How to bring to Justice Western War Criminals and other Western Violators of International Humanitarian Law and how to Sue Them for Damages?

The quest of western anti-fascist and peace movement organizations to end impunity to western aggressors as well as impunity to western war criminals, and to uphold the laws and customs of war and the ban on aggression facing intentional erosion caused by western forces.

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1 Brief sketch

Manual

For legal action against crimes of aggression, crimes against humanity and war crimes committed by western states, for legal action against western war criminals and against violations of international humanitarian law standards by multinational corporations.

Essay

Starting from a compilation of relevant international law provisions, in search of the legal foundations for:

1. Criminal prosecution of western war criminals instigated by non-western victims of western war crimes, as well as prosecution of western perpetrators of aggression and crimes against humanity, before domestic courts in western countries and before the international criminal court (ICC);

2. Intervention resulting from domestic court decisions according to international and national civil law standards in western countries, initiated by non-western victims and potential victims in case of aggression by western states;

3. Civil law litigation, inside or outside armed conflict situations, based on tort, by non-western victims of western aggression, western war crimes and crimes against humanity, especially also by victims of complicity in human rights abuses by multinational corporations, before western courts of the western aggressor-states seeking damages.

Prelude

“When alleged war criminals coming from non-western States are prosecuted, it is called justice. When prosecution of alleged war criminals coming from western States only even is attempted, it is called politics and a mockery of justice” and the **Victim’s Guide to the International Criminal Court (ICC)**, edited by **Reporters Without Borders - Damocles Network** states: “The greatest challenge awaiting **the ICC** will be to prove that it is neither a political organ, nor an instrument of selective justice, nor even the embodiment of some form of judicial neo-imperialism. Even at the risk of dashing the hopes placed in **the ICC**, the court must not become a system of justice for the powerful that would prosecute only pariah States and the weakest governments.”

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3 Introduction

3.1 The use of force outlawed - a landmark in history

One of the most prominent expressions of civilization in recent history has been, for decades, the ban upon the use of force in relations between States.

This was on the one hand the result of a long historic development, but at the same time the outcome of a fierce anti-fascist struggle, especially during and immediately after World War II.

Actually war between States is outlawed.

With **the Kellogg Briand Pact** of 1928 as starting point, and definitively since the realization of **the Charter of the United Nations**, after World War II, stipulating to put an end to "the scourge of war".

This intention of 'the peoples of the world' is reflected in the preamble of **the UN Charter**, after the horrendous experiences of two world wars in the first half of the twentieth century.

The prohibition of the use of force constitutes a landmark of the post-war international legal order.

3.2 The fall of the Socialist World - a turning point

However, after the fall of the Berlin Wall and the vanishing bipolarity in the world, Western States feel themselves increasingly too much tight-handed by this international legal order.

Now, in this new epoch, when only one superpower is left, newly articulated political and economical interests throw their weight about.

The only superpower left, the United States of America, assumed in a very short period of time the air of an empire.

An empire, which intend to put no longer any restraint upon the full execution of its power and is guided no more by the power of constituted law, but by the law of the jungle.

3.3 Growing interests of western States opposed to international humanitarian law

The international legal order, represented by the ban upon the use of force in international affairs between States, is more and more experienced, in this respect, as an unacceptable obstacle by the United States as well as by their Western allies.

However, this feeling by the western States is not only restricted to the prohibition of the use of force, but relates also to the Western perception of acts which have to be characterized as war crimes and crimes against humanity.

Consequently, also Western countries increasingly regard the laws and customs of war as an embarrassment for their interests. In general, it may be said that western States are no longer willing to respect the international rules, when those are not in their supposed benefit.

3.4 Increasing tendency of violation of the ban on force and other breaches of international humanitarian law by western States

Viewed from this perspective, it is quite understandable that the armed force, used by western powers more and more as a matter of routine against non-western States which has been fallen in disgrace to them because of political reasons, goes structurally hand in hand with serious violations of the laws and customs of war.

The result is that western States, first of all by the United States, committed a huge number of war crimes and crimes against humanity in the recent western wars against, successively, Iraq during the 1991 Gulf war, Yugoslavia in 1996, Afghanistan in 2002 and, again, Iraq in 2003.

In their slipstream, closely supported and protected by those western States, especially by the US, Israel claims already for more than half a century a spearhead position with respect to undisguised contempt for established norms of international humanitarian law.

