



**ICRC**

**ADVISORY SERVICE**  
ON INTERNATIONAL HUMANITARIAN LAW

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# **GUIDING PRINCIPLES / MODEL LAW ON THE MISSING**

**Principles for Legislating the Situation of  
Persons Missing  
as a Result of Armed Conflict or Internal Violence :  
Measures to prevent persons from going missing  
and to protect the rights and interests of the  
missing and their families.**

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## INTRODUCTION

The International Committee of the Red Cross (ICRC) remains dedicated to addressing the issue of missing persons which is of growing concern in the modern world. Families are left without news of their loved ones and must face a very harsh reality. Of primary concern is knowing whether the missing persons are alive or dead, dealing with subsequent effects of the loss, whether it be as a result of their absence or death, and of course the eternal question of why they disappeared at all. There are a variety of reasons for which persons may be unaccounted for as disappearances occur in different contexts, including enforced or involuntary disappearances such as abduction, and as a result of natural disasters or migratory movements. In particular, in almost every situation of armed conflict or internal violence, inherent dangers lead to separation and disappearances of soldiers and civilians alike. Within the context of international and non-international armed conflict, violations of international humanitarian law and of human rights account for most cases of missing persons.

Fundamental rules of international humanitarian law and human rights exist to help prevent persons from going missing in situations of armed conflict or internal violence. To respect the principles of international law is to respect the integrity and dignity of all human beings, including the deceased, and in the context of missing persons, it erects a barrier and encourages a resolution of cases of disappearance. If civilians and members of armed forces or armed groups who are sick, wounded, captured, deceased, or deprived of their liberty were treated in accordance with these rules, there would be fewer missing persons and fewer families left in the dark about their fate. It is important for all States to act with determination to prevent disappearances, not perpetrating abductions or other enforced disappearances, to clarify the fate of missing persons and to lend assistance to families who are without news of their relatives.

*Principles for legislating the situation of persons missing as a result of armed conflict or internal violence* is offered as a tool to assist States and their national authoritative bodies with the adoption of legislation that will address, prevent and resolve situations of missing persons. States have an obligation to disseminate IHL and implement its fundamental principles and its rules into their national legal system and practice. With the now universal acceptance of the Geneva Conventions of 1949, the applicability of Common Article 1, which reaffirms the obligation of all parties to undertake to respect and to ensure respect for the fundamentals of humanitarian law in all circumstances, is all the more relevant. Respect means that the State is under an obligation to do everything it can to ensure that the rules in question are respected by its organs as well as by all others under its jurisdiction. Ensuring respect means that States, whether engaged in a conflict or not, must take all possible steps to ensure that the rules are respected by all, and in particular by parties to the conflict in question. This underlying principle is essential to the cause of missing persons and it is imperative that States adopt measures to prevent persons from becoming missing and to protect the rights and interests of the missing and their families.

To ensure the best possible protection for missing persons and their families, such situations must be dealt with on the basis of legal considerations appropriate to each case. This guide is intended to be a comprehensive legal framework that may assist States in completing their domestic legislation on missing persons. The model is based on the principles of international law, in particular international human rights law and international humanitarian law. Human rights treaties apply at all times and in all circumstances to all persons subject to the jurisdiction of a State party, and therefore continue to apply in times of violence alongside international humanitarian law which is specifically applicable in situations of armed conflict and is non-derogable. There is often debate regarding which provisions are obligatory in nature for the State and which are strong recommendations – however, this aspect of the problematic will not be addressed in this context as the goal is to ensure the best possible protection of the victims, which include both the missing person and his or her family. The provisions of international law and IHL which relate to the missing can be found in the ICRC report *The missing and their families* published in 2003 as a follow-up to the International Conference of Governmental and Non-Governmental Experts held in February 2003. This comprehensive list has been reproduced in Annex 3 of this document.

The principles of international law promote the prevention of disappearance with primordial importance. Several measures are available to assist in accomplishing this goal, including the issuance of identity cards and ensuring proper registration of an individual's basic personal information. Once a person has disappeared,

families have the right to be informed of his or her fate and may have recourse to the State for providing the information as per Article 32 of Additional Protocol I (AP-I). In order to uphold this right to know, the parties to a conflict must therefore search for persons reported missing as is prescribed in Articles 32 and 33 of AP-I and Articles 136 to 141 of the Fourth Geneva Convention (GC-IV). The State must facilitate enquiries made by members of families dispersed as a result of the conflict so as to help them restore contact and bring them together. A further responsibility incumbent upon the parties to a conflict concerns deceased persons and is extensively outlined in IHL law. Articles 15 of GC-I, 18 of GC-II, 16 of GC-IV and 34 of AP-I require that all possible measures be taken to search for, recover and identify the dead and maintain lists showing the exact location and markings of the graves, together with particulars of the dead interred therein.

International rules regarding missing persons apply in both international and non-international armed conflicts. Rule 117 of the ICRC's *Customary International Humanitarian Law* study published in 2005 indicates that State practice has established a norm applicable in both international and non-international armed conflicts whereby each party to the conflict must take all feasible measures to account for persons reported missing and must provide their family members with any information it has on their fate.

The new UN Convention against Enforced Disappearance recently adopted by the United Nations General Assembly is the first universally binding instrument that addresses enforced disappearance, defined as the abduction or deprivation of liberty of a person by State authorities and the subsequent refusal to disclose his or her whereabouts or fate. Enforced disappearance is regarded as a human rights violation and it is categorically prohibited. When committed as part of a widespread or systematic attack directed against any civilian population, it is considered as a crime against humanity under the Rome Statute of the International Criminal Court.

Guiding principles are presented here in the form of a model law with the support of an article-by-article commentary to aid in the development of the actual legislative text to be adopted by the State. It covers the fundamental concepts of the law regarding the rights of missing persons and their families, alongside the State's obligation to ensure and uphold these rights. The model law is divided into chapters that outline basic rights as well as certain measures of enforcement in situations prior to their becoming missing, once they are reported missing and in the eventuality of suspected or actual death. The notion of prevention is addressed by a provision on adopting preventive measures of identification and is directly linked to the chapter on criminal responsibility that seeks to establish violations of the law as criminal and thereby liable to prosecution and penal sanctions. As such, this model lends itself as a tool for such States that wish to complement or complete existing legislation, or those that seek to fill the legal void that may exist regarding the governance of cases of missing persons. It can be used as a whole or in part, and can focus as needed on prevention, resolution or any other aspects of the issue. Several examples of State legislation are available for reference on the ICRC web database of National Implementation of IHL at the following link: <<http://www.icrc.org/ihl-nat>>. The Advisory Service on International Humanitarian Law of the ICRC remains readily available for consultation and to provide assistance to States during the discussion and drafting of their national legislation implementing principles of international humanitarian law.

Worldwide, the ICRC continues to work on the problem of missing persons with the parties to conflicts, humanitarian organizations and others with a stake in the issue. This includes efforts to promote existing international law, to support the strengthening of relevant domestic law, to cooperate with military forces to ensure that soldiers wear some means of identification and that human remains are properly handled on the battlefield. The short-term objective is to create a domestic legislative framework that addresses the situation of missing persons. In the long term, the goal would be to resolve all current cases of missing persons and bring closure to the suffering of their families and, ultimately, to prevent future cases of disappearance.

## PART I – GENERAL PROVISIONS

### Article 1

#### Object of the law

- 1) The present Law aims to prevent persons from becoming missing and to provide for aid in the search for and the tracing of a missing person in the context of armed conflict or internal violence, and protect the rights and interests of missing persons and their relatives.
- 2) In respect of State obligations to disseminate and enact principles of international humanitarian and human rights law, the present Law implements the provisions of international treaties and conventions for the protection of victims of war and for the protection of human rights relevant to the prevention of persons becoming missing and the protection of missing persons and their relatives which [*name of the State*] is a party to, including:
  1. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949;
  2. Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949;
  3. Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949;
  4. Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949;
  5. International Covenant on Civil and Political Rights (1966);
  6. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977;
  7. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977;
  8. Convention on the Rights of the Child (1989);
  9. Rome Statute of the International Criminal Court (1998);
  10. International Convention for the Protection of All Persons from Enforced Disappearances (2006).

## COMMENTARY

§ Several international treaties of a universal or regional character contain provisions which link to issues related to missing persons, including:

- International humanitarian law
  - Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949);
  - Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949);
  - Convention (III) relative to the Treatment of Prisoners of War (1949);
  - Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949);
  - Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 1977;
  - Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 1977;
- International human rights law
  - International Covenant on Civil and Political Rights (1966);
  - Convention on the Rights of the Child (1989);
  - International Convention for the Protection of all Persons from Enforced Disappearance (2006);
  - Regional conventions on the protection of human rights: European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); American Convention on Human Rights (1969); African Charter on Human and Peoples' Rights (1981).
- Other relevant international texts of a universal or regional character include
  - Rome Statute of the International Criminal Court (1998);
  - UN Declaration on the Protection of All Persons from Enforced Disappearance (1992);
  - United Nations Guidelines concerning computerized personal data files (1990);
  - Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981);
  - OECD Guidelines governing the Protection of Privacy and Trans-border Flows of Personal Data (1980).

§ The principles of customary international law also address the protection and respect of the rights of the missing and their families. These underlie or complement the provisions adopted in international treaties. They are referenced in the International Committee of the Red Cross (ICRC) study on [*Customary International Humanitarian Law*], published in 2005.

§ Legislative, regulatory and other measures aimed at preventing persons from becoming unaccounted for and accounting for persons reported missing must be undertaken to implement the obligations arising from the above instruments and to give effect to internationally protected humanitarian and human rights, without distinction of any kind. Enacting domestic legislation contributes to the fulfilment of a State's obligations to respect and ensure respect for IHL by disseminating and implementing the fundamentals of IHL into its national legal system and practice.

## Article 2

### Definitions

For the purpose of the present Law:

- 1) *Missing person* is a person whose whereabouts are unknown to his/her relatives and/or who, on the basis of reliable information, has been reported missing in accordance with the national legislation in connection with an international or non-international armed conflict, a situation of internal violence or disturbances, natural catastrophes or any other situation that may require the intervention of a competent State authority.
- 2) *Relative of the missing person* – unless otherwise specified, for the purpose of the present Law, the term “relative” shall be understood in accordance with provisions of the [*Civil Code/Family Law*]. It shall include, at a minimum, the following persons:
  - children born in and out of wedlock, adopted children or step-children;
  - lawfully wedded partner or unwedded partner;
  - parents (including step-mother, step-father, adopter);
  - full or half or adopted sisters and brothers.
- 3) *State authority for tracing missing persons* shall be a designated State authority which shall have competence for the tracing of missing persons and entrusted with the performance of other functions or tasks in accordance with the present Law.
- 4) *National Information Bureau (NIB)* is the office in charge of collecting and transmitting information, documents and objects concerning persons protected by international humanitarian law who have fallen into the hands of an adverse party, in particular prisoners of war and civilian internees.
- 5) *Registry* is the centralized database for the management of tracing requests regarding missing persons.
- 6) *Reliable information on disappearance of a person* is considered to be the information from which it is possible to reasonably conclude that the whereabouts of a certain person are unknown to his/her relatives or, in case of not having relatives, a person does not appear at his/her regular or temporary place of residence.
- 7) *Minimum data on a missing person* is data that contains information such as a missing person’s name, place and date of birth, marital status, occupation, address, date and details of last news/circumstances of disappearance, and rank for military personnel/combatants.
- 8) *Identification of human remains* is the activity carried out by a competent official, whose expertise to carry out such activity is recognized by competent State authorities, and aimed at establishing the identity of a person or remains thereof.

## COMMENTARY

§ National authorities should ensure that the definition of *missing person* is sufficiently wide in scope so as to protect the rights of the person missing and their families who need support in consequence of the circumstances. The definition should include the element of uncertainty about the fate of the person reported missing, even if some of the consequences that flow from the state of being missing may mean that the recognition of such status has similar effects to a declaration of death.

How national law defines the missing person will often derive from the background for the adoption of the measures. It can recognize the status of missing persons in a limited or broad manner depending on the nature and extent of missing persons and families affected. National law may wish to distinguish between those who go missing due to a particular factual, emergency or violent situation, to a specific timeframe or perhaps a specific circumstance such as disappearance following arrest/detention or in relation to an armed conflict. The definition can also be extended to cover persons missing as result of a natural disaster and those who go missing for other reasons. The more narrowly defined the category of persons concerned, the more likely it is that some missing persons will fall outside the scope of the legal provisions. Alternatively, it may be desirable to provide specific provisions for particular situations where needed, and other provisions of a general nature.

For those States that have acceded to the International Convention on the Protection of All Persons from Enforced Disappearance, the Law should incorporate the definition of enforced disappearance as set out in Article 2 of that Convention.

§ The general definition of *relative of the missing person* should be wide enough to include persons affected by the unknown whereabouts of the missing person, although it might be necessary to restrict the definition in specific provisions that provide certain rights. Notwithstanding the general provisions on family relationships found in existing law, for the purpose of protection of and assistance to “relative(s)” of missing persons, the term should be understood to include:

- *children born in and out of wedlock, adopted children or step-children;*
- *lawfully wedded partner or unwedded partner;*
- *parents (including step-mother, step-father, adopter);*
- *full or half or adopted sisters and brothers.*

The definition of *relative* could also be widened to the extent that it takes into account the specific cultural environment whereby the notion of family might extend to include, for example, close friends.

§ In order to ensure a consistent and uniform interpretation and enforcement of the Law, other terms and concepts may be defined, as the need may be. The proposed model defines some additional terms and further develops their contents within specific provisions encompassing the various principles that regulate the situation of missing persons. For example:

- *State authority for tracing missing persons;*
- *National Information Bureau;*
- *Registry;*
- *Reliable information on disappearance of a person;*
- *Minimum data on a missing person;*
- *Identification of human remains;*



## PART II – BASIC RIGHTS AND MEASURES

### Article 3

#### Fundamental rights

- 1) All persons 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 shall enjoy the following fundamental rights:
  - (a) the right not to be arbitrarily deprived of his/her life;
  - (b) the right to be protected against torture, and other cruel, inhuman or degrading treatment;
  - (c) the right to liberty and security, and the right not to be arbitrarily deprived of liberty, including the fundamental and judicial procedural guarantees that must be afforded to all persons deprived of liberty;
  - (d) the right to a fair trial affording all judicial guarantees;
  - (e) the right to respect for family life;
  - (f) the right to know the reason for his/her incarceration, to exchange news with relatives or other persons in a close relationship by any means of communication available;
  - (g) the right not to be subjected to enforced disappearance or involuntary disappearance and/or illegal or arbitrary abductions;
  - (h) the right to recognition as a person before the law.
- 2) Missing persons and their relatives may not be discriminated against on any ground such as language, race, sex, nationality, religion, colour of skin, political ideology.
- 3) Foreign citizens shall be entitled to the same rights under the present Law as citizens of [*name of the State*] unless they benefit from a better protection prescribed by other legislation.
- 4) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

## COMMENTARY

- § In order to prevent persons from becoming unaccounted for and to account for persons reported missing, legislative, regulatory and other measures must be taken to implement the obligations arising from international humanitarian law and to give effect to internationally protected human rights. Those rights and prohibitions include:
- the right not to be arbitrarily deprived of one's life;
  - the right not to be arbitrarily deprived of one's liberty;
  - the right to a fair trial affording all judicial guarantees;
  - the right to respect for one's family life;
  - the right to know the fate of the missing and to exchange news with relatives or other persons in a close relationship by any means of communication available;
  - the prohibition of torture and other cruel, inhuman or degrading treatment;
  - the prohibition of enforced disappearance;
  - the right to be recognized everywhere as a person before the law.
- § Care should be taken in the elaboration of any law on missing persons to ensure that there is no unjustified selective element in the Law. Non-discrimination is easiest to ensure by limiting restrictions on the applicability of the law and making it relevant to all missing persons under a State's jurisdiction. This is particularly important when considering missing persons who are foreign nationals or members of particular ethnic or other groups that live or have lived within a territory that has had its borders redefined as a result of conflict. Families of persons who went missing within the former State may be left without redress if, by the change in their State/nationality, they are left without the opportunity to benefit from measures designed to assist them.
- § In cases where a national of a third State is missing and his/her family is not resident on that territory, care should be taken to notify the authorities of that territory of the missing person. The judicial and other authorities of third States are more likely to recognize the validity of a missing registration or certificate of absence or death if they can see that the procedures established for issuing such documents have a legal basis and are carried out by competent authorities properly designated.
- § Following an international armed conflict, bilateral and multilateral cooperation among States in conjunction with humanitarian organizations can lead to more effective assistance to families. States should endeavour to address the humanitarian nature of the problem independently of other inter-State issues so as to avoid further distress to the families of missing persons pending the resolution of political issues.
- § Regional and international institutions should encourage inter-State cooperation. They may also have an important role to play on their own. The role of the independent and impartial Central Tracing Agency (CTA) established by the ICRC as per the Geneva Conventions is paramount in putting the needs of the missing at the forefront, especially when several State actors are involved. The CTA is in charge of centralizing all information on prisoners of war and protected persons and of forwarding it as rapidly as possible to the authorities concerned, except where doing so might be detrimental to the persons concerned or to their relatives.
- § Respect for the law should be ensured, notably by providing the necessary technical and financial means, and administrative or penal sanctions in case of breach by the officials mandated to uphold the Law. Penalties for failing to fulfil the responsibilities and obligations towards the missing and their families as outlined in the Law are provided for in Article 24.

