either by the proclamation of a state of emergency or by a de facto situation;*
8. *large-scale measures restricting personal freedom such as relegation, exile, assigned residence, displacements;*
9. *allegations of forced disappearances;*
10. *increase in the number of acts of violence (such as sequestration and hostage- taking) which endanger defenceless persons or spread terror among the civilian population.*

Principles of Human Rights Law

Situations of internal disturbances and tensions, judging from the characteristics presented above, may well give way to de facto derogations and limitations of the rights and freedoms of citizens of the State. This practice is not permissible. Where national law allows for emergency measures to be taken in the interest of national security, public order or public safety, measures taken under this provision must not be arbitrary in their application. The right to freedom of assembly, freedom of association and freedom of expression can be limited as a consequence of internal disturbances and tensions only when such limitations are lawful and necessary.

Essential principles of human rights law that are applicable in times of disturbances and tensions and have a particular relevance for law enforcement are:

- the right to life, liberty and security of all persons;
- the prohibition of torture;
- the prohibition of arbitrary arrest or detention;
- the right to a fair trial;
- the right to humane treatment for persons deprived of their liberty;
- no unlawful or arbitrary interference with privacy, family, home or correspondence;
- freedom of opinion, expression, assembly and association.

Principles of Humanitarian Law

At the outset it must be clearly understood that none of the principles presented below, although relevant to situations of internal disturbances and tensions, is actually legally binding in such situations, except insofar as they may also be considered principles of human rights law. Provisions of humanitarian law with a particular relevance for law enforcement in time of internal disturbances and tensions are the following:

- the principles of necessity and proportionality as regards the use of force;
- the prohibition of attacks on persons not taking part in acts of violence;
- the prohibition of hostage-taking, pillage, collective punishments, and acts of terrorism;
- the requirement that the wounded and sick must be searched for;

- the requirement that care and attention must be given to wounded and sick persons;
- special measures to protect children, and to safeguard them from being recruited into armed groups or from taking part in violent acts;
- the right to humane treatment for persons deprived of their liberty;
- the requirement that medical and religious personnel must be protected, and assisted in the performance of their duties.

Law Enforcement Practices

In situations of internal disturbances and tensions the law enforcement agencies will still be primarily responsible for the maintenance of law and order. Depending on the quality of the law enforcement agency (in terms of organization, equipment and qualifications of personnel) such disturbances and tensions pose specific law enforcement problems. Some law enforcement agencies might find themselves near the limit of their particular capacities. Others may have the knowledge, skill and means to deal lawfully and effectively with internal disturbances and tensions.

The characteristics of situations of internal disturbances and tensions listed above give rise to the reasonable suspicion that law enforcement practices, under the pressure of such events, will often become both unlawful and indiscriminate. Unlawful and indiscriminate law enforcement has distinct negative consequences. The fact that innocent people are affected by measures taken can lead to further repercussions on the already deteriorating state of law and order. Ill-treatment of persons deprived of their liberty will certainly result in a loss of confidence in the capacity of law enforcement agencies to deal with the problem while simultaneously respecting and protecting the human rights of all persons. Any random or discriminatory actions by law enforcement agencies will be seen as confirming the perceived state of lawlessness. A failure to bring those responsible for such acts to justice will foster a culture of impunity. Suspension of judicial guarantees (or even the mere overloading of the judiciary, caused, for instance, by mass arrests), will strengthen the perception of lawlessness and further consolidate *de facto* impunity for wrongdoing.

Law enforcement action is the key factor in situations of internal disturbances and tensions. Specific, lawful, non-arbitrary and precisely targeted forms of action, directed at initiators and perpetuators of disturbances and tensions, can lead to a reassertion of control and defuse the situation. Random action — as well as unlawful, arbitrary and discriminatory action — will erode confidence in law enforcement, further

endanger public safety and be at least partly responsible for the further escalation of a situation.

States of Emergency

Internal disturbances and tensions can lead to a situation in which a government is no longer convinced of its ability, under the prevailing conditions and with the measures it normally has at its disposal, to control it. The situation might even be so serious that the very position of a democratically elected government is at stake. For such situations the International Covenant on Civil and Political Rights contains important provisions in its Article 4, which are set out below.

Definition

The ICCPR, in Article 4, creates the possibility for States parties to take *"measures derogating from their obligations under the present Covenant", but only "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed".*

Most constitutions contain emergency clauses that empower the head of State or the government to take exceptional measures (including restrictions on or suspension of basic rights) with or without the consent of parliament in wartime or in other catastrophic situations. Of course such privilege is under threat of abuse and misuse. Those in power might use it to maintain their position or to suspend rights to political participation and opposition of (potential) opponents. International law is thus faced with the task of striking a balance between recognition of the legitimate right of sovereign States to defend their constitutional, democratic order and prevention of misuse of the right to proclaim a state of emergency merely to maintain positions of power.

Requirements

Even though an emergency situation may be readily apparent, the derogation of rights under the ICCPR constitutes a violation of a State Party's obligation unless the emergency has been officially proclaimed by the domestic body empowered to do so. This proclamation must take the form of public notification of the population affected. Therein lies its essential significance: the population must know the exact material, territorial and temporal scope of application of emergency measures and their impact on the exercise of human rights. In particular, the proclamation requirement is intended to prevent de facto derogations, as

well as subsequent attempts to justify human rights violations that have already been committed.

Derogation measures may be taken under a state of emergency only *"to the extent strictly required by the exigencies of the situation"*. This is a clear reference to the principle of *proportionality*. The degree of interference and the scope of the measure (in terms both of territory and of duration) must be commensurate with what is actually necessary to combat an emergency that threatens the life of the nation. In addition to this requirement, the measures taken are not allowed to be *"inconsistent with [the State's] other obligations under international law and [must] not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin"*.

"Other obligations under international law" refers equally to principles of customary international law and international treaty law (primarily to other human rights conventions and to treaties in the field of international humanitarian law). The provision of "non-discrimination" in Article 4.1 of the ICCPR must be applied to provisions under the Covenant from which derogations may otherwise be made (Articles 2.1, 3, 25 and 26).

Article 4.3 of the ICCPR stipulates that any State Party "*shall immediately inform other States Parties, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and the reasons by which it was actuated",* i.e. provide prompt notification of the state of emergency. A similar notification is required when a state of emergency ends. The requirement of notification, unlike the requirement of proclamation, is not a necessary condition that renders the taking of emergency measures lawful. Instead it is meant to facilitate international supervision by other States Parties and by the Human Rights Committee.

Derogations

In Article 4.2 of the ICCPR cross-reference is made to a number of inalienable rights, i.e. rights which cannot be derogated from. They are:

- *the right to life* (Article 6);
- *the prohibition of torture* (Article 7);
- *the prohibition of slavery and servitude* (Article 8);
- *the prohibition of detention for debt* (Article 11);
- *the prohibition of retroactivity of criminal law* (Article 15);
- *the right to recognition as a person before the law* (Article 16);
- *the right to freedom of thought, conscience and religion* (Article 18).

None of these rights can be suspended or abrogated under a state of emergency. Each right exists for all persons in all circumstances. A State therefore cannot use the imposition of a state of emergency as an excuse for failing to protect and uphold each of these inalienable rights.

The various regional human rights instruments, too, recognize states of emergency. Whereas the ICCPR only mentions public emergency, Article 15 of the ECHR, Article 15 of the European Social Charter (ESC) and Article 27 of the ACHR all speak of war as well. The ACHPR does not contain an emergency clause.

Minimum Humanitarian Standards

Although international humanitarian law creates legally binding obligations for States Parties only in situations of armed conflict, it is nevertheless justified to consider application of certain principles of that law during states of emergency.

Besides the principles already mentioned under *Internal Disturbances and Tensions,* a closer examination of the draft "Declaration of Minimum Humanitarian Standards" is appropriate. This document, drawn up by a group of international human rights and humanitarian law experts, has no official legal status. Its contents my, however, offer guidance for the operational behaviour of law enforcement agencies during internal disturbances and tensions or in public emergency situations.

The document consists of 18 articles and deals with the following subjects:

- *scope and purpose of the provisions* (Article 1);
- *equality and non-discrimination* (Article 2);
- *personal rights, and acts forbidden under all circumstances* (Article 3);
- *rules related to deprivation of liberty* (Article 4);
- *prohibition of attacks on persons not taking part in acts of violence, use of force subject to proportionality, prohibition of the use of forbidden weapons* (Article 5);
- *prohibition of acts or threats of violence causing terror among the population* (Article 6);
- *rules relating to displacement* (Article 7);
- *provisions on the right to life* (Article 8);
- *rules relating to legal proceedings and judgment* (Article 9);
- *protection of children* (Article 10);

- *assigned residence, internment, administrative detention* (Article 11);
- *protection, search and medical care for wounded and sick* (Articles 12 and 13);
- *medical and religious personnel* (Article 14);
- *humanitarian organizations and their activities* (Article 15);
- *protection of rights of groups, minorities and peoples* (Article 16);
- *closing provisions* (Articles 17 and 18).

The Declaration urges observance of rights from which, under the ICCPR, derogations may otherwise be made in states of emergency (see for instance Article 9 of the Declaration, in comparison with the ICCPR's Article 14).

Non-international Armed Conflict

Situations of internal disturbances and tensions can escalate to the point that a government decides to involve the armed forces in operations to restore order within its territory. Where this happens, armed confrontations between members of the armed forces and dissident armed forces or other organized armed groups can be said to constitute a situation of "non-international armed conflict" or "civil war".

Applicable Law

Under the heading of "non-international armed conflict" two cases must be considered:

> *1. any situation where, within a State's territory, clear and unmistakable hostilities break out between the armed forces and dissident armed forces or other organized armed groups.*

In situations where this type of non-international armed conflict takes place in the territory of one of the States party to the four Geneva Conventions of 1949, the parties to that conflict are bound to apply the provisions of Article 3 common to those Conventions.

Common Article 3 seeks to provide *protection* to:

- *persons taking no active part in the hostilities; including*
- *members of armed forces who have laid down their arms; and*
- *those placed* hors de combat *by sickness, wounds, detention or any other cause;*

by *stating that:*

the above-mentioned categories of persons *"shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria".* To this end "*the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*

> *(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
>
> *(b) taking of hostages;*
>
> *(c) outrages upon personal dignity, in particular humiliating and degrading treatment;*
>
> *(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*
>
> *The wounded and sick shall be collected and cared for".*

The second case that needs consideration under the heading of non-international armed conflict is:

> *2. any situation where dissident forces or other organized armed groups are under the leadership of a responsible command and exercise such control over a part of the territory as to enable them to conduct sustained and concerted military operations and to implement the Protocol [Protocol II].*

In the second case, and in the absence of the acknowledgement of a state of war involving the application of the entire law of war, the provisions of common Article 3 (set out above) still apply. In addition, the rules of the *Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-international Armed Conflicts* (Protocol II of 1977) must be observed.

Non-international armed conflicts are also governed by principles of international customary law, as well as by those provisions of the human rights conventions from which States Parties have not lawfully derogated under a proclaimed state of emergency.

Matters of Public Order

In times of internal armed conflict, it is a matter of national decision whether existing law enforcement agencies continue to carry out their responsibilities, or whether these responsibilities are shifted to the armed

forces. From the point of view of suitability (in terms of training, equipment and appearance) it is clear that armed forces should not be used for law enforcement and maintenance of public order. For strategic reasons, the basic law enforcement responsibilities should be left in the hands of law enforcement agencies for as long as possible.

Internal armed conflict can lead to situations of large-scale *"public disobedience"* in which respect for the rule of law is in serious jeopardy. If not countered promptly, public disobedience can develop into a culture of impunity as referred to above. It is important in such situations that law enforcement agencies continue working and indeed manage to step up their activities to prevent and detect crime. Criminal offenders must be brought to justice and the rule of law prevail. Otherwise democracy and the rule of law will ultimately be additional victims of the armed conflict.

International Armed Conflict

Definition and Applicable Law

The Geneva Conventions of 1949 are applicable in cases of: *declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Conventions also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance (Article 2 common to the four Geneva Conventions of 1949).*

Additional Protocol I of 1977, which supplements the Geneva Conventions of 1949, *applies in the situations referred to in Article 2 common to those Conventions (AP I, Article 1.3) The situations referred to in AP I, Article 1.3, include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (AP I, Article 1.4).

In cases not covered by the Conventions, the Protocol or other international agreements, or in the event of denunciation of these agreements, *civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience* (P I, Article 1.2; Convention I, Article 63; Convention II, Article 62; Convention III, Article 142; Convention IV, Article 158).

With regard to situations of international armed conflict an important distinction is made between *combatants* and *non-combatants*. According to Article 43.2 of 1977 Additional Protocol I: *"Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities".*

By default, those not qualifying as combatants, are non-combatants who do not have a right to participate in hostilities, but who conversely do have a *right to protection against dangers arising from military operations* (Protocol I, Article 51).

Combatants who fall into the power of an adverse party shall be prisoners of war (Protocol I, Article 44.1).

Article 4 of the Third Geneva Convention of 1949 defines who is entitled to prisoner-of-war status. The Convention lays down rules for the treatment of prisoners of war during captivity. The basic premise for treatment of prisoners of war is that they must be treated humanely at all times and that they must be protected, particularly against acts of violence or intimidation and against insults and public curiosity (GCC III, Article 13).

Combatants receive some protection during hostilities through measures developed to regulate the permissible methods and means of warfare.

Persons who do not have combatant status are classified as civilians. In cases of doubt whether a person is a civilian, he or she is to be treated and considered as a civilian. Civilians do not have the right to take part in hostilities and have no entitlement to the status of prisoner of war. The *Fourth Geneva Convention of 1949* sets out rules for the *Protection of Civilian Persons in Time of War. Additional Protocol I of 1977* sets out rules for the *Protection of Victims of International Armed Conflicts.*

The Geneva Conventions of 1949 and Additional Protocol I of 1977 thereto implicitly acknowledge the *civilian status of law enforcement agencies.* According to Article 43.3 of Protocol I, parties to a conflict can decide to incorporate a paramilitary or armed law enforcement agency into their armed forces, provided that they inform the other parties to the conflict. In such a situation law enforcement officials would acquire combatant status and effectively be subject to the regime set for persons who have combatant status.

Article 54 of the Fourth Geneva Convention of 1949 contains an important provision for Occupying Powers, stating that they are not allowed to alter the status of public officials or judges in occupied territories, or in any way

apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.

Matters of Public Order

Situations of armed conflict generally have a highly disruptive effect on public life, public security and public order. Situations of armed conflict also commonly result in large numbers of people deciding to (temporarily) leave their homes and seek refuge elsewhere, either in their own country or in neighbouring countries. Modern armed conflicts are responsible for the creation of millions of internally displaced persons and refugees. It is important that law enforcement officials be familiar with the rights of these groups, who are especially vulnerable and need protection and assistance. They must in particular realize that the internally displaced are nationals of the country they are in, and as such are entitled to all the rights, freedoms and protection that come with that nationality. For more detailed information on the rights and position of these vulnerable groups, please consult the chapter on *Refugees and Internally Displaced Persons*.

Situations of armed conflict also tend to give rise to all kinds of war-related crimes and a general state of lawlessness and of perceived (if not actual) impunity. As far as they possibly can, law enforcement agencies should continue working. This is important not only to combat the various types of law-related crime, but also to maintain their service function to the public. These are two tasks for which armed forces are neither trained nor equipped. It should be clear that whenever such responsibilities are entrusted to the armed forces, the quality of law enforcement and maintenance of public order will suffer.

Another point that needs mentioning in this chapter, and which has already been briefly raised in connection with internal disturbances and tensions, is that of *"disappearances"* and *"extrajudicial killings"*.

What is a "disappearance"?

The "disappeared" are people who have been taken into custody by agents of the state, yet whose whereabouts and fate are concealed, and whose custody is denied.

– Amnesty International 14-Point Programme for the Prevention of "Disappearances"

What is an extrajudicial execution?

Extrajudicial executions are unlawful and deliberate killings, carried out by order of a government or with its complicity or acquiescence.

– *Amnesty International 14-Point Programme for the Prevention of Extrajudicial Executions.*

The severity of both acts, which are imputable to the State, must be understood. The unlawful and arbitrary deprivation of life or liberty constitutes a deprivation of rights from which all other rights and freedoms flow. People, the fact of whose custody is denied, will not benefit from the right to a fair trial or from any other measure created to protect persons deprived of their liberty. As for the right to life, States are under the obligation to protect it. The cases in which someone can be deprived of their life are clearly prescribed by law. Extrajudicial killings are the ultimate demonstration of a complete lack of respect for human life, human dignity and other inherent rights of every human being. Both enforced or involuntary disappearances and extrajudicial executions will undermine stability, and can spread terror amongst the population of a country. The maintenance of law and order is ill-served by organizations responsible for it that resort to unlawful and arbitrary means in carrying out their tasks and duties. Whenever there are allegations of disappearances or extrajudicial killings, those allegations need to be promptly, thoroughly and impartially investigated. Law enforcement agencies must consider it their duty, at all times, to work towards the effective prevention of such grave acts. At the same time governments are expected to have in place independent and effective mechanisms for the investigation of disappearances and extra-judicial killings.

Chapter Highlights

- Everyone has the right to freedom of opinion and expression, the right of peaceful assembly, and of association.
- Effective crowd control by law enforcement agencies requires knowledge, skill and thorough preparation.
- In unlawful but non-violent assemblies, law enforcement officials must avoid the use of force or, where that is not practicable, must limit its use to the minimum extent necessary.
- In dispersing violent assemblies the firearm may be used only when less dangerous means remain ineffective AND when there is an imminent threat to life or of serious injury.
- Indiscriminate firing into a violent crowd is never a legitimate or acceptable method for dispersing that crowd.
- In times of internal disturbances and tensions minimum humanitarian standards should be observed by law enforcement officials.
- In times of a public emergency that threatens the life of the nation, States can, to the extent strictly required by the exigencies of the situation, take certain measures that derogate from provisions under the ICCPR.
- A state of emergency needs to be officially proclaimed. The purpose of this is to inform the public, to prevent de facto derogations, and to prevent subsequent attempts to justify human rights violations that have already been committed.
- The ICCPR (Article 4) sets out a number of inalienable rights. The right to life, the prohibition of torture and the prohibition of retroactivity of criminal law, along with certain other rights, must be respected at all times.
- Situations of low-intensity armed conflict are governed by Article 3 common to the four Geneva Conventions of 1949.
- Situations of high-intensity armed conflict are governed by Article 3 common to the four Geneva Conventions and Additional Protocol II of 1977.
- Common Article 3 sets out a number of acts that are prohibited at all times. They include violence to life, hostage-taking, outrages upon personal dignity, and extrajudicial punishment and executions.
- Protocol II sets out rules for the protection of victims of non-international armed conflicts.
- All four Geneva Conventions of 1949 and Additional Protocol I of 1977 apply to situations of international armed conflict.
- In international armed conflict an important distinction is made between civilians and persons who have combatant status.
- Persons with combatant status have a right to take part in hostilities; have a right to be treated as prisoners of war when captured by the enemy; must observe the rules relating to methods and means of warfare.
- Law enforcement officials are in principle considered as civilians, unless their government incorporates them into the armed forces and notifies other States Parties to the conflict that it has done so.
- Enforced or involuntary disappearances and extrajudicial killings are grave violations of human rights. They must be promptly, thoroughly and impartially investigated. Their effective prevention is of prime importance.

Study Questions

Knowledge

1. What is the definition of internal armed conflict?
2. In which situations does international humanitarian law legally apply?
3. When can a State proclaim a state of emergency?
4. Which rights may not be derogated from?
5. What is the legal position of persons with combatant status?
6. What is the status of law enforcement officials in internal armed conflict?
7. Do law enforcement officials have to carry out their duties under an occupying power?
8. When is the use of firearms allowed against violent assemblies?

Understanding

1. Why should principles of humanitarian law be observed in situations where they do not legally apply?
2. What could motivate a State to have a de facto, rather than a proclaimed, state of emergency?
3. What is the significance of the fact that law enforcement officials, as a general rule, do not have combatant status?
4. What can law enforcement agencies do in order to prevent enforced or involuntary disappearances and extrajudicial killings?
5. Which measures may law enforcement officials take to lawfully limit the right of freedom of association ?
6. What are, in your view, possible causes for the deterioration of law and order leading to internal disturbances and tensions, and what can law enforcement agencies do to stop it?

Application

When confronted with situations of serious disturbances and tensions in which law enforcement officials are also targeted, your chief orders you to prepare plans to ensure the safety of your duty stations, and asks you to draw up some recommendations for the prevention and (early) detection of further unrest.

1. Draw up the requested security plans by stating what you would focus on, and why.
2. Draw up the requested recommendations for prevention and detection, taking into account the role that could be played by other public bodies and/or community groups.

Concerned about the issue of disappearances and extrajudicial killings, your chief asks you to draw up standing orders for your law enforcement agency that are designed to prevent and detect such acts.

1. Which preventive measures do you propose?
2. Which measures do you propose for detection and subsequent investigation?

BASIC LAW ENFORCEMENT POWERS

Chapter 8

ARREST

Chapter Outline

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Key Questions for Law Enforcement Officials

- *What is deprivation of liberty?*
- *What is arrest?*
- *What is detention?*
- *What is police custody?*
- *What is imprisonment?*
- *What is the difference between an arrested person and a detained person?*
- *When is arrest allowed?*
- *When is arrest not allowed?*
- *Who is allowed to make an arrest?*
- *What are the rights of a person upon arrest and after arrest?*
- *What are the duties of the arresting official?*
- *What are the restrictions an arrested person can be subjected to?*
- *What are the rights of victims of unlawful arrest or detention?*

Introduction

Everyone has the right to life, liberty and security of person.

This provision, stated in Article 3 of the UDHR and reiterated in Article 9.1 of the ICCPR, reflects one of the oldest basic rights of all persons. At the same time, deprivation of personal liberty has long represented the most common means used by the State to fight crime and to maintain internal security. With the gradual displacement of other forms of punishment, such as the death penalty and corporal punishment, imprisonment has even gained in significance over the last centuries. It is likely that in the future, too, the deprivation of personal liberty will remain one of the legitimate means for exercising sovereign State authority.

However, the ICCPR, with its Article 9.1, does not seek to bring about a situation in which the deprivation of liberty is absolutely prohibited, as is the case, for instance, for torture and slavery; rather, it represents a procedural guarantee. It obliges a State to define precisely, in law, the cases in which deprivation of liberty is permissible and the procedures to be applied, and to make it possible for the independent judiciary to take quick action in the event of arbitrary or unlawful deprivation of liberty by administrative authorities or executive officials.

Definitions

Deprivation of liberty is the broadest definition of the infringement of the liberty of movement. It includes the holding of minors, mentally ill persons, alcohol or drug addicts or vagrants, and it extends to situations where such deprivation is caused by private persons as well as public officials.

The following definitions have been drawn from the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,* hereinafter *The Body of Principles*.

Arrest means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

Detained person means any person deprived of personal liberty except as a result of conviction for an offence;

Imprisoned person means any person deprived of personal liberty as a result of conviction for an offence;

Detention means the condition of detained persons as defined above;

Imprisonment means the condition of imprisoned persons as defined above;

A judicial or other authority means a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

Arrest in Law Enforcement

Reasons for Arrest

The task of enforcing the law and maintaining public order may place law enforcement officials and members of society on opposite sides in a given conflict. The interest of States in law and order has resulted in law enforcement officials having not only the responsibility but also the authority to enforce, if necessary, the laws of the State they serve. In most countries law enforcement officials have discretionary powers of arrest, detention and for the use of force and firearms, and can exercise those powers if so required in any particular law enforcement situation.

"No one shall be deprived of his [or her] liberty except on such grounds and in accordance with such procedure as are established by law" (ICCPR, Article 9.1). This provision makes it clear that the reasons for an arrest, as well as the procedures for an arrest, must be found in the laws of the State. This *principle of legality* is violated if somebody is either arrested or detained on grounds which are not clearly established in, or which are contrary to, domestic law.

In a technical sense every infraction of the law or every *"alleged commission of an offence"* (as it is called in the Body of Principles) could warrant the arrest of the person(s) responsible. However, in law enforcement practice not every alleged commission of an offence automatically leads (or should automatically lead) to the arrest of the person(s) responsible. There are a number of factors which influence the decision whether to effect an arrest or not. The gravity and consequences of the offence committed, combined with the personality and behaviour, at the time of apprehension, of the suspect(s), will be basic considerations. Inevitably the quality and experience (i.e. competence) of law enforcement officials involved will also have a bearing on the outcome of a particular situation in which the discretion whether or not to arrest is exercised.

Arbitrary Arrest or Detention

...No one shall be subjected to arbitrary arrest or detention... The prohibition of arbitrariness in the second sentence of the ICCPR's Article 9.1 represents an additional restriction to the deprivation of liberty. This injunction is directed both at the national legislature and at the enforcement agencies. It is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily. The word "arbitrary" in this sense is understood to contain elements of injustice, unpredictability, unreasonableness, capriciousness and disproportionality.

The prohibition of arbitrariness is to be interpreted broadly. Cases of deprivation of liberty provided for by law must not be manifestly disproportionate, unjust or unpredictable, the specific manner in which an arrest is made must not be discriminatory and must be justified as appropriate and proportionate in view of the circumstances of the case.

Arbitrary arrest is also prohibited under the ACHPR (Article 6); and the ACHR (Article 7.1-3). The ECHR (Article 5.1) sets out the specific circumstances under which a person may be deprived of his or her liberty. While the ECHR is applicable only to States Parties, its provisions provide excellent guidance to all law enforcement officials on the various situations in which deprivation of liberty may be considered reasonable and necessary. According to the ECHR, a person may be deprived of his or her liberty in the following circumstances:

- following conviction by a competent court;
- for non-compliance with a lawful order of a court or to secure an obligation prescribed by law;

- for the purpose of bringing a person before the competent legal authority on reasonable grounds of having committed an offence;
- (of a minor) by lawful order for the purposes of educational supervision or bringing him or her before a competent legal authority;
- for the purpose of preventing the spread of infectious diseases, and in respect of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- for the purpose of preventing unauthorized entry into, or residence in, the country.

Conduct of Law Enforcement Officials

The principles of legality and necessity, along with the prohibition of arbitrariness, require the conduct of law enforcement officials in arrest situations to meet certain expectations. Those expectations relate to a knowledge of the law and the procedures to be observed in specific situations and/or circumstances that might lead to a deprivation of liberty.

The Body of Principles states that *arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose* (Principle 2).

The word "competent" does not only mean "authorized" but is also to be understood as referring to the mental and physical aptitude and attitude of law enforcement officials in arrest situations. To effect an arrest that meets all the requirements of legality, necessity and non-arbitrariness, much more is needed than the mere application of the law. Only training and experience can develop the capacity of law enforcement officials to distinguish between individual situations and to adapt their reactions to the circumstances of a particular case in hand.

Managerial Practice 1.

The need for "competent" officials to effect an arrest has led the law enforcement agencies of many countries to maintain specialized units or teams for dangerous or difficult arrest situations. Those units or teams consist of law enforcement officials who are selected and trained to perform a task for which not every law enforcement official can be considered "competent".

The behaviour of individual law enforcement officials in arrest situations will determine in each situation the extent to which that behaviour is judged to be arbitrary. To guarantee equality and to prevent discrimination is in the hands of individual law enforcement officials — as is the responsibility to ensure respect for the rights, according to the law, of each arrested person.

The Arrested Person

Rights upon Arrest

Whenever a person is arrested, it must be for the *alleged commission of an offence or by the action of an authority* (Body of Principles, Principle 36.2).

Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him (ICCPR, Article 9.2; Body of Principles, Principle 10).

The arrested person is to be brought to a place of custody and to be brought promptly before a judge or other officer authorized by law to exercise judicial power who will decide on the lawfulness and the necessity of the arrest. (ICCPR, Article 9.3; Body of Principles, Principles 11 and 37.

Similar provisions on arrest and detention are repeated in the ACHR (Article 7) and in the ECHR (Article 5). The ACHPR does not contain any such provisions. There is no clear definition as to what is meant by "promptly". In many States the maximum period allowed before an arrested person has to be brought before a judge or similar authority is limited to 48 hours; in some other States it is limited to 24 hours. This period of 48 or 24 hours is more commonly referred to and known as *police custody*. The period that follows it is what is known as *pre-trial detention.*

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial (Body of Principles, Principle 38).

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his [or her] arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself [or herself] of such rights. (Body of Principles, Principle 13.)

Managerial Practice 2.

An example of good law enforcement practice is the production and dissemination of leaflets setting out the rights of arrested persons. In many countries law enforcement agencies produce such leaflets in multiple languages in order to ensure their accessibility. Upon being taken into police custody, the person concerned is presented with a leaflet in a language he or she can understand, explaining his or her rights and how to avail himself/herself of those rights.

Rights immediately following Arrest

The presumption of innocence applies to all detained persons and must be reflected in their treatment.

Measures other than those necessary *to prevent hindrance to the process of investigation* or to *maintain order and security in the place of detention* are forbidden (Body of Principles, Principle 36).

A detained person has a right to the assistance of a legal counsel and must be provided with reasonable facilities to exercise this right. Legal counsel must be provided by a judicial or other authority if the detained person has no legal counsel of his or her own choice, and free of charge if the detained person does not have sufficient means to pay (Body of Principles, Principle 17).

The following are the rights of the detained person and/or his legal counsel:

- effective opportunity to be heard by a judicial or other authority;
- to receive prompt and full communication of any order of detention, together with the reasons therefor (Principle 11);
- to communicate with each other and have adequate time and facilities for consultation in full confidence and without delay or censorship;
- to communicate with each other within the sight but not within the hearing of a law enforcement official;
- (...) such communications to be inadmissible as evidence against the detained person unless connected with a continuing or contemplated crime (Principle 18);
- to have access to the recorded information on the duration of any interrogation, the intervals between interrogations and the identity

of the officials who conducted the interrogations and other persons present (Principle 23);

- to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of the detention in order to obtain the release of the detainee, if it is unlawful (Principle 32);
- to make a request or complaint regarding the treatment of the detainee, particularly in the case of torture or other cruel, inhuman or degrading treatment, to the administrative or higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers (Principle 33).

The *prohibition of torture* applies to persons under any form of detention or imprisonment. (Body of Principles, Principle 6) This prohibition is further elaborated in Principle 21, which *explicitly prohibits taking advantage of the situation of a detained person to obtain a confession, to incriminate himself or to testify against others.*

The detained person has *a right to notify,* or to require the competent authorities to notify, *members of his/her family or other appropriate persons of his/her choice* of his/her arrest, detention or imprisonment. This right revives after each every transfer of the person in question (Body of Principles, Principle 16).