So obviously the western States have been decided, initially, simply to pass over the requirements of the international legal order and of international law, and later on they decided, quite openly, to break up this post-World War II framework of international law itself. That don't suit the Western powers any more, in the perspective of their newly conceptualized geopolitical interests in this dramatically changed world.

The United States here in a trendsetting position.

3.5 Enforcing international humanitarian law in non-western States as a tool of western foreign policy

At the same time that the westerns States planned to show no interest any longer in compliance with the requirements of the international legal order and international law by themselves and to disregard more and more the laws and customs of war, the same western powers started, as a paradox, a course of imposing to States, conceived by them as adversaries, a regime of demands, directed at compliance with the requirements of international law by those States and their regimes

Ad hoc-tribunals are installed, instigated mainly by western States, in a number of cases. In order to sentence breaches of the international legal order, violations of the laws and customs of war and other infringements of international humanitarian law, committed by such non-western States and their non-western nationals.

The more the western States distance themselves from compliance with the do's and don'ts of the international legal order and of the laws and customs of war, the more they lay down upon selected non-western States, perceived as adversaries, commands to observe painstakingly the international rules. And the more they institute practises of bringing nationals of such non-western States before ad specifically formed hoc-tribunals.

By this way of acting the western powers abuse the category of law as a tool, in order to support their own political aspirations. They perform victor's justice. And at the same time they make an ominous signal to other non-western States and their leadership that acting contrary to what has been formulated as western interests will come to no good, especially also for the members of that obstructive non western State's leadership personally.

Such a misuse of law can only have a disastrous effect on the integrity and respectability of international law on the longer term.

3.6 The role of certain categories of so-called western international humanitarian law experts

And always there do show up international law experts who are prepared, again and again when western States plunge into a new war of aggression against another non-western State, to cover such wilful demolition of international law by stressing that the norms of international law should not be considered as definitely established and harsh norms, but only as growing law, not yet immovable, but certainly still transient.

Frequently they turn out to be the same international law experts who proclaim, when the prosecution of the Milosevic's and Saddam Hussein's of this world is at issue, with the same ease, that international law should be considered far enough substantial to sentence those non-western suspects of violations of international law.

Anyway, if the norms of international law must be considered to be able to bring to justice the Milosevic's and the Saddam Hussein's, they must be also sufficient to bring to justice western leaders for the same breaches of international law.

3.7 The need to bring to justice western violators of international humanitarian law, on equal terms

Anyhow, it should be completely unacceptable that only the nationals of non-western States, rejected by the western powers, may be prosecuted and brought to justice under the suspicion of crimes against peace, war crimes and crimes against humanity and never any representative of a western State.

No matter how serious and explicit the crimes committed by that specific western State against the international legal order and international law might have been.

It is this radical unbalance and inequality of application of justice that will make deep inroads on the integrity and credibility of international law.

More and more people cannot longer stand such inequality of law any longer. And demand that western States and western suspects of crimes against international law should be treated in accordance with the same standards as non-western States which are disqualified by the western powers, and their non-western suspects.

3.8 Problems with international humanitarian law enforcement on the basis of equality - necessity for action

But there is one huge problem.

There is no explicit structure of power to bring western perpetrators of crimes against international law to justice is completely absent. This in sharp contrast with the overwhelming structure of power that is present in order to put in motion mechanism directed at the sentencing of non-western suspects of the same crimes, if western States perceive such an application of justice as convenient for their political aims.

This fundamentally unequal treatment in the sphere of application of justice can only be challenged by concrete action of civil groups and other non-governmental organisations in the western States itself. Directed at holding also western war crimes suspects liable for there acts and bringing about legal proceedings against them, especially also with the help of domestic courts in their homelands. The victims themselves of western violations of international humanitarian law and their relatives formally should set such steps.

However, western-based anti-fascist organisations and peace movement groups should help bring legal steps - penal claims as well as civil litigation - by non-western (potential) victims before western legal institutions. So that (potential) victims of western aggression and war crimes could take legal action directly against western governments and their political and military responsibles and executives, directly addressing the western perpetrators themselves, even as persons, and holding them liable in accordance with their **penal responsibility** as well as their **civil responsibility** for the crimes committed and their consequences. Only by acting like this a certain measure of counterbalance against an extreme unbalance in application of justice in the sphere of enforcing international humanitarian law might be organized.

