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 effected 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

international public order or against the universal law of nations. The League of Nations rejected the proposal on the grounds that there was not sufficient agreement among nations on the content of an international penal code.

The events of World War Two led to repeated demands for the trial of those responsible for war crimes and crimes against peace. By 1943 there were discussions among the Allies as to what to do with the leaders of the Axis powers at the end of the war. The American Secretary of State proposed that they should be hanged after a summary trial or court martial. But Churchill, Roosevelt and Eden favoured an international trial. Subsequent discussion led to the London Conference in August 1945 at which basic agreement was reached on a trial of German leaders by an international military tribunal. There remained considerable differences of opinion, not least because of different conceptions of criminal justice between those used to an Anglo-American system and those used to the Continental system. The Charter of the International Military Tribunal 1945 that was agreed by the USA, UK, USSR and France therefore represents a considerable compromise. The Charter established the International Military Tribunal although it was not a truly international tribunal since the four allies were acting in the capacity of occupying powers in place of the dissolved Nazi regime in Germany. There have therefore been arguments that the Tribunal operated in some way as a municipal court under the authority of the national government of occupation. This would deal with the difficulty posed by the fact that, certainly at the time, individuals could not be considered the subjects of international law and could therefore not come within the jurisdiction of true international tribunals. Article 6 of the Charter gave the Tribunal jurisdiction over three types of offence:

- *Crimes against peace*: planning, preparation, initiation, or waging a war of aggression, or a war in violation of international treaties, or conspiracy to commit the foregoing;
- *War crimes*: violations of the laws or customs of war including murder, ill-treatment of civilian population, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- *Crimes against humanity*: namely murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population before or during a war and genocide whether or not in violation of the domestic law of the country where perpetrated.

The Tribunal began its proceedings in November 1945. A similar charter was agreed with respect to Japanese War Criminals and an International Military Tribunal for the Far East sat in Tokyo. The judgment of the Nuremberg Tribunal in 1946 and of the Tokyo Tribunal in 1948 affirmed the principle of direct individual responsibility in international law.

The ILC subsequently drew up a Draft Code of Principles Recognised in the Tribunal's judgment which was the start of attempts to establish an international criminal law. The code reiterated the principle of individual responsibility which is repeated in the Genocide Convention.

The definition of war crimes has implications for the individual jurisdiction of states and may involve application of the universality principle (discussed at

7.7). A number of serious violations of the laws of armed conflict were identified in the Charter of the International Military Tribunal as constituting war crimes but the list contained in Article 6 was not intended to be exhaustive. The Geneva Conventions 1949 referred to certain 'grave breaches' of the provisions of the conventions which would constitute war crimes and imposed a duty on states 'to provide effective penal sanctions for persons committing or ordering to be committed, any grave breaches of the Convention'. Every state party to the conventions was further obliged to search for offenders and to bring them, irrespective of their nationality, to trial before its municipal courts or to hand them over for trial in the courts of another contracting party. The definition of grave breaches is further extended in Protocol I which repeats the obligation on states to bring offenders to trial but in addition places an obligation on states to take 'all measures necessary' for the suppression of all acts contrary to the conventions and protocols other than grave breaches. Protocol I also provides for the establishment of an International Fact-Finding Commission to investigate grave breaches of the Conventions or the Protocol.

CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE 1948

[Signed on 11 December 1948 – entered into force 12 January 1951]

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its Resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilised world,

Recognising that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind form such an odious scourge, international co-operation is required,

Hereby agreed as hereinafter provided:

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the groups;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.

Article III

The following acts shall be punishable:

(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide.

Article IV

Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III.

Article VI

Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article VII

Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purposes of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.

Article IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a state for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Article X

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Article XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member state to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary General of the United Nations.

After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member state which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary General of the United Nations.

Article XII

Any Contracting Party may at any time, by notification addressed to the Secretary General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Article XIII

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary General shall draw up a *proces-verbal* and transmit a copy thereof to each member of the United Nations and to each of the non-member states contemplated in Article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article XIV

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiry of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary General of the United Nations.

Article XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than 16, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

Article XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary General.

The General Assembly shall decided upon the steps, if any, to be taken in respect of such a request.

Article XVII

The Secretary General of the United Nations shall notify all Members of the United Nations and the non-member states contemplated in Article XI of the following:

(a) signatures, ratifications and accessions received in accordance with Article XI;

(b) notifications received in accordance with Article XII;

(c) the date upon which the present Convention comes into force in accordance with Article XIII;

(d) denunciations received in accordance with Article XIV;

(e) the abrogation of the Convention in accordance with Article XV;

(f) notifications received in accordance with Article XVI.

Article XVIII

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member states contemplated in Article XI.

Article XIX

The present Convention shall be registered by the Secretary General of the United Nations on the date of its coming into force.

CHAPTER 16

HUMAN RIGHTS

16.1 Introduction

As was stated in Chapter 1, the present system of international law has developed from the law of nations that governed the relations between sovereign states. Prior to World War One it was a clear principle of international law that a state's treatment of its own nationals was a matter exclusively within its domestic jurisdiction. The only exception to this was the concept of humanitarian intervention to prevent large scale atrocities but as was shown in Chapter 13, the concept is one of dubious legality. As has already been noted in Chapter 9, the mistreatment of aliens can give rise to state responsibility.

Following World War One, and with the establishment of the League of Nations, widespread concern was expressed about the protection of 'minorities'. However, the emphasis was very much on protection rather than enforceable rights.