In addition to the rights mentioned above that are directly linked to the arrest or to the time immediately thereafter, there are a number of provisions in the Body of Principles that more specifically relate to the *welfare of the detainee or imprisoned person.* Although those provisions are of great importance to law enforcement, they are more appropriately presented in the chapter on *Detention.*

The Special Position of Women

The principle of non-discrimination *on the basis of sex* is a fundamental principle of international law — enshrined in the UN Charter, the UDHR (Article 2) and major international human rights treaties. Under this principle of non-discrimination, all protection offered to a person on and following arrest (as presented above) equally applies to both men and women.

In addition, however, it is to be noted that *respect for the inherent dignity of the human person* (Body of Principles, Principle 1) and protection of their rights may well require that additional protection and considerations are afforded to women. Such measures include, for instance, ensuring that the

arrest of women is effected by female officials where practicable, that they and their clothing are searched by a female official, and that female detainees are kept in quarters separate from male detainees. These forms of (additional) protection and consideration for women should not be deemed discriminatory, because their goal is to redress an inherent imbalance — to create a situation in which the ability of women to enjoy the rights to which they are entitled is equal to that of men.

The Special Position of Juveniles

The Convention on the Rights of the Child (CRC) defines a *"child"* as *every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier* (Article 1).

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) define a *juvenile* as a *child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult* (Rule 2.2 (a)). Under the Beijing Rules, a *juvenile offender* is *a child or young person who is alleged to have committed or who has been found to have committed an offence (Rule 2.2 (c))*.

The instruments mentioned above do not rule decisively on the minimum *age of criminal responsibility*, leaving a decision on this matter to be made at the national level. However, the Beijing Rules do state that *that age should not be fixed at too low a level — taking into account emotional, mental and intellectual maturity* (Rule 4).

In the commentary to this Rule 4, it is acknowledged that: "The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behaviour."

Juvenile offenders have the same rights and entitlements as adult offenders, but they *enjoy additional protection* by virtue of specific provisions to that effect in the international instruments.

The main *objective of these specific provisions is to divert the juvenile from the criminal justice system and to redirect him or her towards society.*

To that end the CRC contains a number of very explicit provisions:

- no child shall be deprived of his or her liberty unlawfully or arbitrarily;

- the arrest, detention or imprisonment of a child or young person shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time (Article 37).

In addition to reiterating those provisions, the Beijing Rules further stipulate that:

- the parents or guardians of juveniles arrested are to be notified of that arrest immediately (Rule 10.1);
- a judge or other competent authority is to consider, without delay, the issue of release (Rule 10.2);
- juveniles under detention are to be kept separate from adults in detention (Rule 13.4);
- law enforcement officials dealing with juvenile offenders are to be specially instructed and trained (Rule 12);
- contacts between the law enforcement agencies and a juvenile offender are to be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to him or her, with due regard to the circumstances of the case (Rule 10.3).

Victims of Unlawful Arrest or Detention

Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. (ICCPR, Article 9.5)

This provision entitles every victim of unlawful arrest or detention to a claim for compensation, whereas the analogous provision of Article 5.5 of the ECHR guarantees compensation only in the event of a violation of Article 5 (see above).

Under the ACHR (Article 10) compensation is payable to a person who is sentenced by a final judgment through a miscarriage of justice. Unlawful arrest may be an element in a miscarriage of justice.

For all instruments it is equally applicable that actual compensation is a matter of domestic concern, to be taken care of under national legislation.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration) may offer some guidance in defining state responsibility and the rights of victims.

In its Article 4 the Victims Declaration states that *victims should be treated with compassion and respect for their dignity.*

It goes on to recommend, in Article 11, that: *"Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted."*

Obligations of Law Enforcement Officials

The rights of the arrested person as set out above impose clear obligations on law enforcement officials. The first of these obligations is to effect only arrests that are lawful and necessary. Law enforcement officials may use only the powers granted to them by law. The exercise of these powers is subject to review by a judicial or other authority.

The said rights can be translated into the following *obligations for law enforcement officials,* namely:

- *to give prompt information AT the time of arrest about the reasons for arrest;*
- *to inform the arrested person promptly of any charges against him or her;*
- *to inform the arrested person promptly of his or her rights and how to avail himself or herself of these rights*;
- *to duly record for each arrested person*:
  - the reasons for arrest;
  - the time of arrest;
  - the taking of the arrested person to a place of custody;
  - that person's first appearance before a judicial or other authority;
  - the identity of the law enforcement officials concerned;
  - precise information concerning the place of custody;
- *to communicate these records to the arrested person or to his or her legal counsel in a form prescribed by law;*
- *to bring the arrested person promptly before a judicial or other authority who can judge the lawfulness and the necessity of the arrest;*
- *to provide the arrested person with legal counsel and allow adequate opportunity for communication between them;*
- *to refrain from torture or other cruel, inhuman or degrading treatment or punishment during and after arrest;*

- *to ensure the arrested person is further afforded the rights to which he or she is entitled as a detainee* (see also Chapter 9, *Detention)*;
- *to strictly observe the rules for the protection of the special position of women and juveniles.*

Finally it should be emphasized that under the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions,* it is the responsibility of governments to ensure strict control (including a clear chain of command) over all officials involved in arrest, detention, custody and imprisonment — as well as over those authorized to use force and firearms.

Police officials with command and supervisory responsibilities are obliged to ensure that the necessary control measures and chain of command are in place in order to prevent extra-legal killings during arrests and/or detention.

Chapter Highlights

- The right to life, liberty and security of person.
- ***Arrest*** means the act of apprehending a person for the alleged commission of an offence or by the action of an authority.
- ***Detained person*** means any person deprived of personal liberty except as a result of conviction for an offence.
- ***Imprisoned Person*** means any person deprived of personal liberty as a result of a conviction for an offence.
- ***Detention*** means the condition of detained persons as defined above.
- ***Imprisonment*** means the condition of imprisoned persons as defined above.
- ***Judicial or other authority*** means a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.
- Arrests must be both lawful and necessary; arbitrary arrest or detention are prohibited.
- The powers of arrest and detention are to be exercised only by competent officials or authorized persons.
- At the time of arrest the arrested person must be informed of the reasons for arrest and of any charges brought against him or her.
- The arrested person must be brought before a judicial or other authority who can judge the lawfulness of the arrest or detention.
- A detained person is entitled to legal counsel as well as to adequate opportunity of unimpeded communication with such counsel.
- Arresting law enforcement officials are responsible for the recording of certain facts relating to the arrest.
- Arrested persons have the right to notify their family, or other appropriate persons of their choosing, of their arrest, detention or imprisonment, or to have them notified thereof.
- The absolute prohibition of torture applies equally to all arrested, detained or imprisoned persons.
- The arrested person is to be informed about his or her rights in general and how to avail himself or herself of those rights.
- An arrested or detained person cannot be forced to testify, to confess guilt or to incriminate others.
- To protect the special position of women and juveniles, there are additional provisions with regard to their arrest, detention and imprisonment.
- Victims of unlawful arrest or detention have an enforceable right to compensation.
- Victims of crime and abuse of power are to be treated with compassion and with respect for their personal dignity.
- The provisions relating to lawful and non-arbitrary deprivation of liberty mean that certain knowledge and skills are expected of law enforcement officials to ensure their adequate implementation.

Study Questions

Knowledge

1. When is arrest allowed?
2. What is arbitrary arrest or detention?
3. What are the rights of an arrested person at the moment of arrest?
4. At which moment(s) does the arrested person have the right to take legal proceedings against his or her arrest?
5. Which facts should be recorded after an arrest?
6. What is the difference between an arrested person, a detained person and an imprisoned person?
7. What is the position of victims of unlawful arrest or detention?

Understanding

1. What is the purpose of recording the facts mentioned in Question 5 above?
2. Why should a detained person, or his or her counsel, have access to the records of those facts?
3. Which other facts relating to an arrest and subsequent detention would you recommend to be recorded?
4. Can a male official search a female arrested person if there is no female official available?
5. How can law enforcement actions better protect the right to liberty of person?
6. What knowledge and which skills would make a law enforcement official "competent" to effect an arrest?

Application

Draft standing orders for the manner in which arrests must be made and the subsequent treatment of arrested persons and detainees. In this draft you must take into consideration the prohibition of arbitrary arrest and detention, as well as the rights of the arrested person upon and following arrest. This draft must also contain provisions that satisfy the requirements regarding internal supervision of law enforcement operations and the conduct of law enforcement officials in this particular area.*

Chapter 9

DETENTION

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Key Questions for Law Enforcement Officials

- *What is detention?*
- *What is a detainee?*
- *What is a prisoner?*
- *What is meant by "humane treatment"?*
- *Why is torture absolutely prohibited?*
- *What are the rights of prisoners and detainees?*
- *How are the special interests of detained women and juveniles protected?*
- *What are the rules for interrogation of detainees?*
- *What is expected of law enforcement officials dealing with prisoners and detainees?*
- *What are the principles of humanitarian law relating to detention?*
- *What are the rules concerning combatants and non-combatants?*
- *What are the rules related to detention during the different types of armed conflict?*
- *What are the role and responsibilities of the ICRC in this area?*
- *How does the ICRC carry out its different mandates?*

Introduction

As noted in the chapter on Arrest, the deprivation of liberty of person represents the most common and long-standing means used by the State to fight crime and maintain public order. Rather than prohibit such deprivation of liberty completely, international law sets out to provide adequate rules and guidelines to guarantee its lawful and non-arbitrary application by the State.

Those deprived of their liberty, whether lawfully or unlawfully, are entitled to the protection of the law, ensuring a treatment that is both humane and respectful of their inherent human dignity.

It is evident that mere legislation to that end will not suffice. Those officials of the State (for the most part law enforcement officials) who bear responsibility for persons under any form of detention or imprisonment require special training and instruction to perform their duties adequately.

Even in situations of relative peace and stability, the position of detained or imprisoned persons is all too often marked by abuse, ill-treatment, torture, forced and involuntary disappearances and summary or arbitrary executions. When law and order deteriorate or break down and the situation degenerates into disturbances and tensions, or even further into

non-international or international armed conflict, there is often a dramatic increase in the number of persons under detention or imprisonment. The welfare and well-being of such persons in deteriorating situations of law and order is one of the major concerns of the ICRC.

In order to make a full analysis of existing provisions for the protection of the rights of detained or imprisoned persons, it is necessary to examine provisions of both human rights and humanitarian law.

Detention and International Human Rights Law

Recognition of the need to safeguard the human rights of persons under any form of detention or imprisonment — except for those limitations that are demonstrably necessitated by the fact of incarceration — has led the United Nations to develop a variety of instruments that build further on the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR).

The purpose of those instruments is not only to safeguard the human rights of such persons, but also to try and guarantee their successful reform and social rehabilitation. These objectives presuppose a certain level of quality of the penitentiary system in terms both of its infrastructure and personnel and of its placing in the administration of justice. Such expectations are naturally extended to law enforcement officials when they carry out tasks and duties concerned with prisoners and detainees.

Essential Definitions

In the various human rights instruments relating to detention a distinction is made between those persons who have been convicted for an offence and those who are awaiting trial. The former group are referred to as *prisoners*, whereas the latter group are referred to as *detainees*.

However, this distinction is not uniformly applied throughout all instruments. *The Standard Minimum Rules for the Treatment of Prisoners* (SMR), although applicable to both categories mentioned above, uses only the term *"prisoners"* and subsequently divides them into *"convicted"* and *"unconvicted"* prisoners.

Irrespective of the terminology used, the distinction between "convicted" persons and those who are not is important because the rights to which individuals in each of those groups are entitled are not exactly the same, nor are the rules for the treatment of either category.

It is also significant in that, as a general rule, law enforcement officials will only be responsible for, and exercise authority over, persons who are not yet convicted for an offence and who furthermore spend only a relatively short time in custody in police detention facilities.

The Prohibition of Torture

Under international law torture is defined as *severe pain or suffering, whether physical or mental, inflicted by, or at the instigation of, or with the consent or acquiescence of a public official or person acting in an official capacity, for such purposes as obtaining from the person on whom it is inflicted or a third person information or a confession, punishing that person for an act which he or she has committed or is suspected of having committed, or intimidating that person or other persons.* (Convention against Torture, Article 1)

The prohibition of torture is absolute and without exception. There are no situations in which torture can be lawful, nor can there be any successful legal defence for acts of torture committed. A public emergency that threatens the life of the nation (see ICCPR, Article 4) does not permit a derogation from the prohibition on torture. The prohibition of torture can also be found in the Geneva Conventions of 1949 and their Additional Protocols of 1977, which outlaw torture in all forms of armed conflict to which those instruments of humanitarian law apply.

The prohibition of torture is part of customary international law and has been codified in the UDHR (Article 5), the ICCPR (Article 7), the ACHPR (Article 5), the ACHR (Article 5), the ECHR (Article 3) and in the above-mentioned instruments of humanitarian law.

Further codification of the prohibition of torture was effected with the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) cited above, a multilateral treaty which has been ratified by some 105 UN member States (December 1997).

The following provisions are drawn from the Convention against Torture and are legally binding on all States party to it:

- *no exceptional circumstances whatsoever may be invoked as a justification of torture* (Article 2.2);
- *superior orders may not be invoked as a justification of torture* (Article 2.3);
- *torture must be prohibited under domestic laws* (Article 4);

- *all persons accused of committing torture must be brought to justice, irrespective of their nationality or where the crime is alleged to have been committed* (Articles 5, 6, 7);
- *the training of law enforcement officials must take full account of the prohibition against torture* (Article 10.1);
- *the prohibition on torture must be incorporated into general rules and instructions issued to police officials responsible for the custody of detainees* (Article 10.2);
- *interrogation rules, instructions, methods and practices must be kept under systematic review* (Article 11);
- *arrangements for the custody and treatment of persons deprived of their liberty must be kept under systematic review* (Article 11);
- *suspected acts of torture must be promptly and impartially investigated* (Article 12);
- *(alleged) victims of torture are entitled to a prompt and impartial investigation and must be protected against all ill-treatment or intimidation as a consequence of their complaint* (Article 13);
- *domestic law must ensure redress and an enforceable right to fair and adequate compensation for victims of torture* (Article 14);
- *evidence obtained through torture is inadmissible in court* (Article 15).

The Committee against Torture, established under Article 17 of the CAT, monitors implementation of its provisions by States Parties.

The *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* establishes a committee with tasks similar to those of the UN Committee against Torture, The European Committee visits detention facilities and examines the treatment of prisoners and detainees with a view to strengthening the mechanisms of protection against torture. The member States of the United Nations have also appointed a *Special Rapporteur on Torture,* who has the authority to receive complaints, to make country visits and to conduct other investigations into situations of torture anywhere in the world. The Special Rapporteur reports on his or her findings directly to the UN Commission on Human Rights.

The key provisions of the CAT are reflected in Article 5 of the *Code of Conduct for Law Enforcement Officials*, which states that: *"No law enforcement official may inflict, instigate or tolerate any act of torture... nor ... invoke superior orders or exceptional circumstances ... as a justification of torture ..."*

Needless to say, the scope of the prohibition of torture encompasses all aspects of law enforcement and is not limited to detention and imprisonment.

Humane Treatment

In Article 10.1 of the ICCPR it is stated that: *"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."*

All too often the deprivation of liberty of person is accompanied by invasions of the right to privacy — which includes the secrecy of correspondence and the protection of human dignity — and violations of the prohibition on discrimination, the right to education, the freedom of religion and expression and the right to information. Often these additional infringements are referred to as limitations inherent in the deprivation of liberty. However, this is neither correct nor are they allowed. *Only the imposition of measures which are strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of Justice, or for the maintenance of good order in the place of detention is admissible.*

"Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons" (ICCPR, Article 10.2(a)). A similar provision can be found in the ACHR (Article 5), but not in the ACHPR or the ECHR.

For more details as to the meaning of *"treatment appropriate to their status as unconvicted persons"* it is necessary to take a closer look at the SMR and the Body of Principles (the latter has already been presented in the chapter on *Arrest*). The SMR is an instrument which sets out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of [penal] institutions (SMR, Preliminary Observations 1). Although it recognizes (Article 8 (b)) a category of *untried prisoners,* it is of greater relevance to the work of prison officials and those law enforcement officials with specific responsibilities and authority over prisoners than it is for general law enforcement purposes. The SMR will be presented in greater detail under the heading *Penal Institutions* below.

The *Body of Principles* is relevant for the larger law enforcement audience, as it sets out the rules on the treatment of persons deprived of their liberty,

with a specific focus on arrest and pre-trial detention. It specifiies requirements for:

- *humane treatment with respect for inherent human dignity;* (Principle 1)
- *the prohibition of torture;* (Principle 6)
- *judicial supervision of the situation of detainees*; (Principles 4, 11, and 37)
- *the right to (consult with) legal counsel;* (Principles 11, 15, 17 and 18)
- *the right to communicate, and retain contact, with family or chosen persons*; (Principles 15, 16, 19 and 20)
- *adequate medical supervision*; (Principles 24 and 26)
- *the due recording of facts relating to arrest and custody;* (Principle 12)
- *the recording of certain facts relating to interrogation;* (Principle 23)

What exactly is to be understood by *humane treatment* is not defined clearly anywhere in the relevant instruments. However, by eliminating treatment that is not allowed, a general idea of permissible (humane) treatment can be obtained.

The Special Position of Juveniles

"Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication" (ICCPR, Article 10.2 (b)).

Juvenile detainees have all the same rights as adult detainees. In recognition of their particular vulnerabilities, there are a number of additional provisions to give them the additional protection they require. All detainees charged with a criminal offence are entitled *to be tried without undue delay* (ICCPR, Article 14.3 (c)). However, Article 10.2(b) of the ICCPR actually creates a more definite time frame for juveniles through the formulation *"brought as speedily as possible for adjudication"*. The purpose of this provision is to ensure that pre-trial detention for juveniles is kept as short as possible. Furthermore, the term *"adjudication"* is not to be understood in the formal sense of a judgment by a criminal court; rather, it also covers decisions by special, non-judicial organs empowered to deal with crimes by juveniles.

The additional protection for juveniles is further codified in the *Convention on the Rights of the Child;* the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules) and the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty.*

Article 37 of the *Convention of the Rights of the Child* (CRC) is of particular relevance to the treatment of juvenile detainees. Under this provision of the Convention it is stated that:

- *torture and ill-treatment of juveniles is prohibited (as well as capital punishment and life sentences)*;
- *to deprive juveniles unlawfully or arbitrarily of their liberty is prohibited;*
- *juveniles deprived of their liberty must be treated with humanity, with respect for their human dignity and in a manner that takes into account the special needs of persons of their age*;
- *juvenile detainees are to be kept separate from adult detainees*;
- *juvenile detainees have the right to maintain contact with their family, to be given prompt access to legal assistance, and to challenge the legality of their detention before a court or other competent authority.*

The provisions set out in the CRC are largely reiterated and expanded in the other two instruments mentioned above. The Beijing Rules focus particularly on the procedural rights to which juveniles are entitled throughout arrest and pre-trial detention and at all stages of the proceedings. These include (Rule 7):

- *the presumption of innocence;*
- *the right to be notified of the charges;*
- *the right to remain silent;*
- *the right to legal counsel;*
- *the right to the presence of a parent or guardian;*
- *the right to confront and cross-examine witnesses;*
- *the right to appeal to a higher authority.*

The privacy of the juvenile must be respected at all times in order to avoid harm caused by undue publicity or by the process of labelling. In principle no information that could lead to the identification of the juvenile may be published (Rule 8).

The Beijing Rules also focus on *diversion* (i.e. removal from criminal justice processing) — emphasizing that consideration should be given to dealing with juveniles without resorting to formal trial. Law enforcement agencies which have the legal authority to dispose of juvenile cases are required to do so, where possible, without recourse to formal procedures (Rule 11).

Managerial Practice 1.

In The Netherlands, juvenile offenders who meet certain criteria are diverted from the criminal justice system by introducing them to HALT (tHe ALTernative) juvenile offenders qualifying for HALT receive an alternative punishment for their offence. For instance, they can be obliged to perform selected community services, to repair damage caused to property, or to enrol in specific educational programmes and activities aimed at the prevention of juvenile delinquency.

Specialization within law enforcement agencies, where juveniles are concerned, is recommended through the establishment of special units or departments and through the additional training of those law enforcement officials who are required to deal with juvenile offenders (Rule 12).

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNRPJ) is an instrument designed to ensure that juveniles are deprived of their liberty and kept in institutions *only* when there is an *absolute necessity* to do so. Juveniles who are detained must be treated humanely — with due regard for their status and with full respect for their human rights. Juveniles deprived of their liberty are highly vulnerable to abuse, victimization and the violation of their rights.

Rules 17 and 18 of this instrument are of particular importance to law enforcement officials, as they concern juveniles under arrest or awaiting trial.

These rules stress once again that pre-trial detention of juveniles should be avoided as far as possible and limited to exceptional circumstances. *Where pre-trial detention is unavoidable, its duration should be kept to an absolute minimum by giving the highest priority to the most expeditious processing of such cases* (Rule 17).

The rights stated in Article 7 of the Beijing Rules are reiterated in Rule 18 of the UNRPJ. In addition Rule 18 also stipulates the juvenile's right to opportunities to undertake work with remuneration, to opportunities for education and training, and to be provided with educational and recreational materials.

The Special Position of Women

A basic premise of international human rights law is the principle of non-discrimination. Accordingly all forms of protection afforded under the international instruments to persons deprived of their liberty apply equally to women and men.

Observance of the principle of non-discrimination will not always mean that the treatment accorded to men and women will be identical. To ensure an environment which is equally safe for women and men may well involve extending special protection to women. This is particularly relevant — as recognized by the Body of Principles — where the deprivation of liberty is concerned. The Body of Principles states that *measures applied under the law and designed solely to protect the rights and special status of women (especially pregnant women and nursing mothers) shall not be deemed discriminatory* (Principle 5.2).

With regard to accommodation for women detainees, the SMR require that the different categories of prisoners be kept in separate institutions or parts of institutions, taking into account their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. (SMR, 8)

Men and women must so far as possible be detained in separate institutions; in institutions that receive both men and women the whole of the premises allocated to women must be entirely separate (SMR 8(a)). It follows from this rule that women detainees should, as far as possible, be supervised by officials of the same sex. Searches and similar procedures should at all times also be carried out by persons of the same sex as that of the detained person.

Interrogation

Several of the international instruments presented so far include provisions on the protection of the rights of persons subject to interrogation. The *presumption of innocence* (ICCPR, Article 14.2) and the right of a person "[n]ot *to be compelled to testify against himself [or herself] or to confess guilt"* (ICCPR, Article 14.3(g)) form the basis for similar provisions contained in the CAT as well as in the Body of Principles.

The CAT legally obliges States Parties to:

- *keep under systemic review interrogation rules, instructions, methods and practices....* (CAT, Article 11); and to

- *ensure that education and information regarding the prohibition against torture are included in the training* of all persons *involved in the custody, interrogation or treatment of any individual under any form of arrest, detention or imprisonment* (CAT, Article 10.1).

The Body of Principles contains a number of procedural rules relating to the interrogation of prisoners and detainees.

It is prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him or her to confess, to incriminate himself or herself or to testify against any other person (Principle 21.1).

Methods of interrogation, violence or threats which could impair the detainee's capacity of judgment are prohibited. (Principle 21.2)

Managerial Practice 2.

In certain countries law enforcement agencies have introduced the practice of recording the interrogation sessions of supects on video. Recordings are the best guarantee for statements of suspects to be presented in their own words. Video recordings also enable the question whether any statement by a suspect was made entirely of his or her own free will.

With regard to the actual interrogation, the Body of Principles contains the following requirements (in addition to those already cited) relating to the *recording and certification*, in a form prescribed by law, of:

- *the duration of any interrogation;*
- *the intervals between interrogations;*
- *the identity of the officials conducting the interrogation;*
- *the identity of other persons present at any interrogation* (Principle 23.1).

This information must be made available to the detained or imprisoned person or their legal counsel (Principle 23.2). Any failure to comply with the above-mentioned principles in obtaining evidence must be taken into account in determining the admissibility of such evidence against a detained or imprisoned person (Principle 27).

Additional information on the subject of *interrogation* can be obtained from the chapter *Prevention and Detection of Crime*.

Discipline and Punishment

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person (ICCPR, Article 10.1). This provision is of prime importance with regard to the issue of discipline and punishment of such persons for acts or offences committed during their detention or imprisonment. The SMR and the Body of Principles both contain provisions that relate to the maintenance of order and discipline within penal institutions. *The Body of Principles (Principle 30) makes disciplinary matters subject to law or lawful regulations that are duly published. These regulations must clearly stipulate (i) the types of conduct which will constitute disciplinary offences during detention or imprisonment; (ii) the nature and duration of disciplinary punishment that may be inflicted; and (iii) the authority which is competent to impose such punishment.* Prisoners can be punished only in accordance with the terms of such law or regulation, and never twice for the same offence. *Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences* (SMR, see Articles 27 to 32).

Instruments of restraint shall never be applied as punishment (SMR, Article 33).

The use of force against prisoners (or detainees) is to be limited to cases of self-defence, attempted escape, or active or passive physical resistance to an order based on law or regulations. The actual use of force is to be limited to the amount strictly necessary to achieve the objective and must be immediately reported to the director of the institution. Staff performing duties that bring them into direct contact with prisoners should, except in special circumstances, be unarmed. In no circumstances should they be provided with arms unless they have been trained in their use. (SMR, Article 54; BPUOF, Principles 15, 16 and 17)

Penal Institutions

As pointed out above, the majority of States have developed a system whereby law enforcement officials do not have a responsibility for, or exercise authority over, convicted prisoners. That responsibility and authority are left to prison officials who have received special instruction and training for the performance of their duties. The training of law enforcement officials generally does not qualify them as competent personnel for duty in penal or correctional institutions. If they were to be

assigned such duties, then additional instruction and training at least would be required.

Also as pointed out above, the basic instrument setting out good practice in the treatment of prisoners and the management of penal institutions is the SMR. It is divided into two parts:

- Part I: Rules of General Application
- Part II: Rules Applicable to Special Categories.

Part I is applicable to all categories of prisoners — women or men, juvenile or adult, criminal or civil, tried or untried. It contains provisions on a wide range of matters, including:

- separation of categories (Rule 8);
- accommodation (Rules 9 to 14);
- personal hygiene (Rules 15 and 16);
- clothing and bedding (Rules 17 to 19);
- food (Rule 20);
- exercise and sport (Rule 21);
- medical services (Rules 22 to 26);
- discipline and punishment (Rules 27 to 32);
- instruments of restraint (Rules 33 and 34);
- information to and complaints by prisoners (Rules 35 and 36);
- contact with the outside world (Rules 37 to 39);
- books (Rule 40);
- religion (Rules 41 and 42);
- retention of prisoners property (Rule 43);
- notification of death, illness, transfer, etc. (Rule 44);
- removal of prisoners (Rule 45);
- institutional personnel (Rules 46 to 54);
- inspection (Rule 55).

Part II of the SMR identifies five different categories of prisoners:

- A. prisoners under sentence;
- B. insane and mentally abnormal prisoners;
- C. prisoners under arrest or awaiting trial;
- D. civil prisoners; and
- E. persons arrested or detained without charge.

The category most relevant to law enforcement officials is Category C, i.e. prisoners under arrest or awaiting trial. The rules for the treatment of this particular category can be found in Articles 84 to 92 of the SMR. Upon closer consideration of those rules it will become clear that they are in effect

not different from the provisions contained in the Body of Principles with regard to "detainees" which have been thoroughly presented throughout this chapter.

Detention and International Humanitarian Law

Introduction

From numerous examples the conclusion can be drawn that the actual protection of the rights and freedoms of persons deprived of their liberty all too often falls short, in practice, of the standards set by international human rights law. From wide experience we know that the position of persons deprived of their liberty will inevitably be more vulnerable whenever and wherever unrest grows and peace, security and stability in a country are under threat. In such circumstances, fundamental principles of humanitarian law cannot be ignored. Those principles of humanitarian law that relate to deprivation of liberty are therefore briefly examined below.

Disturbances and Tensions

The subject of disturbances and tensions is dealt with in greater depth in the chapter *Maintenance of Public Order*. For the purposes of the present chapter it will be examined in relation to the deprivation of liberty of person.

None of the instruments of international law offers an adequate definition of what is to be understood under *"internal disturbances and tensions"*. Article 1.2 of Protocol II additional to the Geneva Conventions of 1949 does mention "situations of internal disturbances and tensions" as not being armed conflicts; however, it does not provide a definition. It does make it clear though, that, since internal disturbances and tensions are not armed conflicts, the Protocol does not apply to them.

The ICRC has attempted to define disturbances and tensions. In an ICRC document entitled *ICRC protection and assistance activities not covered by international humanitarian law* (ICRC, Geneva, 1986), the following description of *internal disturbances* is given:

> *"this involves situations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more*

or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order. The high number of victims has made necessary the application of a minimum of humanitarian rules".

As for *internal tensions*, the term usually refers to:

a) situations of serious tension (political, religious, racial, social, economic, etc.)

OR

b) sequels of an armed conflict or internal disturbances

In addition to those definitions the ICRC document presents a list of characteristics of internal disturbances and tensions:

Characteristics of Internal Disturbances and Tensions

1. mass arrests;
2. a large number of persons detained for security reasons;
3. administrative detention, especially for long periods;
4. probable ill-treatment, torture or material or psychological conditions of detention likely to be seriously prejudicial to the physical, mental or moral integrity of detainees;
5. maintaining detainees incommunicado for long periods;
6. repressive measures taken against family members or persons having a close relationship with those deprived of their liberty mentioned above;
7. the suspension of fundamental judicial guarantees, either by the proclamation of a state of emergency or by a *de facto* situation;
8. large-scale measures restricting personal freedom such as relegation, exile, assigned residence, displacements;
9. allegations of forced disappearances;
10. increase in the number of acts of violence (such as sequestration and hostage-taking) which endanger defenceless persons or spread terror among the civilian population.

Many of the characteristics above relate to the deprivation of liberty of person and confirm the remarks made in the introduction to this chapter.

As to the question which law applies to situations of internal disturbances and tensions, it is already clear that humanitarian law does not apply. So

for cases of deprivation of liberty, be they lawful or unlawful, we will have to turn to the provisions of national law, to principles of international customary law (which is binding for all States) *AND* to the legally binding treaty provisions of international human rights law to which the State concerned is party, and the operational guidelines derived from them. These have been extensively presented under the heading *Detention and International Human Rights Law*.