3.9 Acting on behalf of the non-western victims, as a precondition for result

In relation to this, it must be stressed that it will turn out not productive if either national civil organizations and groups, or individual nationals, in their own western home State will seek access to their own national judicial organs, in order to denounce before their own domestic legal institutions, in their own capacity, violations of international humanitarian law and breaches of the prohibition of aggression, committed by their own national governments and their own nationals.

Experience shows that the judiciary in most western countries than will seize the opportunity to turn down that legal action - either penal or civil -, using the argument that such civil western groups or individuals don’t have enough legal interest by themselves to make their legal actions admissible.

So the one and only way to avoid that such cases will be, customary, were immediately thrown out by western courts will be to place, in criminal law actions as well as in civil law actions, the (potential) victims of the violations of the laws and customs of war themselves.

Consequently, it should be organised that (potential) victims of acts of aggression and war crimes, in the non-western countries victimized by western powers, are helped to bring cases. So it is necessary that western countries’ based anti-fascist organisations and peace

movement groups organize cases in western States' courts on behalf of the non-western victims.

3.10 Simultaneous availability of opportunities for criminal law action and civil law action

Legal steps by the (potential) non-western victims on two fronts

Firstly **criminal law actions** by filing, with the help of western non-governmental organisations, criminal law complaints at the homeland's prosecutor against the political and military leadership of that specific western state or states, involved in illegal acts of war and war crimes.

And secondly **civil law actions** by suing the western States, responsible for such crimes, and their State actors, for damages. Before the western States' own domestic courts.

So if the western responsibles for crimes of aggression and war crimes might escape **penal law responsibility**, they still have to face their **civil law responsibility** and vice versa.

3.11 Conduct of civil law action against those who are responsible for western violations of international humanitarian law in several western States

Civil lawsuits seeking damages by victims of western war crimes, living in Serbia and Montenegro, are now going on, or are in preparation, in Canada, Germany and the Netherlands.

In the Netherlands claims seeking damages, to be filed by the victims of the attack on the Radio- and TV-Studio in Belgrade and the cluster bomb attacks in Nis in May 1999 during NATO's war of aggression against Yugoslavia, are going to be directed not only against the State of the Netherlands, acting in complicity with respect to these crimes.

But also against the most prominent Dutch politicians and military in charge at the time of these criminal attacks by NATO.

This according to the very essence of the Nuremberg ruling is expressed in the following consideration during that trial: "Crimes against international law are committed by man, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." (Annual Digest, 13 (1946), p. 221)

Meanwhile The Hague Court of Appeal has satisfied a preliminary request by these victims to hear testimonies of those Dutch top politicians in preliminary hearings in court, in relation to those events as the first step in these proceedings.

The **Permanent Commission with respect to Western War Crimes (PC)** calls upon all people from western countries and all western based organisations, dedicated to peace, justice and anti-imperialist struggle, to organize contacts with (potential) victims in non-western States, victimized by western aggression and/or war crimes.

In order to provide them with the opportunity to combat the Western war crimes and war

criminals also straight from inside the judiciary of the western States themselves.

This also in response to the western determination to bring down the existing international legal order, to exploit international humanitarian law concerning war and peace only as an instrument to subdue denounced non-western States and their leadership, who dare to oppose alleged western interests, and to introduce a permanent standard of unequilibration and inequality in the allocation of law and law enforcement, as a new standard of law.

All legal provisions, cited hereafter in this manual, are only reproduced as far as relevant here.

4 Commitment to Universal Prosecution of War Crimes and Crimes against Humanity, Based on the Geneva Conventions

4.1 Range of applicability of the Geneva Conventions and Additional Protocol I in time of war and during occupation

Most States of the world, including all western States, are High Contracting Parties to **the Geneva Conventions**.

En consequently bound by the Geneva Conventions.

Relevant here is, first of all, **the Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted on 12 August 1949 ('Fourth Convention')**.

The range of applicability of the **Fourth Geneva Convention** is formulated in **Article 2 Fourth Convention**.

Article 2 Fourth Convention

> "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

Consequently, the Fourth Convention applies, for example, to Palestine, Kosovo and Iraq.

Relevant here is also the **Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977 (Protocol I)**.

The range of applicability of **Protocol I** is outlined in **article 1 Para 3 Protocol I**.

Article 1 Para. 3 Protocol I

> "3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.
> 4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

So as far as at least one of the parties in an actual occupation may be party to Protocol I, also

this international law instrument will be applicable.

The US did not enter into the Additional Protocols.

