

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-06-90-A

BEFORE THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Patrick Robinson
Judge Mehmet Güney
Judge Carmel Agius

Registrar: Mr. John Hocking

Date Filed: 31 August 2012

THE PROSECUTOR

v.

ANTE GOTOVINA AND MLADEN MARKAC

**BOOK OF AUTHORITIES FOR
ANTE GOTOVINA'S SUPPLEMENTAL
BRIEF ON ALTERNATE MODES OF LIABILITY**

(PUBLIC)

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Mr. Tomislav Kuzmanovic
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**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

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v.
ANTE GOTOVINA AND MLADEN MARKAC
PUBLIC**

**BOOK OF AUTHORITIES FOR
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BRIEF ON ALTERNATE MODES OF LIABILITY**

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- *Prosecutor v. Gotovina et al.*, IT-06-90-A, Prosecution Supplemental Brief on Alternative Modes of Liability for Ante Gotovina, 10 August 2012 ("OTP Brief").

PRELIMINARY MATTERS

- *Prosecutor v. Gotovina et al.*, IT-06-90-A, Order for Additional Briefing, 20 July 2012 ("20 July Order");
- International Criminal Tribunal for the Former Yugoslavia Statute, Articles 21, 25.
- Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia, Rule 114.

GOTOVINA IS NOT GUILTY OF DEPORTATIONS (THROUGH SHELLING) AND PERSECUTIONS (DEPORTATIONS) BECAUSE THE CHAMBER FOUND NO CRIME IN LAWFUL SHELLING

- *Prosecutor v. Gotovina et al.*, IT-06-90-T, Trial Judgement, 15 April 2011 ("TJ").
- *Prosecutor v. Gotovina et al.*, Prosecution Pre-Trial Brief, Public Version, 23 March 2007 ("OTP-PTB").
- *Prosecutor v. Gotovina et al.*, IT-06-90-A, Order for Additional Briefing, 20 July 2012.
- *Prosecutor v. Gotovina et al.*, IT-06-90-A, Ante Gotovina's Supplemental Brief Pursuant to the Oral Order of the Appeals Chamber of 14 May 2012, 17 May 2012 ("Gotovina Supplemental Brief").

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- *Prosecutor v. Gotovina et al.*, IT-06-90-T, Trial Judgement, 15 April 2011 (“TJ”).
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- *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Appeal Judgement, 24 March 2000.
- *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Appeal Judgement, 29 July 2004.
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- *Prosecutor v. Mile Mrkšić & Veselin Šljivančanin*, IT-95-13/1-A, Appeal Judgement, 5 May 2009.
- *Prosecutor v. Ferdinand Nahimana, Jean Bosco Barayagwiza, and Hassan Ngeze*, ICTR-99-52-A, Appeal Judgement, 28 November 2007.
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- *Prosecutor v. Gotovina et al.*, IT-06-90-T, Trial Judgement, 15 April 2011 (“TJ”).
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- *Prosecutor v. Gotovina et al.*, IT-06-90-A, Order for Additional Briefing, 20 July 2012.
- *Prosecutor v. Zlatko Aleksovski*, IT- 95-14/1-T, Trial Judgement, 25 June 1999.
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- International Covenant on Civil and Political Rights, Article 14 (SEE TAB 4).

GOTOVINA IS NOT GUILTY OF DEPORTATIONS (THROUGH SHELLING) AND PERSECUTIONS (DEPORTATIONS) BECAUSE THE CHAMBER FOUND NO CRIME IN LAWFUL SHELLING

- International Criminal Tribunal for the Former Yugoslavia Statute, Article 21.

GOTOVINA IS NOT LIABLE FOR MURDERS, OTHER INHUMANE ACTS AND CRUEL TREATMENT, DESTRUCTION, PLUNDER OR PERSECUTIONS, AS AN AIDER AND ABETTOR OR UNDER ARTICLE 7(3)

- ICRC, *Commentary to Additional Protocol I*, 1977, p. 1010, par 3547; (“ICRC Commentary to API”) (SEE TAB 5).
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GOTOVINA IS NOT LIABLE FOR MURDERS, OTHER INHUMANE ACTS AND CRUEL TREATMENT, DESTRUCTION, PLUNDER OR PERSECUTIONS, AS AN AIDER AND ABETTOR OR UNDER ARTICLE 7(3)