Internal Disturbances and Tensions: States of Emergency.

Under item 7 of the characteristics listed above, mention is made of the *proclamation of a state of emergency*. The ICCPR, in Article 4, creates the possibility for States Parties to take *"measures derogating from their obligations under the present Covenant", but only "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed"*. Even though an emergency situation may be readily apparent, the derogation of rights under the Covenant constitutes a violation of international law unless the emergency has been officially announced by the domestic body empowered to do so. Official proclamation is a *conditio sine qua non* and serves the purpose of domestic supervision, especially by the legislative and judicial branches. This proclamation must take the form of public notification of the population affected. Therein lies its essential significance: the population must know the exact material, territorial and temporal scope of application of emergency measures and their impact on the exercise of human rights. In particular, the proclamation requirement is intended to prevent *de facto* derogations, as well as subsequent attempts to justify human rights violations that have already been committed.

Derogation measures may be taken under a state of emergency only *"to the extent strictly required by the exigencies of the situation"*. This is a clear reference to the principle of *proportionality*. The degree of interference and the scope of the measure (in terms both of territory and of duration) must be commensurate with what is actually necessary to combat an emergency that threatens the life of the nation. In addition to this requirement, the measures taken are not allowed to be *"inconsistent with [the State's] other obligations under international law and [must] not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin"*.

In Article 4.2 of the ICCPR cross-reference is made to a number of *inalienable rights,* i.e. rights which cannot be derogated from. They are:

- *the right to life* (Article 6);

- *the prohibition of torture* (Article 7);
- *the prohibition of slavery and servitude* (Article 8);
- *the prohibition of detention for debt* (Article 11);
- *the prohibition of retroactivity of criminal law* (Article 15);
- *the right to recognition as a person before the law* (Article 16);
- *the right to freedom of thought, conscience and religion* (Article 18).

None of these rights can be suspended or abrogated under a state of emergency. Each right exists for all persons in all circumstances. A State cannot, therefore, use the imposition of a state of emergency as an excuse for failing to protect and uphold each of these "inalienable rights".

Article 4.3 of the ICCPR stipulates that any State Party "*shall immediately inform other States Parties, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and the reasons by which it was actuated",* i.e. provide prompt notification of the State of emergency. At the end of a state of emergency a similar notification is required. The requirement of notification, unlike the requirement of proclamation, is not a necessary condition that renders the taking of emergency measures lawful. Instead it is meant to facilitate international supervision by other States Parties and by the Committee on Civil and Political Rights.

More information on states of emergency, including information on the existing regional arrangements, can be found in the chapter *Maintenance of Public Order*.

The existence of a state of emergency may allow of derogations from certain provisions relating to arrest and detention. However, as explained above, the taking of such measures must be justified in relation to the existing emergency situation, both in territory and in time. It is difficult to imagine that the exigencies of any existing emergency situation would require the derogation from obligations of the ICCPR in terms of the *treatment* of prisoners and detainees.

During a state of emergency there is no legal basis for the application of humanitarian law. Nevertheless there is a growing consensus as to the moral applicability of certain minimum humanitarian standards in relation to states of emergency. For these *minimum humanitarian standards* reference can be made to *Article 3 common to the four Geneva Conventions of 1949*, and to the so-called *Turku Declaration*, a *"New Draft Declaration of Minimum Humanitarian Standards"* relating to internal disturbances and tensions. This document was drawn up by a group of international

human rights and humanitarian law experts but has not (yet) received official acknowledgement as a legal instrument. The Turku Declaration is presented in more detail in the chapter *Maintenance of Public Order*.

With regard to detention during states of emergency, the following humanitarian principles are of importance and observation of them is *recommended*:

Article 3 common to the four Geneva Conventions of 1949:

- *humane and non-discriminatory treatment of persons in detention;*
- *prohibition of violence to life and person, murder of all kinds, mutilation, cruel treatment and torture;*
- *outrages upon personal dignity, in particular humiliating and degrading treatment;*
- *the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*

In addition to those principles the *Turku Declaration* identifies the following principles for the protection of persons deprived of their liberty during states of emergency and internal disturbances and tensions:

- *those deprived of their liberty to be held in recognized places of detention, accurate information concerning their detention and whereabouts to be made promptly available to family members, legal counsel or other persons having a legitimate interest in it* (Article 4.1);
- *right to communicate with legal counsel and the outside world* (Article 4.2);
- *right to effective remedy to determine whereabouts or state of health of persons deprived of their liberty. Arrested or detained persons have a right to legal proceedings to decide on the lawfulness of the arrest or detention* (Article 4.3);
- *minimum rules to ensure the physical and mental well-being of persons deprived of their liberty* (Article 4.4);
- *right to fair trial with guarantees for defence; presumption of innocence; no compulsion to testify or to confess guilt;* ne bis in idem*; non-retroactivity of criminal law* (Article 9).

It is important to stress once again that observance of those provisions of humanitarian law can, at best, only be recommended, as there is no legal basis for enforcement of Article 3 common to the four Geneva Conventions

of 1949 and the Turku Declaration does not in any way have the status of a legal instrument.

Non-International Armed Conflict

Under the heading "non-international armed conflict" it is necessary to consider two cases:

- *any situation where, within a State's territory, clear and unmistakable hostilities break out between the armed forces and dissident armed forces or other organized armed groups;*

In situations where this type of non-international armed conflict takes place in the territory of one of the States party to the four Geneva Conventions of 1949, the parties to that conflict are bound to apply the provisions of Article 3 common to those Conventions.

The provisions of that article, relevant to detention, are set out above under the heading *Internal Disturbances and Tensions.*

The second case that needs consideration under the heading of non-international armed conflict is:

- *any situation where dissident armed forces or other organized armed groups are under the leadership of a responsible command and exercise such control over a part of the territory as to enable them to conduct sustained and concerted military operations and to implement the Protocol [Protocol II].*

In the latter case, and in the absence of the acknowledgement of a state of war involving the application of the entire law of war, the (above-mentioned) provisions of common Article 3 still apply. In addition, the rules of the *Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II of 1977) must be observed.

With regard to detention Additional Protocol II of 1977 sets out the following provisions:

- *Principles providing fundamental guarantees for humane treatment are reiterated* (Article 4); similar to those in common Article 3.
- *Minimum provisions are laid down for the treatment of persons interned or detained for reasons related to the armed conflict* (Article 5.1 (a) to (e)*, including:*
  - *care for the wounded and sick;*

  - *provision of food, water, health and hygiene facilities, and protection;*
  - *entitlement to receive individual or collective relief;*
  - *entitlement to practise religion and receive spiritual assistance;*
  - *working conditions and safeguards similar to those afforded to the civilian population.*

- *Those responsible for the internment or detention must also, within the limits of their capabilities, respect the following provisions relating to such persons* (Article 5.2 (a) to (e):

  a) separate accomodation for men and women (except in the case of families) and the supervision of women by women.

  b) right to receive and send letters and cards;

  c) places of internment and detention must not be located close to the combat zone;

  d) entitlement to benefit of medical examinations;

  e) their physical or mental health and integrity must not be endangered by any unjustified act or omission.

- *The protection of Article 4 and of Article 5.1 (a), (c) and (d) and 5.2 (b) is extended to persons deprived of their liberty for reasons related to the armed conflict, who are not covered by paragraph 1 (Article 5.3).*
- *Article 6 sheds light on the issue of prosecution and punishment of criminal offences related to the armed conflict. In particular it sets out the minimum guarantees for independence and impartiality of court proceedings:*
  - *prompt information about criminal charges;*
  - *principle of individual penal responsibility;*
  - *non-retroactivity of criminal law;*
  - *the presumption of innocence;*
  - *the right to be present at one's trial;*
  - *no compulsion to testify or to confess guilt.*

In situations of non-international armed conflict the above-mentioned principles of humanitarian law enter into force in addition to principles of international human rights law — insofar as the latter have not been lawfully derogated from — but do not replace them.

International Armed Conflict

The Geneva Conventions of 1949 and Additional Protocol I of 1977 are applicable in cases of declared war or of any other armed conflict arising between two or more of the Parties to the Conventions and Protocol I from the beginning of such a situation, even if the state of war is not recognized by one of them. These agreements also cover armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination (Article 2 common to the four Geneva Conventions of 1949).

In cases not covered by the Conventions, the Protocol or other international agreements, or in the event of denunciation of these agreements, *civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience* (P I, Article 1; Convention I, Article 63; Convention II, Article 62; Convention III, Article 142; Convention IV, Article 158).

With regard to detention or, more widely, the deprivation of liberty in situations of international armed conflict, the first important distinction to be made is that between *combatants* and *non-combatants.*

According to Article 43.2 of Additional Protocol I of 1977: *"Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities."*

A definition of "armed forces" is given in Article 43.1 of the Protocol.

By default, those not qualifying as combatants are non-combatants who do not have a right to participate in hostilities, but who conversely do have a *right of protection against dangers arising from military operations.* (Protocol I, Article 51)

Any combatant ... who falls into the power of an adverse party shall be a prisoner of war (Protocol I, Article 44.1). Article 4 of the Third Geneva Convention of 1949 gives a full definition of who is entitled to prisoner-of-war status. The Convention lays down rules for the treatment of prisoners of war during captivity. The basic premise for treatment of prisoners of war is that they must be treated humanely at all times and that they must be protected, particularly against acts of violence or intimidation and against insults and public curiosity (GC III, Article 13).

Article 11 of Protocol I states that *"the physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty ... shall not be endangered by any unjustified act or omission."*

In this case, the deprivation of liberty is directly related to the conflict in question.

It should be noted that *internment* is a measure that can be taken for imperative reasons of security (of the person(s) against whom the measure is directed) and is therefore not a punishment. The required conditions of internment are virtually the same as those applying to prisoners of war and, by and large, the rules of internment applicable to civilians follow almost word for word those concerning prisoners of war (see Articles 79 to 135 of the Fourth Geneva Convention of 1949).

With regard to the deprivation of liberty of persons affected by the armed conflict (be it arrest, detention or internment) Article 75 of Protocol I sets out fundamental guarantees for the treatment of any such person.

Article 75 – Fundamental guarantees (complete text of the article):

> *1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.*
>
> *2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:*
>
> *(a) violence to the life, health, or physical or mental well-being of persons, in particular:*
>
> *(i) murder;*
>
> *(ii) torture of all kinds, whether physical or mental;*
>
> *(iii) corporal punishment; and*
>
> *(iv) mutilation;*
>
> *(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;*

(c) the taking of hostages;

(d) collective punishments; and

(e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt;

(g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and

(j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) any such persons who do not benefit from more favorable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

Role and Responsibilities of the ICRC

Visiting prisoners of war, civilian internees and other persons deprived of their liberty as a result of — or in connection with — a crisis situation constitutes an important aspect of what is known as the *ICRC's protection work*. The purpose of ICRC visits is purely humanitarian. The ICRC seeks

to preserve the physical and moral integrity of persons deprived of their liberty, to prevent any abuse to which they may be subjected and to ensure that their physical conditions of detention meet at least minimum requirements. It must be emphasized, however, that it is the responsibility of the detaining authorities to ensure the protection of the people they take into custody and that they can be held accountable if they fail to do so.

The *Statutes of the International Red Cross and Red Crescent Movement* (Article 5.2) set out the legal mandate of the International Committee; these provisions are reiterated in the ICRC's own Statutes. With regard to this chapter on detention, Section (d) of Article 5.2 is of particular interest. It states as part of the ICRC's role:

> *"to endeavour at all times — as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife — to ensure the protection of and assistance to military and civilians victims of such events and of their direct results..."*

Paragraph 3 of Article 5 describes the *right of initiative* of the ICRC:

> *"The International Committee may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution."*

This *right of initiative* can be exercised in situations of *internal disturbances and tensions,* whether or not a state of emergency has been proclaimed.

In situations of *internal armed conflict*, the ICRC retains its right of initiative, but paragraph 2 of Article 3 common to the four Geneva Conventions of 1949 states in addition that:

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

If, in a situation of internal armed conflict, the case of *control exercised over part of the territory by dissident forces* applies, then Article 18 of 1977 Protocol II gives ICRC the right to *offer its services and if necessary to provide impartial humanitarian relief, subject to the consent of the High Contracting Party concerned.*

In the event of *international armed conflict* States party to the Geneva Conventions of 1949 and their Additional Protocols of 1977 *are bound to accept* those humanitarian activities of the ICRC that are provided for in Article 126 of the Third Geneva Convention of 1949 and Article 143 of the Fourth Geneva Convention of 1949. In addition to this, the ICRC's right of

initiative is acknowledged in Article 9 of the First, Second and Third Convention of 1949 and in Article 10 of the Fourth Convention.

Article 81 of Protocol I additional to the Geneva Conventions stipulates that *States Parties to the conflict must grant the ICRC all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and the Protocol in order to ensure protection and assistance to the victims of conflicts.*

As to the categories of persons deprived of their liberty in situations of international armed conflict, the ICRC concerns itself with:

> *prisoners of war within the meaning of Article 4 of the Third Geneva Convention and Article 44 of Additional Protocol I;*
>
> and,
>
> *civilian internees within the meaning of Article 4 of the Fourth Geneva Convention.*

With regard to the non-international armed conflicts, which are (depending on the situation) covered by Article 3 common to the four Geneva Conventions of 1949, or by common Article 3 and Additional Protocol II, the distinctions are less clear.

The persons protected by common Article 3 and by the relevant provisions of Articles 4, 5 and 6 of Additional Protocol II may be:

> *persons taking part in hostilities who belong to government or rebel forces;*
>
> *civilians arrested by the government;*
>
> *civilians captured by rebel forces.*

It is important to stress, however, that the reason for the deprivation of liberty, or the question whether such deprivation of liberty is lawful, is irrelevant for the purposes of entitlement to protection and humane treatment of persons affected.

In situations of internal disturbances and tensions the distinctions between the various categories of persons deprived of their liberty and thus entitled to ICRC protection becomes even less clear. Suffice to say here that belonging to one category or another does not constitute an obstacle to the actual protection work of the ICRC, as the ICRC never questions the particular reason for a person's arrest.

The ICRC's activities on behalf of persons deprived of their liberty have four main objectives:

- *to prevent or put a stop to disappearances and extra-judicial killings;*
- *to prevent or put a stop to torture and ill-treatment;*
- *to improve conditions of detention where necessary; and*
- *to restore contact between persons deprived of their liberty and their families.*

Chapter Highlights

- Everyone has the right to life, liberty and security of person.
- Torture and other cruel, inhuman or degrading treatment or punishment are absolutely prohibited under human rights law as well as under humanitarian law.
- All persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person.
- Accused persons are to be segregated from convicted persons.
- Accused juveniles must be separated from adults and brought as speedily as possible for adjudication.
- Pre-trial detention of juveniles should be avoided. Where unavoidable, its duration should be kept to an absolute minimum by giving the highest priority to the most expeditious processing of such cases.
- Measures applied under the law and designed solely to protect the rights and special status of women (especially pregnant women and nursing mothers) must not be deemed discriminatory.
- Men and women are as far as possible to be detained in separate institutions; in institutions that receive both men and women, the whole of the premises allocated to women must be entirely separate.
- Accused persons subject to interrogation are entitled to be presumed innocent, and have the right not to be compelled to testify, to confess guilt or to incriminate others.
- There are strict rules relating to discipline and punishment of prisoners and detainees.
- The issue of deprivation of liberty of person is a matter for international humanitarian law and international human rights law.
- Internal disturbances and tensions are governed by domestic law and by principles of international human rights law, insofar as these principles constitute legally binding obligations on a State.
- Under a proclaimed state of emergency States may derogate from provisions of the ICCPR, except from the inalienable rights.
- In situations of non-international armed conflict Article 3 common to the four Geneva Conventions provides guidance on the humane treatment of detainees. In specific cases Additional Protocol II also applies.
- In situations of international armed conflict States Parties are bound by the four Geneva Conventions and Additional Protocol I
- Prisoners of war are protected by the Third Convention. Civilians deprived of their liberty are protected by the Fourth Convention.
- The ICRC has a mandate to provide protection and assistance to victims, whether military or civilian, of armed conflict.
- The ICRC has a right of initiative that entitles it to offer its services, on the basis either of its own Statutes and those of the International Red Cross and Red Crescent Movement, or of specific provisions of the Geneva Conventions.
- In cases of international armed conflict, States Parties to the Geneva Conventions are bound to accept the ICRC's humanitarian activities.

Study Questions

Knowledge

1. What is the difference between detention and imprisonment?
2 What constitutes arbitrary detention?
3 What are the rights of persons under interrogation?
4. When is the use of force against detainees permissible?
5. Define the different categories of prisoners and detainees to be kept separated.
6. What is the position of persons deprived of their liberty in internal armed conflicts?
7. When does the ICRC have the right of initiative?
8. What is the role of the ICRC in situations of armed conflict?

Understanding

1. What could motivate a State not to accept an offer by the ICRC to carry out its mandate?
2. Why should the detention of juveniles as a rule be avoided?
3. What would you define as "mental torture"?
4. When would you consider a state of emergency to exist de facto?
5. Why should law enforcement officials not be charged with the supervision of prisoners?

Application

Prinicple 1 of the Body of Principles says that persons under any form of detention or imprisonment must be treated in a *humane manner* and with respect for the *inherent dignity of the human person*.

1. Define what you understand to be "a humane manner".
2. Define what you understand to be "the inherent dignity of the human person.
3. Use your definitions to prepare a lecture for an audience of law enforcement recruits. Your lecture has to focus on the legal and moral obligations of law enforcement officials *vis-à-vis* persons deprived of their liberty.

Chapter 10

THE USE OF FORCE AND FIREARMS

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Key Questions for Law Enforcement Officials

- *What are the ethical and legal implications of the use of force and firearms?*
- *When is the use of force legally permissible?*
- *Why is the use of the firearm an extreme measure?*
- *What use is protective equipment to law enforcement officials?*
- *Why should the principles of necessity and proportionality be observed?*
- *What alternatives to the use of force do law enforcement officials have?*
- *What are the implications of the use of force for education and training?*
- *What are the reporting and review procedures to be observed?*
- *What are extra-legal, arbitrary and summary executions?*
- *What is the role of the police in their effective prevention and investigation?*

Ethical and Legal Issues associated with the Use of Force and Firearms

In order to enable law enforcement agencies around the world to carry out their duties of enforcing the law and rendering assistance when needed, they have been given a wide range of legal means. Those means, i.e. powers and authorities, relate *inter alia* to arrest, detention, investigation of crime and the use of force and firearms. In particular, the legal authority to use force when necessary and unavoidable for lawful law enforcement purposes, including the lethal use of the firearm, creates situations in which law enforcement officials and members of the community they serve find themselves on opposing sides. Initially such confrontations concern individual law enforcement officials and individual citizens. In effect. however, they are capable of influencing the quality of the existing relationship between a law enforcement agency and the community as a whole.

It is obvious that this relationship will suffer even more from unlawful, i.e. unnecessary or disproportionate, use of force.

Law enforcement officials have to be held to very high standards of discipline and performance that acknowledge both the importance and the sensitivity of the tasks they are called to perform. Adequate monitoring and review procedures are essential and intended to guarantee that there is an appropriate balance between the discretionary powers exercised by individual law enforcement officials and the necessary legal and political accountability of the law enforcement organization as a whole.

The Right to Life, Liberty and Security of All Persons

The right of everyone to life, liberty and security of person is proclaimed in Article 3 of the Universal Declaration of Human Rights (UDHR). These rights are reiterated in Articles 6.1 and 9.1 of the International Covenant on Civil and Political Rights (ICCPR).

Article 6.1. of the ICCPR states that: *"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his [or her] life."*

Article 9.1. of the ICCPR states that: *"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."*

Other international treaties offering legal guarantees for the protection of the right to life are:

The African Charter on Human and Peoples' Rights (ACHPR, Article 4);

The American Convention on Human Rights (ACHR, Article 4); and

The European Convention on Human Rights (ECHR, Article 2).

The right to life is the supreme human right, since without effective guarantees for it, all other human rights would be devoid of meaning. For that particular reason, as for instance in Article 2 of the ECHR, it was placed in the Covenant at the forefront of the subjective rights designated in Part III. The special significance of the right to life is underscored by the adjective *"inherent"*, which is used only in Article 6.1, and by the use of the (declaratory) present tense "has" instead of "shall have".

The *Human Rights Committee*[5] made the following general comments with regard to the right to life:

> *"...It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation... It is a right which should not be interpreted narrowly...*

[5] The Human Rights Committee, established under Article 28 of the ICCPR, is a treaty-based organ that, among other duties, is charged with overseeing the effective incorporation of the rules contained in the ICCPR into the domestic legislation of States Parties. To that effect the "States Parties to the Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights..." (ICCPR, Article 40.1).
In paragraph 4 of Article 40 it is said that "the Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties..."

> *...The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life...*
>
> *...The protection against arbitrary deprivation of life which is explicitly required by the third sentence of Article 6.1 is of paramount importance. The Committee considers that States Parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities...*
>
> *...The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures to protect the right to life..."*

Therefore, and in full compliance with the above, law enforcement agencies around the world give the highest priority to the protection of the right to life of all persons by trying to prevent the deliberate taking of such life and by pursuing with persistence and determination those responsible for the (violent) death of a fellow human being. The seriousness of such an offence is further reflected in the severity of the penalty that can be imposed on the accused by a court of law if found guilty of the act of murder or manslaughter.

But is not the high priority given to the protection of the right to life as set out above at variance with the legal authority of that same law enforcement agency to use force in situations where such is considered necessary and unavoidable for lawful law enforcement purposes? Especially when that authority, under special circumstances, includes the intentional lethal use of the firearm? Is not such power and authority, accorded to law enforcement officials by the State, in direct contradiction to the positive steps that same State is expected to take in order to protect life?

If the answer to those questions is to be no, then the cases in which law enforcement officials resort to the use of force, and especially to the intentional(ly) (lethal) use of the firearm, must be absolutely confined to cases of exceptional circumstances.

Use of Force by Law Enforcement Officials; Authority and Obligation

Law enforcement is not a profession that consists of applying standard solutions for standard problems occurring at regular intervals in time. It is rather the art of understanding both the letter and the spirit of the law, as

well as the unique circumstances of a particular problem to be addressed. Law enforcement officials are expected to be able to distinguish between innumerable shades of grey, rather than to make a simple distinction between black and white, right or wrong.

The key words in law enforcement must be "negotiation", "”mediation“, "persuasion" and "conflict resolution". Communication must be given preference in seeking to achieve legitimate law enforcement objectives. However, those objectives cannot always be achieved by means of communication. Basically two choices then remain: either the situation is left as it stands, and the law enforcement objective will not be achieved, or the law enforcement official decides to use force to achieve the objective.

Countries have vested the legal authority in their law enforcement agencies to use force if necessary for legitimate law enforcement purposes. Not only do countries authorize their law enforcement officials to use force, certain countries go so far as obliging their law enforcement officials to do so. This means that according to domestic legislation a law enforcement official has the duty to use force if in a given situation the objective cannot be achieved otherwise. Only if the use of force would have to be considered inappropriate under the circumstances, i.e. given the importance of the objective to be achieved and the amount of force actually required to achieve it, should such force not be used.

When granting their law enforcement officials the legal authority to use force and firearms, States do not deny their responsibility to protect the right to life, liberty and security of all persons. That legal authority is laid down in domestic laws that clearly define the circumstances under which force may be used, as well as the means that can be used in a particular situation. A further acknowledgment of the recognition by States of their responsibility can be found in the existing rules and practices concerning recruitment, selection, education and training of law enforcement officials.

The quality of law enforcement largely depends on the quality of the human resources available. How good are the communicative skills of the individual law enforcement official? What are the basic attitudes and behaviour of law enforcement officials in potentially confrontational or violent situations? How well are law enforcement officials trained in the controlled use of force and firearms? What alternatives to the use of force does the official recognize in a particular situation? It is mainly the answers to those questions that will decide on the outcome of a confrontation between a law enforcement official

and a citizen. In such cases a good legal framework can at best provide guidance; it never offers a ready-made solution.

Good tools might be considered half the job done. However, the skill of the person using the tools will determine the beauty and quality of the final product.

The Code of Conduct for Law Enforcement Officials

Although already presented in the chapter on *Ethical and Legal Law Enforcement Conduct*, it is appropriate here to repeat some of the provisions of the *Code of Conduct for Law Enforcement Officials (CCLEO),* especially those relating to the use of force and firearms.

This Code seeks to create standards for law enforcement practices that are consistent with the provisions on basic human rights and freedoms. By establishing a set of guidelines of high ethical and legal quality, it seeks to influence the practical attitudes and behaviour of law enforcement officials.

The Code recognizes that a mere knowledge of human rights in itself is not enough to understand what maintaining and upholding human rights really means. The public's experience and perception of the quality of basic rights and freedoms are shaped by contacts with State officials, such as — for instance — law enforcement officials. For that reason the human rights education of law enforcement officials cannot be viewed separately from its practical application in the everyday reality of law enforcement.

Article 3 of the CCLEO states that: *"Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty."*

This provision emphasizes that the use of force by law enforcement officials should be exceptional and never go beyond the level reasonably necessary to achieve legitimate law enforcement objectives. In this connection the use of the firearm is to be seen as an extreme measure.

Article 5 of the CCLEO imposes an *absolute prohibition on torture or other cruel, inhuman or degrading treatment or punishment*. It stipulates that no law enforcement official may invoke superior orders or exceptional circumstances as a justification for such acts.

Lastly, Article 8 of the CCLEO states that: *"Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them."*

The CCLEO also urges law enforcement officials to act against violations of the Code:

> *"Law enforcement officials who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power."*

Those articles aim at sensitizing law enforcement agencies and law enforcement officials to the tremendous responsibilities the State has vested in them. As an instrument of State authority they have been given far-reaching powers and the nature of their duties places them in potentially corrupting situations. The first step in effectively combating those hidden dangers is to bring them out into the open, to make them topics of discussion and active consideration and issues to be addressed in the internal and external accountability of law enforcement agencies. Those issues set high expectations as to the ethical standards to be maintained within law enforcement agencies. The positive input of every official is essential in this regard. The behaviour of individual law enforcement officials has a strong bearing on the image and perception of the agency as a whole. One corrupt law enforcement official can cause an entire law enforcement agency to be viewed as corrupt, because the act of the individual will tend to be seen as an act of the organization.

Basic Principles on the Use of Force and Firearms

The Basic Principles on the Use of Force and Firearms (BPUFF) were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, from 27 August to 7 September 1990.

Although not a treaty, the instrument aims to offer authoritative guidance to *"Member States in their task of ensuring and promoting the proper role of law enforcement officials"*; the principles set out in it *"should be taken into account and respected by Governments within the framework of their national legislation and practice, and be brought to the attention of law enforcement officials as well as other persons, such as judges, prosecutors, lawyers, members of the executive branch and the legislature, and the public."*

The preamble to this particular instrument also acknowledges the importance and complexity of the tasks of law enforcement officials, recognizing their vital role in the protection of life, liberty and security of all persons. Particular emphasis is placed on the maintenance of public safety

and social peace, as well as the importance of the qualifications, training and conduct of law enforcement officials. The preamble ends by stressing the need for national governments to take the principles enshrined in this instrument into account by adapting their national legislation and practice accordingly.

General and Special Provisions

Under these headings of the BPUFF governments are urged to adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. They are furthermore encouraged to keep the ethical issues associated with the use of force and firearms constantly under review (BP 1).

> *Managerial Practice 1.*
>
> Law enforcement agencies around the world make use of trained dogs for specific law enforcement tasks and duties, including the use of the dog as a weapon. Dogs are being trained in the apprehension of armed and dangerous suspects. They are successfully used to search for suspects hiding in urban or other areas. Although not mentioned in the BPUFF, the police dog is an appreciated weapon in the range of means allowing law enforcement agencies to take a differentiated approach to the use of force and firearms.

The said rules and regulations should include provisions:

- to develop a range of means as broad as possible and to equip officials with various types of weapons and ammunition to allow for a differentiated use of force and firearms,
- to develop non-lethal incapacitating weapons to restrain the application of means capable of causing death or injury,
- to equip officials with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind (BP 2);
- to ensure that the development and deployment of non-lethal incapacitating weapons is carefully evaluated in order to minimize the risk of endangering uninvolved persons, and that the use of any such weapons is carefully controlled (BP 3);

- to specify the circumstances under which law enforcement officials are authorized to carry firearms, and to prescribe the types of firearms and ammunition permitted,
- to ensure that firearms are used only when appropriate and in a manner likely to decrease the risk of unnecessary harm,
- prohibiting the use of firearms and ammunition that cause unwarranted injury or present an unwarranted risk,
- regulating the control, storage and issue of firearms and ammunition, and including procedures to ensure that officials are accountable for the firearms and ammunition issued to them,
- requiring warnings to be given, if appropriate, when firearms are to be discharged,
- establishing a system of reporting whenever law enforcement officials use firearms in the performance of their duty (BP 11).

Essential Principles

The essential principles for the use of force and firearms are those of

LEGALITY, NECESSITY and PROPORTIONALITY.

Law enforcement officials may resort to the use of force only when all other means to achieve a *legitimate objective* have failed *and* the use of force can be justified when measured against the legitimate objective to be achieved. Law enforcement officials are urged to exercise restraint when using force and firearms and to act in proportion to the seriousness of the offence and the legitimate objective to be achieved (BP 4 and 5). They are allowed to use only as much force as is necessary to achieve a legitimate objective.

This assessment, which must be made by the individual law enforcement official whenever the question of use of force arises, can lead to the conclusion that the negative implications of the use of force in a particular situation are greater than the significance of the legitimate objective to be achieved. In such situations police officials are recommended to abstain from further action.

Qualifications, Training and Counselling

Governments and law enforcement agencies are urged to ensure that all law enforcement officials:

- are selected by proper screening procedures,
- have appropriate moral, psychological and physical qualities,

- receive continuous and thorough professional training, and are subject to periodic review of their fitness to perform their functions (BP 18);
- are trained and tested in accordance with appropriate proficiency standards in the use of force, and
- if required to carry a firearm, are authorized to do so only after completing special training (BP 19).

> *Managerial Practice 2.*
>
> In a number of countries law enforcement agencies have experimented successfully with so-called "self-help groups". These groups are composed of law enforcement officials who have been in a situation in which they used their firearm against a person and have themselves experienced the emotional aftermath of such an event. They use that experience now to give counselling to colleagues traumatized by an incident involving the use of force and firearms. The self-help groups work in close conjunction with professional counsellors such as psychologists and psychiatrists.