## Article 4

### Rights of persons arrested, detained or interned

- 1) Arrest, detention and imprisonment shall be carried out and duly registered in accordance with the provisions of the Law and only by competent officials or persons legally authorized for that purpose; those persons shall be identifiable and, wherever possible, should identify themselves. Information to be registered shall include:
  - (a) the identity of the person deprived of liberty;
  - (b) the date, time and location where the person was deprived of liberty and the name of the authority that deprived the person of liberty;
  - (c) the name of the authority having decided the deprivation of liberty and the reasons for the deprivation of liberty;
  - (d) the name of the authority controlling the deprivation of liberty, as well as the place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
  - (e) the dates when the arrested person would be produced before the judicial authority and other relevant information relating to the judicial proceedings;
  - (f) elements regarding the physical integrity of the person deprived of liberty;
  - (g) in the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the human remains;
  - (h) the date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.
- 2) Persons deprived of their liberty, whether interned or detained, are informed, at the time of arrest, of the reasons for their arrest and are promptly informed of any charges against them.
- 3) Any person deprived of liberty shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful. This paragraph does not apply to persons protected under the Third and Fourth Geneva Conventions referred to in Article 1 who are interned.
- 4) Anyone who is arrested, detained or imprisoned may request a medical examination and shall receive adequate health care, as the case may be. Such examination shall be conducted in private without the presence and/or influence of the detaining authorities.

The serious illness or death of a person deprived of his/her liberty shall be notified without delay to the spouse, a near relative or any other person previously designated by the person interned or detained.
- 5) Persons deprived of their liberty, whether interned or detained, shall have the right to inform any person with a legitimate interest, such as their families or legal counsel, as a minimum, of their capture or arrest, the location of the place where they are detained and their state of health. They shall be authorized to communicate with and be visited by their family, counsel or any other person of their choice, subject only to the conditions established by law, or, if they are foreigners in the country where they are deprived of liberty, to communicate with their consular authorities, in accordance with applicable international law.
- 6) The transfer or release of persons deprived of their liberty is notified to the spouse, a close relative or any other person with a legitimate interest.
- 7) For the purpose of paragraph 3, the competent authority shall issue regulations providing for the issuance of capture and internment cards for use by prisoners of war and interned civilians in situations of international armed conflict.

## COMMENTARY

- § Arrest, detention or imprisonment must be carried out only in strict accordance with the provisions of the Law and by competent officials or persons authorized for that purpose. Those persons should be identifiable and, wherever possible, should identify themselves. To that end, regulations, orders and instructions should be issued to govern arrest and detention procedures.
- § Persons deprived of their liberty must be informed promptly of the reasons for their arrest or detention. In addition, competent authorities should ensure the effective protection, inter alia, of the right to request a medical examination and to receive health care.
- § Official registers of all persons deprived of their liberty must be maintained and kept up-to-date in every place of internment or detention (including police stations and military bases) and made available to relatives, judges, counsels, any other person having a legitimate interest, and other authorities. The information to be registered should include:
- the identity of the person deprived of liberty;
  - the date, time and location where the person was deprived of liberty and the name of the authority that deprived the person of liberty;
  - the name of the authority having decided the deprivation of liberty and the reasons for the deprivation of liberty;
  - the name of the authority controlling the deprivation of liberty;
  - the place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
  - elements regarding the physical integrity of the person deprived of liberty;
  - in the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the human remains;
  - the date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.
- § The right of persons to inform their families or any other person of their choice of their capture, arrest or detention is provided both under humanitarian law and human rights law. Domestic law and regulations should thus ensure that persons deprived of their liberty, whatever the reason for their internment or detention, have the right to inform their families, at least, of their capture/arrest, address and state of health and adequate means of communication should be provided. This right should not be interpreted as restricting the right to correspond with the members of one's family.
- § In situations of international armed conflict, capture/internment cards must be issued by the authorities for the purpose of establishing contacts between prisoners of war/interned civilians and their families.
- § Capture card – The parties to a conflict which are holding prisoners of war are required to enable the latter to write a card direct to their families and to the Central Tracing Agency informing them that they have been captured. An individual capture card will contain in particular information relating to the prisoner's surname and first names, his State of origin, rank, serial number and date of birth, his family's address, and his captivity, address and state of health. Should a prisoner wish to refrain from revealing certain information, however, this must be respected.
- § Internment card – This is modelled on the capture card and is adapted to the situation of civilian internees. It is also intended for the families and the Central Tracing Agency, and clearly identifies the general circumstances of the civilian internee by providing information notably on his/her internment, address and state of health, provided that the internee considers it appropriate to reveal these details.
- § In the event of death, there is an obligation to provide a death certificate, to handle the human remains with respect and dignity, as well as to return the body to the family and/or to ensure burial.
- § Protected persons under the Third and Fourth Geneva Conventions may be interned for the duration of hostilities (prisoners of war) or for imperative reasons of security (civilian internees). The Conventions provide for specific procedures in relation to the internment of such protected persons.

## Article 5

### Rights of relatives of persons arrested, detained or interned

- 1) The closest known relative, the counsel or the designated representative of a person deprived of liberty, shall receive from the competent authority the following information:
  - (a) the name of the authority having decided the deprivation of liberty;
  - (b) the date, time and location where the person was deprived of liberty and the location where the person was admitted to the place of deprivation of liberty;
  - (c) the name of the authority controlling the deprivation of liberty;
  - (d) the whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;
  - (e) the date, time and place of release;
  - (f) elements regarding the physical integrity of the person deprived of liberty;
  - (g) in the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the human remains.

Accurate information shall be provided without delay.

- 2) In the event of an enforced disappearance, any person with a legitimate interest, such as a relative of the person deprived of liberty, his/her representative or counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.
- 3) No one shall incur penal responsibility or be subjected to threats, violence or any form of intimidation for inquiring about the fate or whereabouts of relatives who are detained or interned or for maintaining private or personal contacts with them, regardless of the nature of the act for which a person was arrested, detained or interned or is suspected of having committed.

## COMMENTARY

- § The relatives of the victim have the right to know the truth regarding the circumstances of the arrest, detention or internment, the progress and results of the investigation and the fate of the disappeared person.
- § In order to prevent persons from being unaccounted for, accurate information about the arrest and the place of detention or internment, including any transfers and release, should be made available without delay to relatives and legal counsels or representatives. Such an obligation for the detaining authority is recognized under several provisions of international humanitarian law, human rights law instruments, and other international texts. These are based on:
- the right not to be held in secret places or incomunicado;
  - the right for the person arrested to inform, or require the competent authorities to notify a relative or any other person of their choice of their arrest, address and state of health;
  - the right to the assistance of defence counsel of their choice;
  - the right to request and receive a medical examination and health care.
- § No penal responsibility should be imposed on relatives for seeking information regarding the fate of a relative who is detained or interned, nor for maintaining private or personal contact with him/her. This right must be upheld no matter the nature of the act the person is suspected of having committed, even if it be of a criminal nature or an act against State security.

## Article 6

### Rights of missing persons

The rights and interests of missing persons shall be protected at all times until their fate has been ascertained or their death recognized.

## COMMENTARY

- § By recognizing a special legal status for the missing, national law responds to needs regarding the legal rights and obligations of the missing person and the uncertainty and hardship faced by the family. It provides a framework and appropriate remedies to deal with everyday practical issues.
- § Missing persons should be presumed to be alive until their fate has been ascertained. The foremost right of a missing person is that of search and recovery. Within his/her right to life and security, a missing person has the right to have a thorough investigation conducted into the circumstances of the disappearance until a satisfactory conclusion can be drawn as to his/her fate.
- § While the fate of a person has not been ascertained, his/her legal status of absence should be acknowledged and a certificate offered to attest to the uncertain fate and to allow for the protection of his/her rights.
- § A person should not be declared dead without sufficient supporting evidence. It is therefore desirable to provide for an interim period of absence before a death certificate is issued. The length of time that this period of absence endures after absence is declared should be reasonable, in order to allow for proper investigation of the circumstances of the person's disappearance and his/her fate. This interim period can be a function of the circumstances of the disappearance and the ability to investigate it. In the event the person is found alive, the certificate of absence should be annulled and the legal status of the person and his/her rights fully re-instituted.
- § The rights and interests of missing persons, including their civil status, property and assets, must be protected at all times until their fate has been ascertained or their death recognized. In a legal system where missing persons are to be presumed to be alive until their fate has been ascertained or their death legally declared, provisional arrangements may be made for the management of the missing persons' property and assets. These should take into account the preservation of the missing persons' interests and the immediate needs of the missing persons' relatives and dependents. Judicial or administrative control should thus be ensured, for instance, by the nomination of a temporary or provisional guardian over the missing persons' property and assets.
- § If needed, a representative should be appointed to safeguard the interests of the missing person. The representative should be able to petition relevant executive, administrative or judicial authorities if needed in respect of specific matters such as rights and obligations related to civil status or family concerns, and financial or property management issues, or any other considerations.



## Article 7

### Rights of relatives to know the fate of missing persons

- 1) Everyone has a right to know about the fate of his/her missing relative(s), including their whereabouts or, if dead, the circumstances of their death and place of burial if known, and to receive mortal remains. The authorities must keep relatives informed about the progress and results of investigations.
- 2) No one shall incur penal responsibility or be subjected to threats, violence or any form of intimidation for inquiring about the fate or whereabouts of relatives, nor for maintaining private or personal contact with them if their whereabouts have been ascertained, regardless of the nature of the act they may have been arrested, detained or interned for or are suspected of having committed.

## COMMENTARY

- § The right of the family to know the fate of a missing relative is provided for under international human rights law and international humanitarian law.
- § International humanitarian law imposes an obligation on each party to an armed conflict to take the necessary measures to clarify the fate of the missing person and to inform the family thereof. This obligation can be met in part through the investigation of cases of disappearances that occurred on the territory under their control and keeping the relatives informed of the progress and results of the investigation.
- § Both the right to know the fate of a missing relative as well as the correlative obligation of public authorities to carry out an effective investigation into the circumstances surrounding a disappearance are recognized under international human rights law, notably through the protection of the right to life, the prohibition of torture and other forms of cruel, inhuman or degrading treatment or the right to family life.
- § As time passes, the likelihood that persons who are unaccounted for will return diminishes. The responsibility of the authorities to provide information on the fate of the missing remains, but the focus of the responsibilities of public authorities is likely to shift towards the exhumation of gravesites and the identification and return of human remains.
- § This change of approach is also reflected by the families who, with time, increasingly speak of the need to receive the human remains of their relatives. This is an important step in accepting the fact of their death and starting the separation and grieving process associated with burial ceremonies.
- § No penal responsibility should be imposed on relatives for seeking information regarding the fate of a relative, nor for maintaining contact once the fate of the person has been determined. This right must be upheld no matter the nature of the act the person is suspected of having committed, even if it be of a criminal nature or an act against State security.

### PART III – LEGAL STATUS OF MISSING PERSONS AND RELATED RIGHTS

#### Article 8

##### Recognition of absence

- 3) The law must recognize and establish the legal personality of the missing person.
- 4) In accordance with [*reference to national law*], a declaration of absence shall be issued at the request of any interested person or of the competent authority by the [*judicial authority*], if it is established that a person has been missing for a period of over [...] years.
- 5) The [*judicial authority*] may issue a declaration of absence upon presentation of a certificate of absence delivered according to the following paragraph.
- 6) A certificate of absence may be delivered by [*the competent administrative or military authority*]. It shall be considered as proof of absence for the purpose of administrative and pension claims.
- 7) The court shall designate a representative of the absentee. The representative shall manage the interests of the absentee in his/her best interests during the period of absence. He shall have the rights and obligations as defined in [*national law on guardianship*].
- 8) Where an interested person other than a relative requests a declaration of absence, a relative or the court-appointed representative may intervene and oppose such a declaration with the competent authority.

## COMMENTARY

- § It is essential to recognize and attribute a legal status to a missing person. A declaration of absence should be issued at the request of relatives, other interested persons or of the competent authority if it has been established that a person has been missing for a determined period of time. The minimum period of absence before a declaration of absence is issued should not be less than one year, but provision may be made for a shorter period with regard to particular events or circumstances.
- § A representative, preferably with legal powers, should be appointed to protect the interests and see to the immediate needs of the missing person and the dependents. The declaration would entitle the missing person's representative to preserve the rights of the missing person and manage property and assets in his/her interest. For the dependants, financial assistance by way of an allowance drawn from the assets of the missing person might be arranged when no public assistance is available. A declaration of absence should enable the heirs to take provisional possession of the missing person's estate as would a declaration of death if the case so merits, however, provision should be made in the event of a missing person's return with regard to compensation/reparation, restitution, assistance and social care.
- § It is suggested that a competent administrative or military authority be granted the authority to issue a "certificate of absence" to enable relatives to assert their rights, in particular before administrative authorities. Such a certificate should be in a particular form to ensure its validity, bear the appropriate authentication of the competent authority and include a provision that it may be adapted or revoked to respond to a change in status of the missing person. A judicial validation of the certificate through a summary procedure (declaration of absence) would be required to assert the rights of the missing person.
- § Account must be taken of the particular difficulty of gathering and furnishing the necessary evidence/documentation in times of armed conflict or internal violence, and in post-conflict situations. Hence, provision should be made for the presentation of substitute or alternate evidence/documentation that may be given probative value, including attestations of absence established by military units, reliable local institutions or the ICRC (e.g. ICRC attestations based on tracing requests).
- § The legal interests of missing persons should be adequately protected through designation of an appropriate representative on his/her behalf. The designation can be made in the declaration of absence. In some cases it may be appropriate for the role of legal representative to fall to a State authority, which can then petition the court or other authorities in respect of specific matters such as custody/guardianship of minors, disposal of assets, access to bank accounts and use of income. In other cases there may be a suitable person such as a spouse or parent who can deal with these issues alone provided the ability to do so has official recognition, via registration or otherwise. It should be possible to revoke the authority of the legal representative should the missing person be located.
- § The civil status of the missing person should remain as is during the period of absence. All related rights should be safeguarded and related responsibilities fulfilled through an appointed representative.
- § Where an interested person other than a relative requests a declaration of absence, a relative should be able to intervene and oppose such a declaration with the competent authority. This would ensure the cautious treatment of the missing persons' assets and that these are administered responsibly at least during any period while there is no presumption of death of the missing person.
- § A model certificate of absence is provided in Annex 1 of this document.

## Article 9

### Rights of relatives regarding legal status of missing persons

- 1) The civil status of the spouse of a person declared missing shall not be modified before the absence or before the death of the missing person has been legally recognized in accordance with Article 8 and Article 20 of the present Law.
- 2) As an exceptional measure and in derogation to paragraph 1, in case both parents are missing or not present, there shall be established provisional guardianship over under-aged children of such persons within 15 days from the date of submission of the request for tracing the missing person to the competent State authority, taking account of the best interest of the child as the primary consideration.
- 3) In the event the absence has been officially recognized and after the expiration of an interim period of [...] year(s) following such a declaration of absence, the marriage shall be ended at the request of the surviving spouse. In the event death has been officially recognized, the marriage shall be terminated at the request of the surviving spouse.
- 4) In the event absence has been officially recognized, a relative of the missing person may request authorization to manage temporarily the missing person's property and assets before a competent court. When absence has not been officially recognized, a relative of the missing person may request before a competent court and exercise temporary management of the missing person's property and assets, where this is in the best interest of the missing person.
- 5) Relatives of the missing person who can prove their material dependence on the missing person's income should be entitled to submit a request to the authority of the competent court claiming that an allowance be drawn from the assets of the missing person in order to meet their immediate needs.
- 6) Where an interested person other than a relative requests a certificate of absence, the relatives may intercede on behalf of their own rights and oppose such a declaration with the competent authority.