- D1634
- D1635

TAB 1

LAW REPORTS
OF
TRIALS OF
WAR CRIMINALS

Selected and prepared by
THE UNITED NATIONS
WAR CRIMES COMMISSION

VOLUME IX

PROPERTY OF U. S. ARMY
THE JUDGE ADVOCATE GENERAL'S SCHOOL
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LONDON: PUBLISHED FOR
THE UNITED NATIONS WAR CRIMES COMMISSION
BY HIS MAJESTY'S STATIONERY OFFICE

1949

proved of their having *voluntarily* participated in the Reich slave-labour programme.⁽¹⁾ It will be noted that nothing more than "knowledge and approval" of Weiss's acts on the part of Flick is mentioned in the Judgment, but it seems clear that the decision of the Tribunal to find him guilty was an application of the responsibility of a superior for the acts of his inferiors which he has a duty to prevent.⁽²⁾

The effect of the decisions of the Tribunals which conducted the *Milch* and *Flick Trials* was to overrule the submission that deportation and enslavement were not war crimes since they were not specifically mentioned in the Hague Convention; the Defence in the *Flick Trial* claimed that, on this matter, "The Indictment is based on two provisions, one of which has no connection at all and the other one only a very limited connection with this question, that is, to Articles 46 and 52. Article 46 of the Hague Land Warfare Convention states:

" 'The honour and the rights of the family, the life of the citizens and private property, as well as religious faith and religious services, are to be respected.' "

Counsel continued: "I can see no connection whatsoever between this regulation and the conscription of labour. Article 52 says:

" 'Contributions in kind and services can only be demanded from communities or inhabitants for the requirements of the occupation army. These must be in proportion to the resources of the country and must be of such a kind that they do not oblige the population to take part in military operations against their native country.' "

"Two restrictions result from this regulation for the compulsory demand of services: firstly, 'only for the requirements of the occupation army', and secondly, 'no participation in military operations'. What is not shown by this Article is a veto to employ these workers outside the occupied territory. On the contrary, if it is practical for the belligerent nation to have the work for the requirements of the occupation army performed in its home country, there is nothing in Article 52 which opposes the compulsory use of workers from the occupied territory for this purpose. This interpretation I base on the aforementioned principle, that exceptions to the unrestricted use of violence in war must be clearly formulated and proved by those who refer to it."

7. THE INTER-RELATION BETWEEN THE INTERNATIONAL MILITARY TRIBUNAL AND THE UNITED STATES MILITARY TRIBUNALS IN NUREMBERG, AND BETWEEN THE LATTER TRIBUNALS THEMSELVES⁽³⁾

The *Justice Trial* (trial of Altstötter and others)⁽⁴⁾ was the first and the *Flick Trial* the most recent to be treated in this series of Reports of the trials which have been held in Nuremberg, before United States Military

⁽¹⁾ See pp. 20-21.

⁽²⁾ See further on this point Vols. IV, pp. 83-96, VII, pp. 61-64, VIII, pp. 88-89, and the Report upon the *High Command Trial* (Trial of Von Leeb and others), in Vol. XII.

⁽³⁾ See p. 2, footnote 1.

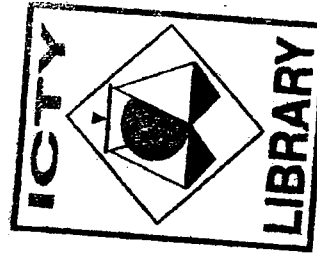
⁽⁴⁾ See Vol. VI of these Reports, pp. 1-110.

TAB 2

TRIALS
OF
WAR CRIMINALS
BEFORE THE
NUERNBERG MILITARY TRIBUNALS

UNDER
CONTROL COUNCIL LAW No. 10

NUERNBERG
OCTOBER 1946-APRIL 1949



VOLUME XI

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An army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein. It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime. No doubt such occurrences result occasionally because of unexpected contingencies, but they are the unusual. With reference to statements that responsibility is lacking where temporary absence from headquarters for any cause is shown, the general rule to be applied is dual in character. As to events occurring in his absence resulting from orders, directions, or a general prescribed policy formulated by him, a military commander will be held responsible in the absence of special circumstances. As to events, emergent in nature and presenting matters for original decision, such commander will not ordinarily be held responsible unless he approved of the action taken when it came to his knowledge.

