

belligerents ...' (Preamble to Convention on Maritime Neutrality, concluded on 20 February 1928). It is clear, however, that the principle of neutrality applies with equal force to transborder incursions of armed forces and to the transborder damage caused to a neutral state by the use of a weapon in a belligerent state (Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Nauru, Written Statement (I), p 35, IV E).

The principle so circumscribed is presented as an established part of the customary international law.

89 The Court finds that as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.

90 Although the applicability of the principles and rules of humanitarian law and of the principle of neutrality to nuclear weapons is hardly disputed, the conclusions to be drawn from this applicability are, on the other hand, controversial.

91 According to one point of view, the fact that recourse to nuclear weapons is subject to and regulated by the law of armed conflict does not necessarily mean that such recourse is as such prohibited. As one state put it to the Court:

Assuming that a state's use of nuclear weapons meets the requirements of self-defence, it must then be considered whether it conforms to the fundamental principles of the law of armed conflict regulating the conduct of hostilities (United Kingdom, Written Statement, p 40, para 3.44);

the legality of the use of nuclear weapons must therefore be assessed in the light of the applicable principles of international law regarding the use of force and the conduct of hostilities, as is the case with other methods and means of warfare' (United Kingdom, Written Statement, p 75, para 4.2(3)); and

The reality ... is that nuclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties. In some cases, such as the use of a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties. It is by no means the case that every use of nuclear weapons against a military objective would inevitably cause very great collateral civilian casualties' (United Kingdom, Written Statement, p 53, para 3.70; see also United States of America, Oral Statement, CR 95/34, pp 89-90).

92 Another view holds that recourse to nuclear weapons could never be compatible with the principles and rules of humanitarian law and is therefore prohibited. In the event of their use, nuclear weapons would in all circumstances be unable to draw any distinction between the civilian population and combatants, or between civilian objects and military objectives, and their effects, largely uncontrollable, could not be restricted, either in time or in space, to lawful military targets. Such weapons would kill and destroy in a necessarily indiscriminate manner, on account of the blast, heat and radiation occasioned by the nuclear explosion and the effects induced; and the number of casualties which would ensue would be enormous. The use of nuclear weapons would therefore be prohibited in any circumstance, notwithstanding the absence of any explicit conventional prohibition. That view lay at the basis of the assertions by

certain states before the Court that nuclear weapons are by their nature illegal under customary international law, by virtue of the fundamental principle of humanity.

93 A similar view has been expressed with respect to the effects of the principle of neutrality. Like the principles and rules of humanitarian law, that principle has therefore been considered by some to rule out the use of a weapon the effects of which simply cannot be contained within the territories of the contending states.

94 The Court would observe that none of the states advocating the legality of the use of nuclear weapons under certain circumstances, including the 'clean' use of smaller, low yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view.

95 Nor can the Court make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict. Certainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict – at the heart of which is the overriding consideration of humanity – make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.

96 Furthermore, the Court cannot lose sight of the fundamental right of every state to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.

Nor can it ignore the practice referred to as 'policy of deterrence', to which an appreciable section of the international community adhered for many years. The Court also notes the reservations which certain nuclear-weapon states have appended to the undertakings they have given, notably under the Protocols to the Treaties of Tlatelolco and Rarotonga, and also under the declarations made by them in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, not to resort to such weapons.

97 Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a state in an extreme circumstance of self-defence, in which its very survival would be at stake.

98 Given the eminently difficult issues that arise in applying the law on the use of force and above all the law applicable in armed conflict to nuclear weapons, the Court considers that it now needs to examine one further aspect of the question before it, seen in a broader context.

In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing

difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.

99 In these circumstances, the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament. This provision is worded as follows:

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.

100 This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community.

Virtually the whole of this community appears moreover to have been involved when resolutions of the United Nations General Assembly concerning nuclear disarmament have repeatedly been unanimously adopted. Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all states.

101 Even the very first General Assembly resolution, unanimously adopted on 24 January 1946 at the London session, set up a commission whose terms of reference included making specific proposals for, among other things, ‘the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction’. In a large number of subsequent resolutions, the General Assembly has reaffirmed the need for nuclear disarmament. Thus, in Resolution 808 A (IX) of 4 November 1954, which was likewise unanimously adopted, it concluded:

that a further effort should be made to reach agreement on comprehensive and co-ordinated proposals to be embodied in a draft international disarmament convention providing for: ... (b) the total prohibition of the use and manufacture of nuclear weapons and weapons of mass destruction of every type, together with the conversion of existing stocks of nuclear weapons for peaceful purposes.