## COMMENTARY

- § The civil status of the spouse and children should not be modified before the death of the missing person has been legally recognized.
- § The spouse of the missing person should be considered as remaining married unless the marriage is terminated or annulled. Consideration may be given to providing for the possibility of such termination upon petition of the spouse as long as the interests of the missing are taken into account. This may be possible through the operation of existing laws on divorce or with a suitable adjustment to them.
- § The interests of the child should receive particular attention as there may be no second parent or care giver in lieu of the person who has been declared missing. A provision may ensure that children are adequately protected in these situations, in the manner which best suits their needs. It is recommended that measures be taken for the provisional custody of the child immediately after the parent(s) have been reported missing and that adoption remain consistent with the 1989 Convention on the Rights of the Child and should not occur against the express wishes of the child, concerned relatives or legal guardians.
- § A number of issues surrounding the management of property of persons unaccounted for, whether situated in the country or abroad, may be raised by relatives of missing persons. Property may have been lost or destroyed. Real property is often the family's most important and valuable asset and losing rights of ownership or possession may severely affect the economic situation of the affected family. Issues related to property claims will be different depending on the nature of the situation. It may involve foreign elements in case of armed conflicts or displacement of population within or across borders. At least, in the shorter term, the family will need to be able to manage the assets of the missing person which were generating income or providing shelter.
- § In a legal system where missing persons are to be presumed to be alive until their fate has been ascertained or their death legally declared, provisional arrangements may be made for the management of a missing persons' property and assets. These should take into account the immediate needs of the missing person's relatives and the preservation of the missing person's interests. Judicial or administrative control should thus be ensured, for instance, by the nomination of a temporary or provisional guardian over the missing person's property and assets. This representative would ideally be able to see to the immediate rights and obligations of the missing person and to the needs of his/her dependents. If possible, financial assistance by way of an allowance drawn from the assets of the missing person might be arranged when no public assistance is available.

## Article 10

### Right to financial assistance and social benefits for the missing and their relatives

- 1) The competent authority shall assess and recognize the specific financial and social needs of missing persons and their families.
- 2) The right to financial assistance and social benefits is an individual and non-transferable right.
- 3) In accordance with the present Law and on the condition that absence or death has been recognized, dependents of the missing person, who were materially supported by such a person or became to be in need of material support following this person's disappearance, shall have the right to monthly financial assistance. A Special Fund shall be established for that purpose.
- 4) The acceptance of public assistance shall not be considered as a waiver of the right to obtain reparation or compensation for damage resulting from a violation of national or international law by individuals or by State authorities or officials.

## COMMENTARY

- § In many instances, the missing persons are men who served as the family breadwinner, so dependent women and children are more vulnerable. On the basis of a needs assessment, authorities should address the specific needs of the families and dependents of missing persons who have been declared absent in relation to armed conflict or internal violence. They should be entitled to the same social or financial benefits provided for other victims. A certificate of absence as described in Article 8 or an attestation issued by the ICRC, for instance, should be sufficient for any claim for assistance.
- § Assistance should also be provided if needed to persons who have been unaccounted for, for a period of time. During their absence, their rights and financial assets including property should be duly safeguarded. Missing persons returning after a prolonged period of absence should be entitled to assistance for their rehabilitation and reintegration into society, in addition to direct financial support. The fiscal regime applicable to the missing persons' revenues and property should also take into account the period of absence.
- § There should be no adverse discrimination between the dependents of servicepersons and civilians, nor any based on gender. In many instances, the missing persons are men who were the family breadwinner, so as such dependent women and children are more vulnerable and thereby merit special protection.
- § Basic social services should be offered to the dependents of missing persons. This may include: an allowance for basic material needs; housing benefits and employment opportunities; health care; an education allowance for the children; and legal assistance. When there is a system of social security, families of the missing should have access to it.
- § A mechanism for needs assessment and processing of requests for assistance must be put into place and be readily accessible to the victims and their families.
- § A request for financial assistance should be submitted to the relevant State or local authority in charge of social welfare in the place of residence of the requesting person, which shall study the request and issue an opinion. The request and the opinion should then be transmitted to the institution providing the assistance which should take the final decision within a reasonable delay (for example, 10 to 15 days) as to the assistance granted. The decision should be subject to appeal before an administrative tribunal.
- § To ensure due adequate implementation of the present Law, the relevant State or local authority should submit the list of processed requests to the [authority] which should monitor the treatment of such requests by State or municipal authorities.



## PART IV – TRACING MISSING PERSONS

### Article 11

#### Preventive measures of identification

- 1) In accordance with applicable national law, competent national authorities shall ensure that all persons receive a personal identity document or any other means of identification upon request. Children shall either have their own personal identity document or be registered on their parents' identity documents.
- 2) In times of armed conflict or internal violence, competent national authorities shall ensure that persons at risk, including in particular unaccompanied children, elderly and disabled persons, refugees and asylum seekers, are registered individually and as soon as possible, in compliance with the rules governing the protection of personal data.
- 3) The competent authority shall issue regulations providing for the issuance, registration and delivering of identification cards and tags to military and associated personnel, including:
  - (a) members of the armed forces and other persons liable to become prisoners of war;
  - (b) medical and religious personnel of the armed forces;
  - (c) members of the armed forces and military units assigned to civil defence.
- 4) The competent authority shall issue regulations providing for the issuance, registration and delivering of identification cards to civilian personnel such as:
  - (a) civilian medical personnel and civilian religious personnel;
  - (b) permanent or temporary staff of civilian hospitals;
  - (c) civilian civil defence personnel;
  - (d) personnel engaged in the protection of cultural property;
  - (e) journalists engaged in dangerous professional missions, provided that they fulfil the conditions constituting that function.

## COMMENTARY

§ It is of paramount importance to adopt identification measures to help prevent disappearances and facilitate tracing in the event a person does go missing. Such measures may be adopted or needed in peacetime, in time of armed conflict or other situations of violence, or in post-conflict situations, depending on the measures required. However, the legal and institutional framework should already be established in peacetime, so that the different procedures can be activated when needed with the least delay.

§ Under international humanitarian law, measures for identifying persons are closely connected with the concept of protection, which constitutes the very basis of the legal instruments of international humanitarian law. It is therefore essential to properly identify persons who are entitled or likely to be entitled to protection under international humanitarian law.

- *Identity card* – This is the basic document with which the status and identity of persons who have fallen into the hands of the adverse party can be determined. It must be issued to any person liable to become a prisoner of war and must contain at least the owner's surname, first name, date of birth, serial number or equivalent information, rank, blood group and rhesus factor. As further optional information, the identity card may also bear the description, nationality, religion, fingerprints and photo of the holder.
- *Specific identity card* – This must be issued for military personnel carrying out special tasks or for certain categories of civilians. It should contain the basic information plus certain other particulars concerning the assignment, such as the distinctive emblem of the activity, the person's training and position, and the stamp and signature of the competent authority. The categories concerned by these measures include civilian medical and religious personnel and those attached to the armed forces, civilian civil defence personnel and journalists engaged in dangerous professional missions, provided that they fulfil the conditions constituting that function.
- *Identity disc* – The authorities may supplement the above measures by providing identity discs. The identity disc is worn permanently round the neck on a chain or strap. It should be made, as far as possible, of durable, stainless material which is resistant to battlefield conditions. The inscriptions it bears are similar to those on the identity card and should be indelible and fade-proof.

It is also important that the issuing and use of the ID, or the information appearing on it, should not be likely to give rise to arbitrary or unlawful discrimination. It should be possible for a personal identity document or any other means of identification to be available to any person on request.

§ The usefulness and importance of the means and standing operating procedures of identifying individuals should be explained, in particular, in the course of training for military personnel and other categories of persons specifically concerned. Special attention should also be devoted to this aspect when international humanitarian law is being disseminated to a wider public.

§ International humanitarian law has provided specific measures for identification of children, especially when less than 12 years old, who should either have their own personal ID or be registered on their parents' ID. If children have been evacuated to a foreign country for compelling reasons of health or safety, the State arranging for the evacuation and, where appropriate, the authorities of the host country must draw up an information card and send it to the ICRC Central Tracing Agency with a view to facilitating the children's return to their families.

§ Necessary measures should be taken to ensure that all persons at risk are registered individually in compliance with the rules governing the protection of personal data.

## Article 12

### State authoritative body for tracing missing persons

- 1) Within 60 days from the date the present Law enters into force, an independent and impartial State authority for tracing missing persons and identification of human remains (hereinafter the “[*authority*]”) shall be established.
- 2) The [*authority*] shall:
  - (a) receive tracing requests and, on the basis of submitted tracing requests, shall collect, check and provide to the applicant and state authorities available information and facts on disappearance, as well as information on the whereabouts and fate of a person, in accordance with the national legislation and with the standards on the protection and management of personal data laid out in the present Law;
  - (b) be responsible for the operation of a Registry of data (hereinafter referred to as the “Registry”) as established under Article 14 of the present Law and shall adopt necessary regulations to this end;
  - (c) take appropriate measures to ensure the right of persons deprived of freedom to inform their relatives of their condition, whereabouts and circumstances of their detention/imprisonment in accordance with Article 4 of the present Law;
  - (d) ensure that a proper search for the dead is conducted in collaboration with competent national or local authorities, as soon as practical during and after any event, including an armed conflict, likely to have caused a large number of deaths or disappearances;
  - (e) ensure the adoption of all preparatory measures required for the establishment and operation of a National Information Bureau in the event of an armed conflict or in case of occupation in accordance with Article 13 of the present Law;
  - (f) take measures to ensure the enjoyment of rights by relatives of the missing person in accordance with the present Law and other legislation;
  - (g) perform any other tasks required by its duties.
- 3) The [*authority*] shall operate and perform its functions through both a central office and local representations. The scope of competence and procedure for the operations of the [*authority*] shall be specified by its Statute.
- 4) Information that has been collected or submitted to the [*authority*] before the present Law enters into force may, at the discretion of an applicant, also be submitted to the [*authority*] after the Law’s entry into force and shall be considered as acceptable should it meet the minimum data requirement as provided in paragraph 7 Article 2 of the present Law.
- 5) The attributions of the State authority established under this provision are without prejudice to the power of national or international courts or other bodies for tracing missing persons and identifying human remains.

## COMMENTARY

- § Consideration may be given to the designation of a competent authority, the [*authority*], to deal with missing persons and their families. This may be an existing office within a specific government ministry or a specially created office. The institutional necessities for the tracing of missing person will obviously vary according to the scope of application of the law, including the choices made regarding the personal, temporal and material scope of the law.
- § The [*authority*] for tracing should have the competence to receive requests for tracing of persons unaccounted for, to carry out an investigation into the circumstances surrounding the missing person and to reply to the applicant.
- § The [*authority*] should also be competent to act as an interface with other State authorities for all issues related to the search for missing persons, the identification of human remains, and the protection of the rights of missing persons and their relatives.
- § It is essential that the States fulfil their obligation to institute National Information Bureaux. This will ensure that information on persons deprived of their freedom is available and forwarded. It will also serve to prevent disappearances, to reassure the families about the fate of their relatives and to secure the fundamental guarantees to which everyone is entitled.

## Article 13

### National Information Bureau

- 1) The [*authority*] must ensure that within 60 days from the date the present Law enters into force, a National Information Bureau (hereinafter the “[NIB]”) shall be set up under the authority of [*name of the concerned national authority*]. The NIB must be operational in the event of armed conflict of an international or non-international character.
- 2) The NIB shall be responsible for centralizing without adverse distinction all information on the wounded, sick, shipwrecked, dead, protected persons deprived of their liberty, children whose identity is in doubt and persons who have been reported missing.
- 3) The structure, membership and working procedure of the NIB, and the coordination mechanisms for the collection and transmission of information to the appropriate authorities, including the Registry established by the State authority, and to the ICRC’s Central Tracing Agency, shall be defined by [*regulations*].

## COMMENTARY

- § The registration of persons detained or interned is perfectly consistent with the law's objective to protect persons not or no longer participating in the hostilities. Because of the tasks they are required to perform and the information they have to collect and transmit to the relatives of persons deprived of their freedom, the National Information Bureaux play a pivotal role in preventing disappearances. In addition, the establishment of a NIB, as provided for in the 1949 Geneva Conventions, is one means of ascertaining the fate of those who have gone missing on the battlefield or in enemy-controlled territory, and thus of allaying their families' anxiety.
- § The NIB must be operational as soon as hostilities break out. It is therefore advisable to lay the groundwork for its establishment in time of peace. If it does not already exist, the authority must ensure it is established. Fully recognizing the role of the NIB during armed conflict, it may also be authorized and structured to play a larger role in supporting the search for missing persons in a wider context, during times of peace and internal violence.
- § The NIB serves as a link between the various parties to an armed conflict. They have to provide it with certain information on prisoners of war and other protected persons as quickly as possible. The NIB must immediately forward that information to the States concerned (in the case of prisoners of war) or to the State of which the protected persons are citizens or on whose territory they reside (in the case of protected persons who are kept in custody for more than two weeks, subjected to assigned residence or interned), via the Central Tracing Agency. The State that ultimately receives the information must forward it as quickly as possible to the families concerned. The NIB must also reply to all inquiries it may receive regarding prisoners of war or protected persons. In the case of prisoners of war, the NIB may make any inquiries necessary to obtain information that is not in its possession.
- § As for the nature, composition and working methods of the NIB, there are no strict regulations in international humanitarian law treaties. The NIB would normally be part of a governmental administration. Since the State is responsible for ensuring that the NIB performs its duties, it must be able to exercise control over it. The State may choose to institute one or two NIBs. If a government administration is to be in charge, it may be logical to institute one NIB for civilians and another for the military, since these two categories of persons are usually dealt with by two different sets of authorities.
- § The facilities granted to the NIB must be determined in advance, by legislative or regulatory means. Such facilities include:
- exemption from postal dues of the correspondence, relief shipments and remittances of money addressed to prisoners of war and civilian internees or despatched by them;
  - so far as possible, exemption from telegraphic charges (or, at least, greatly reduced rates);
  - the provision of special means of transportation organized by the Protecting Powers or by the ICRC to convey the correspondence, lists and reports exchanged between the CTA and the NIB;
  - the provision of the necessary accommodation, equipment and staff to ensure the NIB's efficient operation.
- § Depending on the category to which the protected persons belong, for example, sick, wounded, shipwrecked or dead combatants, prisoners of war or protected civilians, the NIB may collect the information, documents and objects which may assist in their identification. This includes information on the capture, state of health, wounds, sickness or cause of death and changes of situation (transfers, releases, repatriations, escapes, admissions to hospital, deaths). It may also be necessary to collect notifications that escaped prisoners of war have been recaptured, certified lists of all prisoners of war who died in captivity, certificates of death or duly authenticated lists of the dead, information indicating the exact location and markings of graves and articles of value (including foreign currency and documents of importance to the next of kin such as last wills or other articles of intrinsic or sentimental value).
- § In respect of human rights law, an alternative mechanism of tracing may be set up allowing for a petition in front of a local court that could operate in times of peace or internal conflict.

## Article 14

### Registry of information on missing persons

- 1) With a view to ensuring effective and speedy tracing and clarification of the fate of the missing persons, the Registry of centralized data on the missing persons shall be established.
- 2) The Registry shall accumulate and centralize data on the missing persons to assist in the process of establishing their identities, and the location and circumstances of their disappearance.
- 3) The data entered into the Registry shall be subject to independent, impartial and thorough verification of their accuracy and tallying with information from official records on the missing persons kept in [*name of the State*].
- 4) All State authorities of [*name of the State*] must afford all necessary assistance and cooperation to the [*authority*] to facilitate the operation of the Registry.