In the training of law enforcement officials, governments and law enforcement agencies shall give special attention to:

- issues of police ethics and human rights;
- alternatives to the use of force and firearms, including the peaceful settlement of conflicts, understanding of crowd behaviour, and methods of persuasion, negotiation and mediation with a view to limiting the use of force and firearms;
- the training programmes and operational procedures are to be reviewed in the light of particular incidents (BP 20).

Governments and law enforcement agencies shall make stress counselling available to law enforcement officials who are involved in situations where force and firearms are used (BP 21).

Use of Firearms

The use of firearms for the achievement of legitimate law enforcement objectives is to be considered an extreme measure. For that reason the principles of necessity and proportionality are further elaborated in BP 9, 10 and 11:

Law enforcement officials shall not use firearms against persons, except:

- in self-defence or defence of others against the *imminent threat of death or serious injury;*
- to prevent a particularly serious crime *involving grave threat to life;* or
- to arrest, or to prevent the escape of, a person *presenting such a danger* and resisting their authority;

and only when less extreme means are insufficient to achieve these objectives.

Intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life (BP 9).

As stressed above, the use of the firearm is an extreme measure. This is further illustrated by the rules of behaviour that law enforcement officials need to observe prior to their practical use. Basic Principle 10 of the BPUFF states the following rules to be observed at all times:

In the above-mentioned circumstances, law enforcement officials shall:

identify themselves as such

AND

give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed

UNLESS

to do so would unduly place the law enforcement officials at risk

OR

would create a risk of death or serious harm to other persons

OR

would be clearly inappropriate or pointless in the circumstances of the incident.

It is justified to conclude that use of the firearm must be seen as a last resort. The risks involved in its use in terms of damage and (serious) injury or death, as well as the lack of any real option afterwards, mean that it is the final possibility of containing a given situation, for what are law enforcement officials to do if use of the firearm fails to ensure that the legitimate law enforcement objective is actually achieved?

Law enforcement officials should not focus on the next available option when it comes to the use of force and firearms, but rather on means and strategies that might serve to defuse a given situation. The preference again lies with communication rather than with confrontation.

The consequences of the (lethal) use of the firearm can of course be reduced to legal terms. However, it is advisable to consider the personal consequences for the official(s) involved. Although there are general rules as to how human beings react to stressful events, the specific reaction of each person depends first of all on that person and is then further dictated by the particular circumstances of the event. The fact that counselling is made available after the event does not diminish the deeply emotional experience the official might go through as a result of the use of force and/or firearms, but should on the contrary be seen as an acknowledgement of the seriousness of such events.

Misuse of Force and Firearms

"Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence according to the law" (BP 7).

"Exceptional circumstances such as internal political instability or public emergency may not be invoked to justify any departure from these basic principles" (BP 8).

These two principles should be seen in conjunction with Article 5 of the CCLEO mentioned above and the provisions cited under the heading *Reporting and Review Procedures* below.

Arbitrary or excessive use of force and firearms by law enforcement officials constitutes a violation of national criminal law. It also constitutes a violation of human rights by those very officials whose duty it is to maintain and uphold those rights. Abuse of force and firearms can be seen as a violation of the human dignity and integrity both of the officials involved and of the victims concerned. But no matter how they are seen, they will in effect damage the fragile relationship between a law enforcement agency and the community it serves as a whole, and are capable of causing wounds that will take a long time to heal.

It is for all the above reasons that such abuse cannot and must not be tolerated. The focus should be on prevention of such acts, through proper and regular education and training and adequate monitoring and review procedures. Whenever there is a situation of suspected or *alleged abuse,*

there has to be a *prompt, impartial and thorough investigation*. Responsible officials must be punished. Throughout the investigation the special needs of the victims should receive adequate attention. Restoring confidence in a damaged relationship will require a genuine effort from the law enforcement agency involved if it is to succeed in doing so.

Policing Unlawful Assemblies

The UDHR, in Article 20, lays down the right of everyone to freedom of peaceful assembly and association, a right that is reiterated in Article 21 of the ICCPR. Governments and law enforcement agencies consequently must recognize that force and firearms against unlawful assemblies may be used only in accordance with Basic Principles 13 and 14.

> In dispersing *UNLAWFUL* but *NON-VIOLENT* assemblies, *law enforcement officials must avoid the use of force or, where that is not practicable, must restrict the use of force to the minimum extent necessary* (BP 13).
>
> In dispersing *VIOLENT* assemblies *law enforcement officials may use firearms only when less dangerous means are not practicable,*
>
> AND ONLY *to the minimum extent necessary*,
>
> AND ONLY *under the conditions stipulated in Basic Principle 9* (BP 14).

When studying BP 14 the initial conclusion might be drawn that it presents an additional circumstance allowing for the legal use of firearms. This, however, is not true, for in fact it reiterates that only the conditions mentioned in BP 9, i.e. an imminent threat of death or serious injury, warrant the use of firearms. The additional risks posed by a violent assembly — large crowds, confusion and disorganization make it questionable whether the use of firearms is at all practicable in such situations, in view of the potential consequences for persons who are present but not involved. *This principle (BP 14) does not allow indiscriminate firing into a violent crowd as an acceptable tactic for dispersing that crowd.*

Policing Persons in Custody or Detention

In their relations with detainees:

> Law enforcement officials must not use force except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened (BP 15).

Law enforcement officials must not use firearms except in self-defence or in the defence of others against the immediate threat of death or serious injury,

OR

when strictly necessary to prevent the escape of a person in custody or detention who presents the danger referred to in Basic Principle 9.

Reporting and Review Procedures

Governments and law enforcement agencies must establish *effective reporting and review procedures for all incidents where:*

- *death or injury is caused through use of force and firearms by law enforcement officials;*
- *law enforcement officials use firearms in the performance of their duty.*

For incidents reported in accordance with these procedures, the following stipulations are made:

- governments and law enforcement agencies must ensure that an effective review process is available, and that
- independent administrative or prosecutorial authorities are able to exercise jurisdiction in appropriate circumstances;
- in cases of death, serious injury or other grave consequences, a detailed report must be sent promptly to the competent authorities responsible for administrative review and judicial control (BP 22).
- Persons affected by the use of force and firearms, or their legal representatives, must have access to an independent process, including a judicial process;
- in the event of the death of such persons, this provision applies to their dependents (BP 23).

Responsibility of Law Enforcement Officials

Governments and law enforcement agencies must ensure that superior law enforcement officials are held responsible if:

they know or should have known that officials under their command are resorting, or have resorted, to the unlawful use of force and firearms,

AND

they did not take all measures in their power to prevent, suppress or report such use (BP 24).

Governments and law enforcement agencies must ensure that no criminal or disciplinary sanction is imposed on law enforcement officials who, in compliance with the CCLEO and these principles:

- refuse to carry out an [unlawful] order to use force and firearms, or
- who report such [unlawful] use by other officials (BP 25).

Obedience to *superior orders* shall be *no defence* if law enforcement officials:

knew that an order to use force and firearms resulting in the death or serious injury of a person was *manifestly unlawful*

AND

had a *reasonable opportunity to refuse* to follow it.

Responsibility in those situations also rests on the superiors who gave the unlawful orders (BP 26).

Managerial Practice 3.

The Federal Police Force of Australia has linked the regular performance review of its officials to the question of extension of their employment contracts. Contracts expire after five years and only if the official concerned has worked according to expectations will the contract be renewed. For instance, failure to keep up with performance standards for the use of force and firearms could lead to termination of the employment contract.

These principles make it clear that responsibility for the use of force and firearms is shared by the officials involved in a particular incident and by their superior officers. Without taking away the individual responsibility of law enforcement officials for their actions, they thereby make it the duty of superior officers to show all due care.

The relationship between those provisions and the provisions on the misuse of force and firearms (BP 7 and 8) must be understood by law enforcement officials.

Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions[6]

Definition

One of the observations made by the Human Rights Committee with regard to the right to life was that *"the deprivation of life by the authorities of the State is a matter of the utmost gravity"*.

The focus must be placed on *"strictly controlling and limiting the circumstances in which a person may be deprived of his [or her] life by State authorities"* in an effort to prevent the arbitrary taking of life.

> *Extrajudicial executions are unlawful and deliberate killings, carried out by order of a government or with its complicity or acquiescence.*
>
> *Amnesty International 14-Point Programme for the Prevention of Extrajudicial Executions.*

It is important to recognize that such killings are *deliberate* and *not accidental* and that they are *unlawful* and do not qualify as justifiable homicide.

Role of law enforcement agencies

In order to prevent extra-legal, arbitrary and summary executions, governments must ensure strict control, including a clear chain of command, over all officials responsible for apprehension, arrest, detention, custody or imprisonment, as well as those officials authorized by law to use force and firearms.

In the event of a suspected arbitrary deprivation of life there must be a prompt, thorough and impartial investigation. Governments are expected to maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation must be to determine the cause, manner and time of death, the person responsible, and any pattern of behaviour or practice which may have brought about that death.

Persons implicated in or responsible for an arbitrary deprivation of life have to be brought to justice.

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[6] Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, annexed to Economic and Social Council resolution 1989/65.

The families and dependents of victims of extra-legal, arbitrary or summary executions are entitled to fair and adequate compensation within a reasonable period of time.

When reports are heard of the arbitrary deprivation of life, it is often State authorities that are accused of being responsible for such acts. The devastating effects of such practices are not difficult to imagine. Whenever and wherever a State fails to guarantee its citizens the free and continued enjoyment of their right to life, liberty and security of person, it has indeed failed to maintain and uphold the very basis of all human rights.

Likewise, where a law enforcement organization resorts to violations of the law in order to enforce the law or to maintain public order, it loses its credibility and its authority. Nothing will be left but the uniform they are wearing to distinguish law enforcement officials from the criminals they are pursuing.

Chapter Highlights

- The ethical and legal issues relating to the use of force should be kept under constant review.
- Everyone has the right to life, liberty and security of person.
- The right to life must be protected by law.
- Law enforcement officials have the legal authority to use force. At times that authority is even formulated as an obligation to use force when lawful law enforcement objectives cannot be achieved otherwise.
- Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.
- Law enforcement officials must observe and respect the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment.
- When the use of force cannot be avoided, the principles of legality, necessity and proportionality must be observed.
- Before resorting to the use of force, non- violent means have to be attempted first.
- Law enforcement officials should have access to defensive equipment in order to decrease the need to use weapons of any kind.
- Governments must equip their law enforcement officials with a range of means that will allow a differentiated approach to the use of force and firearms.
- The use of the firearm is to be considered an extreme measure.
- The firearm can be used only in specific circumstances involving a imminent threat of death or serious injury. The intentional lethal use of the firearm is allowed only when strictly unavoidable in order to protect life.
- Law enforcement officials must be regularly trained in the use of force and firearms.
- Misuse of force and firearms must be punished as a violation of criminal laws.
- Reporting and review procedures must be observed.
- Responsibility for the use of force and firearms is borne both by the officials involved and by their superiors.
- Deprivation of life by authorities of the State is a matter of the utmost gravity.
- The focus should be on prevention of such incidents. Cases of arbitrary deprivation of life should be promptly, thoroughly and impartially investigated.

Study Questions

Knowledge

1. When is the use of force by law enforcement officials permissible?
2. When is the use of the firearm by law enforcement officials permitted?
3. Give an explanation of the meaning of "necessity" and "proportionality" in relation to the use of force and firearms.
4. Is there any justification for the practice of torture and other cruel, inhuman or degrading treatment or punishment?
5. What are the rules on the use of force and firearms when policing violent assemblies?
6. What are the rules on the use of force and firearms relating to persons in custody or detention?
7. In which situation(s) could a defence based on the notion of "superior orders" be successful?
8. What are the non-violent means at the disposal of law enforcement officials?
9. When are law enforcement officials required to report the use of force and firearms to competent authorities for administrative review and judicial control?
10. When should a law enforcement official refuse to carry out a superior order to use force?

Understanding

1. What are the ethical issues relating to the use of force and why should they be kept under constant review?
2. What are the implications of the use of force and firearms for law enforcement training and education?
3. How can the misuse of force by law enforcement officials be prevented?
4. What is the relevance of the Code of Conduct for Law Enforcement Officials for the use of force and firearms?
5. In what ways does the use of force potentially endanger the relationship of a law enforcement agency with the community?
6. How can the prompt, thorough and impartial investigation into alleged cases of misuse of force best be assured?
7. Could a law enforcement agency function without the authority to use force and firearms?

8. Develop a definition of "force" when talking about the use of force and firearms?

Application

1. Draft operational guidelines for the use of force and firearms for your law enforcement agency. They should cover at least the following topics:
   - use of force and firearms;
   - reporting and review procedures;
   - education and training;
   - misuse of force and firearms.
2. You are invited to give a lecture on the use of force and firearms to law enforcement recruits from a practical point of view. Prepare a plan for your lecture, indicating:
   - the main topics you are intend to cover;
   - the main points you want to put over;
   - other issues to be addressed.
3. Following an incident of misuse of force, your chief asks your advice on steps to be taken to restore the damaged confidence of the community in its law enforcement agency. Draft a letter to your chief that covers at least the following points:
   - what to do about the reported incident of misuse of force;
   - what action to take towards the victim;
   - what action to take within the police organization;
   - what action to take towards the community.

Selected References: Annex III

VULNERABLE GROUPS IN LAW ENFORCEMENT

Chapter 11

WOMEN

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Key Questions for Law Enforcement Officials

- *What is the current position of women in society?*
- *What is the meaning of the principles of "equality" and "non-discrimination" for women?*
- *What are the international instruments protecting the rights of women?*
- *What are the reasons for the occurrence of violence against women?*
- *What is the role and responsibility of law enforcement with regard to domestic violence?*
- *What is the position of women in the prevention and detection of crime?*
- *What are the special needs for protection of female offenders?*
- *What are the special needs of female victims of crime and abuse of power?*
- *Why are there so few female law enforcement officials around the world?*
- *Why are women present in such low numbers in managerial positions?*
- *Why are women so vulnerable to abuse and exploitation?*
- *What can law enforcement do to combat enforced prostitution?*
- *What is the position of women in situations of armed conflict?*
- *What level of protection is provided for women by humanitarian law in armed conflict?*

The Human Rights of Women

Introduction: The Realities of Gender in Society

Equality is the very foundation of every democratic society which is committed to justice and human rights. In virtually all societies and all spheres of activity, women are subject to inequalities in law and in fact. This situation is both caused and aggravated by the existence of discrimination in the family, in the community and in the workplace. Discrimination against women is perpetuated by the survival of stereotyped concepts (of men as well as women) and of traditional cultures and beliefs detrimental to women.

Few countries treat their women as well as their men. The social and economic gap between women and men in almost all parts of the world is still enormous. Women constitute the majority of the world's poor and the number of women living in rural poverty has increased by 50% since 1975. Women also account for the majority of the world's illiterate. Women in Africa and Asia work 13 hours a week more than men and are mostly

unpaid. Worldwide, women earn 30% to 40% less than men for doing equal work. Women hold between 10% and 20% of managerial and administrative jobs worldwide and less than 20% of jobs in manufacturing. Women make up less than 5% of the world's heads of State. Discrimination against women has been called "a deadly disease". More women and girl-children die each day from various forms of gender discrimination and violence than from any other type of human rights abuse. According to United Nations figures, more than a million infant girls die each year because they are female.

Women suffer badly in the administration of justice. In many countries, women do not have the same legal rights as men and are therefore treated as second-class citizens in the police station and in the court-room. When detained or imprisoned, women are much more vulnerable than men to assault — especially gender-based forms of abuse such as sexual assault. Often women are detained, tortured and sometimes even killed because their relatives or the people they are associating with are connected to political opposition groups or are wanted by the authorities. In times of internal disturbance, all human rights are under threat — particularly those of civilians. Women suffer especially in such situations — quickly caught up in conflicts not of their making. They become the butt of reprisal killings. They make up most of the world's refugees and displaced persons. They are left to rear families on their own. They are raped and sexually abused with impunity.

Legal Protection of Women's Human Rights: Equality and Non-discrimination

The *United Nations Charter* was the first international legal instrument to explicitly affirm the equal rights of men and women and to include gender as one of the prohibited grounds for discrimination (along with race, language and religion). These guarantees were repeated in the *Universal Declaration of Human Rights*, adopted by the General Assembly in 1948. Since that time, equal rights for women have been refined and extended in a large number of international human rights treaties — most notably the *ICCPR* and the *ICESCR*. The rights contained in both these instruments are fully applicable to women as well as to men — as are the rights in the *Convention against Torture* and the *International Convention on the Elimination of All Forms of Racial Discrimination*. Non-discrimination on the basis of sex is also included in the *Convention on the Rights of the Child* and in each of the regional human rights treaties (ACHPR, Article 2; ACHR, Article 1; ECHR, Article 14).

Why then, was it thought necessary to develop a *separate* legal instrument for women? Additional means for protecting the human rights of women were seen as necessary because the mere fact of their "humanity" has not been sufficient to guarantee women protection of their rights. As the preamble to the *Convention on the Elimination of All Forms of Discrimination against Women* explains, women still do not have equal rights with men and discrimination against women continues to exist in every society.

The Convention was adopted by the General Assembly of the United Nations in 1979 and entered into force in 1981. Article 1 states that:

> *"the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."*

The Convention reinforces and extends the provisions of existing international instruments designed to combat the continuing discrimination against women. It identifies many areas where there has been notorious discrimination against women, for example with regard to political rights, marriage and the family, and employment. In these and a range of other areas, the Convention sets out specific goals and measures that are to be taken by States Parties to facilitate the creation of a global society in which women enjoy full equality with men and therefore full realization of their guaranteed human rights.

States Parties are also required to recognize the important economic and social contribution of women to the family and to society as a whole. The Convention emphasizes that discrimination will hamper economic growth and prosperity. It also recognizes the need for a change in *attitudes*, through education of both men and women to accept equality of rights and to overcome prejudices and practices based on stereotyped roles. Another very important feature of the Convention is its explicit recognition of the need for *actual* equality (i.e. equality in fact, not just equality in law) — and of the need for temporary special measures to achieve that goal. Unlike the other major human rights treaties, the Women's Convention requires States Parties to tackle discrimination in the *private lives and relationships* of their citizens, and not simply in public sector activities.

The Women's Convention has been ratified by most countries of the world. The number of States Parties would have been a sign of real commitment to ending gender-based discrimination, if it were not for the fact that many

States have submitted reservations to the Convention. As explained in the chapter on *Human Rights Law*, the reservations procedure is designed to help the cause of human rights by providing for exceptions to those human rights guarantees that governments cannot immediately and fully undertake at the time of ratification. Much controversy has surrounded reservations to the Women's Convention because there are more reservations to this instrument than to any other human rights treaty *and* many of them appear to be contrary to the object and purpose of the Convention. Some reservations, for example, are to the general principle of non-discrimination. Others attempt to limit the Convention's provisions which give women equal rights in matters relating to the family, citizenship and legal capacity. Some reservations are so vague and so broad it is difficult to tell exactly to what they apply. Such substantive reservations are capable of significantly limiting the obligations undertaken by the reserving States and in this way they clearly undermine the object and purpose of the Convention. The question of reservations to the Women's Convention has become a political issue within the United Nations General Assembly and the Commission on the Status of Women. To date, however, the States Parties to the Convention have not exercised their right (under the Vienna Convention on the Law of Treaties) to seek an authoritative determination on the permissibility of reservations which appear to undermine the commitment to the core human rights obligations towards women.

International Mechanisms to Protect the Human Rights of Women

In theory, all of the "mainstream" mechanisms mentioned in the chapter on Human Rights Law (including the Commission on Human Rights, the investigative procedures and the treaty-monitoring bodies) are concerned with the human rights of all persons — of women as well as men. The situation in practice is a little different. The so-called "mainstream" human rights mechanisms have traditionally failed to take account of women's human rights and violations of those rights. One of the reasons for this is that the issue of "women's rights" was separated by the United Nations from other issues very early on and specialist bodies were created to deal with issues relating to women. Unfortunately, these bodies have generally been weaker and received less support than the mainstream bodies. Another reason for the "marginalization" of women's human rights is the nature of human rights law itself. Many women's rights activists have argued that human rights law was created *by* men *for* men, i.e. that human rights law generally does not address the issues which are of critical importance for women, including literacy, poverty, violence and repro-

ductive health. Similar charges have been made against international humanitarian law which, it is argued, is more concerned with protecting "honour" than recognizing and responding to the true problems faced by women in situations of armed conflict.

Fortunately, the situation is slowly changing. At the 1993 World Conference on Human Rights, member States of the United Nations agreed that the human rights of women should be integrated into all aspects of the human rights work of the organization. They further declared that:

> *The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels, and the eradication of all forms of discrimination on the grounds of sex are priority objectives of the international community.*
>
> *(Vienna Declaration and Programme of Action, Part 1, paragraph 18.)*

The specialized bodies referred to below remain important for the implementation of women's human rights. As explained in the chapter on *Human Rights Law*, the *Commission on the Status of Women* was established by ECOSOC in 1946. Its function is to prepare reports and recommendations to ECOSOC on promoting women's rights in all spheres. The Commission is also able to develop proposals for action on urgent problems in the area of women's human rights. Significantly, no action is taken on individual complaints which the Commission is authorized to receive and consider. Instead, its procedure is intended to discern emerging trends and patterns of discrimination against women in order to develop policy recommendations aimed at solving widespread problems.

Article 17 of the Women's Convention establishes the *Committee on the Elimination of Discrimination against Women* to oversee the implementation of its provisions. The Committee is composed of 23 experts (almost always women) who are nominated by States party to the Convention. As with the other treaty bodies, members serve in their personal capacity and not as delegates or representatives of their countries of origin. The task of the Committee is to oversee the implementation of the Convention by those States which have ratified or acceded to it. It does so principally by examining reports submitted by them. The Committee is not able to receive and examine complaints from individuals, or complaints from States Parties about the conduct of other States Parties. Many commentators see this as a great weakness of the Women's Convention and efforts are currently being made to draft an *Optional Protocol* to it in order to establish

such complaints procedures. It is important to note in this context that the *Human Rights Committee* (which oversees implementation of the ICCPR) may receive complaints of violations of the sex equality provisions of the ICCPR — in particular, of Article 26. The prohibition of discrimination on the basis of sex has been extended to rights set out in other instruments (e.g. the right to social security guaranteed in the ICESCR). The individual complaints procedure of the Human Rights Committee is available to individuals in each of the countries which have ratified the Optional Protocol to the ICCPR. Women in those countries are thereby able to lodge complaints about violations of their rights under that instrument, as well as the rights protected in other human rights treaties — provided their country is also party to those treaties. The individual complaints procedures established under the *European and Inter-American human rights systems* are also available to women whose rights have been violated (subject of course to States Parties having accepted those procedures).

Violence against Women

The Women's Committee (CEDAW) has defined gender-based violence as:

> *...violence that is directed at a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts and other deprivations of liberty...*

Violence against women is not a new phenomenon but has continued throughout history — unnoticed and unchallenged. Recently, there has been much international pressure to consider violence against women as an international human rights issue. CEDAW has responded by stating specifically that *the general prohibition on gender-based discrimination in the Women's Convention includes gender-based violence* as defined above. The Committee further affirmed that violence against women constitutes a violation of their internationally recognized human rights — irrespective of whether the perpetrator is a public official or a private person. *State responsibility for violence against women* may be invoked when a government official is involved in an act of gender-based violence *and also* when the State fails to act with due diligence to prevent violations of rights committed by private persons or to investigate and punish such acts of violence, and to provide compensation.

These rulings have been reinforced by the *Declaration on the Elimination of Violence against Women* adopted by the General Assembly in 1993, the *Inter-American Convention on Women and Violence* adopted within the

framework of the inter-American human rights system in 1994, as well as specific provisions of the *Vienna Declaration and Programme of Action* adopted at the 1993 World Conference on Human Rights and the *Beijing Declaration and Platform for Action* adopted at the Fourth World Conference on Women in 1995. Each of these instruments make it clear that violence against women, whether it occurs in the home, in the workplace or at the hands of public officials, is a clear violation of human rights.

The Position of Women in the Administration of Justice

Prevention and Detection of Crime

As explained in the chapter on this subject, there is no single international instrument dealing with the prevention and detection of crime — nor with the gender aspects of this particular law enforcement function. Rights and responsibilities in this area must therefore be gleaned from the various human rights instruments. Relevant rights which must be taken into account during this phase include *the right of all persons (men and women) to equality before the law*; and the *presumption of innocence* which ensures that all persons, male or female, charged with a criminal offence have the right to be presumed innocent until proven guilty in a court of law (ICCPR, Article 14.2; ACHPR, Article 7.1 (b); ACHR, Article 8.2; and the ECHR, Article 6.2). With regard to the presumption of innocence, it is important to note that law enforcement officials have no role in deciding on the guilt or innocence of an individual arrested for an offence. The task of law enforcement is limited to fact-finding. It is the judiciary which must find the truth. Other rights which are relevant to the detection of crime phase include the *right to a fair trial* and the *right to privacy* — both of which are examined in detail in the chapter *Prevention and Detection of Crime*. With regard to the *right to privacy* it should be borne in mind that the content of this right may not be the same for a woman and for a man. It follows that different, special measures may sometimes need to be taken by law enforcement officials involved in the investigation of crimes to ensure that the personal privacy of women is protected and preserved.

Prevention of crime is a fundamental objective of law enforcement and is an area of law enforcement activity with specific value for the rights of women. In all societies, women are vulnerable to certain types of crime *simply because they are women*. Such crimes include domestic violence, sexual and other forms of assault, forced prostitution and trafficking. Law enforcement officials can take a wide range of steps to prevent women becoming

victim to such crimes. Forced prostitution, for example, is a human rights violation (and a crime) which disproportionately affects women migrants — many of whom are procured in poor countries for sexual exploitation in richer ones. These women will often be illegal aliens and therefore afraid to approach law enforcement authorities for help — even when they are subjected to the most inhumane treatment. In such cases it is the clear responsibility of law enforcement agencies to make an effort to identify women victims of forced prostitution (at their point of departure as well as in the country of entry) and to take measures to ensure their protection. At the same time law enforcement organizations can be expected to make every effort to track down the perpetrators of such crimes and put a firm stop to their illegal practices.

Domestic violence is another human rights violation and (in most countries) crime which law enforcement officials can often help to prevent. Men who beat their wife or partner are usually confident that they will be able to do so with impunity — that they will not be reported to the police and, even if they are, that they will be able to escape punishment. Unfortunately, law enforcement authorities throughout the world have contributed to this situation by refusing not only to treat domestic violence as a crime but also to intervene to stop such violence — usually on the supposed grounds that it is a "family" problem. Domestic violence is not just a family problem or a woman's problem — it is a *community* problem and the entire community is usually res-ponsible for its continuance: the friends and neighbours who ignore or excuse clear evidence of violence; the doctor who only mends bones and tends bruises; and the police and court officials who refuse to intervene in a "private matter". Law enforcement officials can help to prevent the crime of domestic violence only by treating it as a crime. They are responsible for upholding and protecting a woman's right to life, to security and to bodily integrity. Their failure to protect women against violence in the home is a clear abdication of that responsibility.

In most countries of the world, crimes affecting women rank low in priority. It is the duty of every law enforcement agency to expose such crimes, to prevent them as far as possible and to treat the victims in a caring, sensitive and professional manner.

Human Rights of Women upon Arrest

Under the basic principle of non-discrimination, women are entitled to the same rights on arrest as men (see further details in the chapter *Arrest*). In addition, the related principle of *equal protection of the rights of all persons*

— as well as *respect for the inherent dignity of the human person* (Body of Principles, Principle 1), may well require that additional forms of protection and consideration are offered to women in an arrest situation. Such measures will include ensuring that the arrest of a woman is carried out by a female official (whenever practicable); that women and their clothing are searched by a female official (in all circumstances) and that women detainees are kept separate from male detainees (also in all circumstances).

It should be noted that additional protection and consideration for women in situations of arrest will not be deemed discriminatory, because their goal is to redress an inherent imbalance — to bring about a situation in which the ability women of to enjoy their rights is equal to that of men.

Human Rights of Women in Detention

As pointed out in the chapter on *Detention*, the human rights of detainees are more frequently violated than those of persons at liberty. Specific standards have therefore been established to protect detainees from ill-treatment and abuse of power, to safeguard against damage to health caused by inadequate conditions of detention and to guarantee that the basic rights of detainees — as human beings — are respected. The need for provision of *special* rights for detainees is based on an understanding of their dependant status. Women detainees are in double jeopardy. Almost always they will be poor. Often they will be migrants. In many countries, women will be in detention for crimes which can only be committed by women. Once in detention, women are at a much greater risk of assault than men (especially assault by law enforcement officials).

International human rights law in the area of detention — as in all others — is guided by the fundamental principle of non-discrimination: women detainees are entitled to the same rights as male detainees. Women detainees may not be discriminated against. As noted earlier, equality of *result* does not necessarily mean equality of treatment. The need for extending special forms of protection to women detainees is recognized in the *Body of Principles,* which clearly states that *measures applied under the law and designed solely to protect the rights and special status of women (especially pregnant women and nursing mothers) shall not be deemed discriminatory* (Principle 5.2). Such measures will include the provision of specialized medical facilities. Denial of adequate medical treatment to female detainees constitutes *ill-treatment,* which is forbidden under national and international laws. Other mandatory special measures include

separate quarters for women detainees and the availability of trained female criminal justice personnel. Special measures may also need to extend to matters such as child care and treatment during pregnancy.

With regard to accommodation for women detainees, the *Standard Minimum Rules for the Treatment of Prisoners* (SMR) require that different categories of prisoners be kept in separate institutions or parts of institutions, taking into account their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment (SMR 8). The SMR also explicitly stipulate that *men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate* (SMR 8 (a)). As noted above in the section on arrest, the supervision of women and searches of them or their clothing should be carried out by female officials.