The matter of subordination of units as a basis of fixing criminal responsibility becomes important in the case of a military commander having solely a tactical command. But as to the commanding general of occupied territory who is charged with maintaining peace and order, punishing crime, and protecting lives and property, subordination are relatively unimportant. His responsibility is general and not limited to a control of units directly under his command. Subordinate commanders in occupied territory are similarly responsible to the extent that executive authority has been delegated to them.

Much has been said about the participation of these defendants in a preconceived plan to decimate and destroy the populations of Yugoslavia and Greece. The evidence will not sustain such a charge and we so find. The only plan demonstrated by the evidence is one to suppress the bands by the use of severe and harsh measures. While these measures progressively increased as the situation became more chaotic, and appeared to have taken a more or less common course, we cannot say that there is any convincing evidence that these defendants participated in such measures for the preconceived purpose of exterminating the population generally.

Neither will the evidence sustain a finding that these defendants participated in a preconceived plan to destroy the economy of the Balkans. Naturally there was a disruption of the economy of these countries but such only as could be expected by a military occupation. There were unlawful acts that had the effect of

damaging the economy of Yugoslavia and Greece, possibly the result of a preconceived plan, but the evidence does not show the participation of these defendants therein.

There is evidence to the effect that certain reports and entries in the war diaries do not reflect the truth and were not intended to do so. The explanation is made that certain orders received from the High Command were so harsh and severe that resort was had to subterfuge to appease the insistent demands of superiors. It is asserted, for example, that the number of reprisals taken against the population was increased above the actual number for this purpose and that the number of killings was inflated for the same reason. In this connection we desire to point out that the records of the German Army are mute evidence of the events and occurrences which they themselves made. Statements contained therein which are adverse to the interests of the defendants approach the status of admission against interest. If the evidence and circumstances sustain such an assertion of falsity, we will of course give credence to it, but there are limitations beyond which the most credulous court cannot go.

In determining the guilt or innocence of these defendants, we shall require proof of a causative, overt act or omission from which a guilty intent can be inferred before a verdict of guilty will be pronounced. Unless this be true, a crime could not be said to have been committed unlawfully, willfully, and knowingly as charged in the indictment.

In making our findings of fact, we shall give effect to these general statements except where a contrary application is specifically pointed out. We shall impose upon the prosecution the burden of proving its case beyond a reasonable doubt. We shall also adhere to the rule that the defendants will be presumed innocent until proven guilty by the required quantum of competent evidence. With these general statements in mind, we shall turn to a consideration of the charges against the individual defendants.

A brief historical background is helpful in dealing with issues here involved. The troubles of the German Wehrmacht in the Balkans began in October 1940 with the commencement of the war on Greece by Italy. Until that occurrence, Greece was a neutral nation and immune to invasion by the Allied powers without the violation of fundamental concepts of the rights of neutrals. The attack on Greece by Italy, an ally of Germany, transformed that country into an active belligerent which welcomed the aid of the Allied powers. The failure of the Italian forces to subjugate Greece opened the way to possible invasion of continental Europe by Allied forces. To prevent such a con-

TAB 3

TRIALS
OF
WAR CRIMINALS
BEFORE THE
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UNDER

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NUERNBERG

OCTOBER 1946-APRIL 1949



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"Article 1

"The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

"1. To be commanded by a person responsible for his subordinates;

"2. To have a fixed distinctive emblem recognizable at a distance;

"3. To carry arms openly; and

"4. To conduct their operations in accordance with the laws and customs of war.

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

This Article defines what constitutes a lawful belligerent. Orders to the effect that Red Army soldiers who did not turn themselves over to the German authorities would suffer penalty of being treated as guerrillas, and similar orders, and the execution of Red Army soldiers thereunder, are in contravention of the rights of lawful belligerents and contrary to international law.

It has been stated in this case that American occupational commanders issued similar orders. This Tribunal is not here to try Allied occupational commanders but it should be pointed out that subsequent to the unconditional surrender of Germany, she has had no lawful belligerents in the field.

Judge Harding at this point will continue with the reading of the judgment.