## COMMENTARY

- § The information about missing persons should be located in a centralized institution, to give a coherent overview of the scope of the problem, to assist with the location of the missing person and to give a reference point to other authorities, including foreign authorities, which may be more readily able to identify than the local reporting authority. This is particularly the case where, due to conflict or internal disturbances, families may move away from the area in which the initial report was made and they should not have to return there only for administrative reasons relating to the person who is missing if this can be addressed elsewhere. Every effort should be made to ensure data recorded locally is compiled centrally as soon as possible to avoid confusion and contradiction.
- § The Registry shall accumulate and centralize data on the missing persons to establish their identities, and the location and circumstances of their disappearance. This data would be both administrative, such as name, age, place of residence, and qualitative, including professional details, activities and known whereabouts.
- § The introduction and maintenance of safeguards in conformity with the applicable principles for the collection and processing of information relating to missing persons and their families should not put a particular burden on national authorities or those involved in collecting or processing the information. Without them, however, a significant amount of information, often of a highly sensitive nature, is potentially vulnerable to inappropriate use and this may place the person to whom it relates, or a family member, in danger.



## Article 15

### Submission of a tracing request

- 1) Any interested person may report a missing person immediately and submit a request for tracing directly to the State authority established under Article 12 of the present Law or through designated local authorities.
- 2) The powers of the [authority] to receive such requests and to undertake the tracing of the missing persons shall not be prejudicial to the powers of other State authorities in charge of criminal prosecution.
- 3) The [authority] shall ensure that procedures to report that a person is missing are widely known and facilitated.
- 4) The person submitting the tracing request is required to provide minimum data on the missing person's identity, as provided by paragraph 7 Article 2 of the present Law. In case such minimum required data is not provided, the person who made the request shall provide additional information within a reasonable time delay.
- 5) Requests for tracing foreign citizens, requests may be submitted by a foreign citizen's relatives and by relative authorities of State of citizenship of the missing citizen in accordance with the same procedure as for [name of the State] citizens, if:
  - the missing person had temporary/permanent residence on the territory of [name of the State];
  - the missing person did not have temporary/permanent residence on the territory of [name of the State] but the applicant can provide reliable information that the disappearance took place on its territory.
- 6) Tracing requests that have been submitted to the authorities of the [interior or other competent ministry] before the present Law enters into force may, at the discretion of an applicant, also be submitted to the [authority] after the Law's entry into force and shall be considered as acceptable should they meet the minimum data requirement as provided by paragraph 7 Article 2 of the present Law.

## COMMENTARY

- § Registration of a tracing request is a commitment to do everything possible to respond to a report that a person has gone missing. It may be impossible to clarify the fate of all missing persons at certain moments due to circumstances, such as instances of ongoing violence that pose a threat to general safety. However, this should not *de facto* determine that no cases of missing persons be registered or investigated at all. On the contrary, an active process must be established and facilitated by the [authority], with special emphasis on preventing persons from going missing.
- § In most cases it will be necessary to institute a procedure through which person can be reported missing, registered and consequently have legal effects. The report that a person is missing may coincide with the denunciation of a crime (e.g. kidnapping), but procedures should exist to register the person as missing whether or not that person may also be the victim of a crime. Where a possible criminal act has been notified to the authorities they should begin to investigate in the usual manner.
- § A wide range of persons should be able to register the fact that a person is missing. National authorities should ensure that any person with a legitimate interest may register a missing person. This includes family members and dependents, as well as legal representatives of the missing person or the family. However, it may also include other persons who are able to demonstrate a legitimate interest, such as friends and neighbours, or any person who can bear credible witness that a person is missing. Any request for such registration will of course need to be subject to challenge if information is presented to show the whereabouts of the person, or if the missing person comes forward.
- § To facilitate reporting and registration, national authorities may wish to designate local institutions (police or others) as the appropriate authority for such reports. In many cases this will be the nearest one to the residence of the missing person or place where the person was last seen, but it should also be possible to make the registration elsewhere when there are grounds for doing so. National law may wish to enumerate these grounds but, if it does so, it should leave open the possibility of other reasonable grounds being adduced. These may include the place of residence of the family where it is different from that of the missing person.
- § The reporting should be possible as soon as there are concerns about the missing person. There normally should not be a time lapse prescribed, however, if one does exist, it should be reasonable and may depend on the circumstances reported. A record should be kept of any attempt to report a person missing regardless of the time at which it is made. The time factor with respect to what point any legal effects may come into application should be clearly established.
- § Comprehensive information relating to the missing person should be collected at the time of registration. It is important to ensure that a sufficient number of details regarding the missing person and the circumstances of the disappearance are recorded at the moment of reporting as important details may be forgotten with the passage of time. In addition to basic information such as name, age and gender, it would be essential to note the clothes worn at last sighting, the place of last sighting, including the reason why the person is thought to be missing, and details of family members and of the person making the report. It should be sufficient that the person making the report is able to identify the person deemed to be missing and to give the grounds on which the concern that the person is missing is based, so registration should not be prevented if information is missing.
- § Information collected should not be detrimental to the person reported missing. While it should be shared amongst the appropriate and necessary authorities, all information should be protected once provided.

## Article 16

### Cessation of tracing

- 1) A tracing request is considered settled when the person sought has been located and the family and relevant authorities have been duly informed.
- 2) In case a missing person is declared dead and his/her remains are not found, the tracing procedure shall not be terminated unless requested by the person who submitted the tracing request.

## COMMENTARY

§ A tracing request may be settled in the following cases.

- The person sought has been located. A missing person should be deemed identified when the identification procedure clearly establishes that physical or biological characteristics of the person, corpse or human remains match those of the missing person or his/her whereabouts are established. The identification procedure should be carried out pursuant to the legislation in force.
- The inquirer has been informed that the missing person has been located, whether or not contact can be re-established.
- In case of death, reliable information on the death of the person has been transmitted to the family and the human remains have been returned if possible or handled with dignity and respect with a proper burial. In the absence of human remains, the official transmission of all reliable information to interested parties is essential.
- Upon settlement of a tracing request, all personal data collected with the view to settle the case should be treated in accordance with the law on the protection of personal data, including their deletion or destruction, as the case may be.

## Article 17

### Accessing information on missing persons

- 1) State authorities in charge of foreign affairs, defence, justice, the interior and local governments within their respective competence shall cooperate with, provide available information to and afford necessary assistance to the [authority] in the performance of its tasks, in particular in tracing and identifying missing persons.
- 2) Access to the information should be granted to the individual to whom the information relates, relatives and legal representatives of the missing persons, State authorities and other organizations authorized to perform tracing and recovery of missing persons. The data shall be made available in accordance with the relevant legislation on data protection.
- 3) The information shall not be subject to any restrictions except those which are provided by law and necessary to protect national security or public order. Where the requested authorities refuse to provide information on such grounds, all available cooperative means shall be undertaken so as to provide to the [authority] the information strictly required to trace the missing person or identify human remains.
- 4) The [authority] and other concerned State authorities shall cooperate with the International Committee of the Red Cross and the National Red Cross/Red Crescent society, in accordance with their mandates, with a view to tracing the missing persons and protecting the rights of their families.
- 5) A request for providing the data on the missing person may be submitted to the [authority] by the relative of such a person or by State authorities. The [authority] shall study and decide on such a request within 30 days from the date of its submission.
- 6) A person unsatisfied with the decision of the [authority] on his/her request may refer this decision to the court within 30 days from the date of its adoption.

## COMMENTARY

- § In order for the [*authority*] to fulfil its tasks, it is essential that cooperation with other public agencies and bodies be effective. Much of the information that is relative to the tracing and identification of missing persons to be provided to the inquirer will come from various governmental agencies/ministries at the national or local level. There must be a clear commitment and active support of all relevant ministries in the fulfilment of their clearly defined roles in collecting and processing information related to missing persons.
- § Access to personal data should be granted to the individual to whom the information relates. All persons have to be informed of the existence, use and disclosure of personal information relating to them, and this includes the missing persons and their relatives. The right to obtain a copy and to challenge the accuracy and completeness of the data and to have details amended as appropriate should also be provided for.
- § The controller of the files should be allowed to deny access, in part or totally, where the information sought contains references to other individuals or sources of information received in confidence, including information protected by confidentiality agreements concluded for a humanitarian purpose. Access could also be regulated when it could be expected to seriously threaten an important public interest (national security, public order, etc.), be seriously detrimental to the interests of other persons or impede or jeopardize the purpose for which the information was collected, including humanitarian purposes.

## Article 18

### Protection of data

- 1) The data kept in the Registry may not be disclosed or transferred to persons for purposes other than those for which they were collected in accordance with the present Law.
- 2) Procedure for use, entry, exclusion and exchange of data, its verification and management shall be determined by Regulations on the Registry.

## COMMENTARY

- § Information relating to the missing person must be handled appropriately with respect to the privacy of that person and his/her family. Appropriate data protection rules and practices at the national level can ensure that all personal information remains sufficiently protected in terms of who has access and for what purpose and that access to it is permitted when the humanitarian need requires. Rules regarding data protection need to balance these potentially conflicting needs and will require an explicit or inherent flexibility in any measures, administrative or legal, that operate at the national level.
- § In many national systems, elaborate legal provisions for the protection of personal data and privacy already exist. However, often the most sophisticated systems are uncertain about how to address issues relating to missing persons and their families and little specific provision exists in this regard. While some national laws specifically protect the data of living people only, when dealing with missing people it is to be assumed that they are alive and that their data should be protected. Where national law does not protect the information on dead people, special consideration may be due in the case of death following a period of being missing as the information may continue to be deemed personal by the family.
- § Measures must ensure protection of information and the privacy of missing persons and their relatives, as well as ensure that the data is not used for any purpose other than intended. The use for which data is being collected should be clearly established at the time of collection. The consent of the individual concerned, whether it is the missing person or person providing the information, is understood as also comprising consent to the specific purpose for which the collection of the data is intended. Such purposes include: establishing the identity, location, conditions and fate of persons reported missing; establishing the identity of unidentified human remains; providing information to families concerning a missing or deceased relative; and as the case may be, contributing to the administration of justice. Information deemed to be sensitive, such as DNA information collected from family members for matching human remains, is increasingly used in relation to criminal investigations and proceedings as well as in situations of natural disasters, accidents, and the search for missing persons. National legislation should normally provide for the situations in which DNA samples may be taken, the method for doing so and the processing of the data in the framework of the intended purpose. It is important to ensure that a DNA analysis performed for the purpose of identification of a missing person be separated from any other use, for example, in criminal proceedings, otherwise it may inhibit recourse to this form of information gathering on the part of relatives and interested parties.
- § At the same time, these measures of protection must not in any way serve as an obstacle to locating or identifying the missing person. It is imperative therefore that within organizations that collect, process or store personal data, clear procedures are put in place to ensure respect of privacy together with a system of accountability and control. Implementing measures must include provisions addressing a failure to comply that outline significant consequences.
- § Any transfer of personal data to a third party will have to be assessed in light of the specific purpose for which the data was obtained, of the specific purpose of the data collection or information request by the third party, and of the guarantees of protection that the third party can offer. Whether the data subjects would have given such information to the third party and whether the consent to the collection and processing of the data comprised an implicit consent or otherwise for such a transfer should be also assessed.
- § Personal data that has served the purpose for which it was collected should be deleted or destroyed, thus preventing any improper or inappropriate use in the future. Specific information collected or processed for the purpose of locating a missing person or identifying human remains is no longer necessary once the person has been located or the remains identified. It should therefore be destroyed unless there is an overwhelming humanitarian need to retain it for a further and definite period of time. Alternatively, the information can be depersonalized so that it is no longer possible to identify an individual on the basis of it. This may be done for statistical or historical purposes. Personal data that has lost its personal character is no longer protected as personal data.



## **PART V – THE SEARCH, RECOVERY, AND TREATMENT OF THE DEAD**

### Article 19

#### Obligation for proper search and recovery of the dead

Once the fate of a missing person has been determined to be death, all available means must be undertaken to ensure recovery of the body and any personal effects.

## COMMENTARY

- § The death of a missing person may be determined through the discovery of human remains or presumed as a result of other evidence, events or certain defined situations, or may be presumed after the passage of time. It is not generally desirable to provide for an automatic presumption of death except in clearly defined circumstances which suggest that death was inevitable. In such cases, a reasonable period of time should have passed since the registration of the missing person. Death may be presumed after the passage of a certain time period (probably a few years) and at the request of the legal representative or spouse/family, or the competent authority. For reasons of certainty, testamentary and otherwise, it is probably not desirable for a legal status of missing to be indefinite and there should be some provision for the determination of the status, if not by request then perhaps when the missing person would have reached a particularly old age.
- § In situations of internal violence, domestic law and regulations must provide for an effective official investigation into the circumstances of death when any person is killed or appears to have been killed as a result of the use of force by agents of the State. In international and non-international armed conflicts, the competent authorities must adopt adequate procedures for providing information on identity, location and cause of death to the appropriate authorities or to the families.
- § The change in status from a missing person to a confirmed case of death obligates the State authority to undertake all necessary measures available to recover the human remains. This process can also extend to the personal effects that may be associated with the victim.
- § The [authority] should identify the deceased and inform the relatives of the discovery. All records should be brought up to date and synchronized, including the NIB and the Registry, with reference information about persons deceased under their authority or control, whether identified or not, the location of human remains and graves, and the issuance of death certificates. At this time, the legal status and related rights as well as the need for financial assistance of the dependents of the deceased may need to be re-evaluated.
- § A declaration of death should not be issued before all available measures or actions to ascertain the fate of the missing person have been taken, including public notifications that a declaration of death is to be issued. Provision should be made for the consequences of the return of missing persons who have been legally declared dead.
- § All necessary measures should be undertaken to ensure proper handling of the remains and personal effects of the deceased. Maintaining dignity and respect is of utmost importance. The remains may be returned to the family if possible. If not, a proper burial should be ensured.

## Article 20

### Declaration of death

- 1) A declaration of death shall be issued at the request of any interested person or of a competent State authority by [competent national, administrative or military authority], if it is established that a person has been missing or declared absent for a period of over [...] year(s). If someone other than the relatives requests a declaration of death, the relatives may oppose such a declaration with the competent national authority.
- 2) A declaration of death shall not be issued until such time as all available measures or actions to ascertain the fate of missing persons have been taken, including public notifications that a declaration of death is to be issued.

## COMMENTARY

- § A declaration of death may be issued at the request of any interested person or the competent authority. If someone other than the family requests a declaration of death, the relatives should be allowed to oppose such a declaration. Such a declaration should not be issued before all available measures or actions to ascertain the fate of the missing person have been taken, including public notifications that a declaration of death is to be issued.
- § A declaration of death and issuance of a death certificate should be performed by a designated judicial or other competent authority. The courts in the missing person's place of residence or in the family's current place of residence should be competent to hear a request for a declaration of death. Account must also be taken of the particular difficulty of accessing the court and gathering and furnishing the necessary evidence/documentation in times of armed conflict or internal violence, and in post-conflict situations. Hence, additional provision should be made for circumstances where a medical practitioner or other competent person can issue a death certificate within a reasonable time. Also, provision should be made for the presentation of substitute or alternate evidence/documentation and it may be appropriate for attestations of absence/death established by military units, reliable local institutions or the ICRC to be given probative value (e.g. ICRC attestations based on tracing requests).
- § Issuance of a death certificate, following a finding of actual or presumed death, should have all of the effects with regard to a missing person as it does with regard to any other person. The death certificate should also bring to an end any special legal arrangements made to address the fact that a person was missing. For example, a spouse should be free to remarry and inheritance provisions may take their normal course. A provision should be made in the event of a missing person's return with regard to compensation/reparation, restitution, assistance and social care.
- § A model certificate of death is provided in Annex 2 of this document.

## Article 21

### Treatment of human remains

- 1) The competent authority should ensure that the dead are treated with respect and dignity. The dead must be identified and buried in individually marked graves in sites that are identified and registered.
- 2) If exhumations are required, the competent authority should ensure that the identity of human remains and cause of death are established with due diligence by an official qualified to perform exhumations and post-mortem examinations and to make a final determination.
- 3) In situations of international armed conflict, exhumations shall be permitted only:
  - (a) to facilitate the identification and return of the remains of the deceased and of personal effects to the home country upon its request or upon the request of the next of kin;
  - (b) where exhumation is a matter of overriding public necessity, including cases of medical and investigative necessity, notice shall be given to the home country of the intention to exhume the remains together with details of the intended place of reburial.
- 4) Human remains and personal effects shall be returned to the families.