The above rules are the only explicit ones which exist in relation to women detainees. Not even the *Women's Convention* itself contains any provisions on women detainees. The lack of gender-specific standards in this area is usually put down to the fact that women constitute a small minority of prison populations. However, small numbers cannot lessen basic human rights and it is an accepted fact that the percentage of women in custody is growing rapidly in almost all parts of the world. One of the most serious human rights concerns is, of course, *violence against women detainees* by law enforcement and security officials. Protection against violence is a basic human right. The United Nations Economic and Social Council (ECOSOC) has called upon member States to take all appropriate measures, urgently, to eradicate acts of physical violence against women detainees. Such measures should include, as an absolute minimum, ensuring that women are only ever interrogated or detained by or under the supervision of female officials. There should be *no contact* between male guards and female detainees without the presence of a female guard. All law enforcement officials coming into contact with female detainees should receive appropriate training. All officials must be made aware of the fact that sexual assault on a woman in detention is *an act of torture* and will not be tolerated under any circumstances whatsoever. Law enforcement agencies must ensure that their procedures protect women and do not exacerbate their vulnerability. Prompt, thorough and impartial investigations must be conducted into all reports of torture, assault or ill-treatment of women detainees. Any law enforcement official responsible for such acts or for encouraging or condoning them should be brought to justice. Special procedures should also be in place for identifying and reacting to

allegations of violence against women detainees. Victims of rape and sexual abuse and other torture or ill-treatment in custody should be entitled to fair and adequate compensation and appropriate medical care (for further details, see below).

Women Victims of Crime and Abuse of Power

As noted in the chapter on victims, the rights and legal position of victims of crime and abuse of power are very poorly protected — especially in comparison with the range of rights which are extended (in theory at least) to offenders.

The *United Nations Declaration on Principles of Justice for Victims of Crime and Abuse of Power* (Victims Declaration) is the only instrument offering guidance to member States on the issue of protection and redress for such victims. It is not a treaty and therefore does not create legally binding obligations for States.

There are only a few treaty provisions that create legally binding obligations for States Parties concerning the rights and the position of victims of crime and abuse of power:

- *the enforceable right of victims of unlawful arrest or detention to compensation* (ICCPR, Article 9.5);
- *victims of punishment based on a miscarriage of justice must be compensated according to law* (ICCPR, Article 14.6);
- *victims of torture have an enforceable right to fair and adequate compensation* (Convention against Torture, Article 14.1).

The Victims Declaration defines as *"Victims of Crime":*

> *persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power* (Article 1).

In Article 18 of the Victims Declaration a definition of *"Victims of Abuse of Power"* is given:

> *persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions* ***that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.***

The Declaration further states that a person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the relationship between the perpetrator and the victim (Article 2). The notion of victims is subsequently extended to the immediate family or dependants of the victim, as well as to persons who suffered harm intervening on the victim's behalf.

The Victims Declaration does not distinguish between male and female victims, nor does it address the specific vulnerabilities and needs of female victims of crime and abuse of power.

It sets out provisions relating to *access to justice and fair treatment, restitution, compensation, and assistance*, stating the following rights which victims of crime and abuse of power should have, namely the right:

- *to be treated with compassion and respect for their dignity, and have access to mechanisms of justice and to prompt redress* (Article 4);
- *to the establishment of fair, inexpensive and accessible procedures of redress, both formal and informal* (Article 5);
- *to be informed of the role of such mechanisms, the scope, timing and progress of the proceedings and the disposition of their cases, especially in cases of serious crime and where such information was requested* (Article 6(a));
- *to have their views presented and considered at appropriate stages of the proceedings where their personal interests are affected* (Article 6 (b));
- *to be provided with proper assistance throughout the legal process* (Article 6(c));
- *to protection of their privacy, and to measures to ensure their safety and that of their families from intimidation and retaliation* (Article, 6(d));
- *to avoidance of unnecessary delay in the disposition of their cases and the execution of orders granting awards to them* (Article 6(e);
- *to have access to informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, which should be used where appropriate to facilitate conciliation and redress for victims* (Article 7).

With regard to restitution and compensation a number of principles are set out in Articles 8 to 13: offenders should make restitution to their victims; States are encouraged to keep mechanisms for restitution under review and to consider their introduction into criminal law; the State should be responsible for restitution in cases where the offender is a State official.

Where compensation cannot be obtained from the offender or other sources, States are encouraged to provide such compensation. The establishment of particular funds to that end is encouraged. In addition:

- *victims should receive the necessary material, medical, psychological and social assistance* (Article 14).
- *victims should be informed about possible assistance measures available to them* (Article 15);
- *police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure prompt and proper aid* (Article 16).

The Victims Declaration and the other relevant treaty provisions are disturbingly *gender-neutral.* They do not go any way towards recognizing that the needs of women victims of crime and abuse of power will often be very different to the needs of male victims, not only in physical and psychological terms but also because the female victim is likely to have experienced a violation which is peculiar to her sex. With regard to victims of crime, law enforcement officials are usually the first point of contact for a female victim. The welfare and well-being of the victim should be the law enforcement official's highest priority. The crime committed cannot of course be reversed. However, adequate assistance to victims will definitely help to limit the negative consequences of that crime.

If the incident is of a domestic nature or the victim otherwise knows her offender, she may be reluctant to press charges for fear of reprisals. Proper care and assistance for women victims of crime may require special measures, including protection from further victimization, referral to shelters and the provision of specialized medical attention. Respect for a woman victim's right to privacy and personal dignity may also require special measures such as specialized training of law enforcement officials, the availability of female officials to conduct investigations and special facilities within police stations for the comfort and well-being of the victim.

Women victims of abuse of power will also require special protection to ensure that their rights are not further violated. Of particular concern is the situation of women victims of violence at the hands of State officials — including women who are assaulted in detention. As the above section indicates, it is the clear duty of law enforcement agencies to ensure that *any* allegation of such violence is promptly, thoroughly and impartially investigated, that medical assistance, counselling and other support is available to women victims, and that implementation of their right to compensation is facilitated.

Women as Law Enforcement officials

Various instruments cited in this Manual make clear reference to the need for *representative law enforcement* (see also the chapter on *Law Enforcement in Democratic States*). The requirement that every law enforcement agency should be representative of the community as a whole is specifically included in the General Assembly resolution (34/169) by which the Code of Conduct for Law Enforcement Officials was adopted. *The right to equal access to public service* (Universal Declaration, Article 21(2); ICCPR, Article 25(c); ACHPR, Article 13.2; ACHR, Article 23c;) and the *right to free choice of profession and employment and to equality of opportunity* (Women's Convention, Article 11 (b) and (c)) are also relevant requirements in relation to women as law enforcement officials.

Unfortunately, women are seriously under-represented in almost every law enforcement agency in the world. They are particularly sparse at strategic, managerial and policy-making levels. Under-representation is a fundamental reason why law enforcement is generally so hostile to women and to their special needs. It is not good enough to have a handful of women in the lower ranks. Such measures amount to little more than tokenism and the lack of a critical "female mass" will prevent those women from being able to serve to their full potential.

Another problem facing women who are recruited to law enforcement agencies is the fact that they are not integrated into regular law enforcement areas. Instead, many are restricted to administrative tasks and to "feminine" aspects of law enforcement (e.g. women and children) — often for less pay than their male counterparts. Additional considerations include the prevalence of sexual harassment and the maintenance of policies, practices and attitudes which marginalize women officials and their impact on the organization. Very few law enforcement agencies in the world have developed coherent strategies to address such problems. Law enforcement agencies are often very isolated from the society within which they operate and are often the very last to respond to changing social mores.

Discrimination against women in recruitment and selection procedures should be identified and acted upon. Often such discrimination is hidden and procedures which seem to be "gender-neutral" will, on closer inspection, be found to be "gender-specific" in their application. One example is the height requirement and physical test — both of which are potential obstacles with regard to access by women (and often also by people from ethnic minority backgrounds) to law enforcement. A height requirement which is the same for men and women is discriminatory

because men are, on average, taller than women and therefore more men will meet this requirement. The same logic applies to physical tests which are set at the same level for men and women or which, even if different, do not set realistic goals for women applicants.

Women in Situations of Armed Conflict: Humanitarian Law

General Comments

Women are often in greater danger than men during situations of both internal and international armed conflict. The increased danger itself, as well as the forms of harm to which women are subject, is specific to their sex. It is for this reason that special measures for the protection of women are justified. *International humanitarian law* (IHL) contains specific provisions designed to protect women from violence during armed conflict. In addition, general provisions of human rights treaties can also be construed as prohibiting violence against women during situations of armed conflict.

Importantly, women are entitled to the general protection of humanitarian law (for both combatants and civilians) on a non-discriminatory basis. Each of the four *Geneva Conventions* of 1949 as well as their *Additional Protocols* of 1977 contains an identical prohibition on *"any adverse distinction founded on sex"* (GC I, Article 12; GC II, Article 12; GC III, Articles 14 and 16; GC IV, Article 27; P I, Article 17; P II, Article 4). Distinctions on the basis of sex are therefore prohibited only insofar as they are unfavourable. Parties to the various Conventions and Protocols retain the right to extend *additional* protection to women. The provision on non-discrimination is, in most instruments, supplemented by another provision stipulating that *"women shall be treated with all consideration due to their sex"* (GC I, Article 12; GC II, Article 12; GC III, Article 14).

Women are also entitled to certain gender-specific forms of protection under IHL. The relevant provisions cover the following issues:

- humane treatment of female combatants, including prisoners of war;
- protection of female internees and civilians accused of offences against an occupying power;
- protection of female civilians from sexual abuse and degrading treatment;
- provision for the special physical needs of pregnant women and mothers of young children.

Protection of Women Combatants

There are no laws prohibiting women from taking (official) part in the conduct of hostilities in situations of armed conflict. In situations where women choose to become combatants within the meaning of the Geneva Conventions of 1949, the protection to which they are entitled is primarily dependent upon the type of armed conflict. In the legal instruments (common Article 3; or common Article 3 and Additional Protocol II) applicable in situations of non-international armed conflict, the term "combatant" is not used. However, neither of those instruments provides for protection of persons taking active part in the hostilities. Their provisions are clearly designed to offer protection to those persons who do not take part in them, or no longer do so. In situations of international armed conflict — to which the four Geneva Conventions of 1949 and Additional Protocol I of 1977 apply — the rules on the conduct of hostilities that impose limitations on the methods and means of warfare offer some protection and guarantees to combatants.

Protection of Civilian Women during Armed Conflict

Women who do not take part in hostilities can be termed non-combatants or civilians. In both non-international and international armed conflict IHL offers protection to persons who do not, or no longer, take part in the hostilities. Article 3 common to the four Geneva Conventions lists a number of acts that are prohibited at all times against all such persons, and Additional Protocol II lays down fundamental guarantees in Articles 4 and 5 for their humane treatment and protection, whether their liberty has been restricted or not. In situations of international armed conflict the protection of civilians is addressed by the Fourth Geneva Convention of 1949, which contains a number of specific provisions for the protection of women in such situations. Additional Protocol I of 1977 reiterates the requirement for separate accommodation for men and women whose liberty has been restricted; and further requires *female supervision of women* whose liberty has been restricted for reasons related to the armed conflict (P I, Article 75.5).

Sexual and other forms of assault directed specifically against women civilians during armed conflict may be part of a deliberate strategy to repress or punish the civilian population or it may be the result of a failure of command officials to discipline their troops. IHL specifically *forbids* any attack upon the honour of women, including *"rape, enforced prostitution or any form of indecent assault"* (GC IV, Article 27; P I, Article 75 and 76; P II, Article 4).

A Note on Rape as a Method of Warfare

Rape and abuse of women has been reported in almost every modern situation of armed conflict — both international and non-international. There can be no doubt that rape, enforced prostitution and any other form of indecent assault against women is prohibited under international rules governing the conduct of hostilities. Nevertheless, as the recent wars in Rwanda and the territory of the former Yugoslavia have so graphically demonstrated, the use of rape as a method of warfare is still prevalent. In both cases, the rape of women and girl-children was carried out in an organized and systematic way — a clear indication that sexual abuse was part of a wider pattern of warfare used to deprive opponents of their human dignity, to undermine and punish enemies and to reward troops. The International Tribunal set up by the United Nations Security Council to deal with the aftermath of the Yugoslavia conflict has been unequivocal in condemning such atrocities as war crimes and crimes against humanity. The perpetrators are hence individually responsible under international law — as are their superiors who failed to take action to prevent such abuse.

Rape is not an accident of war. Its widespread use in times of conflict reflects the special terror which it holds for women, the sense of power it gives to the perpetrator and the contempt for the victim that is expressed by it. The use of rape in conflicts also reflects the inequality which women suffer in almost every sphere of their lives. Such atrocities will continue to occur as long as endemic discrimination against women continues to exist, as long as there is an absence of political will to prevent it and as long as impunity can be guaranteed for offenders.

Chapter Highlights

- Women and men are entitled to the same rights and freedoms in full equality and without any adverse distinction for any reason. The reality is that the position of women around the world is far from equal to the position of men.
- The basic premises in human rights are "equality" of and "non-discrimination" between the sexes.
- The issue of discrimination against women is only slowly receiving the level of attention it deserves. The mainstream mechanisms for the promotion and protection of human rights still do not devote a substantial part of their attention to the human rights of women.
- Violence against women is a problem affecting all societies. It is perpetuated by the failure or refusal of State authorities to recognize violence against women as simultaneously being a criminal offence punishable under national laws and a violation of the human rights of the women concerned.
- Law enforcement agencies must stop their practice of considering domestic violence as a private family matter. They are required to act whenever domestic violence occurs; just as they must when any other crime occurs within their jurisdiction.
- During the arrest and detention of women, law enforcement officials must observe the special needs and rights to protection of women. Women offenders must at all times be dealt with and supervised by female law enforcement officials. During detention women must be kept separated from men.
- The Victims Declaration aims to provide protection and assistance to victims of crime and abuse of power, as well as redress for the harm they have suffered. However, the instrument is not particularly sensitive to the special position and needs of female victims of crime and abuse of power.
- In general women occupy an unequal proportion of posts available on the labour market. They are underrepresented at every level — from operational functions to policy making positions. The situation is much the same in terms of women law enforcement officials.
- Law enforcement agencies must develop distinct policies and practices to ensure equal representation of women throughout the various levels of the organization.
- Women are extremely vulnerable in situations of armed conflict and require special protection and care for their position.
- Gender-based violence, such as sexual assault and rape, appear to be used as methods of warfare and are widely detrimental to the rights and freedoms of women and girl-children.
- International humanitarian law prohibits certain acts at all times and against all persons, including rape, torture and ill-treatment.
- It is the responsibility of the international community of States to prevent such acts against women and girl-children from happening. Likewise the prosecution and punishment of the perpetrators of such crimes against humanity are a State responsibility.

Study Questions

Knowledge

1. What is meant by "equality" of men and women?
2. What is the role and position of the Commission on the Status of Women?
3. What is the role and position of the Women's Committee established under the CEDAW?
4. What are the special rights of women to protection during arrest and detention?
5. What are the rights of female civilians in situations of armed conflict?
6. What are the rights of female combatants in situations of armed conflict?
7. What is the working definition for "non-discrimination"?

Understanding

1. What is your opinion on the position of women in society?
2. What do you consider to be the main causes for discrimination against women?
3. What steps must be taken to improve the position of women in terms of equality with men?
4. What can law enforcement officials do to enhance the welfare and well-being of women?
5. What do you consider to be the primary role of law enforcement in gender-based violence?
6. What steps must law enforcement agencies take to combat and prevent abuse and exploitation of women?

Application

Develop proposals for law enforcement action concerning the following issues:

1. enforced prostitution of migrant workers in your country;
2. incidents of domestic violence within your jurisdiction;
3. under-representation of women at all levels of your organization;

Chapter 12

JUVENILES

Chapter Outline

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Key Questions for Law Enforcement Officials

- *Why should children be viewed and treated differently from adults?*
- *What are the threats endangering the well-being of children?*
- *Why should States adopt special legislation regarding children?*
- *What is the purpose of a separate system for the administration of juvenile justice?*
- *When can a child be deprived of his or her liberty?*
- *What are the rights of children deprived of their liberty?*
- *What is the position of children in armed conflict situations?*
- *When can force or firearms be used against children?*
- *What are the implications for law enforcement practice vis-à-vis children?*
- *What are the implications for law enforcement training concerning the issue of children?*

The Special Position of Children in Society

Introduction

Children need special care and protection and are dependent upon the aid and assistance of adults, especially in the early years of their existence. It is not enough that children are granted the same human rights and freedoms as adult persons. In many parts of the world the situation of children is critical as a result of inadequate social conditions, natural disasters, armed conflicts, exploitation, illiteracy, hunger and disability. Children on their own are not capable of effectively fighting such conditions or changing them for the better. The international community therefore urged governments to adopt legislation which recognizes the special position and needs of children and which creates a framework of additional protection conducive to their well-being. At the international level, the United Nations General Assembly adopted on 20 November 1989 — unanimously — *the Convention on the Rights of the Child* (CRC), which recognizes the need for special safeguards and care, including appropriate legal protection for children both before and after birth.

The Convention on the Rights of the Child

For the purposes of the Convention, *"a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier"* (CRC, Article 1).

The prime focus of the CRC is *"the best interests of the child"*. All measures prescribed under the Convention take this principle as their starting point. The CRC leaves no doubt as to the fact that children are entitled to the same human rights and freedoms as adults. Certain fundamental rights, such as the right to life, liberty and security of person, the right to freedom of thought and of expression, and the right to peaceful assembly and association are firmly reiterated in the Convention. In addition it seeks to provide additional *protection against abuse, neglect and exploitation* of children (CRC, Articles 32 to 36).

The CRC also sets forth the reasons for and the conditions under which children can be lawfully deprived of their liberty, as well as the entitlements of the child who is accused of having infringed penal law (CRC, Articles 37 and 40). Those provisions will be presented in more detail below, under the headings *Arrest* and *Detention*.

The CRC is a treaty. It therefore creates legally binding obligations for member States to ensure that its provisions are fully implemented at the national level. Measures taken to this end may include (but are not limited to) the adaptation of existing legislation concerning children, or the adoption of new legislation in conformity with the provisions as they are set out in the Convention.

The Administration of Juvenile Justice

Through a number of legal instruments, the international community has acknowledged the special position of juveniles who come into contact with the law as offenders. Because of their age, *juveniles are vulnerable to abuse, neglect and exploitation* and need to be protected against such threats. In keeping with the objective of *diverting juveniles away from the criminal justice system and redirecting them towards the community*, special measures for the *prevention of juvenile delinquency* must be developed.

The administration of juvenile justice is not so much a *different* set of rights to which juveniles are entitled, as a set of provisions that aim to offer protection in addition to the rights of adult persons — which of course apply equally to juveniles.

International Instruments

The following international instruments govern the administration of juvenile justice:

- *Convention on the Rights of the Child (CRC);*

- *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules);*
- *United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines);*
- *United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNRPJ);*
- *United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules).*

Of the instruments mentioned above, only the CRC is a treaty. The other instruments can be considered as offering authoritative guidance, but their provisions do not constitute legally binding obligations for States — except insofar as they reiterate obligations that are part of customary international law or are codified in multilateral treaties.

Purpose and Scope of Measures

The aim of the juvenile justice system is to enhance the well-being of the juvenile and to ensure that any reaction to juvenile offenders is proportionate to the circumstances of the juvenile and the offence. Juvenile offenders should be diverted from the criminal justice system and redirected to community support services wherever possible.

The international instruments set out above are specifically designed to:

- *protect the human rights of juveniles;*
- *protect the well-being of juveniles who come into contact with the law;*
- *protect juveniles against abuse, neglect and exploitation; and*
- *introduce special measures to prevent juvenile delinquency.*

The Convention on the Rights of the Child is central to the administration of juvenile justice. It offers a wide range of measures aimed at protecting the direct interests of the child. These include measures that seek to protect children coming into conflict with the law.

The CRC requires States Parties (Articles 33 to 36) to take measures that combat *abuse, neglect and exploitation* of children, specifically:

- the adoption of rules to fight drug abuse by children and prevent the use of children in the trafficking of drugs (Article 33);
- protection against all forms of sexual abuse and exploitation, including unlawful sexual activity, exploitation of children in prostitution or unlawful sexual practices, and exploitative use of children in pornographic performances and materials (Article 34);

- national, bilateral and multinational measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form (Article 35);
- protection against all other forms of exploitation prejudicial to any aspects of the child's welfare (Article 36).

The Beijing Rules develop and extend those articles of the CRC which cover topics such as arrest, detention, investigation and prosecution, adjudication and disposition, and the institutional and non-institutional treatment of juvenile offenders.

The Riyadh Guidelines focus on the prevention of juvenile delinquency through the involvement of all parts of society and through the adoption of a child-oriented approach. They are based on the belief that the prevention of juvenile delinquency is an essential part of crime prevention in society. This instrument defines the roles of family, education, community and the mass media to this end, in addition to setting out the roles and responsibilities of social policy, legislation and juvenile justice administration, and research, policy development and coordination.

An underlying premise of the Guidelines is that youthful conduct which does not conform to overall social norms should be considered as part of the maturation process and tends to disappear spontaneously with the transition to adulthood (Article 5(e)).

The Guidelines urge States to develop and implement comprehensive plans, at every level of government, for the prevention of juvenile delinquency. They also call for close cooperation between all relevant sectors of society (including the various levels of government, the private sector, representative citizens of the community, child care agencies, law enforcement and judicial agencies) in taking action to prevent juvenile crime; specialized personnel should exist at all levels.

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNRPJ) is an instrument designed to ensure that juveniles are deprived of their liberty and kept in institutions **only** when there is an absolute necessity to do so. Juveniles who are detained are to be treated humanely, with due regard for their status and with full respect for their human rights. Juveniles deprived of their liberty are highly vulnerable to abuse, victimization and the violation of their rights. This is a further reason why their detention should remain a measure of last resort.

Rules 17 and 18 of this instrument are of particular importance to law enforcement officials, as they concern juveniles under arrest or awaiting

trial. These Rules stress, once again, that pre-trial detention of juveniles should be avoided as far as possible, and limited to situations of exceptional circumstances. *Where pre-trial detention is unavoidable, its duration should be kept to an absolute minimum by giving the highest priority to the most expeditious processing of such cases* (Rule 17).

The rights stated in Article 7 of the Beijing Rules (the basic procedural safeguards to ensure that the right of juveniles to a fair trial is respected) are reiterated in Rule 18 of the UNRPJ. In addition, Rule 18 also sets out the detained juvenile's right to have opportunities to undertake work with remuneration, to be able to continue education and training, and to be provided with educational and recreational materials.

The United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) is an instrument concerned with juvenile offenders in general and at all stages of the proceedings — irrespective of whether they are suspected, accused or sentenced. The instrument formulates basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to measures other than imprisonment. It recommends that in order to provide greater flexibility (consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society) and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures -from pre-trial to post sentencing dispositions. Non-custodial measures fit in very well with the overall objective of the juvenile justice system to divert juveniles who come into contact with the law away from the criminal justice system and to redirect them towards the community.

The Tokyo Rules set out precisely which custodial measures are allowed, the conditions and legal safeguards for their application, and the rules for their effective monitoring and supervision. Non-custodial measures must of course be properly incorporated into national legislation as a pre-condition for their lawful application.

Implications for Law Enforcement Practice

It has been recognized — in all countries and all societies — that a juvenile offender is a special type of offender requiring special protection and treatment. This fact has been acknowledged at the international level through the development of international instruments specifically designed to protect the rights and interests of the juvenile offender.

As law enforcement officials are the first point of contact with the juvenile justice system, it is most important for them to act in an informed and appropriate manner so as to protect and further the well-being of the juvenile offender.

The Beijing Rules are very explicit as to the specialization required within law enforcement agencies in relation to juveniles. Rule 1.6 states that juvenile justice services must be systematically developed and coordinated with a view to improving and sustaining the competence of personnel involved in the services, including their methods, approaches and attitudes. Rule 12 draws attention to the need for specialized training for all law enforcement officials who are involved in the administration of juvenile justice. Law enforcement units specialized in all aspects of juvenile delinquency would therefore be indispensable, not only for the implementation of specific principles contained in the Beijing Rules, but also more generally to improve the prevention and control of juvenile crime and the handling of juvenile offenders.

The diversion of juveniles away from the criminal justice system and their redirection towards the community requires a type of attitude and action from law enforcement officials that is distinct from those actions and attitudes which are appropriate for adult offenders. The establishment and maintenance of a working relationship with community groups, child care agencies and officials within the judiciary assigned to juvenile justice necessitate special knowledge and skills on the part of law enforcement officials. To view juvenile delinquency as a transitional problem that may occur on the way from childhood to adulthood, and for which guidance, understanding and preventive support measures are therefore more suitable, calls for greater insight than is offered during the average basic law enforcement training.

The successful application of non-custodial measures also calls for a thorough understanding of the person of the juvenile, as well as a capacity to apply such measures in close cooperation and coordination with other key agencies in order to ensure the successful reformation and rehabilitation of the juvenile offender. The main objective here is to prevent recidivism rather than to inflict punishment for an offence committed. Such approaches require law enforcement officials to have a broad and thorough understanding not only of the rights and the special position of juveniles, but also of the special position and rights of victims of juvenile crime as well as the needs for protection and satisfaction of society. There will be a multitude of interests that need equal protection and to which the particular interests of the juvenile offender cannot be made subordinate — or given priority over them — without thorough justification.

Arrest of Juveniles

General Principles

The Convention on the Rights of the Child (CRC) defines a *"child"* as *every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier* (Article 1).

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) define a *"juvenile"* as *a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult* (Rule 2.2 (a)). Under those Rules, a *"juvenile offender"* is *a child or young person who is alleged to have committed or who has been found to have committed an offence (Rule 2.2 (c)).*

The instruments mentioned above do not rule decisively on the minimum *age of criminal responsibility* — leaving a decision on this matter to be made at the national level. However, the Beijing Rules do state that *such age should not be fixed at too low a level — taking into account emotional, mental and intellectual maturity* (Rule 4).

In the commentary to this Rule, it is acknowledged that: "The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behaviour."

As stated previously, the main objective of the administration of juvenile justice is to divert the juvenile offender away from the criminal justice system and to redirect him or her towards society. The rules relating to arrest (and detention) of juveniles reflect this general objective.

The CRC contains a number of very explicit provisions relevant to the arrest of juveniles:

- no child shall be deprived of his or her liberty unlawfully or arbitrarily;
- the arrest, detention or imprisonment of a child or young person shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time every child derpived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty .. (Article 37).

Rights on Arrest and Following Arrest

Whenever a person is arrested it must be for the *alleged commission of an offence or by the action of an authority* (Body of Principles, Principle 36.2).

At the time of the arrest anyone who is arrested shall be informed of the reasons for his arrest and shall be promptly informed of any charges brought against him (ICCPR, Article 9.2; Body of Principles, Principle 10).

The arrested person is to be brought promptly before a judge or other officer authorized by law to exercise judicial power who will decide on the lawfulness and the necessity of the arrest (ICCPR, Article 9.3; Body of Principles, Principles 11 and 37).

Similar provisions on arrest and detention are repeated in the ACHR (Article 7) and in the ECHR (Article 5). The ACHPR does not contain any such provisions. There is no clear definition as to what is meant with "promptly". In many States the maximum period allowed before an arrested person has to be presented to a judge or similar authority is limited to 48 hours. In some other States this period is limited to 24 hours. This period of 48 or 24 hours is more commonly referred to and known as *police custody*. It is the period that precedes what is known as *pre-trial detention*.

With respect to the *arrest of juvenile offenders* law enforcement officials are required to observe a number of additional provisions, *inter alia*:

- *the parents or guardians of juveniles arrested shall be notified of that fact immediately* (Beijing Rules, Rule 10.1);
- *a judge or other competent authority shall consider, without delay, the issue of release* (Beijing Rules, Rule 10.2);
- *juveniles under detention* — following arrest — *shall be kept separate from adults in detention* (Beijing Rules, Rule 13.4).

The following provisions apply equally to arrested adult offenders and juvenile offenders:

> *"A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial."* (Body of Principles, Principle 38)

> *"Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights."* (Body of Principles, Principle 13)

The presumption of innocence as well as the provisions relating to the right to a fair trial are equally applicable to juvenile offenders. There is no need to repeat those provisions in greater detail here.

Detention of Juveniles

General Principles

> *"No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."* (CRC, Article 37(b))
>
> *"Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication."* (ICCPR, Article 10.2 (b))

Juvenile detainees are entitled to all the rights of adult detainees, which are set out in full in the chapter *Detention*. In recognition of their particular vulnerabilities, there are a number of additional provisions to give juveniles in detention the protection they need.

Whereas adult detainees charged with a criminal offence are entitled *to be tried without undue delay* (ICCPR, Article 14.3 (c)), Article 10.2(b) of that same instrument actually establishes a more definite time frame for juveniles by means of the formulation *"brought as speedily as possible for adjudication"*. The objective of this provision is to ensure that periods spent by juveniles remanded in custody and pre-trial detention are as short as possible. It should be noted that the term *"adjudication"* is not to be understood in the formal sense of a judgment by a criminal court; rather, it also covers decisions by special, non-judicial organs empowered to deal with crimes committed by juveniles.

Specific Protection

The additional protection for juveniles deprived of their liberty is codified in the *Convention on the Rights of the Child; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules) and the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*.

Article 37 of the *Convention on the Rights of the Child* (CRC) is of particular relevance to the treatment of juvenile detainees. Under this provision of the Convention (which legally binds all States parties to it) it is stated that:

- *torture and ill-treatment of juveniles is prohibited (along with capital punishment and life sentences);*

- *unlawful or arbitrary deprivation of a juvenile's liberty is prohibited;*
- *juveniles deprived of their liberty are to be treated with humanity, with respect for their human dignity and in a manner that takes into account the special needs of persons of their age;*
- *juvenile detainees are to be kept separated from adult detainees;*
- *juveniles have the right to maintain contact with their family, to gain prompt access to legal assistance, and to challenge the legality of their detention through a court or other competent authority.*

The provisions set out in the CRC are largely reiterated and expanded in the other two instruments mentioned above. The Beijing Rules focus particularly on the procedural rights to which juveniles are entitled throughout arrest and pre-trial detention and at all stages of the proceedings. These include (Rule 7):

- *the presumption of innocence;*
- *the right to be notified of charges;*
- *the right not to be compelled to testify or confess guilt;*
- *the right to counsel;*
- *the right to the presence of a parent or guardian;*
- *the right to confront and cross-examine witnesses;*
- *the right to appeal to a higher authority.*

The same provisions can be found in Article 40.2(b) of the CRC, which, being a treaty, creates legally binding obligations for States Parties to adopt conforming legislation.