Covenant of the League of Nations

Article 22

1 To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the states which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in the Covenant.

2 The best method of giving practical effect to this principle is that the tutelege of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

3 The character of the mandate must differ according to the stage of development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

4 Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

5 Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of fortifications or military and naval bases and of military training of the natives

for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

6 There are territories, such as South-West Africa and certain of the South Pacific Islands which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguard above mentioned in the interests of the indigenous population.

7 In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

8 The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

9 A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

Article 23

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

(a) will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations;

(b) undertake to secure just treatment of the native populations of territories under their control;

(c) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs;

(d) will entrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest;

(e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connection the special necessities of the regions devastated during the war of 1914–18 shall be borne in mind;

(f) will endeavour to take steps in matters of international concern for the prevention and control of disease.

In addition to the provisions of the Covenant the League of Nations also established a system protecting specific minorities in the new Eastern European and Baltic states which emerged following the break-up of the Austro-Hungarian Empire.[1] The League of Nations Council was given the task of monitoring the rights of minorities and there was also a right of petition procedure by minorities to the League of Nations. However such protections

1 Among the specific treaties was one dealing with the Serbo-Croat-Slovene State.

only applied to the minorities expressly mentioned and there was no attempt at the creation of any binding obligations of general application.

The atrocities committed before and during World War Two exposed the need for some comprehensive system of protection of fundamental human rights and this was recognised in the Preamble to the Charter of the United Nations which states:

> We the Peoples of the United Nations determined to save succeeding generations from the scourge of war ... and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ... have resolved to combine out efforts to accomplish these aims.

Article 1(3) of the Charter pledged member states to achieve international co-operation in promoting and encouraging respect for 'human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. The obligation to promote respect for and observance of human rights and fundamental freedoms is made express in Articles 55 and 56 of the Charter:

> **Article 55**
>
> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> (a) higher standards of living, full employment, and conditions of economic and social progress and development;
>
> (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
>
> (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
>
> **Article 56**
>
> All members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.

Since 1945 a considerable number of rules of international law, both customary and treaty, have been developed with the aim of protecting human rights and fundamental freedoms. Of course the effectiveness of such rules is open to doubt. The mere existence of rules does not ensure observance of them and over the years it has proved far easier to identify particular rights than to provide effective enforcement mechanisms. More has been achieved on a regional basis rather than at a global level and many human rights experts look to developments regionally as the way forward rather than hoping for great things on the global plane. It is worth noting, however, that the mere existence of human rights agreements can have a beneficial role by giving publicity to abuses and by raising expectations and standards of behaviour and treatment. The role of publicity in the sphere of human rights enforcement should not be underestimated

One final introductory point can be made. Human rights are extremely difficult to define. Generally speaking, they are regarded as those fundamental and inalienable rights which are essential for life as a human being. Put another

way, they are those rights which inherent in that they exist by virtue of the human condition. However, the view of what specific rights exist and more importantly the interpretation of the extent of such rights may well differ according to the particular economic, social and cultural society in which they are being defined. Thus, while it may be comparatively easy to obtain global agreement that human rights are 'a good thing' the task of reaching consensus on the articulation of particular rights has proved, and is still proving, far more difficult.

16.2 The sources of the law

International human rights law is a combination of customary international law and treaty law. The treaties may be global or regional and general or specialised.

16.2.1 General international agreements

At the inaugural conference of the United Nations held in San Francisco in April 1946 the representatives of Cuba, Mexico and Panama had proposed that the conference should adopt a Declaration on the Essential Rights of Man. However, there was insufficient time available to discuss the proposal, and so, at the first session of the UN General Assembly, Panama submitted a Draft Declaration on Fundamental Human Rights and Freedoms. On 11 December 1946 the General Assembly decided to refer the draft to the Economic and Social Council (ECOSOC) for detailed consideration by its Commission on Human Rights. The Commission had been established by ECOSOC under Article 68 of the UN Charter and it spent two years working on a draft International Bill of Rights with the instructions that the bill should be acceptable to all, short, simple and easy to understand. The draft bill was presented to the Third session of the UN General Assembly, and on 10 December 1948 Resolution 217A was adopted: the Universal Declaration of Human Rights (UDHR). There was no opposition to the resolution although eight States did abstain, primarily because of the effect that such obligations could have on State sovereignty. The Declaration contains a list of economic, social, cultural and political rights. Since it was only a resolution of the General Assembly, it could not create binding legal obligations, nor was it intended to do so. Rather the UDHR serves to provide a standard for States to aim at. The precise effect of the resolution was to urge States to establish procedures for the future protection of human rights. The Declaration has, however, provided the impetus for the development of customary law (which is discussed at 16.2.4, below). Commitment to the provisions of UDHR and other instruments relating to human rights was recently reaffirmed in Vienna Declaration and Programme of Action 1993, made by States at the UN World Conference on Human Rights held in Vienna in June 1993.

UNIVERSAL DECLARATION OF HUMAN RIGHTS[2]

PREAMBLE

Whereas 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,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realisation of this pledge.

Now, Therefore,

THE GENERAL ASSEMBLY

Proclaims

The universal declaration of human rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of member states themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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 Adopted by the UN General Assembly on 10 December 1948 (UN Doc A/811. Voting was 48 for and nil against – Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, Ukrainian SSR, USSR, Union of South Africa, and Yugoslavia abstained.