## COMMENTARY

- § The treatment of death is normally subject to legal regulation within the domestic framework. However, this national legislation should contain provision that covers the situation of the dead and human remains in the case of missing persons. The law adopted to address the missing should subsequently contain a provision referring to this national legislation.
- § Questions concerning the circumstances of death, or at times the number of possible dead, or the fact that the deaths may have occurred many years ago, may lead some to suggest that the normal rules may not apply. While these are factors that must be taken into account, the basic proposition should be that normal handling is appropriate except where the authorities can invoke a well founded reason to act differently. Any separate procedure must still take into account the rules of international law and the basic need to ensure respect for the dead and the needs of their families.
- § In addition, the domestic rules of criminal procedure and investigation should provide that information collected during exhumations that might help identify the victims of armed conflict or internal violence is forwarded to the authorities responsible for identifying the victims. Such rules should also ensure that all information/evidence gathered on deceased persons during judicial proceedings or investigations is forwarded directly to the family or to the ICRC, the latter acting either as an intermediary or to ensure that the information is properly stored pending transmission to the families.
- § When following up the discovery of unidentified bodies and human remains, however old and wherever found, there should be an awareness that their identities may subsequently be confirmed and their treatment should as far as possible be the same as for an identified corpse.
- § The discovery of burial sites can be important not only in tracing missing persons but also in the identification of the commission of crimes and their possible subsequent prosecution. As such, exhumations should be performed only with the proper authorizations, and according to the conditions specified in law. Normally, the skills of a fully qualified forensic specialist should be employed and a framework provided for the type of professional qualifications necessary to carry out or supervise any activities that involve the handling of human remains.
- § Ethical rules of conduct commonly accepted by the international community on the use of means of identification, in particular for investigations carried out in an international context, must be upheld and should be promoted and/or adopted by the competent authorities. The procedures of exhumation and post-mortem examination should respect the following principles.
- At all times, the dignity, honour, reputation and privacy of the deceased must be respected.
  - The known religious beliefs and opinions of the deceased and his/her relatives should be taken into consideration.
  - Families should be kept informed of the decisions in relation to exhumations and post-mortem examinations, and of the results of any such examination. When circumstances permit, consideration should be given to the presence of the families or of family representatives.
  - After post-mortem examination, the remains should be released to the family at the earliest time possible.
  - It is essential that all information be collected for the purpose of identification whenever exhumations are performed; regulations and procedures should be in conformity with the principles governing the protection of personal data and genetic information; it is important to preserve evidence conducive to the identification and that may be required for any criminal investigation, whether under national or international law.
- § Depending on the apparent circumstances of the death or deaths concerned, overall responsibility for the protection and recovery of the remains should be allocated to a specific authority, in cooperation with others as appropriate. In this way, it is more likely that a clear chain of responsibility, authority and accountability is established. There should be a clear form of authorization for the operation of recovery, including appropriate health and safety regulations.

## Article 22

### Burial and exhumation

- 1) The missing persons' relatives shall have the right to demand that places of burial and exhumation where the missing persons were either buried or exhumed be marked.
- 2) The marking of the place of burial or exhumation shall be within the competence of the [authority] after establishing the identity of buried persons or their remains.
- 3) The [authority] shall issue a permit for putting up a memorial plaque or some other commemorative mark. Issues concerning the marking of burial or exhumation sites shall be governed by regulations adopted by the [authority] within 60 days from the date of entry into force of the present Law.
- 4) The [authority] shall ensure the existence and functioning of an official graves registration service to record the particulars of the dead and their burial. This service should extend to the information regarding protected persons in international armed conflicts.

## COMMENTARY

- § The remains of those who have been killed in action and of other dead persons must be disposed of in compliance with the rules of international law, in particular with regard to the search, collection, identification, transportation, disposal or burial, and repatriation of the persons deceased.
- § In all circumstances, applicable procedures, directives and instructions should respect *inter alia* the following principles.
- The dead must be treated with respect and dignity.
  - The identity of human remains and the cause of death should be established with due diligence, and all available information should be recorded prior to the disposal of the remains. A public official or person competent, preferably a trained forensic specialist, is to be designated to perform post-mortem examinations and to make the final determination as to identity and cause of death. Commonly recognized international ethical standards of practice must be adhered to during this process.
  - The burial should be preceded where possible by a medical examination and a report should be prepared.
  - Burial should be in individual graves, unless circumstances require the use of collective graves.
  - The dead should be buried where possible according to the rites of the religion to which the deceased belonged.
  - Cremation should be avoided, except where necessary (e.g. for reasons of public health) and a record of the reason for it kept, as well as the ashes.
  - All graves must be marked.
- § For the benefit of members of the armed forces, including those involved in peace keeping or peace enforcement operations, of armed groups, and of civilian auxiliary services or other organisms involved in the collection and management of the dead, standard operating procedures, directives or instructions should include:
- the search, collection, and identification of the dead without distinction;
  - the exhumation, collection, transportation, temporary storage or burial, and repatriation of human remains and corpses;
  - training and information on means of identification and the treatment of the dead.
- § In international armed conflicts, the authorities must see to it that the dead, including their burials, are recorded as well as the particulars of graves and those interred there. This task might be efficiently covered by the State's official graves registration service – if not, it would require the establishment and functioning of a complementary system to record the details of the death and interment of protected persons.



## Article 23

### Unidentified dead

- 1) Any unidentified human remains, shall be treated in accordance with Articles 19 to 22 of the present Law.
- 2) A record shall be kept with the Registry and access to the relevant information facilitated to ensure that the unidentified dead receive due attention until their identity is ascertained and the family and interested parties are informed.

## COMMENTARY

- § All available means must be employed to identify human remains.
- § If the remains of a person are found, yet not identified or identifiable, the body and all personal effects must still benefit from all measures that ensure dignified handling and burial.
- § A record should necessarily be kept **active** in order to allow for future identification and subsequent notification to relatives and interested parties, including State authorities.

## PART VI – CRIMINAL RESPONSIBILITY

### Article 24

#### Criminal acts

- 1) The following acts, when committed in violation of the present Law or any other applicable penal law, shall be prosecuted and punished according to prescribed penalties:
  - (a) illegal arrest, detention or internment
  - (b) unjustified refusal by an official to provide data on a missing person when requested by the missing person's relative, the [*authority*] or any other State authorities;
  - (c) undue refusal or delay to provide information on a missing person by an official requested to provide such data in accordance with the present Law and the Regulation of the Registry;
  - (d) intentional provision of false and unverified data on the missing person by an official that impedes the tracing of such a person;
  - (e) unlawful use and disclosure of personal data;
  - (f) the systematic and deliberate denial of the right to inform relatives of one's capture/arrest, address and state of health in contravention of Article 4 (5) of the present Law;
  - (g) the systematic and deliberate denial of the right to exchange news with relatives in contravention of Article 4 (5) of the present Law;
  - (h) intentional mutilation, despoliation and desecration of the dead;
  - (i) causing enforced disappearance.
- 2) The failure by an authorized official to uphold the provisions of this Law and related legislation, including the administrative laws and regulations governing the State authoritative bodies described herein, shall be subject to penalties prescribed in the [*reference to domestic penal legislation*] with regard to acts which constitute violations thereof.
- 3) The present Law is completed by [*reference to domestic penal legislation*] with regard to acts which constitute violations of international humanitarian law or other crimes under international law.

## COMMENTARY

- § The systematic and deliberate denial of the right to know the fate of one's relative should be punished as a criminal offence under domestic law. Penalties should be defined that are appropriate to the gravity of the offence.
- § The systematic and deliberate denial of the right to inform relatives of one's capture/arrest, address and state of health should be punished as a criminal offence under domestic law. Penalties should be defined that are appropriate to the gravity of the offence.
- § Consistent with most religious and cultural traditions, humanitarian law prohibits the despoliation and mutilation of the dead. National measures should exist in most legal systems to ensure that this prohibition is respected through the criminalization of all acts of mutilation and despoliation. The act of mutilating or despoiling the dead can lead to complications in the identification of the dead and is therefore likely to increase the chances of a person being considered missing when in fact they have been killed. It therefore directly impacts on the ability of the family to know the fate of the missing person.
- § Similar offences should exist for the non-respect of burial sites, and the desecration of graves. The act of mutilating or despoiling the dead can constitute the war crime of committing outrages upon personal dignity, in particular humiliating or degrading treatment as identified in Articles 8(2)(b)(xxi) and 8(2)(c)(ii) of the Statute of the International Criminal Court. National law should ensure that the crimes of despoliation and desecration of the dead are punishable as criminal offences. Intentional mutilation should also constitute a criminal offence, and may additionally be an element of concealing separate criminal offences which resulted in the deaths.
- § The current Law must contain a reference to the criminality of serious violations of IHL and other crimes under international law and the penal sanctions associated with these crimes as provided for in domestic legislation. If such national provisions implementing IHL do not yet exist, the [*authority*] shall undertake the promotion and incorporation of IHL principles on a national level and retain the power to initiate criminal proceedings with respect to violations when necessary.
- § The failure by an authorized official to uphold the provisions of this Law shall be subject to penalties prescribed in the domestic penal legislation. The responsibility of the officials extends to those acts committed by their subordinates.

## Article 25

### Prosecuting criminal acts

- 1) State authorities shall adopt legislation in order to ensure that crimes enumerated in Article 24 of the present Law are criminalized under domestic law and that criminal proceedings can be initiated by the missing person or his/her legal representative, family members, interested parties or the State authority.
- 2) An amnesty for acts may be granted to individuals and under certain conditions. No form of amnesty may be granted for crimes under international law or serious violations of international humanitarian law.

## COMMENTARY

- § The national authorities shall take the necessary measures to establish its jurisdiction over the offences listed in Article 24.
- § The person or group of persons on trial for the crimes defined in Article 24 shall be entitled to all the judicial guarantees normally granted to any ordinary person being tried.
- § If a crime has been committed and the designated State authority (e.g. Minister of Public Affairs) is not prosecuting the penal acts, then the State should oblige the enforcement of the law and prosecution of the crime.
- § If amnesty is granted by a legislative act, it must clearly specify who and which cases at law can and cannot benefit from such a provision, and under what circumstances. For example, amnesty must not:
- cover persons who committed crimes under international humanitarian law, including war crimes, genocide and crimes against humanity;
  - preclude the initiation of civil proceedings or have a legal effect on the victims' right to reparations;
  - circumvent any guarantees of due process;
  - eliminate the opportunity for identifiable victims to question and challenge the decision.

## **PART VII – SUPERVISION**

### Article 26

#### Supervision

Monitoring of the execution of the present Law shall be the responsibility of the supervisory authority of the [*authority*].

**PART VIII – CONCLUDING PROVISION**

Article 27

Entry into force

The present Law shall enter into force in accordance with the domestic legislation of [*name of the State*].



ANNEX 1 – Model certificate of absence

**(Title of responsible authority)**

**CERTIFICATE OF ABSENCE**

Reference number .....

Name and first names .....

Place and date of birth .....

Address .....

Citizenship ..... Sex .....

Occupation .....

Type and number of document .....

Father's name .....

Mother's name .....

Name of spouse .....

Dependents .....

Date and place of last sighting .....

Name of the reporting person .....

Address of the reporting person .....

**REPRESENTATIVE OF THE MISSING PERSON**

Authority .....

or

Name and first name .....

Address .....

Citizenship .....

Type and number of document .....

Duration of the validity of the declaration of absence .....

(Date, seal and signature of the responsible authority)

ANNEX 2 – Model certificate of death

**(Title of responsible authority)**

**CERTIFICATE OF DEATH**

Reference number .....

Name and first names .....

Place and date of birth .....

Last address .....

Citizenship ..... Sex .....

Occupation .....

Type and number of document .....

Father's name .....

Mother's name .....

Name of spouse .....

Dependents .....

Authority .....

## ANNEX 3

### IHL provisions

Extract from the ICRC report *The missing and their families* published following the International Conference of Governmental and Non-Governmental Experts held from 19 to 21 February 2003.

#### Foreword

International humanitarian law and international human rights law are concurrently applicable in armed conflicts. Human rights treaties apply at all times and in all circumstances to all persons subject to the jurisdiction of a State Party. They therefore continue to apply in times of armed conflict, except to the extent that a State Party may have legitimately derogated from some of its obligations under a treaty. Stringent conditions must be met for a derogation to be legitimate. International humanitarian law is applicable in situations of armed conflict and is non-derogable.

In order to spare the reader unnecessary repetition, the provisions of international human rights law are cited as references only in respect of the rules applicable in internal violence; only those provisions that specifically mention armed conflicts or refer to a non-derogable obligation are cited as references in respect of the rules applicable in international and non-international armed conflicts.

Neither this list of international humanitarian law rules applicable in armed conflicts nor that of the international human rights rules applicable in internal violence is by any means exhaustive.

## A. International law

### **International law applicable in international armed conflicts**

- [1] The State Parties undertake to respect and ensure respect for the Geneva Conventions and Additional Protocol I in all circumstances, and, in situations of serious violations of the Geneva Conventions or Additional Protocol I, the State Parties undertake to act, jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter.

#### *Knowing the fate of relatives*

- [2] Families have the right to know the fate of their relatives.
- [3] Each party to the conflict must take all feasible measures to account for persons reported missing as a result of an armed conflict.

#### *General protection*

- [4] All protected persons have the right to respect for their family life.
- [5] The life of every combatant *hors de combat* and civilian must be respected and protected.
- [6] Whenever circumstances permit, and particularly after an engagement, all possible measures must be taken, without delay, to search for and collect the wounded, sick and shipwrecked, without adverse distinction.
- [7] Every combatant *hors de combat* and civilian must be treated humanely.
- [8] Torture and other cruel, inhuman or degrading treatment or punishment are prohibited.
- [9] Hostage-taking is prohibited.
- [10] The arbitrary deprivation of liberty is prohibited.
- [11] Enforced disappearance is prohibited.
- [12] Discrimination based on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria is prohibited.
- [13] Everyone has the right to a fair trial by an independent, impartial and regularly constituted court respecting all internationally recognized judicial guarantees.
- [14] Without prejudice to more favourable treatment, neutral States must apply by analogy the relevant provisions of the four Geneva Conventions and Additional Protocol I to protected persons they receive or intern in their territory.
- [15] Each party to the conflict must allow the free passage of and not arbitrarily impede the delivery of relief supplies of an exclusively humanitarian nature intended for civilians in need in areas under its control; humanitarian relief personnel must have the freedom of movement essential to guarantee the exercise of their functions, unless imperative military reasons so demand.

### *Conduct of hostilities*

- [16] The parties to the conflict must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly must direct their operations only against military objectives.
- [17] Indiscriminate attacks are prohibited.
- [18] In the conduct of military operations, precautions in attack and against the effects of attack must be taken to spare the civilian population, civilians and civilian objects.
- [19] Combatants *hors de combat* and civilians must not be used to shield military operations.

### *Protection of civilians*

- [20] The parties to the conflict must not order the displacement of or forcibly displace the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand and then only for the time necessary; civilians thus evacuated must be transferred back to their homes as soon as hostilities in the area in question have ceased.
- [21] Where displacement occurs, the basic needs of the civilian population must be met, its security ensured and family unity maintained.
- [22] The voluntary and safe return and reintegration of displaced persons must be facilitated.
- [23] Returned displaced persons must not be discriminated against.
- [24] The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory is prohibited.
- [25] Women, the elderly and the disabled affected by armed conflict are entitled to special protection.
- [26] Children affected by armed conflict are entitled to special protection.

### *Protection of protected persons deprived of their liberty for reasons related to the conflict*

- [27] The personal data of protected persons deprived of their liberty for reasons related to the conflict must be recorded.
- [28] The information recorded on protected persons deprived of their liberty for reasons related to the conflict must be of such a character as to make it possible to identify the person exactly and to advise the next-of-kin quickly.
- [29] Internment of civilians.
  - A. Protected persons on the territory of a party to the conflict may be interned or placed in assigned residence only if the security of the Detaining Power makes this absolutely necessary. This action must be reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose; if internment or placing in assigned residence is maintained, the court or administrative board must review the action periodically, and at least twice yearly, with a view to the favourable amendment of the initial decision, if circumstances permit. [30]

- B. If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. Decisions regarding such assigned residence or internment must be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of GCIV, including the right of appeal. The appeal must be decided with the least possible delay and, if the decision is upheld, it must be subject to periodic review, if possible every six months. [31]
- C. Protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of interment or imprisonment is proportionate to the offence committed. [32]
- D. Each interned protected person must be released by the Detaining Power as soon as the reasons which necessitated his/her internment no longer exist. [33]

[34] Interned members of the same family must be lodged together in the same place of internment.