RESPONSIBILITY OF COMMANDERS OF OCCUPIED TERRITORIES

JUDGE HARDING: The defense in this case as to the field commanders on trial has been partially based on the contention that while criminal acts may have occurred within the territories under their jurisdiction, that these criminal acts were committed by agencies of the state with which they were not connected and over whom they exercised no supervision or control. It is conceded that many of these defendants were endowed with executive power but it is asserted that the executive power of field commanders did not extend to the activities of certain economic and police agencies which operated within their areas; that the activities of these agencies constituted limitations upon their exercise of executive power.

In this connection it must be recognized that the responsibility of commanders of occupied territories is not unlimited. It is fixed according to the customs of war, international agreements, fundamental principles of humanity, and the authority of the commander which has been delegated to him by his own government. As pointed out heretofore, his criminal responsibility is personal. The act or neglect to act must be voluntary and criminal. The term "voluntary" does not exclude pressures or compulsions even to the extent of superior orders. That the choice was a difficult one does not alter either its voluntary nature or its criminality. From an international standpoint, criminality may arise by reason that the act is forbidden by international agreements or is inherently criminal and contrary to accepted principles of humanity as recognized and accepted by civilized nations. In the case of violations of international agreements, the criminality arises from violation of the agreement itself—in other cases, by the inherent nature of the act.

War is human violence at its utmost. Under its impact excesses of individuals are not unknown in any army. The measure of such individual excesses is the measure of the people who compose the army and the standard of discipline of the army to which they belong. The German Army was, in general, a disciplined army. The tragedy of the German Wehrmacht and these defendants is that the crimes charged against them stem primarily from its highest military leadership and the leadership of the Third Reich itself.

Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility. The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means coextensive. Modern war such as the last war entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting

TAB 4



OFFICE OF THE HIGH COMMISSIONER
FOR HUMAN RIGHTS



International Covenant on Civil and Political Rights

**Adopted and opened for signature, ratification and accession by General
Assembly resolution 2200A (XXI)
of 16 December 1966**

entry into force 23 March 1976, in accordance with Article 49

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person, Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights, Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms, Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
 - (a) 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;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent

authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional

release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. 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.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) 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;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, 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 understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. 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.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

Article 25

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 country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV**Article 28**

1. There shall be established a Human Rights Committee (hereafter referred to in the present

Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.
2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:
 - (a) Twelve members shall constitute a quorum;
 - (b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present 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: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
- (b) Thereafter whenever the Committee so requests.
2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.
4. 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 may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.
5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:
 - (a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;
 - (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
 - (c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with

the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1.

(a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report

shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirtyfifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

1. Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:
 - (a) Signatures, ratifications and accessions under article 48;
 - (b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

**Office of the United Nations High Commissioner for Human Rights
Geneva, Switzerland**

TAB 5

Reading Committee

Chairman: Jean PICTET

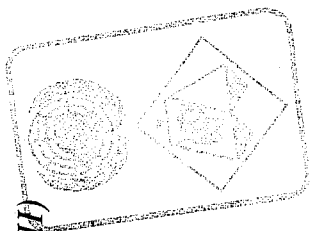
Hans-Peter GASSER · Sylvie-S. JUNOD ·
Claude PILLOUD† · Jean DE PREUX ·
Yves SANDOZ · Christophe SWINARSKI ·
Claude F. WENGER · Bruno ZIMMERMANN

Claude PILLOUD† · Jean DE PREUX ·
Yves SANDOZ · Bruno ZIMMERMANN ·
Philippe Eberlin · Hans-Peter Gasser · Claude F. Wenger
(Protocol I)

Philippe EBERLIN (*Annex I*) ·
Sylvie-S. JUNOD (*Protocol II*)

with the collaboration of

Jean PICTET



Commentary on the Additional Protocols

of 8 June 1977
to the Geneva Conventions
of 12 August 1949

Editors

Yves SANDOZ · Christophe SWINARSKI ·
Bruno ZIMMERMANN

International Committee of the Red Cross

Martinus Nijhoff Publishers

Geneva 1987

reconciles the divergent texts, having regard to the object and purpose of the treaty,³³ and therefore the French version should be given priority since it covers both cases.³⁴ It seems to be established that a superior cannot absolve himself from responsibility by pleading ignorance of reports addressed to him,³⁵ or by invoking temporary absence as an excuse.³⁶ According to post-war judicial decisions, the tactical situation, the level of training and instruction of subordinate officers and their troops, and their character traits are also pieces of information of which the superior cannot claim to be ignorant.³⁷ Such information available to a superior may enable him to conclude either that breaches have been committed or that they are going to be committed (examples would be information on lack of any instruction for the troops on the Geneva Conventions and the Protocol, on the means of attack allocated or available in an area densely populated by civilians, on lack of medical services and absence of instructions relating to prisoners of war). Every case must be assessed in the light of the situation of the superior concerned at the time in question, in particular distinguishing the time that the information was available and the time at which the breach was committed, also taking into account other circumstances which claimed his attention at that point, etc.³⁸