However, the US have solemnly declared that it will comply with the provisions of Protocol I

And Article 6 Fourth Convention reads:

> "The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.
> (…)
> In case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, and 143."

However, later on, within the framework of **Protocol I**, is stated:

Article 3 Protocol I

> "Beginning and end of application
> Without prejudice to the provisions, which are, applicable at all times:
> (…)
> (b) The application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment."

Consequently, Protocol I extends the application of the Fourth Convention till the very end of occupation.

And finally is relevant here also **the Geneva Convention relative to the treatment of Prisoners of War, adopted 12 August 1949 ('Third Convention')**.

Article 2 Third Convention points out:

> "The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets no armed resistance."

So not only **the Fourth Geneva Convention**, but also **the Third Geneva Convention** is applicable in occupied territories.

4.2 Duty to universal prosecution of grave breaches of the Geneva Conventions

The High Contractors Parties are, according to **the Geneva Conventions**, under the obligation to enact legislation to provide sanctions for **grave breaches** of **the Geneva Conventions** and to bring persons involved in such grave breaches before its own courts, regardless of their own nationality:

Article 146 Fourth Convention first part

> "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."

And **Article 129 Third Convention** is, as far as relevant here, identical.

So each High Contracting Party to the Geneva Conventions shall, according to **Article 146 Fourth Geneva Convention** and **Article 129 Third Geneva Convention**, be bound to prosecute all suspects of **grave breaches** of these **Conventions**, no matter their nationality.

4.3 The need for domestic legislation in order to implement the obligation for universal jurisdiction with respect to grave breaches of the Geneva Conventions

All High Contracting Parties are, consequently, under the obligation to establish national laws, in order to provide in national penal regulations with regard to persecution and trying of suspects by their domestic courts.

At least as far as are at issue what **the Conventions** observe as **grave breaches**.

And this legislation must provide also, at the same time, for jurisdiction according to the **principle of universality**.

This means that the national States, acceded to the **Geneva Conventions**, had to create national legislation, not only allowing but also even requiring prosecution of suspects of such **grave breaches,** wherever committed on earth by whomever of whatsoever nationality.

National provisions, in accordance with the requirements of **article 146 Fourth Convention** and **article 129 Third Convention** have been established by now in all western States.

Unfortunately, most western States didn't implemented the Convention's requirements for establishment of full universal jurisdiction with respect to grave breaches properly.

Mostly they introduced various limitations on this principle of universal jurisdiction. In the sense that there only should be competence for their own national courts in relation to non-

nationals in case that either such grave breaches were committed on their own national territory, or committed by or against own nationals, or at least the State's own national interests were affected.

4.4 The principle of direct applicability of the Geneva Conventions' requirements for universal jurisdiction with respect to grave breaches in the national legal order of western States, in case of defectuous implementation in the national legal systems

However, if those regulations, in one western state or another, were not adequate to enable litigation against suspects of war crimes, committed without any relation as regards territory, nationality or interests with the country where raises the question of prosecution, those national legislation must be regarded as an insufficient implementation of the requirements of **the Geneva Conventions**.

In such a case the duty to every State Party to the Geneva Conventions to trace and prosecute war criminals from wherever on earth, put upon by the requirements of the **fourth Geneva Convention**, must be considered as directly originating from **the Convention itself**.

This obligation than, alternatively should be regarded, as such, as self-executing with respect to those requirements.

Unless the national law system of the States concerned explicitly may exclude such interpretation of direct applicability in the State's domestic law system.

4.5 Former position of the Netherlands with regard to the implementation of the requirements of the Geneva Conventions concerning universal jurisdiction

Once, the Netherlands had been fulfilled this obligation, based on **the Geneva Conventions**, to create such national penal provisions, providing for universal jurisdiction in view of grave breaches of the Geneva Conventions.

This was settled in the **War Crimes Act** (Wet Oorlogsstrafrecht).

For a long time the **War Crimes Act** had been lying dormant. Not before the nineties of the last century this act was rediscovered.

However, also for a long time there has been much doubt whether those regulations were enough far-reaching to allow also the prosecution of suspects of war criminals from abroad, who have no common grounds with the Dutch national legal order. However, this question was definitively cleared by **the verdicts of the Dutch Supreme Court (Hoge Raad) of 22 October 1996 and 11 November 1997, NJ 1998, no. 462 and no. 463**, against a Yugoslav suspect of war crimes, Keredzic.