[35] Women deprived of their liberty must be separated from detained men, unless they are members of the same family, and must be guarded by women.

[36] Every civilian internee must be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible.

[37] Accused prisoners of war, accused persons in occupied territory, and accused civilian internees must be allowed to receive visits from their legal counsel.

[38] The ICRC must be granted access to all protected persons deprived of their liberty for reasons related to the conflict.

[39] Protected persons deprived of their liberty for reasons related to an international armed conflict must be released and repatriated in accordance with the Geneva Conventions.

#### *Communication between family members*

[40] All persons in the territory of a party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them. This correspondence shall be forwarded speedily and without undue delay.

[41] Prisoners of war and civilian internees must be allowed to send and receive letters and cards; the censoring of correspondence addressed to prisoners of war or civilian internees or dispatched by them must be done as quickly as possible and only by the appropriate authorities.

[42] Correspondence addressed to prisoners of war or civilian internees or dispatched by them through the post office, either direct or through the Information Bureaux, must be exempt from any postal dues.

[43] Should military operations prevent the Powers concerned from fulfilling their obligation to ensure the conveyance of mail and relief shipments, the Protecting Power, the ICRC, or any other organization duly approved by the parties to the conflict may undertake to ensure the conveyance of such shipments by suitable means.

### *Treatment of the dead and graves*

- [44] Whenever circumstances permit, and particularly after an engagement, all possible measures must be taken, without delay, to search for and collect the dead, without adverse distinction.
- [45] Each party to the conflict must treat the dead with respect and dignity and prevent their being despoiled.
- [46] Each party to the conflict must take measures to identify the dead before disposing of their remains.
- [47] The dead must be disposed of in a respectful manner and their graves respected.
- [48] Burial should be in individual graves, unless unavoidable circumstances require the use of collective graves. All graves must be marked.
- [49] Each party to the conflict must take all possible measures to provide information to the appropriate authorities or to the family of the deceased regarding the deceased's identity, location and cause of death.
- [50] Each party to the conflict must endeavour to facilitate the return of the deceased's remains and personal effects to the home country at its request or at the request of the next-of-kin.

### *Collecting and forwarding information*

Upon the outbreak of a conflict and in all cases of occupation, each party to the conflict must establish an official Information Bureau:

- A. to centralize, without adverse distinction, all information on the wounded, sick, shipwrecked, dead, protected persons deprived of their liberty, children whose identity is in doubt and persons who have been reported missing and to provide this information to the appropriate authorities, through the intermediary of the Protecting Powers and likewise of the ICRC Central Tracing Agency [51];
  - B. to be responsible for replying to all enquiries concerning protected persons and for making any enquiries necessary to obtain information which is asked for if this is not in its possession [52];
  - C. to act as an intermediary for the free transport of matter, including correspondence, sent to and by protected persons (and whenever requested through the ICRC Central Tracing Agency) [53].
- [54] Information recorded on protected persons deprived of their liberty or on deceased persons must be of such a character as to make it possible to identify the person exactly and to advise the next-of-kin quickly.
- [55] Each party to the conflict must furnish the persons under its jurisdiction liable to become prisoners of war with an identity card showing :
- A. full name,
  - B. rank, army, regimental, personal or serial number or equivalent information,
  - C. date of birth.

- [56] Medical and religious personnel must carry a special identity card embossed with the stamp of the military authority showing :
- A. the distinctive emblem;
  - B. full name;
  - C. rank and service number;
  - D. date of birth;
  - E. the capacity in which he/she is entitled to protection;
  - F. photograph;
  - G. signature and/or fingerprints.
- [57] Within the shortest possible period, each of the parties to the conflict must transmit to the Information Bureau the following information, when available, on each prisoner of war (and medical and religious personnel) :
- A. full name;
  - B. rank, army, regimental, personal or serial number;
  - C. place and date of birth;
  - D. indication of the Power on which the POW depends;
  - E. first name of father;
  - F. maiden name of mother;
  - G. name and address of the person to be informed;
  - H. address at which correspondence may be sent to the POW;
  - I. information regarding transfers, releases, repatriations, escapes, admissions to hospital and death;
  - J. if the POW is seriously ill or wounded, the state of health (to be supplied regularly, every week<sup>7</sup> if possible).
- [58] Within the shortest possible period, each of the parties to the conflict must transmit to the Information Bureau at least the following information on other protected persons deprived of their liberty for reasons related to the conflict :
- A. full name;
  - B. place and date of birth,;
  - C. nationality;
  - D. last known place of residence;
  - E. distinguishing characteristics;
  - F. first name of father;
  - G. maiden name of mother;
  - H. date, place, and nature of the action taken with regard to the individual;
  - I. address at which correspondence may be sent to the person deprived of liberty;
  - J. name and address of the person to be informed;
  - K. information regarding transfers, releases, repatriations, escapes, admissions to hospital and death;
  - L. if the protected person deprived of his/her liberty is seriously ill or wounded, the state of health (to be supplied regularly, every week if possible).



- [59] Within the shortest possible period, each of the parties to the conflict must transmit to the Information Bureau the following information, when available, on each wounded, sick, shipwrecked or dead person:
- A. full name;
  - B. army, regimental, personal or serial number;
  - C. date of birth;
  - D. any other particulars figuring on the identity card or disc;
  - E. date and place of capture or death;
  - F. particulars concerning wounds or illnesses, or cause of death.
- [60] In case of death, the following must be collected and transmitted to the Information Bureau :
- A. date and place of (capture and) death;
  - B. particulars concerning wounds/illnesses or cause of death;
  - C. all other personal effects;
  - D. date and place of burial with particulars to identify the grave,
  - E. when applicable, half of the identity disc must remain with the body and the other half transmitted.
- [61] At the commencement of hostilities, the parties to the conflict must establish an official graves registration service to see to the dead, including burials, and to record the particulars for identification of graves and those there interred.

[62] The authorities of the party to the conflict arranging for the evacuation of children to a foreign country and, as appropriate, the authorities of the receiving country must establish for each child a card with photographs, which they must send to the ICRC Central Tracing Agency. Each card must bear, whenever possible and whenever it involves no risk of harm to the child, the following information :

- A. full name;
- B. sex;
- C. place and date of birth (or, if that date is not known, the approximate age);
- D. father's full name;
- E. mother's full name and maiden name;
- F. next-of-kin;
- G. nationality;
- H. native language, and any other language spoken by the child;
- I. address of the child's family;
- J. any identification number attributed to the child;
- K. state of health;
- L. blood group;
- M. any distinguishing features;
- N. date on which and place where the child was found;
- O. date on which and place from which the child left the country;
- P. religion, if any;
- Q. present address in the receiving country;
- R. should the child die before returning, the date, place and circumstances of death and the place of interment.

[63] Information the transmission of which might be detrimental to the person concerned or to his/her relatives must be forwarded to the ICRC Central Tracing Agency only.

[64] The Information Bureau and the ICRC Central Tracing Agency must enjoy free postage for all mail and, as far as possible, exemption from telegraphic charges or, at least, greatly reduced rates.

#### *Customary international law*

Whereas the customary law status of the rule [62] is uncertain at the time of writing, all other rules mentioned above are widely recognized as representing customary international law applicable in international armed conflicts.

## **International law applicable in non-international armed conflicts**

### *General protection*

- [65] All persons have the right to respect for their family life.
- [66] The life of every person not or no longer directly participating in the hostilities must be respected and protected.
- [67] Whenever circumstances permit, and particularly after an engagement, all possible measures must be taken, without delay, to search for and collect the wounded, sick and shipwrecked, without adverse distinction.
- [68] Every person not or no longer directly participating in the hostilities must be treated humanely.
- [69] Torture and other cruel, inhuman or degrading treatment or punishment are prohibited.
- [70] Hostage-taking is prohibited.
- [71] Discrimination based on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria is prohibited.
- [72] Everyone has the right to a fair trial by an independent, impartial and regularly constituted court respecting all internationally recognized judicial guarantees.
- [73] Each party to the conflict must allow the free passage of and not arbitrarily impede the delivery of relief supplies of an exclusively humanitarian nature intended for civilians in need in areas under its control; humanitarian relief personnel must have the freedom of movement essential to guarantee the exercise of their functions, unless imperative military reasons so demand.

### *Conduct of hostilities*

- [74] The parties to the conflict must at all times distinguish between the civilian population and persons participating directly in the hostilities and between civilian objects and military objectives and accordingly must direct their operations only against military objectives.
- [75] Indiscriminate attacks are prohibited.
- [76] In the conduct of military operations, precautions in attack and against the effects of attack must be taken to spare the civilian population, civilians and civilian objects.
- [77] Persons not or no longer directly participating in the hostilities must not be used to shield military operations.

### *Protection of civilians*

- [78] The parties to the conflict must not order the displacement of or forcibly displace the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand and then only for the time necessary.
- [79] Where displacement occurs, the basic needs of the civilian population must be met, its security ensured and family unity maintained.
- [80] Children affected by armed conflict are entitled to special protection.

*Protection of persons deprived of their liberty for reasons related to the conflict*

- [81] Women deprived of their liberty must be separated from detained men, unless they are members of the same family, and must be guarded by women.
- [82] The ICRC should be granted access to all persons deprived of their liberty for reasons related to the conflict.
- [83] At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who participated in the armed conflict or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

*Communication between family members*

- [84] Persons deprived of their liberty for reasons related to the armed conflict must be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary.

*Treatment of the dead and graves*

- [85] Whenever circumstances permit, and particularly after an engagement, all possible measures must be taken, without delay, to search for and collect the dead, without adverse distinction.
- [86] Each party to the conflict must treat the dead with respect and dignity and prevent their being despoiled.
- [87] The dead must be disposed of in a respectful manner and their graves respected.

*Customary international law*

It is widely recognized that, [the abovementioned rules represent customary international law. It is also recognised that rules mentioned under 1 to 3, 10, 11, 22, 23, 25, 27, 46, 48 and 49 in international armed conflict are also] applicable *mutatis mutandis* in non-international armed conflicts.

## International law applicable in internal violence

### *General protection*

- [88] All persons have the right to respect for their family life.
- [89] The arbitrary deprivation of life is prohibited.
- [90] All persons must be treated with humanity and with respect for the inherent dignity of the human person.
- [91] All persons have a right to adequate food, clothing and housing and to the enjoyment of the highest attainable standard of physical and mental health.
- [92] Torture and other cruel, inhuman or degrading treatment or punishment is prohibited.
- [93] Hostage-taking is prohibited.
- [94] Everyone has the right to liberty and security of person; the arbitrary deprivation of liberty is prohibited.
- [95] *Incommunicado* detention or detention in a secret location is prohibited.
- [96] Enforced disappearance is prohibited.
- [97] Discrimination based on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria is prohibited.
- [98] Everyone has the right to a fair trial by an independent, impartial and regularly constituted court respecting all internationally recognized judicial guarantees.

### *Protection of the population*

- [99] The deportation or forcible transfer of any civilian population committed as part of a widespread or systematic attack directed against that population, with knowledge of the attack, is prohibited.
- [100] All persons have the right to leave any country, including their own, and to return to their country.
- [101] The principle of *non-refoulement* must be respected.
- [102] Returned displaced persons must not be discriminated against.
- [103] Children are entitled to special protection.

### *Protection of persons deprived of their liberty*

- [104] Official up-to-date registries of persons deprived of their liberty must be established and maintained and, in accordance with domestic law, must be made available to relatives, judges, attorneys, any other person having a legitimate interest and other authorities.
- [105] Persons deprived of their liberty should be allowed to receive visitors.

### *Communication between family members*

- [106] All persons have the right to correspond with members of their families.

**References: International law (the numbers refer to the bracket number)**

1. GCI-IV: common Art. 1; API: Arts. 1(1), 89.
2. API: Art. 32.
3. API: Arts. 32, 33; GCIV: Arts. 136-141.
4. GCIV: Arts. 26, 27(1), 49(3), 82(2), 116; API: Arts. 74, 75(5), 77(4); HRIV: Art. 46; ACHR: Arts. 17(1), 27(2).
5. GCI: Arts. 12, 50; GCII: Arts. 12, 51; GCIII: Arts. 13, 130; GCIV: Arts. 27, 147; API: Arts. 75(2), 85; Rome Statute: Arts. 6(a), 7(1)(a), 8(2)(a)(i), 8(2)(b)(vi); ICCPR: Arts. 4, 6; ECHR: Art. 2, 15(2); ACHR: Arts. 4, 27(2); ACHPR: Art. 4.
6. GCI: Art. 15; GCII: Art. 18; GCIV: Art. 16; API: Art. 10.
7. GCI: Art. 12; GCII: Art. 12; GCIII: Art. 13; GCIV: Arts. 5(3), 27(1); API: Arts. 10(2), 75(1); HRIV: Art. 4.
8. GCI: Arts.12(2), 50; GCII: Arts. 12(2), 51; GCIII: Arts. 17(4), 87(3), 89, 130; GCIV: Arts. 32, 147; API: Arts. 75(2), 85; Rome Statute: Arts. 7(1)(f), 7(2)(e), 8(2)(a)(ii), 55(1)(b); 1984 Conv. against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Arts. 1, 2; ICCPR: Arts. 4(2), 7; ECHR: Arts. 3, 15(2); ACHR: Arts. 5(2), 27(2); ACHPR: Art. 5; 1985 Inter-American Conv. to Prevent and Punish Torture: Arts. 1, 5; 1989 Conv. on the Rights of the Child: Art. 37.
9. GCIV: Arts. 34, 147; API: Arts. 75(2)(c), 85; Rome Statute: Art. 8(2)(a)(viii).
10. GCIV: Arts. 43, 78; API: Art. 75(1); Rome Statute: Arts. 55(1)(d), 59(2).
11. Rome Statute: Arts. 7(1)(i), 7(2)(i); 1994 Inter-American Conv. on the Forced Disappearance of Persons: Art. X. This rule is not formulated as such in international humanitarian treaty law, but the practice of enforced disappearance would violate other rules stated above (**e.g. rules 2, 5, 8 to 11, 13 and 29**).
12. GCI: Arts. 12(2), 31; GCII: Arts. 12(2), 30; GCIII: Arts. 14, 16, 43, 61, 88; GCIV: Arts. 13, 27, 54, 98, 118; API: Preamble, Arts. 9(1), 69(1), 70(1), 75(1), 85(4)(c); Rome Statute: Arts. 7(1)(h), 7(1)(j).
13. GCI: Art. 49(4); GCII: Art. 50(4); GCIII: Arts. 84(2), 86, 96(3)-(4), 99, 102-108, 129(4), 130; GCIV: Arts. 5, 33, 66, 67, 71-78, 117-126, 146(4), 147; API: Arts. 75(4), (7), 85(1), (4)(e); HRIV: Art. 50; Rome Statute: Arts. 8(2)(a)(vi), 20(2), 25, 55, 60, 63(1), 64, 66, 67-69, 76; Second Protocol (1999) to the 1954 Hague Conv. for the Protection of Cultural Property in the Event of Armed Conflict: Art. 17(2).
14. GCI: Art. 4; GCII: Art. 5; GCIII: Arts. 4B, 109(2), 110, 111, 114-116; GCIV: Arts. 24(2), 36(1), 132(2); API: Art. 19; 1907 Hague Conv. (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land: Arts. 11, 12, 14.
15. GCIII: Arts. 72, 73; GCIV: Arts. 23, 59, 108, 109; API: Art. 70.
16. API: Arts. 48, 51, 52, 85(3)(a); Rome Statute: Arts. 8(2)(b)(i), 8(2)(b)(ii); Protocol II (amended 1996) to the 1980 CCW: Arts. 1(2), 3(7); Protocol III (1980) to the 1980 CCW: Art. 2; 1954 Hague Conv. for the Protection of Cultural Property in the Event of Armed Conflict: Art. 4; Second Protocol (1999) to the 1954 Hague Conv. for the Protection of Cultural Property in the Event of Armed Conflict: Art. 6.