3546 What is the position if the superior concerned persists in maintaining that he was not aware of the breaches committed or of information enabling him to conclude that they had been committed or were going to be committed, and if no proof can be furnished to the contrary? It is not possible to answer this question in the abstract; something that is true may, depending on circumstances, seem unlikely. It is not impossible for a superior actually to be ignorant of breaches committed by his subordinates because he deliberately wishes to remain ignorant. The fact is that in several flagrant cases the tribunals which were established to try war crimes after the Second World War did not accept that a superior could wash his hands of an affair in this way, and found that, taking into account the circumstances, a knowledge of breaches committed by subordinates could be presumed.³⁹

³³ Cf. Art. 33, para. 4, of the Vienna Convention on the Law of Treaties.

³⁴ In this sense, see *supra*, note 32.

³⁵ See "The Hostages' Trial", 8 *Law Reports*, p. 89.

³⁶ *Ibid.*

³⁷ See the Yamashita case, 4 *Law Reports*, p. 35, and in this respect, the observations made by M.C. Bassiouni in "Repression of Breaches...", *op. cit.*, pp. 207-208.

³⁸ In this sense, *O.R. IX*, pp. 131-132, CDDH/SR.51, para. 43.

³⁹ In the case of the "High Command Trial" the Tribunal found that the responsibility of a superior was involved "where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence." (12 *Law Reports*, p. 76). In the Yamashita case, the Tribunal declared: "Where murder and rape and vicious, revengeful actions are widespread offences and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them" (4 *Law Reports*, p. 35). In another case the Tribunal clearly based its verdict on the fact that "it was inconceivable that he [the commander] should not have been aware of the acts of atrocity committed by his subordinates [...]" (*ibid.*, p. 88). In other (continued on next page)

c) *The obligation to take measures to prevent or repress breaches*

3547 This last clause deals with the central purpose of this paragraph: the superior who is responsible and who is aware of the facts must act to prevent or repress the breach. This rule concerns both the immediate commander and his superiors. However, the specific duties of commanders are further dealt with in the detailed provisions which will be examined under Article 87 (*Duties of commanders*). The present provision merely poses the principle of the indictment of superiors who have tolerated breaches of the law of armed conflict. This rule is not without precedent in national law.⁴⁰

3548 Using relatively broad language, the clause requires both preventive and repressive action. However, it reasonably restricts the obligation upon superiors to "feasible" measures, since it is not always possible to prevent a breach or punish the perpetrators. In addition, it is a matter of common sense that the measures concerned are described as those "within their power" and only those. These requirements correspond exactly to the judgments in post-war cases. An illustration can be found in the judgment given by the International Military Tribunal of Tokyo regarding the treatment of prisoners of war and civilian internees and the reasons given in that judgment may serve as a corroboration. The Tribunal stated that it was the duty of those responsible to ensure that prisoners were well treated, that ill-treatment was avoided, and to establish and guarantee an effective and permanent system for this purpose. If they refrain from taking the requisite measures, or if, having taken them, they do not ensure their constant and effective application, they fail in their duties and incur responsibility. Such responsibility continues if, while knowing that breaches are committed, they refrain from taking the appropriate measures that are in their power to prevent further breaches in the future. Ignorance does not absolve them from responsibility if it can be attributed to a fault on their part. The fact that the

circumstances the Tribunals seemed to have found that at least some proof must be furnished before accepting that a superior was aware of the acts of his subordinates (*ibid.*, p. 89). When depositing its instrument of ratification on 13 August 1982, Austria made the following reservation: "Pour juger toute décision prise par un commandant militaire, les articles 85 et 86 du Protocole I seront appliqués pour autant que les impératifs militaires, la possibilité raisonnable de les reconnaître et les informations effectivement disponibles au moment de la décision soient déterminants." ("In order to judge any decision taken by military commanders, Articles 85 and 86 of Protocol I will be applied with military imperatives, the reasonable possibility of recognizing them and information actually available at the time of the decision, being decisive." (Translated by the ICRC)).