The same conviction has been expressed outside the United Nations context in various instruments.

102 The obligation expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons includes its fulfilment in accordance with the basic principle of good faith. This basic principle is set forth in Article 2, para 2, of the Charter. It was reflected in the Declaration on Friendly Relations between States (Resolution 2625 (XXV) of 24 October 1970) and in the Final Act of the Helsinki Conference of 1 August 1975. It is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969, according to which ‘[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith’.

Nor has the Court omitted to draw attention to it, as follows:

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential (*Nuclear Tests (Australia v France)*, Judgment of 20 December 1974; [1974] *ICJ Rep* at p 268, para 46).

103 In its Resolution 984 (1995) dated 11 April 1995, the Security Council took care to reaffirm 'the need for all States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to comply fully with all their obligations' and urged:

... all states, as provided for in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, to pursue negotiations in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control which remains a universal goal.

The importance of fulfilling the obligation expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons was also reaffirmed in the final document of the Review and Extension Conference of the parties to the Treaty on the Non-Proliferation of Nuclear Weapons, held from 17 April to 12 May 1995.

In the view of the Court, it remains without any doubt an objective of vital importance to the whole of the international community today.

104 At the end of the present Opinion, the Court emphasises that its reply to the question put to it by the General Assembly rests on the totality of the legal grounds set forth by the Court above (paras 20 to 103), each of which is to be read in the light of the others. Some of these grounds are not such as to form the object of formal conclusions in the final paragraph of the Opinion; they nevertheless retain, in the view of the Court, all their importance.

105 For these reasons,

THE COURT,

(1) By 13 votes to one,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judge Oda.

(2) Replies in the following manner to the question put by the General Assembly:

A Unanimously,

There is in neither customary nor conventional international law any specific authorisation of the threat or use of nuclear weapons;

B By 11 votes to three,

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judges Shahabuddeen, Weeramantry, Koroma.

C Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, para 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

D Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E By seven votes to seven, by the President's casting vote,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake;

IN FAVOUR: President Bedjaoui; Judges Ranjeva, Herczegh, Shi, Fleischhauer, Vereschetin, Ferrari Bravo;

AGAINST: Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, Higgins.

F Unanimously,

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

A specific aspect of nuclear weapons that has been considered is the use of radiological weapons. Such weapons are designed to utilise the radio-active fallout which follows a nuclear explosion. Radiological weapons fall into two categories: those which use separate radio-active agents which act independently of the nuclear explosion itself, and so-called dirty nuclear weapons which are designed to maximise the amount of fallout from the nuclear explosion. The use and possession of such weapons has for some time been considered by the UN Conference on Disarmament.

### 15.5.1.3 Biological and chemical weapons

Biological and chemical weapons can be distinguished from other weapons in that they exercise their effect solely on living matter and are aimed at large groups rather than individual soldiers. The use of poisoned weapons is not new. Historically much use has been made during sieges of the tactic of poisoning water supplies and in medieval times plague victims proved effective weapons when thrown over city walls.

The first treaty reference to such weapons appeared in Article 23 of the Hague Regulations Respecting the Laws and Custom of War on Land which prohibits the use of poison or poisoned weapons. The Regulations are generally regarded as constituting customary international law but it remains unclear

whether the prohibition on the use of poison covers the use of gas. Gas was used in both World Wars, in Vietnam and in the Iran-Iraq war. The peace treaties concluded after World War One all prohibited the possession by Germany of all 'asphyxiating, poisonous and other gases and analogous liquids, material and devices' but it was unclear whether this prohibition applied to all states. The Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare 1925 (the Geneva Gas Protocol) expressly recognised that the prohibition of asphyxiating, poisonous and other gases and analogous liquids, materials and devices was part of international law and extended the prohibition to the use in war of bacteriological weapons. However, problems have remained over the interpretation of the Protocol's provisions. In particular there has been dispute over whether the prohibition covers only lethal weapons or extends to such things as tear gas and other non-lethal materials such as herbicides. The problem is partly caused by the fact that the French text, which is equally authentic to the English text of the Protocol, refers to '*similaires*' rather than 'other' gases and analogous liquids, etc.