17. API: Arts. 51(4)-(5), 85(3)(b); Protocol II (amended 1996) to the 1980 CCW: Arts. 1(2), 3(8)-(9); Protocol III (1980) to the 1980 CCW: Art. 2.
18. API: Arts. 57, 58; HRIV: Art. 26; Protocol II (amended 1996) to the 1980 CCW: Arts. 1(2), 3(10)-(11); Second Protocol (1999) to the 1954 Hague Conv. for the Protection of Cultural Property in the Event of Armed Conflict: Arts. 6(d), 7, 8.
19. GCI: Art. 19; GCIII: Art. 23; GCIV: Art. 28; API: Arts. 12(4), 51(7); Rome Statute: Art. 8(2)(b)(xxiii).
20. GCIV: Arts. 49, 147; API: Art. 85(4)(a); Rome Statute: Arts. 7(1)(d), 8(2)(a)(vii), 8(2)(b)(viii).
21. GCIV: Art. 49(3); API: Art. 78.
22. GCIV: Arts. 45, 49(2).
23. This is in application of the general rule of non-discrimination, see 10.14.
24. GCIV: Arts. 49, 147; API: Art. 85(4)(a); Rome Statute: Arts. 8(2)(a)(vii), 8(2)(b)(viii).
25. GCI: Art. 12(4); GCII: Art. 12(4); GCIII: Arts. 14(2), 16, 25, 44, 45, 49, 88(2)-(3); GCIV: Arts. 14(1), 17, 27, 76(4), 82, 85, 119; API: Arts. 8(a), 70(1), 75(5), 76; APII: Arts. 4(2)(e), 5(2)(a), 6(4).
26. GCIV: Arts. 23(1), 24(1), 38(5), 50, 76(5), 89(5); API: Arts. 8(a), 70(1), 77(1); 1989 Conv. on the Rights of the Child: Art. 38; 1990 African Charter on the Rights and Welfare of the Child: Art. 22; Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child on the involvement of children in armed conflict: Arts. 1-4, 6; ACHR: Arts. 19, 27(2).
27. GCIII: Arts. 122, 123; GCIV: Arts. 136, 137, 140; HRIV: Art. 14(1).
28. GCIII: Art. 122(4); GCIV: Art. 138(1).
29. GCIV: Art. 79.
30. GCIV: Arts. 41-43.
31. GCIV: Art. 78.
32. GCIV: Art. 68.
33. GCIV: Art. 132(1).
34. GCIV: Art. 82(2)-(3); API: Art. 77(4).
35. GCIII: Arts. 25(4), 29(2), 97(4), 108(2); GCIV: Arts. 76(4), 82, 85(4), 124(3); API: Art. 75(5).
36. GCIV: Art. 116.
37. GCIII: Art. 105; GCIV: Arts. 72, 126.
38. GCIII: Arts. 56(3), 126; GCIV: Arts. 76(6), 96, 143; Art. 56(3) of GCIII and Art. 96 of GCIV state that delegates of the Protecting Power, the ICRC or other agencies providing relief to POWs may visit labour detachments.

39. HRIV: Art. 20; GCIII: Arts. 109-117 (direct repatriation and accommodation in neutral countries of prisoners of war with special needs), Arts. 118-119 (release and repatriation of prisoners of war at the close of hostilities); GCIV: Arts. 35, 45(4), 132-135 (release, repatriation and accommodation in neutral countries of civilian internees); API: Art. 85(4)(b).
40. GCIV: Art. 25.
41. GCIII: Arts. 35, 70, 71, 76; GCIV: Arts. 25(3), 93, 106, 107, 112.
42. GCIII: Art. 74(1); GCIV: Art. 110; HRIV: Art. 16.
43. GCIII: Art. 75; GCIV: Art. 111.
44. GCI: Art.15; GCII: Art. 18; GCIV: Art. 16; API: Art. 33.
45. GCI: Art. 15; GCII: Art.18; GCIV: Art. 16; API: Art. 34.
46. GCI: Arts. 16, 17; GCII: Arts. 19, 20; GCIII: Arts. 120, 121; GCIV: Arts. 129, 131.
47. GCI: Art. 17; GCII: Art. 20; GCIII: Art. 120; GCIV: Art. 130; API: Art. 34(1).
48. GCI: Art. 17; GCII: Art. 20; GCIII: Art. 120; GCIV: Art. 130; API: Art. 34.
49. GCI: Arts. 16,17; GCII: Art. 19; GCIII: Art. 120; GCIV: Art.130; API: Art. 33.
50. API: Art. 34(2)(c).
51. GCI: Arts. 16, 17(4); GCII: Arts. 19(2), 20; GCIII: Arts. 120, 122, 123; GCIV: Arts. 130, 136-138, 140; API: Art. 33(3); HRIV: Arts. 14, 16.
52. GCIII: Art. 122(7); GCIV: Art. 137(1); API: Art. 33(3); HRIV: Art. 14.
53. GCIII: Art. 74; GCIV: Art. 110; HRIV: Art. 14.
54. GCI: Art. 16; GCII: Art. 19; GCIII: Arts. 120, 122; GCIV: Arts. 129, 138(1), 139; API: Art. 34.
55. GCIII: Art. 17, Annex IV.A.
56. GCI: Art. 40(2)-(4), 41(2), Annex II; GCII: Art. 42(2)-(4), Annex. For the definition of medical and religious personnel, see Arts. 24, 26, 27 of GCI, Arts. 36, 37 of GCII and Art. 8(c)-(d) of API.
57. GCI: Art. 16; GCII: Art. 19; GCIII: Arts. 17, 70, 122, Annex IV.B.
58. GCIV: Arts. 136-138; HRIV: Art. 14.
59. GCI: Art. 16; GCII: Art. 19.
60. GCI: Arts.16, 17, 40(2); GCII: Arts. 19, 20, 42(2); GCIII: Art. 120; GCIV: Arts. 129, 130, 139; HRIV: Arts. 14, 19; API: Art. 34.
61. GCI: Art. 17(3); GCII: Art. 20(2); GCIII: Art. 120(6); GCIV: Art. 130(3).
62. API: Art. 78(3).
63. GCIV: Arts. 137(2), 140(2).



64. GCIII: Arts. 74, 124; GCIV: Arts. 110, 141; HRIV: Art. 16; 1994 Universal Postal Convention: Art. 7(3).
65. APII: Arts. 4(3)(b), 5(2)(a); ACHR: Arts. 17(1), 27(2).
66. GCI-IV: common Art. 3; APII: Art. 4(2); Rome Statute: Arts. 6(a), 7(1)(a), 8(2)(c)(i); ICCPR: Arts. 4, 6; ECHR: Arts. 2, 15(2); ACHR: Arts. 4, 27(2); ACHPR: Art. 4.
67. GCI-IV: common Art. 3; APII: Arts. 7, 8.
68. GCI-IV: common Art. 3; APII: Arts. 4, 5(3), 7(2).
69. GCI-IV: common Art. 3; APII: Art. 4(2); Rome Statute: Arts. 7(1)(f), 7(2)(e), 8(2)(c)(i), 55(1)(b); 1984 Conv. against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Arts. 1, 2; ICCPR: Arts. 4(2), 7; ECHR: Arts. 3, 15(2); ACHR: Arts. 5(2), 27(2); ACHPR: Art. 5; 1985 Inter-American Conv. to Prevent and Punish Torture: Arts. 1, 5; 1989 Conv. on the Rights of the Child: Art. 37.
70. GCI-IV: common Art. 3; APII: Art. 4(2)(c); Rome Statute: Art. 8(2)(c)(iii).
71. GCI-IV: common Art. 3; APII: Arts. 2(1), 4(1), 7(2), 18(2); Rome Statute: Arts. 7(1)(h), 7(1)(j).
72. GCI-IV: common Art. 3; APII: Art. 6(2)-(3); Rome Statute: Arts. 8(2)(c)(iv), 20(2), 25, 55, 60, 63(1), 64, 66, 67- 69, 76; Second Protocol (1999) to the 1954 Hague Conv. for the Protection of Cultural Property in the Event of Armed Conflict: Art. 17(2).
73. APII: Arts. 5(1)(c), 18(2).
74. GCI-IV: common Art. 3; APII: Arts. 4, 13; Protocol II (amended 1996) to the 1980 CCW: Art. 1(2)-(3); Protocol III (1980) to the 1980 CCW: Art. 2; Rome Statute: Arts. 8(2)(e)(i), 8(2)(e)(xii).
75. Protocol II (amended 1996) to the 1980 CCW: Arts. 1(2)-(3), 3(8), 3(9); Protocol III (1980) to the 1980 CCW: Art. 2.
76. APII: Art. 13(1); Protocol II (amended 1996) to the 1980 CCW: Arts. 1(2)-(3), 3(10), 3(11); Second Protocol (1999) to the 1954 Hague Conv. for the Protection of Cultural Property in the Event of Armed Conflict: Arts. 6(d), 7, 8, 22.
77. APII: Arts. 4, 13(1).
78. APII: Art. 17; Rome Statute: Arts. 7(1)(d), 8(2)(e)(viii).
79. APII: Arts. 4(3)(b), 17(1).
80. APII: Art. 4(3); 1989 Conv. on the Rights of the Child: Art. 38; 1990 African Charter on the Rights and Welfare of the Child: Art. 22; Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child on the involvement of children in armed conflicts: Arts. 1-4, 6; ACHR: Arts. 19, 27(2).
81. APII: Art. 5(2)(a).
82. Although there are no specific treaty provisions requiring that the ICRC be granted access to persons deprived of their liberty in non-international armed conflicts, this rule is widely recognized as representing customary international law applicable in non-international armed conflicts.
83. APII: Arts. 5(4), 6(5).

84. APlI: Art. 5(2)(b).
85. APlI: Art. 8.
86. APlI: Art. 8.
87. APlI: Art. 8.
88. 1948 Universal Declaration of Human Rights: Art. 12; ECHR: Art. 8; ICCPR: Arts. 17, 23(1); ICESCR: Art. 10(1); ACHR: Arts. 17, 27(2); ACHPR: Art. 18; Additional Protocol (1988) to the ACHR in the Area of Economic, Social and Cultural Rights: Art. 15(1); 1989 Conv. on the Rights of the Child: Arts. 9, 10, 37; 1990 African Charter on the Rights and Welfare of the Child: Arts. 18, 19, 25(2)(b).
89. ICCPR: Arts. 4, 6(1); ECHR: Arts. 2, 15(2); ACHR: Arts. 4, 27(2); ACHPR: Art. 4; Rome Statute: Arts. 6(a), 7(1)(a).
90. ACHPR: Art. 5; ICCPR: Art. 10(1); ACHR: Art. 5.
91. ICESCR: Arts. 11, 12; 1948 Universal Declaration of Human Rights: Art. 25(1); Additional Protocol (1988) to the ACHR in the Area of Economic, Social and Cultural Rights: Arts. 10, 12; ACHPR: Art. 16; 1951 Conv. Relating to the Status of Refugees: Arts. 20, 21, 23; 1989 Conv. on the Rights of the Child: Art. 22; 1990 African Charter on the Rights and Welfare of the Child: Art. 23.
92. 1984 Conv. against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Arts. 1, 2; ICCPR: Arts. 4(2), 7; ECHR: Arts. 3, 15(2); 1987 European Conv. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Preamble; ACHR: Arts. 5(2), 27(2); 1985 Inter-American Conv. to Prevent and Punish Torture: Arts. 1, 5; ACHPR: Art. 5; 1989 Conv. on the Rights of the Child: Art. 37; Rome Statute: Arts. 7(1)(f), 7(2)(e), 55(1)(b).
93. ECHR: Art. 5; ICCPR: Arts. 9, 12; ACHR: Arts. 7, 22; ACHPR: Art. 6; 1973 Conv. on Crimes Against Internationally Protected Persons, including Diplomatic Agents: Art. 2; 1979 International Conv. against the Taking of Hostages: Arts. 1, 8, 12.
94. 1948 Universal Declaration of Human Rights: Art. 3; ICCPR: Art. 9(1); ECHR: Art. 5(1); ACHR: Art. 7(2)-(3); ACHPR: Art. 6; 1989 Conv. on the Rights of the Child: Art. 37; Rome Statute: Art. 55(1)(d).
95. This rule is not formulated as such in international human rights treaty law, but its violation would constitute a violation of other rules stated above (e.g. 12.2 to 12.4, 12.6 to 12.8, 12.10, 12.12, 12.21 and 12.23).
96. 1994 Inter-American Conv. on Forced Disappearance of Persons: Preamble, Arts. I, II, X, XI, XII; Rome Statute: Arts. 7(1)(i), 7(2)(i).
97. UN Charter: Art. 1(3); 1948 Universal Declaration of Human Rights: Arts. 2, 7; ICCPR: Arts. 2, 4; ECHR: Arts. 14, 15; ACHR: Arts. 1, 27; ACHPR: Art. 2; 1965 Convention on the Elimination of Racial Discrimination: Arts. 2, 5; 1989 Conv. on the Rights of the Child: Art. 2(1); 1973 International Convention on the Suppression and Punishment of Apartheid: Art. I; Rome Statute: Arts. 7(1)(h), 7(1)(j).
98. ICCPR: Arts. 9(3), 14; ECHR: Arts. 5(3), 6, 40(1); Protocol No. 7 (1984) to the ECHR: Arts. 2, 4; ACHR: Arts. 7, 8; ACHPR: Art. 7; 1989 Conv. on the Rights of the Child: Art. 40(2)(b); Rome Statute: Arts. 20(2), 55, 60, 63(1), 64, 66, 67-69, 76; 1994 Inter-American Conv. on Forced Disappearance of Persons: Art. X.

99. Rome Statute: Art. 7(1)(d) (“For the purposes of paragraph 1, “attack directed against the civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such an attack.” Rome Statute: Art. 7(2)(a).); ICCPR: Art. 13; Protocol No. 4 (1963) to the ECHR: Arts. 3, 4; Protocol No. 7 (1984) to the ECHR: Art. 1; ACHR: Art. 22; ACHPR: Art. 12(5); 1984 Conv. against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Art. 3; 1989 Indigenous and Tribal Peoples Conv: Art. 16.
100. 1948 Universal Declaration of Human Rights: Art. 13(2); ICCPR: Art. 12(4); Protocol No. 4 (1963) to the ECHR: Art. 3; ACHR: Art. 22(5); ACHPR: Art. 12(2); 1984 Conv. against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Art. 3; 1969 Conv. Governing the Specific Aspects of Refugee Problems in Africa: Art. 5; 1989 Indigenous and Tribal Peoples Conv.: Art. 16.
101. 1951 Conv. Relating to the Status of Refugees: Arts. 32, 33; 1969 Conv. Governing the Specific Aspects of Refugee Problems in Africa: Art. 2(3); 1984 Conv. against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Art. 3.
102. This is in application of the general rule of non-discrimination, see 12.11; 1969 Conv. Governing the Specific Aspects of Refugee Problems in Africa: Arts. 4, 5; 1951 Conv. Relating to the Status of Refugees: Art. 3.
103. 1948 Universal Declaration of Human Rights: Art. 25(2); ICCPR: Art. 24; ACHR: Art. 19, 27(2); ICESCR: Art. 10; ACHPR: Art. 18(3); 1989 Conv. on the Rights of the Child: Arts. 3, 20; 1990 African Charter on the Rights and Welfare of the Child: Art. 4.
104. 1994 Inter-American Conv. on Forced Disappearance of Persons: Art. XI.
105. 1987 European Conv. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Arts. 1-2; 1994 Inter-American Conv. on Forced Disappearance of Persons: Art. X.
106. 1948 Universal Declaration of Human Rights: Art. 12; ICCPR: Art. 17(1); ACHR: Art. 11(2); ECHR: Art. 8(1)

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UN Human Rights Committee: *María del Carmen Almeida de Quintero and Elena Quintero de Almeida case* (Uruguay), decision of 21 July 1983, Communication No. 107/1981, para. 14.

Inter-American Commission: Report No. 136/99, 22 December 1999, *Case of Ignacio Ellacría et al*, Case No. 10.488, paras. 221 & 224.

*Lucio Parada Cea et al*, Report 1/99, 27 January 1999, Case No. 10.480, par. 151.

Report OEA/Ser.L/V/II.116, Doc. 5 rev.1 corr. (22 October 2002) "Report on Terrorism and Human Rights", paras. 304 & 305.

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*Godínez Cruz Case*, Judgment of 20 January 1989, Series C: Decisions and Judgments, No.5, para. 191.