In these verdicts the Dutch Supreme Court established that, no matter the precise wording of the Dutch Act functioning at that very moment as the national provision according to **the Geneva Convention**'s obligations here at issue, should have been regarded as bringing war crimes, committed wherever on earth, within the jurisdiction of the Dutch judiciary.

This concerned national Act should have been the **War Crimes Act**, the '**Wet Oorlogsstrafrecht**'.

In this verdict the Dutch Supreme Court observes it, inter alia:

> "The 'laws of war', referred to in article 8 of the **War Crimes Act ('Wet Oorlogsstrafrecht')**, may be found, inter alia, in the four **Geneva Conventions** of August 12, 1949, among which the **Geneva Convention relative to the protection of Civilian Persons in Time of War ('Fourth Convention')**, with accessory Protocols, as mentioned in the demands by the prosecutor.
> See also the explanatory memorandum of the bill of the **War Crimes Act ('Wet Oorlogsstrafrecht')**. These Conventions impose on the Parties, acceded to them, not only the obligation to call into being adequate criminal provisions focusing on further specified 'grave breaches' of these Conventions. But also lay upon these Parties the duty to trace, to prosecute and to bring to justice, whether to turn over the suspects to another Party to the Conventions. Those obligations also rest upon neutral States, not involved in the conflict" (NJ 1998, p. 2624).

In this verdict, repeated references are made to the transcripts of explanatory memorandum of the bill.

Like:

> "The Dutch judiciary shall be considered competent with respect to violations of the laws and customs of war, also when they were committed outside the territory of the Netherlands by the adverse party. References are made to the Articles 49/50/129/146 of the four **Geneva Conventions** of August 12, 1949. When another power, Party to the Convention that has been violated, is not requesting extradition of a prisoner of war, being into the hands of the Dutch authorities, it shall be possible that the Dutch judiciary is going to try him, even when the crime has been committed abroad, and regardless of whether the fact has been committed against someone of Dutch nationality or whether, by committing that fact, national interests of the Netherlands were affected" (Kamerstukken II [parliamentary chronicles] 1950-1951, 2258, no. 3, blz. 6); NJ 1998, blz. 2625).

And to the memorandum in reply of the bill:

> "The regulation of article 3(1) provides the Dutch judge with competence to war crimes, indifferent by whom or wherever those crimes were committed, and, as a consequence, also when the crime concerned has been committed in a war the Netherlands was not participating in. As it is rightly observed in the provisional parliamentary protocol of the bill, the present provision must be regarded as an application of the so-called principle of universality; in the present case (is the application of the principle of universality a result) of the four **Geneva Conventions** of August 12, 1949" (Kamerstukken II [parliamentary chronicles] 1950-1951, 2258, nr. 5, blz. 5); NJ 1998, blz. 2625).

And on the occasion of the parliamentary debate about the bill, when Member of Parliament, Van der Feltz, was asking himself whether a Bolivian who, during a coup d'etat in Bolivia - a foreign civil war - has been committed a violation of the articles 8 and 9 of the **War Crimes Act ('Wet Oorlogsstrafrecht')** could be tried by a Dutch judge, to which the government

had answered affirmatively, and also had added:

> "This goes far indeed; however, the fact is that this is based on the special circumstances, addressed by this bill, of course with the intention that the chance that the criminal could fail to get the sentence he deserves should be minimized, wherever on earth he might be" (Handelingen II [parliamentary chronicles], 1951-1952, p. 2251); NJ 1998, blz. 2626).

The Supreme Court states moreover in its verdict of **11 November 1997, NJ 1998, nr. 463** concerning the same suspect of war crimes Keredzic:

> "When another State, also Party to the violated Convention, should request to hand over the prisoner of war, who were in Dutch hands, it should be possible that he is going to sentenced by a Dutch judge, even when the crime has been committed abroad, and also when the fact not has been committed by a Dutch citizen or when there has been not damaged any Dutch interest" (Kamerstukken II [parliamentary chronicles], 1951-1952, 2258, nr. 3, p. 6; NJ 1998, nr. 463, p. 2639) (respectively); "The provision, constituted as article 3(1) [of the **War Crimes Act ("Wet Oorlogsstrafrecht")**] makes the Dutch judge competent with regard to war crimes, no matter by whom and wherever they will be committed, and consequently also in those cases, in which the crime were committed by a not-Dutchman, outside the Netherlands, in a war in which our country is not involved. Rightly it has been observed in the Provisional Parliamentary Protocols, that this provision must be considered to be an application of the principle of universality" (Kamerstukken II [parliamentary chronicles], 1951-1952, 2258, nr. 5, p. 5; NJ 1998, nr 463, p. 2639).