The Beijing Rules stipulate that the privacy of the juvenile is to be respected at all times in order to avoid harm caused by undue publicity or the process of labelling, and that in principle no information that could lead to the identification of the juvenile may be published (Rule 8). They also focus on *diversion* — emphasizing thereby that consideration should be given to dealing with juveniles without resorting to formal trial. Law enforcement agencies must be empowered to dispose of juvenile cases and are required to do so, where possible, without recourse to formal procedures (Rule 11).

Specialization within law enforcement agencies, with regard to juveniles, is recommended through the establishment of special units or departments and through the additional training of those law enforcement officials who are required to deal with juvenile offenders (Rule 12).

Use of Force and Firearms Against Juveniles

Neither the Basic Principles on the Use of Force and Firearms nor the Code of Conduct for Law Enforcement Officials (or any of the other international instruments for that matter) provide guidance on the use of such measures against children. It is safe to conclude that the same rules and provisions applicable to adults apply equally to children or young persons. The chapter on the *Use of Force and Firearms* provides a clear and detailed overview of those rules.

However, in view of the vulnerable position of the child — and the requirements for special protection and treatment — it is reasonable to conclude that utmost restraint must be exercised in the use of force and firearms against children. Because of their young age and their immaturity children are very unlikely to pose the kind of threat which would justify the use of such extreme measures. At the same time the impact of their use against children is likely to be more severe than in the case of adult, mature persons. Law enforcement officials therefore must be urged to seriously weigh such consequences against the importance of the legitimate objective to be achieved. They must also be encouraged to search for adequate alternatives to the use of force and firearms against persons, especially children.

The Position of Children in Situations of Armed Conflict

Undoubtedly situations of armed conflict will have an especially devastating effect on children. The separation of families, the orphaning of children, the recruitment of child soldiers and the death or injury of child civilians are but a few gruesome examples of likely consequences of war for children. It is difficult to gauge what the effects of war on the future psychological and physical development of children who have been exposed to armed conflict situations will be. Recent history provides enough vivid examples for us to begin to understand the terrible effects of war on children. They will always require special protection and treatment in situations of armed conflict.

Protective Measures

Article 38 of the *Convention on the Rights of the Child* urges States Parties to respect the rules of humanitarian law which are applicable to them in situations of armed conflict and relevant to the child. It furthermore enjoins States Parties to take all feasible means to ensure that *persons who have not*

attained the age of fifteen years do not take a direct part in hostilities. Nor may States Parties recruit persons younger than 15 years of age into their armed forces. If they recruit persons between the age of fifteen and eighteen, they are to give preference to those who are oldest. Finally, States Parties must take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Situations of recognized *non-international armed conflict* are governed by Article 3 common to the four Geneva Conventions of 1949, and in cases of high-intensity non-international armed conflict also by Additional Protocol II of 1977. The latter, in Article 4, provides fundamental guarantees for the humane treatment of persons not or no longer taking part in hostilities. Article 4.3 (a) to (e) states the special measures which are applicable or relevant to children, concerning:

- *education (a);*
- *reunion of temporarily separated families (b);*
- *minimum age for participation in hostilities or recruitment into the armed forces (c);*
- *protection of captured child combatants under the age of fifteen (d);*
- *temporary displacement of children for reasons related to the armed conflict (e).*

With regard to *international armed conflict* (to which the four Geneva Conventions of 1949 and their Additional Protocol I of 1977 apply) similar provisions can be found in Articles 77 and 78 of Additional Protocol I. According to Article 24 of the Fourth Geneva Convention of 1949, States party to the conflict *must take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources*, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances.

If arrested, detained or interned for reasons related to the armed conflict, children must be held in quarters separate from the quarters of adults, except where families are accommodated as family units (Additional Protocol I, Article 77.4).

Unless there are imperative reasons for doing so, no Party to the conflict may arrange for the evacuation of children, other than its own nationals, to a foreign country. When an evacuation does occur, all necessary steps must be taken to facilitate the return of the children to their families and their country (Additional Protocol I, Article 78).

Chapter Highlights

- Children need special care and protection and are dependent on the assistance of adults, especially during the early years of their existence.
- Juveniles are entitled to all rights and freedoms in full equality with adults. The special rules relating to juveniles offer additional protection for the interests of this vulnerable group.
- The Convention on the Rights of the Child primarily focuses on securing the best interests of the child and seeks to protect children against abuse, neglect and exploitation.
- The objective of the administration of juvenile justice is to enhance the well-being of the juvenile and to ensure that any reaction to juvenile offenders is proportionate to the circumstances of the juvenile and the offence.
- Juvenile offenders should be diverted from the criminal justice system and redirected to community support services wherever possible.
- Upon arrest the juvenile is to be informed of the reasons for the arrest or of any charges brought against him or her.
- Following arrest the parents or guardian of the juvenile are to be informed thereof.
- Where pre-trial detention of a juvenile persons is unavoidable, its duration should be kept to an absolute minimum by giving the highest priority to the most expeditious processing of such cases.
- Arrested or detained juveniles are entitled to the same rights as adults under any form of arrest or detention.
- During detention juveniles must be kept separated from adults; and accused juveniles must be kept separated from convicted juveniles.
- Where possible, the application of non-custodial measures is preferred over imprisonment of the juvenile.
- Although no special provisions exist with regard to the use of force and firearms against juveniles, law enforcement officials must be urged to exercise even more restraint in their use than in situations involving adults.
- Children are extremely vulnerable in situations of armed conflict.
- Children under fifteen years of age must not be allowed to take part in hostilities, nor must they be recruited into the armed forces.
- States party to a conflict must take all feasible measures to ensure protection and care of children who are affected by an armed conflict.
- If arrested, detained or interned for reasons related to the armed conflict, children must be kept separated from adults, except in cases where families are accommodated as family units.
- Law enforcement officials charged with responsibilities concerning juveniles should receive special training and education to prepare them adequately for their job.

Study Questions

Knowledge

1. What is the objective of the administration of juvenile justice?
2. How does the Convention on the Rights of the Child define a "child"?
3. What are the rights of a juvenile upon arrest?
4. What are the rights of a juvenile following arrest?
5. What is the general principle underlying pre-trial detention of juveniles?
6. When can a young person be recruited into the armed forces?
7. When can a young person take part in hostilities?
8. What is the purpose of non-custodial measures?

Understanding

1. Why do children deserve special care and protection under the law?
2. Why should juvenile offenders be diverted from the criminal justice system?
3. What is your opinion as to the value of non-custodial measures?
4. Why should pre-trial detention of juveniles be avoided?
5. Why do law enforcement officials dealing with juveniles require additional training?
6. Which other groups in society could play a role in preventing juvenile delinquency?
7. What could be done to limit the harmful effects of armed conflict on children?

Application

1. To find alternative ways of dealing with offences committed by minors, you are asked to draw up proposals for non-custodial measures. Give details of the measures you propose and of the conditions under which each of these measures is to be applied.
2. Law enforcement officials dealing with juveniles should receive additional training. Draw up a training programme and state the topics you would include in it. For each topic specify at least the main learning objectives.

3. Your police service has been requested to participate, on a regular basis, in social science classes at a local high school. The students in those classes vary in age between 15 and 17 years old. Your chief has asked you to develop some ideas for lessons that could be presented to this audience.

   a) Which topics would you present and discuss with these students?

   b) State some basic objectives to be achieved by discussing each of the topics chosen under a)

4. Your chief has asked you to develop an information and education campaign for young people to warn them about the risks of the use of drugs.

   a) Prepare a list of the most critical risks in the use of drugs.
   b) Consider and list the arguments to dissuade young people from using drugs.
   c) Indicate the main media you would use in fielding a campaign like this.

Chapter 13

VICTIMS OF CRIME AND ABUSE OF POWER

Chapter Outline

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Key Questions for Law Enforcement Officials

- *Who are considered to be victims of crime?*
- *Who are considered to be victims of abuse of power?*
- *Which rights do both categories of victims have?*
- *How can victims avail themselves of their rights?*
- *What are the rights of victims of unlawful or arbitrary arrest or detention?*
- *What are the rights of victims of excessive or arbitrary use of force?*
- *What are the rights of family members of both categories of victims?*
- *What are the rights of victims of torture?*
- *What are the rights of victims in situations of armed conflict?*
- *What protective measures does humanitarian law offer to victims of armed conflict?*
- *What is the role and responsibility of law enforcement officials concerning victims?*

Introduction

A cursory examination of existing law enforcement training and practices reveals that attention and resources are centred on (potential) offenders. The tasks of law enforcement and the maintenance of public order tend to be focused only on those breaking the law or disturbing public order. Little or no concern is shown for the vast majority of people who abide by the law and who do not cause any disruption. It is consequently not surprising that beyond their right to file a complaint, individuals who suffer injury or other harm at the hands of a criminal offender receive little or no attention or protection.

This chapter examines the existing mechanisms to protect the rights of victims of crime and abuse of power.

Victims of Crime and Abuse of Power

Given the numerous instruments that set out to protect the rights and position of suspects and accused persons, the fact that there is only one instrument protecting those of victims of crime and abuse of power offers a disconcerting view of priorities. It does not seem fair or just that their rights and position are so poorly protected in comparison with the levels of protection extended to offenders.

The *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Victims Declaration) is the only instrument

offering guidance to member States on the issue of protection and redress for such victims. The Victims Declaration is not a treaty and therefore does not create legally binding obligations for States.

There are only a few treaty provisions that create legally binding obligations for States Parties concerning the rights and the position of victims of crime and abuse of power:

These provisions are:

- *the enforceable right of victims of unlawful arrest or detention to compensation* (ICCPR, Article 9.5);
- *victims of punishment based on a miscarriage of justice must be compensated according to law* (ICCPR, Article 14.6);
- *victims of torture have an enforceable right to fair and adequate compensation* (Convention against Torture, Article 14.1).

The Victims Declaration defines as *"victims of crime":*

> *persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions* ***that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power*** (Article 1).

In Article 18 of the Victims Declaration, a definition of *"victims of abuse of power"* is given:

> *persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions* ***that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.***

The Declaration further states that a person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the relationship between the perpetrator and the victim (Article 2). The notion of victims is subsequently extended to the immediate family or dependents of the victim, as well as to persons who suffered harm intervening on the victim's behalf.

The Victims Declaration sets out provisions relating to *access to justice and fair treatment, restitution, compensation and assistance*, stating the following rights which victims of crime and abuse of power should be able to exercise:

> *the right to be treated with compassion and respect for their dignity, to access to mechanisms of justice and to prompt redress* (Article 4);

the right to the establishment of fair, inexpensive and accessible procedures of redress, both formal and informal (Article 5);

the right to be informed of the role of such mechanisms, the scope, timing and progress of the proceedings and the disposition of their cases, especially in cases of serious crime and where such information was requested (Article 6(a));

the right to have their views presented and considered at appropriate stages of the proceedings where their personal interests are affected (Article 6 (b));

the right to be provided with proper assistance throughout the legal process (Article 6(c));

the right to protection of their privacy, and to measures to ensure their safety and that of their families from intimidation and retaliation (Article 6(d));

the right to avoidance of unnecessary delay in the disposition of their cases and the execution of orders granting awards to them (Article 6(e);

the right to have access to informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, which should be used where appropriate to facilitate conciliation and redress for victims (Article 7).

With regard to restitution and compensation a number of principles are set out in Articles 8 to 13: offenders should make restitution to their victims; States are encouraged to keep mechanisms for restitution under review and to consider their introduction into criminal law; the State should be responsible for restitution in cases where the offender is a State official (e.g. a law enforcement official).

Where compensation cannot be obtained from the offender or other sources, States are encouraged to provide such compensation. The establishment of particular funds to that end is encouraged. In addition:

victims should receive the necessary material, medical, psychological and social assistance (Article 14);

victims should be informed about possible assistance measures available to them (Article 15);

police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure prompt and proper aid (Article 16).

In most cases law enforcement officials will be the first to establish contact with a victim of crime. It is those initial contacts that constitute what can be described as the "first-aid" stage of the victim's situation, at which the provision of proper care and assistance for victims is essential. Law enforcement tends to be primarily concerned with the progress and results of any investigation process. It is important to convince law enforcement officials that the welfare and well-being of the victim should be their highest priority. The crime committed cannot be reversed, but adequate assistance to victims will definitely help to limit the negative consequences of that crime for them.

Arbitrary Arrest and Detention

...No one shall be subjected to arbitrary arrest or detention.... The prohibition of arbitrariness in the second sentence of the ICCPR's Article 9.1 represents an additional restriction with regard to the deprivation of liberty, a restriction that is addressed both to the national legislature and to the enforcement agencies. It is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily. The word "arbitrary" in this sense is understood to contain elements of injustice, unpredictability, unreasonableness, capriciousness and disproportionality.

The prohibition of arbitrariness is to be interpreted broadly. Cases of deprivation of liberty provided for by law must not be manifestly disproportionate, unjust or unpredictable. The specific manner in which an arrest is made must not be discriminatory and must be justified as appropriate and proportional in view of the circumstances of the case.

Arbitrary arrest is also prohibited under the ACHPR (Article 6); and the ACHR (Article 7.1-3). The ECHR (Article 5.1) sets out the specific circumstances in which a person may be deprived of his or her liberty. While the ECHR is applicable only to States Parties, its provisions provide excellent guidance to all law enforcement officials on the various situations in which deprivation of liberty may be considered reasonable and necessary. According to the ECHR, a person may be deprived of his or her liberty in the following circumstances:

- following conviction by a competent court;
- for non-compliance with a lawful order of a court or to secure the fulfilment of an obligation prescribed by law;

- for the purpose of bringing a person before the competent legal authority on reasonable grounds of having committed an offence;
- (of a minor) by lawful order for the purposes of educational supervision or bringing him or her before a competent legal authority;
- for the purpose of preventing the spread of infectious diseases, and in respect of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- for the purpose of preventing unauthorized entry into, or residence in, the country.

"Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." (ICCPR, Article 9.5)

This provision entitles every victim of unlawful arrest or detention to a claim for compensation, whereas the analogous provision of Article 5.5 of the ECHR guarantees compensation only in the event of a violation of Article 5 (see above).

Under the ACHR (Article 10) compensation is payable to a person who is sentenced by a final judgment through a miscarriage of justice. Unlawful arrest may be an element in a miscarriage of justice.

For all instruments it is equally applicable that the actual mechanisms and levels of compensation are a matter of domestic concern, to be taken care of under national legislation.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration) may offer some guidance in defining State responsibility and the rights of victims. In Article 4 it urges that *victims should be treated with compassion and respect for their dignity*. It further recommends that:

> *"Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted."* (Article 11)

Use of Force and Firearms

The Basic Principles on the Use of Force and Firearms (BPUFF) contain a number of provisions relating to misuse of force and firearms and the protection of the rights and position of victims of any such misuse. The BPUFF is not a treaty creating legally binding obligations for States

Parties, but merely an instrument offering authoritative guidance to UN member States.

> *Governments must ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence according to the law* (BP 7).

> *Exceptional circumstances such as internal political instability or public emergency may not be invoked to justify a departure from these basic principles* (BP 8).

The arbitrary or abusive use of force and firearms by law enforcement officials constitutes a violation of the criminal laws of a country. It is also a violation of human rights committed by the very officials whose duty it is to maintain and uphold those rights. Abuse of force and firearms can be seen as a violation of the human dignity and integrity both of the officials involved and of the victims concerned. Irrespective of how those acts are seen, their effect will be to damage the fragile relationship which exists between a law enforcement agency and the community it is serving; they are capable of causing wounds that will take a long time to heal.

It is for all the above reasons that such abuse cannot be tolerated. The focus should be on prevention of such acts, through proper and regular education and training and adequate monitoring and review procedures. Whenever abuse is suspected or alleged to have occurred, there must be a prompt, impartial and thorough investigation. The officials responsible must be punished. Throughout the investigation the special needs of the victims should receive adequate attention. Restoring confidence in a damaged relationship will require a genuine effort on the part of the law enforcement agency involved if it is to have any chance of success in doing so.

Governments and law enforcement agencies must establish *effective reporting and review procedures for all incidents where:*

> *death or injury is caused by the use of force and firearms by law enforcement officials; or where*

> *law enforcement officials use firearms in the performance of their duty* (BP 22).

For incidents reported in accordance with these procedures, governments and law enforcement agencies must ensure that:

> *an effective review process is available, and independent administrative or prosecution authorities are able to exercise jurisdiction in appropriate circumstances;*

in cases of death, serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control (ibid.).

Persons affected by the use of force and firearms, or their legal representatives, shall have access to an independent process, including a judicial process.

In the event of death of such persons, this provision applies to their dependents. (BP 23).

Torture

Under international law torture is defined as *severe pain or* suffering, *whether physical or mental, inflicted by, or at the instigation of, or with the consent or acquiescence of a public official or person acting in an official capacity, for such purposes as obtaining from the person on whom it is inflicted or a third person information or a confession, punishing that person for an act which he or she has committed or is suspected of having committed, or intimidating that person or other persons* (Convention against Torture, Article 1).

The prohibition of torture is absolute and knows no exception. There are no situations in which torture can be lawful, nor are there possibilities for a successful legal defence for acts of torture committed. A public emergency that threatens the life of the nation (see ICCPR, Article 4) does not permit a derogation from the prohibition of torture. Confirmation of the prohibition on torture can also be found in the Geneva Conventions of 1949 and their Additional Protocols of 1977, which outlaw torture in all forms of armed conflict to which those instruments of humanitarian law apply.

The prohibition of torture is part of customary international law and has been codified in the UDHR (Article 5), the ICCPR (Article 7), the ACHPR (Article 5), the ACHR (Article 5), the ECHR (Article 3) and in the above-mentioned instruments of humanitarian law.

Further codification of the prohibition on torture was effected with the said *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) — an international treaty which has been ratified by 105 different States (December 1997).

The following provisions are drawn from the CAT and are legally binding on all States party to it:

- *no exceptional circumstances whatsoever ... may be invoked as a justification of torture* (Article 2.2);

- *superior orders may not be invoked as a justification of torture* (Article 2.3);
- *torture must be prohibited under domestic laws* (Article 4);
- *all persons accused of committing torture must be brought to justice, irrespective of their nationality or where the crime is alleged to have been committed* (Articles 5, 6, 7);
- *the training of law enforcement officials must take full account of the prohibition against torture* (Article 10.1);
- *the prohibition of torture must be incorporated into general rules and instructions issued to police officials responsible for the custody of detainees* (Article 10.2);
- *interrogation rules, instructions, methods and practices must be kept under systematic review* (Article 11);
- *arrangements for custody and treatment of persons deprived of their liberty must be kept under systematic review* (Article 11);
- *suspected acts of torture must be promptly and impartially investigated* (Article 12);
- *(alleged) victims of torture are entitled to a prompt and impartial investigation and must be protected against all ill-treatment or intimidation as a consequence of their complaint* (Article 13);
- *domestic law must ensure redress and an enforceable right to fair and adequate compensation for victims of torture* (Article 14);
- *evidence obtained through torture is inadmissible in court* (Article 15).

The key provisions of the CAT are reflected in Article 5 of the *Code of Conduct for Law Enforcement Officials*, which states that: *"No law enforcement official may inflict, instigate or tolerate any act of torture ... nor ... invoke superior orders or exceptional circumstances ... as a justification of torture ..."*

Under Article 14 of the *Convention against Torture*:

> *"Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his [or her] dependents shall be entitled to compensation"* (paragraph 1).

> *"Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law"* (paragraph 2).

Since the CAT is a treaty, its provisions create legally binding obligations for States Parties. This particular provision on protection and redress for victims of torture therefore offers better guarantees to any such victim than the provisions of the Victims Declaration set out above.

Domestic Violence

Men who beat their wife or partner are usually confident that they will be able to do so with impunity — that they will not be reported to the police and, even if they are, that they will be able to escape punishment. Unfortunately, law enforcement authorities throughout the world have contributed to this situation by refusing not only to treat domestic violence as a crime but also to intervene to stop such violence — usually on the supposed grounds that it is a "family" problem. Domestic violence is not just a family problem or a woman's problem — it is a community problem and the entire community is usually responsible for its continuance: the friends and neighbours who ignore or excuse clear evidence of violence; the doctor who only mends bones and tends bruises and the police and court officials who refuse to intervene in a "private matter". Law enforcement officials can help to prevent the crime of domestic violence only by treating it as a crime. They are responsible for upholding and protecting a woman's right to life, to security and to bodily integrity. Their failure to protect women against violence in the home is a clear abdication of that responsibility.

In most countries of the world, crimes affecting women rank low in priority. It is the duty of every law enforcement agency to expose such crimes, to prevent them as far as possible and to treat the victims in a caring, sensitive and professional manner.

Victims of Situations of Armed Conflict

Introduction

The principal objective of the four Geneva Conventions of 1949 and their two Additional Protocols of 1977 is to protect victims of armed conflict. In general their provisions relate to the protection of:

> *persons taking no active part in hostilities, including members of the armed forces who have laid down their arms or been placed hors de combat by sickness, wounds, detention or any other cause...*

The protection of wounded and sick members of armed forces in the field is covered by the First Geneva Convention.

The Second Geneva Convention covers the protection of wounded, sick and shipwrecked members of the armed forces at sea.

The Third Geneva Convention covers the protection of prisoners of war.

The Fourth Geneva Convention covers the protection of civilian persons in time of war.

Protocol I covers the protection of victims of international armed conflicts.

Protocol II covers the protection of victims of non-international armed conflicts of a high intensity nature.

Protective Measures

One of the fundamental principles of humanitarian law is *that the right of belligerents to choose means of injuring the enemy is not unlimited*. From this principle flow the principles of *proportionality* and *discrimination* (the required distinction between military objectives and civilian objects, respect for protected zones and objects, etc.).

Civilians, and members of the armed forces who have laid down their arms or who are placed *hors de combat* because of sickness, wounds, detention or by any other cause, must be protected. They cannot be the object of any attack or reprisals. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited (Protocol I, Article 51.2; Protocol II, Article 13.2).

Starvation of civilians as a method of warfare is prohibited. It is therefore prohibited to attack. destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works (Additional Protocol I, Article 54; Additional Protocol II, Article 14).

Civilians or members of the armed forces who find themselves in the power of an adverse party to a conflict have the right to humane treatment and to protection of their dignity and integrity. (Article 3 common to the four Geneva Conventions of 1949; Article 11 of Protocol I)

Article 91 of Additional Protocol I of 1977 states that *"a party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."*

It must be noted that this provision applies only to situations of international armed conflict.

Chapter Highlights

- With out any clear justification, the principal focus of law enforcement officials is on prevention and detection of crime and the apprehension of suspects. The specific needs of victims of crime and abuse of power tend to receive insufficient attention.
- The position and interests of the suspected and the accused person are much better protected in the international instruments than the position and interests of victims.
- There are only a few treaty provisions that relate to the protection of victims and create legally binding obligations for States Parties.
- The Victims Declaration distinguishes between *victims of crime* and *victims of abuse of power*.
- Both categories are entitled to be treated with compassion and respect for their dignity. They are entitled to access to mechanisms of justice and to prompt redress.
- Victims are to be kept informed about the progress of the proceedings and the disposition of their cases, especially in cases of serious crime and where such information was requested.
- Victims might require assistance for the protection of their privacy and for their safety and that of their family against intimidation and retaliation.
- Victims should receive the necessary material, medical, psychological and social assistance.
- Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure prompt and proper aid.
- Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
- Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted.
- Persons affected by the use of force or firearms, or their legal representatives, shall have access to the competent authorities for administrative review and judicial control.
- In the event of death of such persons, the above provision applies to their dependents.
- Victims of torture have an enforceable right to fair and adequate compensation.
- Domestic violence is a crime that requires an immediate and adequate law enforcement response. Victims of domestic violence require protection.
- International humanitarian law provides rules for the conduct of hostilities and for the protection of victims of armed conflict.
- The Geneva Conventions of 1949 and the Additional Protocols of 1977 protect the rights and position of civilians and of members of the armed forces who have laid down their arms or who are placed *hors de combat* by sickness, wounds, detention or by any other cause.

Study Questions

Knowledge

1. Who are considered to be victims of crime?
2. Who are considered to be victims of abuse of power?
3. What are the main entitlements of both categories of victims?
4. What are the rights of victims of arbitrary arrest and detention?
5. What are the rights of persons affected by the use of force and firearms?
6. What are the rights of victims of torture?
7. What are the rights of victims of domestic violence?
8. What are the main measures protecting victims of armed conflicts?
9. Which acts against the civilian population are prohibited?

Understanding

1. What can law enforcement officials do to protect the rights and position of victims?
2. Why must domestic violence be approached differently from other violent crimes?
3. What is the relevance of the distinction between "crime" and "abuse of power" in defining victims?
4. In your opinion, does the difference between the protection of "offenders" and that of "victims" constitute "inequality before the law" (see ICCPR, Article 26)?

Application

1. Describe how law enforcement officials can best be trained to prepare them adequately for their tasks relating to victims of crime and abuse of power.
2. Prepare a prioritized list of what must be done in relation to a victim of violent crime who calls for law enforcement assistance. Explain your choices.
3. Which parameters would you suggest using to determine what is to be understood as "fair and adequate compensation" to a victim of crime or abuse of power?

Chapter 14

REFUGEES AND INTERNALLY DISPLACED PERSONS

Chapter Outline

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Key Questions for Law Enforcement Officials

- *Which persons can be considered as refugees?*
- *Which persons can be considered as internally displaced persons (IDPs)?*
- *What are the rights of a refugee?*
- *What are the rights of an IDP?*
- *Who is supposed to protect the rights of refugees?*
- *Who is supposed to protect the rights of IDPs?*
- *What levels of protection are offered to refugees and IDPs by human rights law?*
- *What levels of protection are offered to refugees and IDPs by humanitarian law?*
- *Which international organizations are concerned with refugees and IDPs?*
- *What is the role of the UN High Commissioner for Refugees?*
- *What are the responsibilities of law enforcement officials with regard to this vulnerable group?*
- *What can individual law enforcement officials do to help refugees and IDPs?*

Introduction

The plight of refugees and internally displaced persons (IDPs) has over recent years become a formidable problem of global significance and implications. The total number of refugees and IDPs is currently (1997) estimated at around 50 million worldwide, with the majority of these people in Africa and Asia. Their ever-increasing numbers pose enormous challenges to the international community and have even proved capable of sparking tensions in areas and regions that were previously untroubled. Simple requirements as to food, shelter, medical care and hygiene, through sheer quantitative needs, create huge logistical problems in terms of procurement and adequate and equal distribution. The governments concerned see themselves in apparently insoluble dilemmas, including those presented by the repatriation of groups of people who fled their home country because of ethnic strife and human rights violations. These people are often afraid to return, while at the same time their presence in another country or region gives rise to insurmountable problems. The current international dimensions of the refugee and IDP problem does not in any way diminish its significance for law enforcement officials at the national level. This chapter will on the contrary underline the importance of the protection and assistance that can be derived from law enforcement activities on behalf of refugees and IDPs.

Definitions

Refugees

The Convention relating to the Status of Refugees (CRSR) of 1951 defines the term "refugee" as applying to any person who:

> *... [a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable, or owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it ...* (Article 1 A(2)).

The Convention also sets minimum standards for the treatment of refugees, including the basic rights to which they are entitled. An overview of the provisions intended to protect the rights and interests of refugees is presented below under the heading *Protection and Treatment*.

After the entry into force of the CRSR in 1954 it soon became clear that the problem of refugees was not going to be limited to dealing with the effects and aftermath of the Second World War. The emergence of conflicts after 1 January 1951 initiated a flow of new refugees who could not claim or benefit from the protection of the CRSR. On 4 October 1967 the *UN Protocol relating to the Status of Refugees* entered into force; by disregarding the time limits contained in the definition of "refugee" laid down in Article 1 of the CRSR, it extended the scope of that definition to any person to whom it otherwise applied.

Internally Displaced Persons

As a result of situations of armed conflict (or the threat thereof) and mass violations of human rights, as well as floods, earthquakes and other natural disasters, the number of people fleeing their homes has increased dramatically over recent years. There are also deeper-seated factors underlying this phenomenon of mass displacement. Underdevelopment, poverty, unequal distribution of wealth, unemployment, degradation of the environment, ethnic tensions, subjugation of minorities, intolerance, absence of democratic procedures, and many other factors have been cited as causes. Where such people, in fear of persecution, seek refuge in other countries, their interests are protected by the Refugee Convention of 1951 and the 1967 Protocol relating to the Status of Refugees. If those persons

are victims of armed conflict situations, they are entitled to protection under the Geneva Conventions of 1949 and their Additional Protocols of 1977. In general, human rights law offers protection to all persons without any adverse distinction. However, where such people are displaced within their own country, specific problems as to rights and protection arise.

Under the following *working definition* of "Internally Displaced Persons" (IDPs), which was developed by the Special Rapporteur on IDPs as there is at present no specific international legislation devoted to that issue, they are:

> *"Persons or groups of persons who have been forced to flee their homes or places of habitual residence suddenly or unexpectedly as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who have not crossed an internationally recognized State border".*[7]

Protection and Treatment

Refugee Law

Persons falling within the definition of refugee under Article 1 of the Convention relating to the Status of Refugees (CRSR) of 1951 are entitled to the protection of their rights as set out under the Convention.

In sub-sections D, E and F of Article 1, the conditions are specified under which a person cannot benefit from the protection and rights offered by the Convention. Particular attention is drawn to sub-section F, which stipulates that: *"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*

> *(a) He [or she] has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
>
> *(b) He [or she] has committed a serious non-political crime outside the country of refuge prior to his [or her] admission to that country as a refugee;*
>
> *(c) He [or she] has been guilty of acts contrary to the purposes and principles of the United Nations."*

It is important to note that while refugees are entitled to general protection of their rights and freedoms in full equality with other persons, the CRSR sets out to offer additional protection making due allowance for the particular circumstances which refugees face.

---

[7] Lavoyer, Jean-Philippe (Ed.), *Internally Displaced Persons*, Report of the Symposium, Geneva, 23-25 October 1995, Note 3 at 16.

With regard to refugees, conventions and/or declarations have been drafted by the Council of Europe, the Organization of African Unity (OAU) and the Organization of American States (OAS). In comparison to the CRSR of 1951, the OAU Convention of 10 September 1969 governing the specific aspects of refugee problems in Africa gives a broader definition of the term "refugee", taking account of most of the root causes of the refugee problem.