In 1986 a UN Security Council resolution condemned the use by Iraq of chemical weapons which was stated to be in clear violation of the Geneva Gas Protocol. The prevailing view today seems to be that the provisions of the Protocol have become customary international law and that consequently the first use of lethal chemical and biological weapons is prohibited. There is less agreement on the use of non-lethal chemical and biological weapons.

There now exist a Biological Weapons Convention 1972 and a Chemical Weapons Convention 1992, both of which prohibit the production and stockpiling of specific weapons, although they do not deal with the use in armed conflict of such weapons.

#### **15.5.1.4 Environmental weapons**

The widespread use of defoliants by the USA during the Vietnam War and growing concern about the environment generally led to calls for regulation of weapons which have a particular effect on the environment. During the Vietnam War there were press reports that the USA was attempting to artificially produce rain in the war zone to flood North Vietnamese supply routes. This provoked international discussions aimed at prohibiting the use of environmental modification techniques as weapons of war. The result of the discussions was the UN Convention on the Prohibition of Military Use of Environmental Modification Techniques 1977. This Convention prohibits the hostile use of any technique for changing 'the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space'. It is arguable that the Convention would cover the use of nuclear weapons.

In addition to the 1977 Convention, Article 55 of the Geneva Protocol I Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts 1977 places an obligation on states in warfare to minimise widespread, long-term and severe damage to the natural environment and prohibits the use of weapons and methods of warfare which 'may be expected to cause' such damage and thereby to prejudice the health

and survival of the population. It has been suggested that the deliberate spillage by Iraq of quantities of oil into the Persian Gulf during the 1991 Gulf Conflict contravened these provisions.

### *15.5.2 Restrictions on methods of warfare*

A basic distinction in the law of armed conflict must be drawn between combatants and civilians. Combatants are those under command, having fixed visible and distinctive emblems, carrying arms openly, and observing the laws of war. The basis of the law of armed conflict is that it is the combatants who fight the war, and if they are captured they are entitled to Prisoner of War (POW) status. The civilian, in turn, should be protected from attack. The distinction between combatant and civilian is crucial to the question of legitimate targets: combatant or military targets are legitimate, civilian targets are not. The rule is one of customary international law binding on all states. The problem is then one of establishing what is a military target and what is a civilian target. Clearly some objects can be defined without problem, for example, a tank is a military target, a nursery school is not. However, not all targets can be so clearly distinguished.

An attempt was made at a distinction in the Hague Draft Rules of Aerial Warfare 1923 which were never fully adopted but which are now considered declaratory of customary international law. The Draft Rules prescribed that attacks from the air would only be permitted if directed against a military objective, the total or partial destruction of which presented a 'distinct military advantage to the attacker'. Article 24 contained a list of targets which were to be classed as military targets:

... military forces, military works, military establishments or depots, factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies, lines of communication or transportation used for military purposes.

The Rules provided that compensation was payable for any breach of the prohibition. As can be seen, the list leaves considerable scope for interpretation and raises problems where targets are used for both military and civilian purposes, for example, railways or roads. The problem was further compounded by the fact that the rules were produced in three languages, French, German and English, all of which were equally authentic and valid and none of which said completely the same thing. The German text, for example, makes more clear reference to radio stations and other news media, not expressly included in the English text 'lines of communication'.

Some writers in the 1930s suggested that a subjective approach should be adopted based on the dominant purpose. Further development of the definition occurred during and immediately after the Second World War. It became more clear that bombing exclusively directed at civilian population is prohibited. Both the UK and the US governments condemned such bombing in December 1939 in the context of German tactics during the Spanish Civil War and at the beginning of World War Two and the Charter of the Nuremberg Tribunal 1946 included such indiscriminate bombing in its definition of war crimes. It has to be noted, however, that UK and US practice, particularly in respect of the

'carpet' bombing of Dresden, did not accord with the statements made in 1939. The prohibition on attacks on civilian targets has been re-iterated in a series of UN Resolutions and the most recent example comes from the Iran-Iraq war when Iraqi bombing of civilian areas in Iran drew widespread condemnation and led to an agreement between the two sides to cease military attacks on purely civilian targets.