The foregoing leads to the conclusion that the Netherlands have had jurisdiction with respect to all war crimes, as meant in the **articles 8-9 War Crimes Act ('Wet Oorlogsstrafrecht')**, committed wherever on earth or by whomever. And that the military chamber of the District Court in Arnhem had been the competent court.

4.6 Present position of the Netherlands with regard to the Geneva Conventions' requirements of universal jurisdiction - repercussion of a new tendency in the western world

Unfortunately, the **War Crimes Act ('Wet Oorlogsmisdrijven)**, for the most part, will be replaced in the course of 2003, by a new act, the **International Crimes Act ('Wet Internationale Misdrijven')**.

This new Act represents a real backlash.

Here we see that history in Belgium with respect to the developments regarding the '**Genocide Act**' repeats itself in the Netherlands: making national legal provisions with respect to universal jurisdiction of prosecution of ware crimes more diffuse is nowadays the motto.

The newly established **International Crimes Act ('Wet Internationale Misdrijven')** puts up far-reaching barriers in the field of prosecution of suspects of serious crimes against international humanitarian law from whatever foreign State, allegedly committed wherever on earth, as a full implementation of the principle of universality.

First of all the **International Crimes Act ('Wet Internationale Misdrijven')** introduces the requirement that prosecution of persons not subjected to Dutch jurisdiction according to the principles of personality or territoriality, shall be henceforth only possible with respect to persons who, at least, are staying onto Dutch soil.

This limitation was not laid down in the old **International Crimes Act ('Wet Oorlogsmisdrijven')**

This had been clarified at the parliamentary proceedings of the bill, not just explaining this intervention, but also further broadening this cutback in the field of universal jurisdiction.

In the parliamentary documents of the bill has been stated clearly that, in the sense of this Act, 'residence into the Netherlands' must be measured off from the moment the person concerned will be taken in custody.

However, it is also observed that not before such a person from abroad has been taken in custody, terms may rise to start an official inquiry.

The parliamentary documents of the bill furthermore explicitly stipulate that there should be neither terms to undertake any investigation against such a person, nor even to place incriminating data on file against him, as long as he is not put under arrest.

Consequently, as long as there is no arrest and no custody, there may not be only no prosecution, but also no inquiry and even a ban on collecting and filing of incriminating documents.

Only action of taking somebody into custody might trigger further investigation and subsequently prosecution of suspects from elsewhere.

4.7 Perfect control by the western States' administrations as to who is going to be prosecuted under suspicion of grave breaches of the Geneva Conventions

And that makes the circle go round: as long as there is no arrest, there cannot be any official inquiry against somebody who is not a national, and all the more, of course, no prosecution either.

So the control, exerted by the prosecuting authority, and through it, directly by the minister of justice and the government, about who is going to be prosecuted for crimes against international humanitarian law is, as a result of this new Act, perfect and sound, just because to arrest a person is a prerogative of the prosecutors and because the prosecutor, and its policy, are subordinated to the government's minister of justice, thus eventually the question who from outside the country is going to be arrested, and consequently, prosecuted under the new **International Crimes Act ('Wet Internationale Misdrijven')** will be furthermore perfectly controlled by the Dutch government itself.

4.8 No expectations for application of the principle of universal jurisdiction, targeted at western friends

Needless to say that never any person from a friendly western State will going to be arrested and prosecuted under this newly established legal regime!

Only poor devils from non-western States perceived by us as hostile are running the risk of being arrested and prosecuted.

In order to accentuate that we have our good arguments against those States they come from.

This as an extension of western foreign policy.

And so the commitment of the **Geneva Conventions** to bring suspects of serious crimes against international humanitarian law to justice, from whatever State, is going to be dismantled and distorted as a political tool for western foreign political aims.

4.9 The necessity for political and legal action against the tendency in western States to dismantle the Geneva Conventions' requirements for universal jurisdiction

Of course resistance against this dismantling of the principle of universal jurisdiction will be a necessity.

This introduction of such breaches into the principle of universal jurisdiction in the national law systems of those western States which had before a proper implementation of that principle, like in 2003 conducted in Belgium and in the Netherlands, brings also the scarce States which, in this respect, had been acting in accordance with their treaty obligations, in contravention with the Geneva Conventions.