⁴⁰ Cf. for example, Article 4 of the French Decree on repression of war crimes of 8 August 1944: "Lorsqu'un subordonné est poursuivi comme auteur principal d'un crime de guerre et que ses supérieurs hiérarchiques ne peuvent être recherchés comme coauteurs, ils sont considérés comme complices dans la mesure où ils ont organisé ou toléré les agissements criminels de leurs subordonnés." ("When a subordinate is prosecuted as the person primarily responsible for a war crime and it is not possible to look upon his superiors in the hierarchy as jointly responsible, they will be treated as accomplices insofar as they organized or tolerated the criminal activities of their subordinates." (translated by the ICRC)). For other examples, see 4 *Law Reports*, pp. 87-88.

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Annex

FINAL REPORT OF THE COMMISSION OF EXPERTS ESTABLISHED
PURSUANT TO SECURITY COUNCIL RESOLUTION 780 (1992)

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law applicable to internal armed conflicts which includes the concept of war crimes.

53. The body of customary international law applicable to international armed conflicts includes the concept of war crimes, and a wide range of provisions also stated in Hague Convention IV of 1907, the Geneva Conventions of 1949 and, to some extent, the provisions of Additional Protocol I.

54. It must be observed that the violations of the laws or customs of war referred to in article 3 of the statute of the International Tribunal are offences when committed in international, but not in internal armed conflicts.

D. Command responsibility

55. The Commission addressed the matter of command responsibility in paragraphs 51 through 53 of its first interim report as follows:

"51. A person who gives the order to commit a war crime or crime against humanity is equally guilty of the offence with the person actually committing it. This principle, expressed already in the Geneva Conventions of 1949, applies to both the military superiors, whether of regular or irregular armed forces, and to civilian authorities.

"52. Superiors are moreover individually responsible for a war crime or crime against humanity committed by a subordinate if they knew, or had information which should have enabled them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such an act and they did not take all feasible measures within their power to prevent or repress the act.

"53. Military commanders are under a special obligation, with respect to members of the armed forces under their command or other persons under their control, to prevent and, where necessary, to suppress such acts and to report them to competent authorities."

56. The Commission notes with satisfaction that article 7 of the statute of the International Tribunal uses an essentially similar formulation.

57. The doctrine of command responsibility is directed primarily at military commanders because such persons have a personal obligation to ensure the maintenance of discipline among troops under their command. Most legal cases in which the doctrine of command responsibility has been considered have involved military or paramilitary accused. Political leaders and public officials have also been held liable under this doctrine in certain circumstances.

58. It is the view of the Commission that the mental element necessary when the commander has not given the offending order is (a) actual knowledge, (b) such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences, or (c) an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander, under the facts and circumstances of the particular case, must have

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known of the offences charged and acquiesced therein. To determine whether or not a commander must have known about the acts of his subordinates, one might consider a number of indices, including:

- (a) The number of illegal acts;
- (b) The type of illegal acts;
- (c) The scope of illegal acts;
- (d) The time during which the illegal acts occurred;
- (e) The number and type of troops involved;
- (f) The logistics involved, if any;
- (g) The geographical location of the acts;
- (h) The widespread occurrence of the acts;
- (i) The tactical tempo of operations;
- (j) The modus operandi of similar illegal acts;
- (k) The officers and staff involved;
- (l) The location of the commander at the time.

59. The military commander is not absolutely responsible for all offences committed by his subordinates. Isolated offences may be committed of which he has no knowledge or control whatsoever. As a fundamental aspect of command, however, a commander does have a duty to control his troops and to take all practicable measures to ensure that they comply with the law. The arguments that a commander has a weak personality or that the troops assigned to him are uncontrollable are invalid. In particular, a military commander who is assigned command and control over armed combatant groups who have engaged in war crimes in the past should refrain from employing such groups in combat, until they clearly demonstrate their intention and capability to comply with the law in the future. Thus, a commander has a duty to do everything reasonable and practicable to prevent violations of the law. Failure to carry out such a duty carries with it responsibility.

60. Lastly, a military commander has the duty to punish or discipline those under his command whom he knows or has reasonable grounds to know committed a violation.

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