The present law can be found in the Geneva Protocol I 1977 which is widely considered to represent a codification of customary international law. The Protocol defines military targets as those objects which by their nature, location, purpose or use make effective contribution to military action as well as those whose total or partial destruction, capture or neutralisation in the circumstances at the time, offers a definite military advantage. Article 52 of the Protocol then goes on to outlaw attacks on civilian objects and Article 57 imposes a duty on those planning or deciding upon an attack to take all feasible precautions to verify that the objectives to be attacked are military objectives and to refrain from attack which might cause incidental loss of civilian life which would be excessive in relation to the military advantage gained (the proportionality principle). Part II of the Protocol contains provisions relating to the protection of the sick, wounded and shipwrecked and Article 12 specifically states that medical units shall not be the object of attack. Medical units includes any establishment, military or civilian, which is organised for the search for, collection, transportation, diagnosis or treatment of the wounded, sick or shipwrecked. Such units should be clearly identified by the red cross (lion, star or crescent) emblem. Linked to the protection given to medical units is the obligation on states not to site them close to legitimate military targets. During the Gulf Conflict 1991 there were allegations that Iraq had deliberately sited anti-aircraft batteries close to hospitals in Baghdad. Such deliberate siting and the misuse of the red cross emblem will result in the protection given under the Protocol being withdrawn and constitutes a breach of treaty obligations. Part IV of the Protocol deals with the civilian population and states clearly that civil defence installations, such as air raid shelters, shall be protected. However, Article 65 states that the protection shall cease if they are used to commit acts harmful to the enemy. The chapter goes on to provide that shelters should be identifiable. The internationally recognised symbol for such installations is a blue triangle on an orange background.

The question of legitimate targets was much discussed during the Gulf Conflict specifically in the context of Coalition attacks on bridges that were used for both civilian and military transport and one particular attack on a building that Iraq claimed was an air-raid shelter but which the Coalition forces argued was being used as a military communications headquarters. The discussions confirmed the existence of binding rules regarding legitimate and non-legitimate targets but showed the immense difficulties encountered in clearly distinguishing between the two in practice. A term which was much used during the war and which has continued to have a high currency is collateral damage. This was used to refer to damage caused to non-legitimate targets during the carrying out of attacks on military targets. Clearly there is a limit to the amount of collateral damage that can be caused before it becomes wholly disproportionate to the military advantage gained.



In addition to the question of targets of attack, there are four methods of warfare which are specifically prohibited under international law:

- *No quarter*: this refers to methods of warfare which admit of no limit. An order to leave no survivors and take no prisoners would amount to no quarter and it has long been prohibited by international law. The Geneva Protocol I specifically forbids such orders given in relation to enemy combatants (Article 40);
- *Starvation*: deliberately subjecting the civilian population to starvation as a means of defeating the enemy. Article 54 of the Geneva Protocol I expressly prohibits the use of starvation as a method of warfare and also prohibits attacks on foodstuffs and other objects and areas indispensable to the survival of the population, for example, drinking water installations. Articles 69 to 71 further provide protection to those engaged in humanitarian relief operations;
- *Belligerent reprisals*: acts of victimisation or vengeance directed against civilians, POWs or others *hors de combat* in response to attacks by non-combatants are prohibited by international law.
- *Perfidy*: international law draws a distinction, which is not always easy to make in practice, between a general level of deception which is an integral part of warfare and the deliberate use of certain specific acts of treachery and 'impermissible ruses' such as the improper use of the white flag of surrender, the use of false flags, and such things as disguising missile sites as hospitals.

### 15.5.3 Humanitarian rules

Humanitarian law in the widest sense concerns the protection of individuals in war or armed conflict. What are discussed here are humanitarian rules in a narrower sense, that is to say, those rules which specifically protect the human person, rather than the general rules concerning means and methods of waging warfare. The majority of these humanitarian rules apply to both international and non-international armed conflicts.

#### 15.5.3.1 Treatment of civilians

Civilians are non-combatants and combatants who are *hors de combat*. Most of the protection afforded to civilians is based on the system laid down in the Geneva Convention IV 1949 as supplemented by Geneva Protocols I and II of 1977. The Protocols actually state that anyone who is not a combatant is presumed to be a civilian. Article 75 Protocol I includes a catalogue of forbidden practices to which civilians and persons *hors de combat* must not be subjected:

- (a) violence to life, health of physical or mental well-being of persons, in particular:
  - (i) murder;
  - (ii) torture of all kinds, whether physical or mental;
  - (iii) corporal punishment;
  - (iv) mutilation;
- (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

- (c) taking of hostages;
- (d) collective punishments;
- (e) threats to commit any of the above.

Civilians must not be subjected to any action which causes their physical suffering or their intimidation. Hostages must not be taken and civilians must not be used to protect military targets. These provisions were breached by Iraq during the Gulf Conflict. If civilians are interned they must be given adequate clothes, light and heat and must not be subjected to forced mass transfers. There have been many allegations of breaches of these rules during the conflict in former Yugoslavia.