*Castillo Paéz Case*, Judgment of 3 November 1997, Series C: Decisions and Judgments, No. 34, para. 90.

*Blake Case*, Judgment of 24 January 1998, Series C: Decisions and Judgments, No. 36, paras. 66, 97, 103.

*Bámaca Velázquez Case*, Judgment of 25 November 2000, Series C: Decisions and Judgments, No. 70, paras. 129, 145(f), 160-166, 182(a), (c), (g), 197-202.

*Las Palmeras Case*, Judgment of 6 December 2001, Series C: Decisions and Judgments, No. 90, paras. 58-61, 65, 69.

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UN GA resolution 34/169 of 1979 – Code of Conduct for Law Enforcement Officials.

UN GA resolution 37/194 of 1982 – Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

UN GA resolution 40/34 of 1985 – Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

UN GA resolutions 40/32 and 40/146 of 1985 – Basic Principles on the Independence of the Judiciary.

UN GA resolution 43/173 of 1988 – Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

UN GA resolution 45/111 of 1990 – Basic Principles for the Treatment of Prisoners.

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Resolution XI of the 21st International Conference of the Red Cross (Istanbul, 1969) – Protection of prisoners of war.

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Resolution I of the 24th International Conference of the Red Cross (Manila, 1981) – Wearing of identity discs.

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Resolution IX (para. 5) of the 25th International Conference of the Red Cross (Geneva, 1986) – Protection of children in armed conflicts.

Resolution XIII of the 25th International Conference of the Red Cross (Geneva, 1986) – Obtaining and transmitting personal data as a means of protection and preventing disappearances.

Resolution XIV of the 25th International Conference of the Red Cross (Geneva, 1986) – National Information Bureaux.

Resolution XV of the 25th International Conference of the Red Cross (Geneva, 1986) – Cooperation between National Red Cross and Red Crescent Societies and governments in the reuniting of dispersed families.

Resolution 2 of the 26th International Conference of the Red Cross and Red Crescent (Geneva, 1996) – Protection of the civilian population in period of armed conflict.

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Marco Sassòli, “The National Information Bureau in Aid of Victims of Armed Conflicts”, *International Review of the Red Cross*, January–February 1987.

## B. Special protection to which children are entitled

### **Special protection to which children are entitled: international law applicable in international armed conflicts**

§ [1] Children are protected by GCIV relative to the protection of civilian persons in time of war and API; they are protected by the fundamental guarantees that these treaties provide, in particular the right to life, the prohibitions on corporal punishment, torture, collective punishment and reprisals, [2] and by the rules of API on the conduct of hostilities, including both the principle that a distinction must be made between civilians and combatants and the prohibition on attacks against civilians.

§ Children affected by armed conflict are entitled to special protection. GCIV guarantees special care for children, but it is API that lays down the principle of special protection: "Children shall be the object of special respect and shall be protected against any form of indecent assault. The parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason." [3]

The provisions setting out this protection are summarized in the rules that follow.

[4] Evacuation, special zones: evacuation must be temporary and only arranged where compelling reasons of health or medical treatment of the child so require or from areas of combat for safety reasons; special zones may be established by the parties in order to protect from the effects of war children under 15, expectant mothers and mothers of children under 7.

[5] Assistance and care: children must be given priority access to food and health care; children under 15 years of age must be given additional food, in proportion to their physiological needs.

[6] Education and cultural environment: the education of children must be facilitated and their cultural environment preserved.

§ Identification, family reunification and unaccompanied children :

[7] A. The parties to the conflict must endeavour to arrange for all children under 12 to be identified by the wearing of identity discs, or by some other means.

[8] B. The parties to the conflict must take the necessary measures to ensure that children under 15, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances and as far as possible entrusted to persons of a similar cultural tradition.

[9] C. All protected persons have the right to correspond with members of their families.

[10] D. Each party to the conflict must facilitate enquiries made by the members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible.

[11] E. Where displacement occurs, the basic needs of the population must be met, its security ensured and family unity maintained.

[12] F. Information on unaccompanied children and children who have been separated from their families must be centralized and provided to the ICRC Central Tracing Agency.

§ Arrested, detained or interned children:

[13] A. Proper regard must be paid to the special treatment due to minors.

[14] B. If arrested, detained or interned for reasons related to the conflict, children must be held in quarters separate from those of adults, except where families are accommodated as family units.

[15] C. The cases of pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict must be considered with the utmost priority.

[16] Exemption from the death penalty: the death penalty for an offence related to the armed conflict must not be carried out on persons who had not attained the age of 18 years at the time the offence was committed.

§ Recruitment and participation in hostilities:

[17] A. Conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities is prohibited.

[18] B. If, in exceptional cases, children who have not attained the age of 15 years take a direct part in hostilities and fall into the power of an adverse party, they continue to benefit from the special protection accorded by international humanitarian law, whether or not they are prisoners of war.

[19] C. In recruiting among persons who have attained the age of 15 years but not the age of 18 years, priority should be given to those who are oldest.

[20] D. States must take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

[21] E. Children under the age of 18 must not be compulsorily recruited into the armed forces.

[22] F. States that permit voluntary recruitment into their national armed forces under the age of 18 years must maintain safeguards to ensure, as a minimum, that:

- such recruitment is genuinely voluntary;
- such recruitment is carried out with the informed consent of the person's parents or legal guardians;
- such persons are fully informed of the duties involved in such military service;
- such persons provide reliable proof of age prior to acceptance into national military service.

[23] G. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

[24] All protected persons have the right to respect for their family life.

§ It is widely recognized that rules 1 to 16, 17, 18 and 24 represent customary international law applicable in non-international armed conflicts.



## **Special protection to which children are entitled: international law applicable in non-international armed conflicts**

- [25] Children are covered by the fundamental guarantees for persons not or no longer directly participating in hostilities; they are further protected by the principle: “The civilian population as such, as well as individual civilians, shall not be the object of attack.” [26]
- [27] Children affected by armed conflict are entitled to special protection: “Children shall be provided with the care and aid they require . . .”

The provisions setting out this protection are summarized in the rules that follow.

- [28] Evacuation, special zones: measures must be taken, if necessary and whenever possible with the consent of their parents or persons who are responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country.
- [29] Assistance and care: children must be provided with the care and aid they require.
- [30] Identification, family reunification and unaccompanied children: all appropriate steps must be taken to facilitate the reunion of families temporarily separated.
- [31] Where displacement occurs, the basic needs of the population must be met, its security ensured and family unity maintained.
- [32] Education, cultural environment: children must receive an education, including religious and moral education.
- [33] Exemption from the death penalty: the death penalty may not be pronounced on persons who were under the age of 18 years at the time of the offence and may not be carried out on pregnant women or mothers of young children.

### § Recruitment and participation in hostilities:

- [34] A. Conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities is prohibited.
- [35] B. The special protection provided by international humanitarian law to children who have not attained the age of 15 years remains applicable to them if they take a direct part in hostilities.
- [36] C. In recruiting among persons who have attained the age of 15 years but not the age of 18 years, priority should be given to those who are oldest.
- [37] D. States must take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.
- [38] E. Children under the age of 18 must not be compulsorily recruited into the armed forces.

- [39] F. States that permit voluntary recruitment into their national armed forces under the age of 18 years must maintain safeguards to ensure, as a minimum, that:
- a. such recruitment is genuinely voluntary;
  - b. such recruitment is carried out with the informed consent of the person's parents or legal guardians;
  - c. such persons are fully informed of the duties involved in such military service;
  - d. such persons provide reliable proof of age prior to acceptance into national military service.
- [40] G. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
- [41] All persons have the right to respect for their family life.
- § It is widely recognized that, in addition to rules 26 to 32, 34, 3 and 41, rules 9 and 14 also represent customary international law applicable *mutatis mutandis* in non-international armed conflicts.

## **Special protection to which children are entitled: international law applicable in internal violence**

[42] Children are entitled to special protection.

[43] Everyone has the right to education.

§ Arrested, detained or interned children:

[44] A. Every child deprived of liberty must be separated from adults unless it is considered in the child's best interest not to do so.

[45] B. Juvenile offenders must be accorded treatment according to their age and legal status.

[46] Sentence of death must not be imposed for crimes committed by persons below the age of 18 years.

[47] All persons have the right to correspond with members of their families.

[48] All persons have the right to respect for their family life.

§ Recruitment:

[49] A. Conscripting or enlisting children under the age of 15 years into the national armed forces is prohibited.

[50] B. In recruiting among persons who have attained the age of 15 years but not the age of 18 years, priority should be given to those who are oldest.

[51] C. Children under the age of 18 must not be compulsorily recruited into the armed forces.

[52] D. States that permit voluntary recruitment into their national armed forces under the age of 18 years must maintain safeguards to ensure, as a minimum, that:

- a. such recruitment is genuinely voluntary;
- b. such recruitment is carried out with the informed consent of the person's parents or legal guardians;
- c. such persons are fully informed of the duties involved in such military service;
- d. such persons provide reliable proof of age prior to acceptance into national military service.

- [53] States that recognize and/or permit the system of adoption must ensure that the best interests of the child must be the paramount consideration and they must:
- A. ensure that adoption is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
  - B. recognize that inter-country adoption may be considered as an alternative means of child care, if the child cannot be placed in a foster home or with an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
  - C. ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
  - D. take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
  - E. promote, where appropriate, the above objectives by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

## References: Special protection to which children are entitled

1. GCIV: Arts. 27-34; API: Art. 75.
2. API: Arts. 48, 51.
3. API: Art. 77; 1989 Conv. on the Rights of the Child: Art. 38; 1990 African Charter on the Rights and Welfare of the Child: Art. 22; ACHR: Arts. 17, 19, 27(2).
4. GCIV: Arts. 14 (safety zones), 17, 24(2), 49(3), 132(2); API: Art. 78.
5. GCIV: Arts. 16, 23(1), 24(1), 38(5), 50, 81(3), 89(5); API: Arts. 8(a), 70(1), 77(1).
6. GCIV: Arts. 24(1), 50, 94; API: Art. 78(2).
7. GCIV: Art. 24(3).
8. GCIV: Art. 24(1).
9. GCIII: Arts. 35, 70, 71; GCIV: Arts. 25, 93, 106, 107, 112.
10. GCIV: Arts. 26, 50; API: Art. 74.
11. GCIV: Art. 49(3); API: Art. 78.
12. GCIV: Arts. 25, 50, 136-140; API: Art. 78(3).
13. GCIV: Arts. 76(5), 85(2), 89(5), 94, 119(2), 132.
14. GCIV: Arts. 76(5), 82; API: Art. 77(4).
15. GCIV: Arts. 89(5), 91, 127, 132; API: Arts. 75(5), 76.
16. GCIV: Art. 68(4); API: Art. 77(5).
17. Rome Statute: Art. 8(2)(b)(xxvi); API: Art. 77(2); GCIV: Art. 50(2); 1989 Conv. on the Rights of the Child: Art. 38(2)-(3); 1990 African Charter on the Rights and Welfare of the Child: Arts. 2, 22(2) (specifying that children may neither participate nor be recruited below 18 years); 1999 Conv. on the Worst Forms of Child Labour: Arts. 1, 3.
18. API: Art. 77(3); GCIII: Arts. 16, 49.
19. API: Art. 77(2); 1989 Conv. on the Rights of the Child: Art. 38(3).
20. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child on the involvement of children in armed conflict: Art. 1; 1990 African Charter on the Rights and Welfare of the Child: Arts. 2, 22(2) (specifying that children may neither participate nor be recruited below 18 years).
21. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child on the involvement of children in armed conflict: Art. 2; 1990 African Charter on the Rights and Welfare of the Child: Arts. 2, 22(2).
22. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child on the involvement of children in armed conflict: Art. 3.

23. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child on the involvement of children in armed conflict: Art. 4.
24. GCIV: Arts. 26, 27(1), 49(3), 82(2), 116; API: Arts. 74, 75(5), 77(4); HRIV: Art. 46; ACHR: Arts. 17(1), 27(2).
25. GCI-IV: common Art. 3; APII: Art. 4.
26. APII: Art. 13.
27. APII: Art. 4(3); 1989 Conv. on the Rights of the Child: Art. 38; 1990 African Charter on the Rights and Welfare of the Child: Art. 22; ACHR: Arts. 17, 19, 27(2).
28. APII: Art. 4(3)(e).
29. APII: Art. 4(3).
30. APII: Art. 4(3)(b).
31. APII: Arts. 4(3)(b), 17(1).
32. APII: Art. 4(3)(a).
33. APII: Art. 6(4).
34. Rome Statute: Art. 8(2)(e)(vii); APII: Art. 4(3)(c); 1989 Conv. on the Rights of the Child: Art. 38(2)-(3); 1990 African Charter on the Rights and Welfare of the Child: Arts. 2, 22(2) (specifying that children may neither participate nor be recruited below 18 years); 1999 Convention on the Worst Forms of Child Labour: Arts. 1-3.
35. APII: Art. 4(3)(d).
36. 1989 Conv. on the Rights of the Child: Art. 38(3).
37. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child on the involvement of children in armed conflict: Art. 1; 1990 African Charter on the Rights and Welfare of the Child: Arts 2, 22(2) (specifying that children may neither participate nor be recruited below 18 years).
38. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child on the involvement of children in armed conflict: Art. 2; 1990 African Charter on the Rights and Welfare of the Child: Arts. 2, 22(2).
39. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child on the involvement of children in armed conflict: Art. 3.
40. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child on the involvement of children in armed conflict: Art. 4.
41. APII: Arts. 4(3)(b), 5(2)(a); ACHR: Arts. 17(1), 27(2).
42. 1948 Universal Declaration of Human Rights: Art. 25(2); ICCPR: Art. 24; ICESCR: Art. 10; ACHR: Arts. 17, 19, 27(2); ACHPR: Art. 18(3); 1989 Conv. on the Rights of the Child: Arts. 3, 20; 1990 African Charter on the Rights and Welfare of the Child: Art. 4.
43. 1948 Universal Declaration of Human Rights: Art. 26, ICESCR: Art. 13; ACHPR: Art. 17; 1989 Conv. on the Rights of the Child: Art. 28; 1990 African Charter on the Rights and Welfare of the Child: Art. 11.

44. 1989 Conv. on the Rights of the Child: Art. 37(c); ICCPR: Art. 10(2)(b), (3); ACHR: Art. 5(5); 1990 African Charter on the Rights and Welfare of the Child: Art. 17(2)(b).
45. ICCPR: Art. 10(3); 1989 Conv. on the Rights of the Child: Arts. 20, 37, 40; ACHR: Art. 5(5); 1990 African Charter on the Rights and Welfare of the Child: Art. 17.
46. ICCPR: Art. 6(5); ACHR: Art. 4(5); Protocol to the ACHR to Abolish the Death Penalty (1990): Art. 1; Protocol No. 6 (1983) to the ECHR concerning the abolition of the death penalty: Arts. 1, 2; Second Optional Protocol (1989) to the ICCPR, aiming at the abolition of the death penalty: Arts. 1, 2(1).
47. 1948 Universal Declaration of Human Rights: Art. 12; ICCPR: Art. 17(1); ACHR: Art. 11(2); ECHR: Art. 8(1); 1989 Conv. on the Rights of the Child: Art. 16.
48. 1948 Universal Declaration of Human Rights: Art. 12; ECHR: Art. 8; ICCPR: Art. 23(1); ICESCR: Art. 10(1); ACHR: Art. 17; ACHPR: Art. 18; Additional Protocol (1988) to the ACHR in the Area of Economic, Social and Cultural Rights: Art. 15(1); 1989 Conv. on the Rights of the Child: Arts. 8-10, 16, 37; 1990 African Charter on the Rights and Welfare of the Child: Arts. 18, 19, 25(2)(b).
49. 1989 Conv. on the Rights of the Child: Art. 38(3); 1990 African Charter on the Rights and Welfare of the Child: Arts. 2, 22(2) (specifying that children may not be recruited below 18 years); 1999 Convention on the Worst Forms of Child Labour: Arts. 1-3.
50. 1989 Conv. on the Rights of the Child: Art. 38(3).
51. Optional Protocol (2000) to the 1989 Conv. on the Rights of the Child on the involvement of children in armed conflict: Art. 2; 1990 African Charter on the Rights and Welfare of the Child: Arts. 2, 22(2).
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