The second paragraph of Article 1 of the OAU Convention states that

> *"the term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his [or her] country of origin or nationality, is compelled to leave his [or her] place of habitual residence in order to seek refuge in another place outside his [or her] country of origin or nationality."*

As for the OAS, the 1984 *Cartagena Declaration*, *which is not binding upon States*, lays down the foundations for the treatment of Central American refugees. The Declaration includes the principle of *non-refoulement* (discussed below) and addresses the important issue of integration of refugees into receiving societies, as well as the need to eradicate the causes of the refugee problem. *Under the Cartagena Declaration the term "refugee" is defined as including "persons who have fled their countries because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order"* (Part III, paragraph 3).

It is an established fact that 80% of the current refugee population consists of women and children. Not only are these groups particularly vulnerable; in many countries the human rights of women and children are ill protected in the first place. Both groups are extremely prone to abuse, neglect and sexual or other forms of exploitation. They therefore require special protection of their fundamental rights and freedoms (i.e. the right to life, liberty and security of person) if they are to be at all able to claim the other rights to which they are entitled under the international human rights instruments.

Human Rights Law and Internally Displaced Persons

Careful consideration of the definition of IDPs will bring to light fundamental questions as to the existing levels of protection of rights and freedoms of persons falling within that category. The consequences of

internal displacement are manifold and can deprive the persons concerned of the essentials they need to survive. Loss of home, loss of employment, loss of security of person, threats to life and liberty, deprivation of food, loss of adequate health care and loss of education opportunities are amongst the harsh and immediate consequences of such a displacement. Most of today's IDPs have fled their homes because of massive and gross violations of human rights that threatened their life and livelihood. Yet the flight from their place of habitual residence leaves IDPs particularly exposed to further acts of violence, to enforced disappearances and assaults upon their personal dignity, including sexual violence and rape. The governments of States that have IDPs within their territory are first and foremost responsible for their care and protection. It must not be forgotten, however, that the very acts which drove the IDPs away from their homes were often instigated or tolerated by that same government to begin with. In other cases the governments concerned are not willing or able to provide the IDPs with the levels of assistance and protection they need and to which they are entitled.

The general observation can be made that IDPs are entitled to all the human rights and freedoms to which they were entitled when still living at their original place of residence within their country. Certain issues relating to, inter alia, the right to life, liberty and security of person, freedom of movement, asylum, etc. may be answered through legally binding instruments that are already available. The special vulnerability of IDPs to human rights violations and the fact that there are not yet legal instruments that adequately address these vulnerabilities nonetheless remain.

Internally displaced persons are fugitives in their own country who, more often than not, find their rights and interests unrecognized and unprotected. Recent examples from Africa and the former Yugoslavia show that relevant government authorities are indeed unable and/or unwilling to respond adequately to the needs of IDPs and as a result are increasingly appealing to the international community for assistance. This has already caused UNHCR (discussed below) to include the plight of IDPs in the execution of its mandate, although they are not officially a part thereof.

Humanitarian Law, Refugees and Internally Displaced Persons

In situations of armed conflict to which the Geneva Conventions of 1949 and their Additional Protocols of 1977 apply, *refugees and stateless persons* are recognized as requiring special protection and treatment. This issue is specifically dealt with in Article 44 of the Fourth Geneva Convention of

1949 and Article 73 of Additional Protocol I of 1977. In situations of international armed conflict refugees and stateless persons are protected persons within the meaning of Parts I and III of the Fourth Geneva Convention, in all circumstances and without any adverse distinction. In conflicts not of an international character Article 3 common to the four Geneva Conventions of 1949 states that *persons taking no active part in the hostilities must be treated humanely in all circumstances, and without any adverse distinction*, by the parties to the conflict. Additional Protocol II of 1977 offers specific measures of protection for the civilian population, in which refugees can be included.

As for the protection of *internally displaced persons*, the first observation to be made is that IDPs not taking active part in hostilities must be considered as civilians and are entitled to all the levels of protection accorded to civilians in situations of armed conflict. Of particular relevance to IDPs is Article 26 of the Fourth Geneva Convention of 1949 which stipulates that:

> *"Each party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organisations engaged on this task provided they are acceptable to it and conform to its security regulations."*

In this connection reference is made to Article 33 of Additional Protocol I of 1977 which addresses the issue of "missing persons" and the obligation for parties to conflict to search for them and facilitate such searches. Article 74 of the same instrument addresses the issue of reuniting dispersed families.

The Fourth Geneva Convention of 1949 (applicable in situations of international armed conflict) *prohibits individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the occupying power or to that of any other country, occupied or not, regardless of their motive* (GC IV, Article 49). It furthermore states, in the same article, that *the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies*. Article 85.4(a) of Additional Protocol I of 1977 stipulates that the aforesaid acts, when committed wilfully and in violation of the Conventions or the Protocol, shall be regarded as *grave breaches*.

In situations of armed conflict not of an international character, protection for the civilian population is offered by Article 3 common to the four Geneva Conventions of 1949 and by Additional Protocol II of 1977 (applicable in situations of high-intensity non-international armed

conflict). Rules for the general protection of the civilian population against the dangers arising from military operations are set out in Articles 13 to 16 of Protocol II. Article 17 stipulates that *the forced movement of civilians is prohibited* unless the security of the civilians involved or imperative military reasons so demand. Paragraph 2 of this article states that: *"Civilians shall not be compelled to leave their own territory for reasons connected with the conflict."*

As recent history shows, States very often have difficulty in admitting that there is an armed conflict on their territory and therefore refuse to apply humanitarian law. Often the claim is made that operations conducted by the government are merely police operations aimed at restoring public order. Although it is true that there is no clear definition of non-international armed conflict, States must nevertheless be encouraged to apply and respect principles of humanitarian law in armed conflict situations. This is particularly relevant where the plight of IDPs is concerned. Their right to return to the place of their habitual residence is often not respected. Such a return must take place under acceptable conditions of security and with guarantees of fundamental respect for their human dignity. Quite often IDPs have lost all identification documents. The provision of such papers is crucial if IDPs are truly to enjoy their right to legal personality through, for instance, registration of births, deaths and marriages.

It has been held that the special and new position of IDPs calls for additional standard-setting at the United Nations level, for instance by creating a Convention on IDPs. However, consideration must also be given to the risk that such a Convention may undermine the legal standards (protecting the rights and position of IDPs) already in force.

It is in any case evident with regard to the situation of IDPs in general that there is no lack of legal standards to protect their position and rights, but rather a lack of assiduity in applying the legally binding norms already in existence.

Office of the United Nations High Commissioner for Refugees

In its Resolution 319 A (IV) of 3 December 1949, the General Assembly decided to establish the Office of the United Nations High Commissioner for Refugees (UNHCR). It was set up as a subsidiary organ of the General Assembly on 1 January 1951, initially for a period of three years. Since then UNHCR's mandate has been routinely extended for successive periods of five years. The Statute of UNHCR was adopted by the General Assembly

on 14 December 1950 as annex to Resolution 428 (V). In this resolution, the Assembly also called upon governments to cooperate with the High Commissioner in the performance of his [or her] functions concerning refugees falling under the competence of his [or her] Office.

In 1996, UNHCR was caring for some 17 million refugees around the world. Its main office is located in Geneva, and it has field offices in more than a hundred countries around the world. According to Article 1 of its Statute, *the main task of the High Commissioner is to provide international protection to refugees and to seek durable solutions for refugees by assisting governments to facilitate the voluntary repatriation of refugees, or their assimilation within new national communities.* The High Commissioner's work is qualified as *"entirely non-political"* and *"humanitarian and social"* and is to relate, as a rule, to groups and categories of refugees.

Under Article 8 of the Statute:

> *"The High Commissioner shall provide for the protection of refugees falling under the competence of his [or her] Office by:*
>
> *(a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;*
>
> *(b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;*
>
> *(c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;*
>
> *(d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;*
>
> *(e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;*
>
> *(f) Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;*
>
> *(g) Keeping in close touch with the Governments and inter-governmental organizations concerned;*
>
> *(h) Establishing contact in such a manner as he [or she] may think best with private organizations dealing with refugee questions;*

(i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees."

In addition to "refugees" as defined by the Refugee Convention of 1951, other categories of persons finding themselves in refugee-like situations have gradually been included among the concerns of the High Commissioner in accordance with subsequent General Assembly and ECOSOC Resolutions.[8] Over the years UNHCR has become more and more active in countries of origin of refugees. This practice has a dual purpose: to enable the voluntary repatriation of refugees to take place in conditions of dignity and security, and to promote greater respect for improvement of respect for human rights in those countries — as a means of preventing people from becoming refugees in the first place. UNHCR's activities for IDPs should be viewed in the same light. The actual number of IDPs today far exceeds the number of refugees. However, UNHCR will provide protection and assistance to IDPs only when it has been authorized to do so by the UN General Assembly or the UN Secretary-General.

The ICRC

In view of the role and responsibilities of the ICRC in protecting and providing humanitarian assistance to victims of armed conflict, its activities merit special consideration here insofar as they relate to refugees and IDPs. The basis for the activities of the ICRC can be found in the four Geneva Conventions of 1949 and their Additional Protocols of 1977, as well as in the Statutes of the International Red Cross and Red Crescent Movement.

Refugees

As a general rule, the ICRC's mandate with regard to refugees is subordinate to that of UNHCR. However, the ICRC can become heavily involved with refugees when they find themselves in a situation of armed conflict or unrest, or when UNHCR does not (or does not yet) have an operational presence. Whatever the situation, the ICRC will offer its services to transmit Red Cross (family) messages, trace missing persons and reunite dispersed families. The ICRC has also developed major programmes to take care of unaccompanied minors.

8 See for example General Assembly Resolutions: 1167 (XII) - 1388 (XIV) - 1501 (XV) - 1671 (XVI) - 1673 (XVI) - 1783 (XVII) - 1784 (XVII) - 1959 (XVII) - 2958 (XXVII) - 3143 (XXVIII) - 3454 (XXX) - 3455 (XXX), and ECOSOC Resolutions: 1655 (LII) - 1705 (LIII) - 1741 (LIV) - 1799 (LV) - 1877 (LVII) - 2011 (LXI).

Internally Displaced Persons

As victims of situations of armed conflict or unrest, IDPs are at the heart of the ICRC's mandate. They are an important category of victims to whom the ICRC offers protection and assistance.

The ICRC's concern is to reinforce the legal protection of all victims through respect for humanitarian law by all parties to armed conflict. Efforts to that effect are being directed to members of armed forces and to members of police and security forces alike.

Law Enforcement Responsibilities

The issue of refugees and IDPs is of direct relevance to law enforcement officials. They are most often the first point of contact between a refugee and a receiving State, and may well have to help meet the needs of refugees and/or IDPs in the course of their duties. It is therefore of the utmost importance that law enforcement officials be aware of the rights of refugees and IDPs. In addition, law enforcement officials must understand the specific problems experienced by refugees and IDPs and their own capacity either to alleviate or to aggravate the latter's suffering. They must treat refugees in strict accordance with the provisions of the Refugee Convention of 1951 and the 1967 Additional Protocol thereto; those provisions are minimum standards to be observed. As for IDPs, law enforcement officials must be aware of the fact that these persons remain nationals of their country of residence and fully entitled to all the rights and protection of national and international law, just as though they were still in their homes.

Appropriate treatment of refugees by law enforcement agencies requires additional training and education of law enforcement officials. Knowledge both of international laws and of domestic legislation is indispensable. An empathic capacity to understand the particular situation and circumstances of individual refugees is a must if protection, care and appropriate treatment are not to remain empty words. The procedures established within law enforcement agencies for the processing of persons seeking refugee status or for their referral to competent authorities must be adequate and swift.

In a more general sense, law enforcement officials must respect and protect human dignity and maintain and uphold the human rights of all persons, without any adverse distinction. It is up to individual law enforcement officials to implement this rule and ensure that it has true practical effect rather than only theoretical significance. With regard to law enforcement

responsibilities vis-à-vis refugees the following provisions of the CRSR are of particular importance:

- *No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion* (Article 33);

N.B.:
With respect to the principle of non-refoulement it could be argued that this principle forms part of customary international law. The consequence of this argument is that the principle is therefore binding upon all states and not only on those states that have ratified the Refugee Convention of 1951 or the 1967 Protocol relating to the status of refugees.

- *the provisions of the Convention must be applied without discrimination as to race, religion or country of origin* (Article 3);
- *as regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances* (Article 15);
- *a refugee shall have free access to the courts of law on the territory of all Contracting States* (Article 16);
- *refugees lawfully within the territory of a State Party have the right to choose their place of residence and to move freely within that territory, subject to any regulations applicable to aliens generally in the same circumstances* (Article 26);
- *the Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document* (Article 27);
- *for the purpose of travel outside the territory of the State, refugees are to be issued with travel documents, unless compelling reasons of national security or public order require otherwise* (Article 28.1);
- *penalties must not be imposed for the illegal entry into or presence in the territory of a Contracting State of a person seeking refugee status as defined in Article 1, provided that the person(s) concerned present themselve(s) without delay to the authorities and show good cause for their entry or presence* (Article 31).

Chapter Highlights

- The term "refugee" applies to any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable, or owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable, or owing to such fear is unwilling, to return to it.
- "Internally displaced persons" are individuals or groups of persons who have been forced to flee their homes or places of habitual residence suddenly or unexpectedly as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who have not crossed an internationally recognized State border.
- Refugees are entitled to the general protection of all human rights instruments and enjoy additional protection under the provisions of the Refugee Convention.
- The Convention does not apply to any person suspected of having committed a crime against peace, a war crime or a crime against humanity. Nor does it apply to persons who have committed a serious non-political crime outside the country of refuge and prior to their admission to that country as a refugee.
- The provisions of the Convention must be applied without discrimination as to race, religion or country of origin.
- States must observe the principle of *"non-refoulement"* because it is part of customary international law.
- Under the regional systems the refugee issue has also been the object of standard-setting activities.
- Under the regional arrangements of the OAU and OAS the definition of "refugee" has been extended to include causes such as armed conflict, foreign domination, external aggression, and massive violations of human rights which might compel a person to flee their country of residence.
- IDPs are entitled to all the same rights and freedoms as persons who have not been displaced.
- Refugees and IDPs enjoy the same special protection under international humanitarian law in situations of armed conflict as that to which all members of the civilian population are entitled.
- Forced movements of the civilian population or a part thereof are forbidden under international humanitarian law.
- UNHCR was created with a view to providing international protection to refugees and to seek durable solutions for refugees by assisting governments to facilitate voluntary repatriation of refugees, or their integration within new national communities.
- The ICRC provides valuable protection and assistance to refugees and IDPs as part of its broader mandate to protect victims of armed conflict and internal disturbances and tensions.
- Law enforcement officials need to be aware of the special needs of refugees and IDPs in order to provide them with due levels of protection and assistance.

Study Questions

Knowledge/Understanding

1. Which persons qualify for refugee status under the Refugee Convention of 1951?
2. Which persons fall into the category of internally displaced persons?
3. What is the meaning of the principle of "*non-refoulement*"?
4. What does humanitarian law say about displacements of the civilian population?
5. How would you define "missing person"?
6. What is the difference between a "missing" person and a "disappeared" person?
7. Why is the position of IDPs as compared to that of refugees so difficult?
8. What are your views on changing the definition of refugees in the 1951 Convention to include IDPs?
9. To which persons does the Refugee Convention of 1951 not apply?

Application

Imagine yourself responsible for the establishment of a temporary camp for the accommodation of a large group of IDPs, consisting of men, women and children. They have been travelling on foot for several days without food and with limited water and have finally reached the safe haven of your region.

1. How will you go about establishing this temporary camp?
2. Which persons and/or organizations (public and private) will you bring into this operation and why?
3. Which priorities would you set with regard to the reception and treatment of this group?
4. Which emergency aid measures do you propose on the basis of your previous answer?
5. What are your views on accepting the intervention of the ICRC or UNHCR in this matter?
6. Suppose that this group have fled their homes because of internal violence. What are the advantages and/or disadvantages for your government to consider the situation an internal armed conflict?

7. What are the provisions of Additional Protocol II that would be relevant to this situation, and why?
8. Which special measures do you propose for the protection of women and children in the camp?

COMMAND AND MANAGEMENT

Chapter 15

MONITORING AND REVIEW PROCEDURES

Chapter Outline

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Key Questions for Law Enforcement Officials

- *What is the role of law enforcement in the promotion and protection of human rights?*
- *How do organizational structures in law enforcement affect responsive capacity?*
- *What are the implications of human rights for education and training?*
- *What is the purpose of measuring and evaluating law enforcement performance?*
- *How can performance evaluation affect promotion and protection of human rights?*
- *What is the significance of public relations for law enforcement?*
- *What is meant by "responsive law enforcement"?*
- *To whom must law enforcement officials consider themselves accountable?*
- *In what ways can law enforcement officials be held accountable for their actions?*
- *Where can people go with their complaints about law enforcement practices?*
- *How should the law enforcement organization deal wit such complaints?*
- *What lessons can be drawn from complaints about law enforcement practice?*

Introduction

Law enforcement officials have conflicting powers vis-à-vis human rights. While their principal role is to promote and protect human rights and freedoms, they are at the same time potential violators of the very rights they are called upon to maintain and uphold. This paradoxical situation is brought about by the array of legal powers and authorities vested in law enforcement officials to enable them to carry out their tasks and duties. From the outset it must be clear that unlawful and/or arbitrary use of those powers and authorities was clearly not intended by the legislating authorities of States. Nevertheless abuse or misuse thereof occurs frequently in all parts of the world. Unlawful or arbitrary arrest and detention, fabrication of evidence, excessive use of force, ill-treatment of detainees and torture, are but a few of the many known contemporary examples of illegal and unacceptable law enforcement practices.

This chapter seeks to explore the ways in which law enforcement officials charged with command and/or management responsibility can institutionalize control and supervisory mechanisms that help ensure adequate and appropriate law enforcement practice. It also sets out to explain the relevant international legal obligations for States.

Law Enforcement Organization

Structures, Change, Development

A comparative examination of law enforcement organizations around the world does not reveal any spectacular differences in their organizational structures. Most such organizations are of a civilian nature and are under the authority of the Ministry of the Interior or the Ministry of Justice. Only a minority are attached to the Ministry of Defence and (para)military in nature. Irrespective of their nature and attachment, most law enforcement organizations tend to have a strict hierarchical (military-type) set-up with as many functional levels as there are different ranks. They are mainly closed systems and most decision-making processes are of the "top-down" variety. Promotions are generally based on seniority rather than on quality, while at the same time the majority of law enforcement officials stay with the norganization until they retire. While all law enforcement agencies experience public scrutiny in one way or another, most of them are not engaged in establishing or maintaining structured relations with the community they are serving.

It is only very recently that law enforcement organizations, or rather their strategic management officials, have started to feel the extent to which effectiveness and efficiency are being impeded by their highly bureaucratized and centralized structures. The incentive to change lies more in the increasing (political) pressure being brought to bear from outside the organization than in the absolute conviction that bureaucracy and hierarchical systems are probably less desirable features in a dynamic, ever-changing, environment. That pressure is coming from political decision-makers dissatisfied with the current levels of effectiveness and efficiency reached by the (traditional) law enforcement organization. Underlying this dissatisfaction there will often be adverse public opinion, perceptions and experience of law enforcement performance or the lack thereof. A glance at the steadily growing private security market is sufficient to see that companies operating in this sector are in fact selling the protection and security which national law enforcement agencies are failing to provide.

This mounting dissatisfaction within the community is inducing law enforcement organizations to change. Gradually, throughout the world, there is a tentative move towards decentralized and less bureaucratic law enforcement structures. New management concepts are being introduced and tested. Out goes the top-down style of decision-making and in come concepts of "self management" and "result responsibility", concepts aimed at involving all levels of the organization in taking responsibility as well as credit for law enforcement performances. Concepts such as "community policing" are gaining ground, while at the same time "lifetime employment" is being cast in doubt with the introduction of temporary contracts for all law enforcement officials. Attempts are being made to make law enforcement strategies both more proactive and more responsive to community needs.

It is essential to understand the impact of organizational realities on performance possibilities capabilities, especially where those realities (bureaucracy, hierarchical structures, complexity, etc.) stand in the way of change. To obtain the desired degree of change, such obstacles need to be removed.

Recruitment and Selection

The effectiveness of law enforcement largely hinges on the qualifications of individual law enforcement officials in terms of knowledge, skills, attitudes and behaviour. Law enforcement is by no means a mechanical production process with distinct possibilities for quality control prior to the sale of ready products. The law enforcement "factory" mainly produces services. Most of these services are provided "on the spot", beyond the span of control of those officials charged with monitoring and/or reviewing responsibilities. The powers and authorities assigned by the State to the law enforcement function are in effect powers and authorities exercised by individual law enforcement officials in individual law enforcement situations. It is controversial whether the individual official should on the one hand be vested with responsibilities and authorities that can potentially go so far as deciding over life and death, while at the same time holding next to no authority or decision-making power within the organization he or she is part of. This particular issue will be examined again below when discussing the question of accountability in law enforcement.

Knowing that human capital is the prime driving force behind quality performance in law enforcement, it becomes self-evident that levels of recruitment and selection as well as the quality of education and training

are of critical importance. Basic qualifications of law enforcement personnel can be influenced both by raising entry level requirements in the recruitment and selection phase and by modifying basic and advanced education and training. The selection of future law enforcement officials is (or should be) based on testing a candidate's profile and qualifications against the profile and qualifications of the law enforcement official sought. The latter profile is a mixture of personal qualities deemed necessary to meet the essential job requirements. All too often, however, this is not how the recruitment and selection of law enforcement officials actually take place at the national level. It is obvious that in situations where standards are low or virtually non-existent, the average qualifications of law enforcement officials will be low. If the existing levels of education and training are also poor, then the quality of law enforcement performance is likely to fall short of expectations.

Education and Training

As with recruitment and selection, there are huge differences in the existing levels and quality of education and training of law enforcement officials around the world. The basic training of a law enforcement official can take six weeks in certain countries and up to two years in others. Advanced education and training is non-existent in some countries. In others such training is provided only for officers; elsewhere it is mandatory for all personnel. Some countries place the main emphasis on knowledge, whereas others give priority to skills or to a combination of both. In some countries education and training are dictated by traditional views on law enforcement, with the stress on law, order, authority and enforcement tactics. In other countries the tide is turning and the concepts of community service, social skills, consensus and prevention tactics are gradually prevailing over the traditional views.

Law enforcement is performed in a dynamic environment with evolving views and relations. The law enforcement organization, through its individual officials, must develop a capacity to adapt and change if the way it works as a whole is not to become an obstacle to progress in society. Therefore education and training programmes cannot be closed systems with a predetermined future. Like the organization itself, they too need to be open to change and further development as dictated by the requirements of a changing environment. Only in this way can law enforcement officials meet the wants and needs of the community they are serving, and thus fulfil the expectations it has placed in them.

Law Enforcement Practice

Human Rights in Law Enforcement

The obligations created by international human rights treaties for States Parties are twofold. The first obligation is to adapt (or enact) legislation at the national level to ensure compliance with the requirements of a given treaty. The second requires States Parties to refrain from practices that are in contravention of treaty provisions. As explained in the chapter entitled *Law Enforcement in Democratic States,* this second obligation in fact establishes a link between law enforcement practice and international human rights law, as law enforcement practice is a matter of State responsibility.

States Parties are required to take positive steps to ensure both the effective implementation and the observance of the obligations deriving from treaty law by all State officials. For law enforcement this can be translated into an obligation in terms of education and training, as well as an obligation to keep law enforcement procedures under constant review and to ensure their compliance with international human rights law. In addition to this monitoring obligation at the national level, States must take rigorous steps to prevent and oppose violations of human rights committed by law enforcement officials. State responsibility is the ultimate stage of accountability for law enforcement practices. The issue of accountability in law enforcement will be dealt with below.

Conduct of Operations

Law enforcement officials are expected to respect and protect human dignity and to maintain and uphold the human rights of all persons (Code of Conduct for Law Enforcement Officials, Article 2). This objective can be achieved only if law enforcement practice meets the inherent requirements of this provision. It is necessary to bear in mind the four basic principles that underlie correct law enforcement practice:

- *legality;*
- *necessity;*
- *proportionality;* and
- *ethics.*

All law enforcement practices must be based on positive law, while at the same time recourse to them must be required by the given circumstances and the gravity of the measures taken must not be excessive in relation to that specific situation. Besides these basic principles, law enforcement

officials must take ethical standards into account. (See the chapter *Ethical and Legal Law Enforcement Conduct*.)

It is common knowledge that not all law enforcement operations are conducted "by the book". All too often the principles of legality and especially necessity and proportionality are violated. Equally often such practices remain undetected. For example, during a criminal investigation law enforcement officials may gather information using methods and/or means that are not strictly in accordance with the above principles. Since information thus obtained is used only as "soft information" — meaning that it will not be used or written down in a (final) report — the practice as such generally remains undetected. It is important to draw the attention of law enforcement officials to this phenomenon of so-called "grey policing", especially because law enforcement officials tend to be of the opinion that what they do is permissible, or at least justifiable, in the given circumstances. Grey policing is neither permissible nor is it justifiable. In criminal investigations it is likely to violate a suspected (or accused) person's right to a fair trial. It may also constitute an unlawful and/or arbitrary interference with privacy, family, home or correspondence.

Measuring and Evaluating Performance

A variety of reasons can be given as to why the individual performance of law enforcement officials requires regular recording, measuring and evaluation. The most prominent of those reasons is to ensure a constant quality of law enforcement "products" and "services" to the general public. As explained above, the quality of law enforcement performance is largely dictated by the individual qualities and qualifications of law enforcement officials. An additional reason for measuring and evaluating performance is therefore to encourage individual law enforcement officials to develop their capabilities. Regular performance reviews, guidance, career planning and continued education and training are a few of the tools to be used to this effect.

In addition to the reasons mentioned above, there are legal requirements which make the monitoring, recording and evaluation of law enforcement activities a necessity. Where monitoring and review are included among the legal requirements of law enforcement practice, they play a distinct part in the accountability of law enforcement organizations. For example, if force and firearms are used, law enforcement officials are required to report such use to their superior officers. They must moreover do so in writing in every case where the use of force or firearms causes death or injury. It is important

to point out these requirements to law enforcement officials. In this connection reference is made to the chapters on *Arrest, Detention* and *Use of Force and Firearms*.

Public Relations

Introduction

Although this may not be true of all aspects of law enforcement, it can in general be said that law enforcement is a community service. Expectations as to the type of services provided by the law enforcement organization and its members, as well as the appropriateness and adequacy of those services, are therefore justifiable. Both aspects — type and quality of services — depend on the capacity of a law enforcement organization to detect and interpret the wants and the needs of the community it is serving. This implies more than the availability of emergency phone lines for people in distress to call in for help. It requires access to all levels of the population and connections with all groups within society. At the same time it presupposes easy accessibility of the law enforcement organization itself and the existence of mutual trust between citizens and their law enforcement officials. Such relationships do not come naturally, nor do they mature overnight. They require sound investments combined with clarity of vision and objectives.

Responsiveness

"Responsiveness" means the capacity of law enforcement organizations to respond — whether reactively or proactively — to the wants and the needs of society. As such this attribute is naturally closely linked with and dependant upon the existing levels and quality of public relations. Most law enforcement organizations have a very low capacity for proactive responses to external developments, and consequently limit themselves to reactive response management. It is probably for this reason that most attention in law enforcement is focused on people in some form of distress or breaking the law, as being obvious situations requiring a law enforcement response. Proactive responses call for a much wider focus, taking into account the various elements which constitute a society and determine its law enforcement needs. Aspects of economic status and development, composition of the population, levels of urbanization and demographic data all in their own way provide insight into the current and future development of society. On the basis of such insights, useful and accurate prognoses can be made as to developments in public order and security.

Preventive strategies are not a strong point in law enforcement, nor are they very much appreciated or supported by law enforcement officials. It is generally felt that the effects of prevention cannot be measured objectively, making it difficult to assess the value of individual tactics. It is hard to say how many car accidents are prevented by posting a uniformed official at a dangerous intersection, or how many burglaries are prevented by police patrols at night in residential areas.

The requirement of responsiveness has only recently led to initial, feeble attempts of law enforcement organizations to take community opinions into account and to design proactive rather than reactive responses. The recognition that the traditional law enforcement organization described above is in fact obstructing proactive law enforcement is only slowly gaining ground within law enforcement organizations.

Accountability

As explained above, the recording, measuring and evaluation of performance can take place as part of accounting for law enforcement practices. Law enforcement organizations are answerable to the local government and the community as a whole, and their actions and practices must conform with national law as well as with State obligations under international human rights law and humanitarian law. To facilitate the necessary scrutiny, transparency of law enforcement organizations and practices is required.

Three levels of accountability need to be established. The first level is that of ***international accountability*** for law enforcement practices. According to international human rights law, individual States can be held accountable for situations in which there exists, within the territory of the State, *a consistent pattern of gross and reliably attested violations of human rights* (see ECOSOC Resolution 1503 (XLVIII) of 27 May 1970). In situations where such a pattern of violations can be attributed to law enforcement practices, those practices are recognized at the international level as practices of the State, for which it can be held accountable. In the case of incidental violations of human rights that do not amount to "a consistent pattern of gross violations", the State is still accountable for those violations. Only the complaints mechanisms are different. This issue will be dealt with in more detail below.

The second level of accountability is the ***external accountability*** of law enforcement organizations for their practices. Law enforcement officials within the territory of the State operate under and are answerable to national law. The establishment of law enforcement strategies and policies

is not a matter to be dealt with exclusively within the law enforcement organization. Local government, the community and the judiciary must be equally involved. It follows logically from this requirement for strategy and policy development that the same parties should also be involved in the evaluation of strategy and policy implementation. (This apparent logic does not, however, necessarily reflect reality in every country of the world.)

The third level of accountability, the ***internal accountability*** of law enforcement organizations, relates to the existing individual responsibility of every law enforcement official to respect and strictly observe the requirements of the law. This responsibility goes beyond a mere knowledge of the law. It sets distinct requirements as to attitudes and skill which, combined with the necessary knowledge, can guarantee prompt, adequate and appropriate application of the law without any adverse distinction. Individual law enforcement officials are therefore required — through reporting and review procedures — to expose themselves to supervision, control and scrutiny. They are equally expected to maintain and uphold the levels of knowledge and skill needed for the correct and effective performance of their duties.

It is the duty of superior officials to offer guidance and to impose correctional measures whenever a given situation so demands. If necessary, such correctional measures must go as far as disciplinary action and/or criminal charges against an individual official. Another aspect of internal accountability is the periodic evaluation of law enforcement performances against existing strategy and policy objectives. The findings of such evaluations serve to ensure the proper management and administration of the organization as a whole.