### 15.5.3.2 Specially protected groups

Certain categories of persons are afforded specific protection by international law:

*Wounded, sick and shipwrecked:* the protections given to the wounded, sick and shipwrecked apply to both civilians and combatants. They must all be treated humanely and not subjected to murder, torture, or any biological experiments. There is an obligation on captors to search for and collect enemy wounded, sick and shipwrecked and to give them adequate care.

*Women:* special protection is given to women under Geneva Convention IV which prescribes that they must not be subjected to attacks on their honour, enforced prostitution, rape or any form of indecent assault. Further protection is given to pregnant women and those with new-born babies.

*Children under 15:* Geneva Convention IV imposes an obligation on belligerents to ensure the safety of those under 15 who have been orphaned or separated from their parents as a result of war.

*Journalists:* war correspondents receive some protection under Geneva Convention III in that they are to be accorded POW status if captured. They are given further protection under Geneva Protocol I Article 79.

*Civil defence, medical and religious personnel:* individuals falling within these categories are given extra protection under the Geneva Conventions and Protocols in that they must be allowed to carry on their work and medical personnel must not be made POWs.

*Prisoners of war (POWs):* there was early agreement on rudimentary protection of POWs in the Geneva Convention 1864. The essence of the obligations as far as POWs are concerned is that detaining them is not a sanction or punishment but is purely a precautionary measure. There is an overriding duty to treat POWs humanely. Those who can be accorded POW status are listed in Article 4 of the Geneva Convention III and Protocol I but there is still some doubt as to the ambit of protection. There is dispute about the status of those who commit war crimes prior to capture, and the exact status of guerrilla forces is unclear.

As has already been mentioned, POWs must be treated humanely. More specifically, POWs cannot be subjected to summary execution, medical experiments, torture, or interrogation. Article 17 of the Geneva Convention III provides that POWs are only required to give their name, rank and number. POWs are to be given adequate food, clothing and health care and adequate

hygiene standards must be observed. Escapees may be disciplined within the limits imposed by Article 89. Non-officers may be compelled to undertake work of a type authorised by the Convention. POWs are allowed to receive and send up to two letters and four postcards per month. At the end of hostilities all POWs must be repatriated and those who are seriously wounded should be repatriated during hostilities.

## 15.6 Responsibility and enforcement

Violations of the laws of armed conflict involve state responsibility (discussed in Chapter 9) and the duty to make reparation. Yet as the International Military Tribunal at Nuremberg stated:

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

The problem for international law has therefore been to identify the individuals responsible for breaches of the laws of armed conflict and to ensure that they are effectively punished. The issue of enforcement has often shown up weaknesses in international law. Partly this has been because of the procedural difficulties encountered in bringing to trial those responsible for breaches but more particularly it is because the enforcement of the law has usually been seen as little more than the application of the principle of *vae victis*: it only ever appears to be members of the defeated side who bear responsibility for breaches of the law. The legitimacy of war criminal trials is always adversely affected by the fact that the tribunal itself is seen as having a major interest in the result since generally it is made up of representatives of the victorious states. The alternative is for trials to take place within the municipal courts of the defendant's state. The drawback with this option is that the defendant's state often has little interest in pursuing the trial with any real conviction.

One aspect of individual responsibility that was established at Nuremberg that should be noted is that the fact that an individual was acting pursuant to the orders of his or her government or of a superior does not automatically absolve him or her from responsibility. It may only be considered in mitigation of punishment. This seemed to confirm a view that had been held for some time that 'superior orders' does not constitute a defence to breaches of the laws of armed conflict. The one exception to this is where it can be shown that the subordinate individual could not reasonably have been expected to be aware of the illegality of the superior orders given. Of course, in such a situation, the individual giving the order will bear responsibility for the action carried out.

Following the end of the First World War the Allied Commission upon the Responsibility of the Authors of the War and on the Enforcement of Penalties prepared a list of 896 alleged war criminals, including the German Kaiser Wilhelm II, and the intention was to try the leading members before an international tribunal. However, difficulties in actually bringing any of the principal defendants to trial and criticism that the whole process was motivated by a spirit of vindictiveness led to the proposal's failure. In 1920 an Advisory Commission of Jurists investigated the possibilities of establishing an international criminal court with powers to try crimes constituting a breach of