The three levels of accountability proposed must not be seen as separate entities but rather as a continuum. An account of activities undertaken at the internal accountability level will become part of the account given at the external accountability level, which in turn may well be part of the account presented by the State at the international accountability level.

At the end of the day accountability is intended to establish guarantees that law enforcement practice will be in accordance with the principles of legality, necessity and proportionality.

Complaints Mechanisms

In addition to the remarks made above under the heading *Accountability,* it is appropriate to devote some attention to the phenomenon of complaints about law enforcement practices or procedures. In this connection the

chapter *Investigation of Human Rights Violations* should also be consulted. The law enforcement business does not only have satisfied customers. In fact the tendency in contemporary societies is to perceive the law enforcement function as a necessary evil. The duty of law enforcement officials to act impartially and without any adverse distinction between people heightens this perception. The fundamental premise underlying law enforcement is respect for and obedience to the law. Evidently this may lead to situations where individuals are not satisfied with a particular decision made or action taken by individual law enforcement officials, even if such actions do meet with requirements of legality, necessity and proportionality. In addition, situations where such decisions and actions are not in compliance with the principles of legality, necessity and proportionality may give raise to complaints. Law enforcement practice is prone to complaints by individual citizens, who feel victimized through decisions made or actions taken.

The existence of complaints must not be viewed as an inevitable consequence of law enforcement, needing no specific attention or care. Several of the international human rights instruments recognize the right of individuals to complain about the behaviour of State officials and accord victims of crime and/or abuse of power an enforceable right to compensation (see for instance Article 9.5 of the ICCPR in relation to unlawful or arbitrary arrest or detention; and Article 13 of the CAT, which lays down the right of alleged victims of torture to file complaints). Individuals can bring alleged violations of human rights to the attention of the Human Rights Committee for its consideration, regardless of whether the right to complain has been specifically recognized (for these individual "communications" to be successfully brought to the attention of the Human Rights Committee, the State concerned must have ratified the 1966 Optional Protocol to the ICCPR). At the national level individuals can pursue their complaints about law enforcement by pressing criminal charges, starting civil proceedings, or even by doing both. A third feasible option is to file the complaint with the responsible law enforcement authority and demand an investigation and compensation.

The possibility to file complaints with the responsible law enforcement organization does not exist in every country of the world. Where it does, the way in which the proceedings are structured and conducted varies considerably. *Complaints about law enforcement practices must be investigated promptly, thoroughly and impartially*. In some countries this requirement has led to the establishment of civilian review boards, charged with the investigation of such complaints. In other countries the initial

investigation is conducted by officials of the law enforcement organization concerned. In no way does the right to file a complaint with a review board, or with the agency concerned, affect the individual's rights to take the same matter to court. The general aim of complaints mechanisms, whatever their structure or attachment, is mediation and peaceful settlement of the dispute. For individuals not satisfied with the outcome of the complaints proceedings, more and more countries are providing the opportunity to bring the issue to the attention of the national ombudsman or of a national commission on human rights. In the chapter on *Investigation of Human Rights Violations* the issue of individual complaints is examined in greater depth.

Chapter Highlights:

- Law enforcement officials must respect and protect human dignity and maintain and uphold the human rights of all people.
- Law enforcement organizations are dependant on human capital for the performance of their tasks and duties.
- Investment in the quality of law enforcement officials is an investment in the quality of law enforcement performance.
- Education and training of law enforcement officials must not only address issues at the theoretical level. Adequate and correct application of knowledge is essential for appropriate law enforcement practices.
- Law enforcement practices must be guided by the principles of legality, necessity and proportionality, as well as by ethical principles.
- Law enforcement is subject to public scrutiny. Operations require transparency. Performances must be regularly recorded and evaluated.
- Law enforcement officials must be respectful of and obedient to the law.
- The establishment and maintenance of relations between every entity of the law enforcement organization and the community it serves is crucial for adequate law enforcement performance.
- Public relations are a key factor in the accomplishment of responsive law enforcement.
- Law enforcement organizations are legally accountable to the government and to the community as a whole.
- The State can be held accountable for law enforcement practices that violate the principles of legality, necessity and proportionality.
- It is the responsibility of the State to ensure that human rights are promoted and protected by and via all State entities and officials.
- Law enforcement organizations and individual law enforcement officials can be held accountable for their actions under national laws.
- Strategy and policy development in law enforcement is a co-production involving the law enforcement organization, the government, the judiciary and the community.
- Law enforcement organizations, through their internal hierarchy, must make their officials accountable at the individual level. Superior officials must offer guidance and support. They are also expected to take rigorous action against illegal acts.
- Law enforcement performance is prone to complaints from members of society. Law enforcement organizations must be equipped to investigate any such complaint promptly, thoroughly and impartially.
- In certain countries the investigation of complaints about law enforcement performance is entrusted to an independent civilian review board.
- The right to file a complaint with a review board or with a particular law enforcement organization concerned in no way affects the individuals' right to have their complaint examined by an independent court or tribunal in criminal or civil proceedings, or both.

Study Questions

Knowledge/Understanding

1. Why must law enforcement practices be supervised and regularly evaluated?
2. What is the purpose of accountability in law enforcement?
3. What exactly is meant by "responsive" law enforcement?
4. What is the role of law enforcement in the protection of human rights?
5. What is the position of the State vis-à-vis unlawful law enforcement practices?
6. What are the options of an individual whose rights are violated by law enforcement action?
7. What can superior officials do to guard against unlawful law enforcement practices?
8. What is the influence of education and training in the promotion of and respect for human rights?

Application

Your chief has asked you to set up a complaints mechanism within the organization, for the swift settlement of complaints against individual law enforcement officials. He has asked you to prepare a memo for him in which you must outline the following:

1. formulation of the mechanism's task;
2. formulation of its powers and authorities;
3. proposal for the composition (members) of the mechanism;
4. formulation of its basic procedures;
5. proposals as to options for the settlement of complaints.

You have organized a first meeting with representatives of the community you serve. You can expect them to have a number of grievances to bring to your attention. You also want to address certain issues of cooperation with them.

1. Which points would you like to discuss with a view to establishing fruitful cooperation between your force and the community.
2. What reply will you give if your force is accused of inadequacy and said to be incapable of responding to specific community needs.

Chapter 16

INVESTIGATION OF HUMAN RIGHTS VIOLATIONS

Chapter Outline

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Key Questions for Law Enforcement Officials

- *What is a violation of human rights?*
- *What is the role and responsibility of the State in protection of human rights?*
- *In the case of human rights violations, what are the international complaints procedures?*
- *Can the individual person bring a complaint against the State?*
- *What remedies exist at the national level for human rights violations?*
- *What is the role and responsibility of a national ombudsman?*
- *What is the role and responsibility of a national human rights commission?*
- *What happens when law enforcement officials violate human rights?*
- *Is there a duty to investigate such violations?*
- *Who is accountable for human rights violations by law enforcement officials?*
- *What are the rights of victims of human rights violations?*

Introduction

Towards the end of this Manual it is appropriate to give some thought to the issue of human rights violations. This chapter has clear connections with the first three chapters, which set forth the legal framework and should therefore be consulted if more detail is required. Violations of human rights deserve wider consideration than merely from the point of view of law enforcement. They must be placed squarely in the context of both international and national law and the requirements contained therein. It has been emphasized throughout this *Manual*, and will become clearer in the course of this chapter, that human rights violations are great threats to peace, security and stability in a country because they undermine government credibility and authority. Law enforcement, as a visible component of State practice, plays a crucial role in promoting and protecting rights. At the same time law enforcement officials are also potential violators of individual rights and freedoms.

Defining Violations of Human Rights

Introduction

In principle, there are two ways to address the issue of violations of human rights. From the victim's standpoint, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* proposes two definitions for such violations. The first characterizes them as *"a violation of criminal laws*

operative within Member States, including those laws proscribing criminal abuse of power". Central to such violations is the individual or collective harm and suffering caused to persons, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that can be imputed to the State. The second definition concerns those *"acts and omissions [imputable to the State] that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.*"

The word "recognized" must be understood to refer to norms contained in human rights treaties, norms that form part of international customary law, or norms that form part of principles of law as recognized by civilized nations.

State Responsibility

Although the issue of State responsibility has been extensively dealt with in the first three chapters of this *Manual*, for the subject covered by this chapter it is useful to repeat some of the main points.

International law establishes and regulates relations between States. The most important sources of international law are constituted by custom, treaty law and principles of law as recognized by civilized nations. For the purposes of the present chapter the consideration of international law will be limited to international human rights law. International human rights law creates legally binding obligations for States. These obligations include the requirement to adapt (or create) national legislation in accordance with the international norms, as well as to refrain from practices that are in contravention of those norms. This latter requirement as to the practices of States extends to all entities and persons acting on behalf of the State, including public officials such as law enforcement officials. Ultimate responsibility for the acts of individual officials lies with the State. This provision does not interfere with or replace the existing levels of individual and organizational accountability at the national level. It constitutes accountability at the international level. At that level the States themselves are accountable for the individual practices of their officials, as well as for the (legislative and other) actions of their governmental agencies.

International Complaints Mechanisms

There are various ways of calling States to account at the international level for their decisions and practices (or the lack thereof) in relation to human rights. The exact procedures by which States can be held accountable for

human rights violations can be found in all sources of law, including decisions of international and regional courts, resolutions of the United Nations General Assembly, and, of course, in specialized human rights instruments themselves. There are two sets of procedures that will be examined more closely in this chapter, with specific reference to the investigation of human rights violations. They are the inter-State complaints procedure and the procedure for individual communications concerning violations of human rights.

Inter-State Complaints

There are only three specialized human rights instruments that have a provision concerning inter-State complaints. These instruments are the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention against Torture* (CAT) and the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD). Under the ICCPR and the CAT, to submit such complaints States must declare their recognition of the competence respectively of the Human Rights Committee and the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant or the Convention. Recognition of the competence of the Committee on the Elimination of Racial Discrimination to deal with inter-State complaints is mandatory for all States Parties. Each of these instruments sets out the procedures for the reception and consideration of specific complaints and for their settlement. *The general role of each of the aforesaid Committees in the case of inter-State complaints is one of mediation and conciliation, with a view to bringing about an amicable settlement on the basis of respect for the obligations provided for in the instrument concerned.*

For a complaint to be admissible, both the State bringing the complaint and the State against which the complaint is made must have recognized the jurisdiction of the respective Committees (with the exception of the Committee on the Elimination of Racial Discrimination, of which, as mentioned above, recognition is mandatory).

Individual Communications

Individual complaints procedures exist only under the ICCPR, CERD and CAT regimes. The procedure (whereby individual persons may complain of violations of treaty obligations committed by a State Party) is optional for States Parties, i.e. in situations where a State Party has not accepted the competence of a Committee to receive and consider individual commu-

nications, such communications are inadmissible. Individual communications submitted under these instruments are addressed to the Committee concerned. Under the *ICCPR* only communications from *individuals claiming to be the victim* of a violation of the Covenant's provisions will be considered by the Human Rights Committee. For the CAT the provision is similar, although the communication, addressed to the Committee against Torture, can also be sent *on behalf* of the individual claiming to be a victim of a violation of that Convention. The CERD allows only communications from individuals or groups of individuals claiming to be victims of violations of the CERD to be received for consideration by the Committee on the Elimination of Racial Discrimination.

As to the admissibility of individual petitions, the three instruments lay down specific criteria:

- *the competence of the Committee needs to be recognized* (ICCPR/OP Art. 1; CAT 22.1; CERD 14.1);
- *exhaustion of domestic remedies* (ICCPR/OP Arts 2 and 5.2(a); CAT 22.5(b); CERD 14.7);
- *no anonymous communication, no abuse* (ICCPR/OP Art. 3; CAT 22.2; CERD 14.6);
- *compatibility* **(ratione temporis, personae, loci, materiae)** *with provisions of the Covenant/ the Convention* (ICCPR/OP Art. 3; CAT 22.2);
- *no current examination of the matter under another international procedure* (ICCPR/OP Art. 5.2(a));
- *no past or current examination of the matter under another international procedure* (CAT 22.5(a));
- *substantiation of allegations* (prima facie *case*) (ICCPR/OP I, Art. 2; CAT 22.1).

When a complaint is considered admissible, the Committee will proceed to bring it to the attention of the State Party concerned. Within six months, the receiving State must submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State. (ICCPR/OP Article 4; CERD Article 14.6(b), but restricted to three months; CAT Article 22.3). The subsequent considerations of the Committee will be based upon the information made available to it by ("or on behalf of", CAT Article 22.1) the petitioner and the State Party concerned (ICCPR/OP Article 5.1; CAT Article 22.4; CERD Article 14.7(a)). Following these considerations, which are made in closed meetings, the Committee will forward its views to the State Party concerned

and to the individual (ICCPR/OP Article 5.3 and 5.4; CAT Article 22.6 and 22.7; CERD Article 14.7(a) and (b), no indication that meetings of this Committee in this respect are closed meetings). All Committees are required to present an annual report of their activities under the Protocol (ICCPR) or under the Convention (CAT and CERD), to the Commission on Human Rights.

	ICCPR	CERD	CAT
Total number of States Parties	141	162	105
Individual communications procedure accepted.	93 ratifications of Optional Protocol I	25 declarations under Article 14	39 declarations under Article 22

Status of ratifications of ICCPR, CERD and CAT and acceptance of individual communications as at December 1997
Source: UN International Instruments Branch, Office of the High Commissioner for Human Rights, Geneva.

The procedure as described above relates to individual violations of human rights. It is of course possible that they in fact reveal an apparent pattern of violations of specific rights or in a specific country or region. In the event of such violations, individuals can bring their communication to the attention of the UN Secretary-General under the so-called "1503 procedure" — a reference to Economic and Social Council Resolution 1503 (XLVIII) of 27 May 1970. (See under the relevant heading in the chapter *Human Rights Law*.) From the communications received, the Working Group on Communications (established by the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities) will select for the attention of the Sub-Commission those communications (including the replies, if any, from governments to them) that appear to reveal *a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms*. A diagram showing this procedure is given below.

1503 PROCEDURE

Individual Communications received by the Secretary General of the U.N. under ECOSOC RESOLUTIONS 728 F (XXVIII) 30 July 1959 and in accordance with Resolution 1235 (XLII) of 6 June 1967.

Working Group of Communications of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities.

→ Admissible communications may originate from a person or group of persons who, …, are victims of *such violations*, any person or group of persons who have a direct and reliable knowledge of those violations, or N.G.O.'s acting in good faith, …, and having direct and reliable knowledge of those violations.

→ …to consider all communications, including replies of governments thereon, …, to bringing to the attention of the Sub-Commission those communications, …, Which appear to reveal a consistent pettern of gross and reliably attested violations of human rights and fundamnetal freedoms within the terms of reference of the Sub-Commission.

PRE-ADMISSIBILITY STAGE

→ Anonymous communications shall be inadmissible; …, the author of a communication, …, must be clearly identified.

→ Communications shall not be inadmissible solely because the knowledge of the individual author is second hand, provided that they are accompanied by clear evidence.

→ The object of the communication must not be inconsistent with the relevant principles of the Charter, of the U.D.H.R. and of the other applicable instruments in the field of Human Rights.

→ Communications shall be admissible only if, …, there are reasonable grounds to believe that they may reveal a consistent pattern of gross and reliaby attest violations of human rights and fundamental freedoms.

ADMISSIBILITY STAGE

→ A communication will not be admissible if:

- it does not contain facts, states the purpose of the petition and of the rights that were violated;
- if its language is essentially abusive;
- if it has manifestly political motivations anf its subject is contrary to the provision of the U.N. Charter;
- if it appears to be based exclusively on reports disseminated by mass media;
- if their admission would prejudice the functions of specialized U.N. agencies;
- if viable domestic remedies have not been exhausted;
- if they relate to cases settled by the States concerned in accordance with the principles of the U.D.H.R. or other human rights instruments;
- if they are not submitted within a reasonable time after the exhaustion of domestic remedies.

Sub-Commission consideration

Discontinue

Commission on Human Rights consideraton

A thorough study by the Commission on the basis of paragraph 3 of ECOSOC Resolution 1235 (XLII) of 6 June 1967. (paragraph 6(a) 1503)

Investigation by an ad-hoc committee on the basis of paragraph 6(b) of ECOSOC Resolution 1503 (XLVIII) of 27 May 1970.

National Remedies

The requirement that domestic remedies must have been exhausted before individual communications can become admissible to one of the treaty bodies mentioned above makes it necessary to consider the various remedies that exist at the national level. The ICCPR in its Article 2 in fact imposes the obligation upon States Parties *to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity"*. There are a few exceptions to the requirement of exhaustion of domestic remedies. The first exception lies in the use of the wording *"effective"* of the article cited. In situations where no remedy exists, or the existing remedies are insufficient to adequately remedy the complaint, the exhaustion of domestic remedies is not required. This is for instance the case in a situation where a person would claim compensation for suffering but the national remedy does not provide for the awarding of financial compensation. The second exception to the exhaustion of domestic remedies is constituted by situations in which the application of the remedies is unreasonably prolonged.

Legal Proceedings

In view of the fact that human rights violations are acts or omissions that constitute a violation either of criminal laws operative within the territory of the State or of internationally recognized norms related to human rights, States are under an obligation to exert judicial control over such acts or omissions as well as to protect the victims thereof. Where a human rights violation is also a violation of criminal laws, the implications for judicial control are prescribed in national law. In purpose and scope criminal law is, however, normally more concerned with the perpetrator than with the victims of crime. Aspects of compensation and redress to such victims quite often become the object of subsequent civil proceedings.

As for internationally recognized norms of human rights that are not yet incorporated into national laws, courts and tribunals at the national level are nevertheless under an obligation to take those norms into consideration insofar as they form part of customary international law, or belong to treaty law to which that State is party.

Complaints Mechanisms

Besides legal proceedings of the criminal or civil kind, there are other ways for individuals (at the national level) to attempt to obtain an effective remedy for their complaint. Sometimes provision for the establishment of a

complaints mechanism at the national level is made in international human rights instruments such as the *CERD* (see its Article 14.2). Only when domestic remedies have been exhausted can an individual submit his or her complaint at the international level to one of the treaty bodies concerned. For the effective promotion and protection of human rights at the national level there are two types of institutions which have been established in many countries around the world and which deserve closer consideration. These are the *national ombudsman* and *national human rights commissions*.

National Ombudsman[9]

The office of "ombudsman" is now established in a large number of countries. The ombudsman (who may be an individual or a group of persons) is generally appointed by the national parliament. The primary function of this institution is to protect the rights of individuals who believe themselves to be the victim of unjust acts on the part of the public administration (in most instances this includes acts of the law enforcement officials). Accordingly, the ombudsman will often act as an impartial mediator between an aggrieved individual and the government.

While the institution of ombudsman is not exactly the same in any two countries, all follow similar procedures in the performance of their duties. The ombudsman receives complaints from members of the public and will investigate these complaints provided that they fall within the competence of his or her office. In the process of the investigation the ombudsman is generally granted access to the documents of all relevant public authorities. He or she will then issue a statement of recommendation based on the findings of this investigation. That statement is given to the person lodging the complaint, as well as to the office or authority complained against. In general, if the recommendation is not acted upon, then the ombudsman may submit a specific report to parliament. While any citizen who believes that his or her rights have been violated may submit a complaint to the ombudsman, many countries require that the complainant first exhaust all alternate legal remedies. There may also be time limits imposed on the filing of complaints, and while the ombudsman's authority usually extends to all aspects of public administration, some are not empowered to consider complaints involving presidents, ministers or the judiciary. Access to the ombudsman also varies from country to country. In many countries individuals may lodge a complaint directly with the ombudsman's office.

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[9] The contents of this section are drawn from UN Fact Sheet No. 19, *National Institutions for the Promotion and Protection of Human Rights,* pp. 8 and 9.

In other countries complaints may be submitted through an intermediary such as a member of parliament. The complaints made to the ombudsman are generally confidential, and the identity of the complainant is not disclosed without that person's consent.

The ombudsman is not always restricted to acting upon complaints and may be able to commence an investigation on his or her own initiative. Self-initiated investigations often relate to issues which the ombudsman may have determined to be of broad public concern, or issues which affect group rights and are therefore not likely to be the subject of an individual complaint.

In many respects, the powers of the ombudsman are quite similar to those of the human rights commissions (to be discussed below). Both may receive and investigate individual complaints. In principle, neither has the power to make binding decisions. There are nevertheless some differences in the functions of the two bodies which explain why some countries establish and simultaneously maintain both types of institutions.

National Human Rights Commissions[10]

In many countries, special commissions have been established to ensure that the laws and regulations concerning the protection of human rights (at the national level) are effectively applied. Most commissions function independently from other organs of government, although they are usually required to report to parliament on a regular basis. Human rights commissions are concerned primarily with the protection of nationals against discrimination and with the protection of civil and other human rights. The precise functions and powers of a particular commission will be defined in the legislative act or decree under which it is established. These laws will also serve to define the commission's jurisdiction by specifying the range of discriminatory or violative conduct that it is empowered to investigate. Some commissions concern themselves with alleged violations of any rights recognized in the constitution. Others may be able to consider cases of discrimination on a broad range of grounds including race, colour, religion, sex, national or ethnic origin, disability, social condition, sexual orientation, political convictions and ancestry.

One of the most important functions vested in an human rights commission is to receive and investigate complaints from individuals (and occasionally from groups) alleging human rights abuses committed in violation of

[10] *Ibid*, pp. 6 and 7.

existing national law. Such complaints may well include complaints against law enforcement organizations or individual officials. In order to properly carry out its tasks, the commission will usually have the authority to obtain evidence relating to the matter under investigation. Even if only used rarely, this power is important in that it guards against the possibility of frustration through lack of cooperation on the part of the person or the body complained against. While there are considerable differences in the procedures followed by various human rights commissions in the investigation and resolution of complaints, many rely on conciliation and/or arbitration. If the process of conciliation fails to resolve the dispute, the commission may be able to resort to arbitration in which it will, after a hearing, issue a determination.

The ability of a commission to initiate enquiries on its own behalf is an important measure of its overall strength and probable effectiveness.

Law Enforcement

Violations of Human Rights

Law enforcement officials act in a public capacity under the direct authority of and with special powers granted to them by the State in which they operate. The practices of and decisions taken by law enforcement officials must therefore be seen and accepted as practices and decisions of the State, for which the latter is responsible and accountable. Law enforcement practices must be based on respect for and obedience to the laws of the State. Evidence of all too often, however, subsequent evidence reveals what must be considered as a *"détournement de pouvoir"* (an incorrect use of lawful powers or authorities) or *"abus de pouvoir"* (an abuse of power and/or authority). Where law enforcement practices violate the rights and freedoms of individual citizens, the very foundation for the establishment and acceptance of State authority is undermined. Whenever and wherever such practices remain without (judicial) consequences for those responsible, it is not merely the credibility of the State with regard to international human rights obligations that is at stake but also the very concept and quality of individual rights and freedoms.

The Duty to Investigate

Under national laws, responsibility for the prevention and detection of crime has been assigned to law enforcement organizations. It must be understood to include a responsibility to investigate crimes committed by

public officials, thus also by law enforcement officials. Evidence of this responsibility can be found in national penal codes, which often contain provisions relating to punishable offences committed by a person acting in a public capacity. The penalty that can be imposed for such offences takes into account the fact that the perpetrator acted in an official capacity and the serious consequences this can entail. Similarly, a duty to investigate human rights violations (at the national level) is contained in several of the international instruments relating to human rights, both in hard law and in soft law instruments. Examples of the duty to investigate can be found in Article 12 of the *Convention against Torture* (CAT); Articles 11, 19.2, and implicitly Articles 33 to 36 of the *Convention on the Rights of the Child* (CRC); Article 2(d) in connection with Article 4 (a), (b) and (c) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD); Article 8 of the *Code of Conduct for Law Enforcement Officials* (CCLEO); Article 22 of the *Basic Principles on the Use of Force and Firearms* (BPUFF); and Article 9 of the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*.

All such *investigations must be carried out promptly, thoroughly and impartially*. These three specifications are of equal and crucial importance to the outcome of the investigation as well as to its credibility. It must be understood that the criterion of "impartiality" will weigh particularly heavily for external observers of such an investigation. The act of one individual law enforcement official is capable of discrediting the law enforcement organization as a whole. It is hence not difficult to understand that any law enforcement investigation into the circumstances of an incident involving law enforcement officials will meet with scepticism as to its impartiality.

Accountability

Law enforcement officials must be held accountable for their individual acts, including those that are unlawful and or arbitrary. A law enforcement official cannot successfully invoke superior orders when it must have been clear to the official concerned that the order in question was manifestly unlawful and there was a reasonable opportunity to refuse to follow it. Even in situations where lawful superior orders could successfully be invoked in defence of the acting law enforcement official, he or she is not subsequently exempted from any personal responsibility for the contested act; the accountability for the wrongful act (or omission) is merely extended to include the superior official. Nor can exceptional circumstances such as

states of emergency, situations of armed conflict or the threat thereof be successfully invoked as a justification for unlawful or arbitrary law enforcement practices. In any case, superior officers can and must be held accountable if they were aware of the fact that officials under their command were resorting to unlawful and/or arbitrary practices in the performance of their duties, and did not take all measures in their power to prevent, suppress or report such practices. Establishment and maintenance of effective monitoring and review procedures is a necessity to guarantee the individual accountability of law enforcement officials. In this connection the chapter on *Monitoring and Review Procedures* should be consulted, especially the paragraphs under the heading *Accountability*.

Victims

While the situation of all victims of crime and abuse of power is a matter of concern to law enforcement officials, victims of human rights violations deserve particular attention for the very fact that the violation in question has been "committed" by the State, through one of its public officials or another person acting in an official capacity. This fact does not in any way change the victim's entitlement to *treatment with compassion and respect*, nor does it affect *their right to access to the mechanisms of justice and to prompt redress*. It must be understood that such a violation of the rights of an individual when committed by — or with the acquiescence of — a State official, can seriously impair the relationship between citizens and the State. Law enforcement performance, in terms of the actual state of law and order, depends upon the existence of good public relations. Where law enforcement officials resort to practices that run counter to individual rights and freedoms, the very relationship between the organization as a whole and the community is at stake. Trust and confidence are two prerequisites for fruitful communication and cooperation between the community and a law enforcement organization. When trust and confidence wane because of apparent unlawful or arbitrary behaviour of law enforcement officials, the quality of cooperation and communication will also decline. Special care must be taken of the victims of such violations if isolated incidents are not to have a disastrous effect on the image and performance of the entire law enforcement organization.

Chapter Highlights

- Human rights violations can be defined as violations either of national criminal laws or of internationally recognized standards relating to human rights that have not yet been incorporated into national laws.
- In the strict legal sense a violation of human rights occurs only when the act or omission is imputable to the State.
- At the international level States can be held accountable for their human rights practices by means of inter-State complaints or individual communications procedures.
- Individual complaints addressed to one of the treaty-monitoring bodies can be taken into consideration only when the State concerned has accepted the jurisdiction of that body to receive and consider such communications.
- Inter-State complaints are possible only under the ICCPR, the CERD and the CAT and only when the States concerned have declared their acceptance of the respective Committees to that end. In the case of the CERD, acceptance of the inter-State complaint possibility is mandatory upon becoming a State Party.
- Individual communications concerning violations of human rights can also be addressed to the UN Secretary-General and can lead to consideration under the "1503 procedure" when such communications may reveal a consistent and reliably attested pattern of gross violations of human rights and fundamental freedoms. This procedure is not dependent upon the consent of the State.
- Exhaustion of domestic remedies is a prerequisite for admissibility of individual communications to treaty bodies.
- Other admissibility criteria include recognition of the competence of the committee; clear identification of the petitioner; compatibility with the provisions of the convention concerned; no current (or past, in the case of the CAT) examination under another international procedure; and a substantiation of the allegations.
- National remedies include legal proceedings, whether criminal or civil, arbitration or conciliation mechanisms, and a national ombudsman or national human rights commission.
- Violations of human rights committed by law enforcement officials are detrimental to the integrity of the entire law enforcement organization. Their existence must not be denied. Their occurrence must be prevented, and in cases where that was not possible they need to be investigated promptly, thoroughly and impartially.
- Law enforcement organizations have a duty, on the basis both of national laws and of State obligations under international law, to investigate human rights violations.
- Individual law enforcement officials must be held accountable for their actions. This requires internal monitoring and review procedures. In the event of human rights violations adequate disciplinary measures and/or legal proceedings must be initiated.
- Due attention should be paid to the special needs of victims of human rights violations, especially victims of violations committed by law enforcement officials.

Study Questions

Knowledge/Understanding

1. How would you define a "human rights violation"?
2. What is the significance of State responsibility for human rights violations?
3. Can terrorist actions be construed as violating human rights?
4. Do law enforcement officials have a duty to investigate violations of human rights?
5. What individual complaints procedures exist at the international level?
6. What is the selection criterion for the "1503 procedure"?
7. What is the difference between the "1503 procedure" and individual communications to one of the treaty bodies?
8. Why should special attention be given to victims of human rights violations committed by law enforcement officials?
9. Why must petitioners first exhaust domestic remedies before their complaint is admissible for consideration by one of the treaty bodies?
10. What is the difference between a national ombudsman and a national human rights commission?

Application

You have been asked by your chief to draw up a set of rules for an internal complaints procedure for individual citizens who want to complain about law enforcement practices or the behaviour of individual law enforcement officials.

1. Draw up recommendations for the composition of an investigative board to be established.
2. Formulate criteria for the admissibility of complaints, if any.
3. Develop recommendations for the settlement of disputes and complaints.
4. Indicate the way(s) in which the existence of this procedure can best be made known to the public.

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The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.

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This manual compiles all the rules of human rights and humanitarian law that are relevant for professional law enforcement practice, covering the entire spectrum from situations of peace to situations of international armed conflict. The manual consists of sixteen different chapters addressing *inter alia* issues of international law, law enforcement responsibility, and law enforcement power. Equally, it focuses on the implications for law enforcement practice of the special position of women, juveniles, victims, refugees, and internally displaced persons in the administration of justice. An attempt has been made to write every chapter as a separate and independent entity. Each chapter provides a cursory explanation of the placement of its particular subject matter in the structure of the entire manual. In addition, all chapters contain cross-references to other chapters of the manual where appropriate. Consequently, the manual can be used following the sequence from chapter one through chapter sixteen. However, it is also possible to enter directly into the subject matter of a particular chapter of interest, or to make combinations of any number of chapters. Although written with members of police and security forces in mind this manual may prove equally valuable to members of the armed forces involved in operations to which the laws of war do not apply.

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