This conduct is not only in contravention of **UNGA Resolution 3074 (XXVIII) of 3 December 1973 on the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity**, more specifically Para 8 of this resolution, which reads:

> "States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity."

But also legal provisions, introduced in some western States, which are in clear contravention with these Geneva Convention treaty obligations even should be considered to be void or, at least, stepping back for these treaty obligations.

4.10 Alternatives - increasing chance of admissibility of the ICC

On the other hand, not only the Geneva Conventions' regulation of application of universal jurisdiction, directed at **grave** breaches, alternatively, should be considered self-executing for all States, as far as they didn't have implemented properly this treaty requirement. Also

counts here that the more the legislators and policy makers of westerns States are doing harm to the principle of universal jurisdiction, the more shall also be applicable the clause of **article 17 (1)(2) Rome Statute** that there should be no direct admissibility to the **International Criminal Court (ICC)**,

> "…unless the decision [not to prosecute] resulted from the unwillingness or inability of the State genuinely to prosecute;",

and the clause of **article 17 (2) under (a)**:

> "2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court…"

So the more obstacles are created with respect to a fair and faithful implementation and application of the principle of universality on the **national** level, the more the **International Criminal Court (ICC)** is going to be directly admissible for complaints against serious violations of international humanitarian law.

4.11 Prose curability of non-grave breaches of the Geneva Conventions in the Netherlands

There is one specific point in the domestic legislation of the Netherlands concerning the issue of prosecution of breaches of the Geneva Convention rather unique in comparison with other western States.

And this is the fact that the principle of universality, here in the Netherlands, has not only been introduced with respect to **grave breaches**, as enumerated in the **Fourth Convention**, but also with respect to other violations of the laws and customs of war.

As it is also observed by the Attorney-General at the Court of Appeal in Arnhem in the above mentioned verdict of the Supreme Court:

> "And further it must be considered that the Netherlands, in the midst of the said countries, occupies an extraordinary position by making punishable as a war crime not only the "grave breaches" of the Geneva Conventions, but also the less severe violations of the laws respecting war, and because of making the principle of universality applicable also therefore. Also insofar the comparison with other countries falls short" (HR 11 November 1997, NJ 1998, no. 463, p. 2653).

This point is maintained in the new **International Crimes Act ('Wet Internationale Misdrijven')**.

So, according to Dutch domestic law, also other violations of the laws and customs of war, enumerated in the **International Crimes Acts,** will be prosecutable.

However, in other Western countries, being party to the Geneva Conventions, mostly only the most severe infringements of the Geneva Conventions shall be punishable.

4.12 Universal duty to undertake with respect to non-grave breaches of the Geneva Conventions

However, also these remaining western States Parties to **the Geneva Conventions** are likewise obliged to undertake against **other** infringements of the **Geneva Conventions**:

Article 146 Fourth Convention continuation

> "Each High Contracting Party shall take measures necessary for **the suppression** of all acts contrary to the provisions of the present Convention **other than the grave breaches** defined in the following Article."

4.13 Enumeration of grave breaches of the Geneva Conventions and Protocol I - assignation as war crimes

Grave breaches in the sense of the Third and Fourth Convention are:

Article 147 Fourth Convention

> "**Grave** breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

Article 130 Third Convention is identical.

Grave breaches in the sense of Protocol I are:

Article 85 Para 2 Protocol I

> "2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse party protected by Articles 44 [prisoners of war], 45 and 73 [refugees and stateless persons] of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under control of the adverse Party and are protected by this Protocol.
>
> 3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:
>
> (a) Making the civilian population or individual civilians the object of attack;

(b) Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);

(c) Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);

(d) Making non-defended localities and demilitarized zones the object of attack;

(e) Making a person the object of attack in the knowledge that he is hors de combat;

(…)

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions of the Protocol;

(a) 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 parts of the population of the occupied territory within or outside this territory, (…);

(b) Unjustifiable delay in the repatriation of prisoners of war or civilians;

(…)

(d) Making the clearly-recognized historic monuments, works of art or places of worship which constitutes the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b) [to use such objects in support of the military effort] , and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

(e) Depriving a person protected by the Conventions or [in the power of the adverse Party] of the rights of fair and regular trial.

5. Without prejudice to the application of the Conventions and of this Protocol grave breaches of these instruments shall be regarded as war crimes.”

4.14 Definition of prisoners of war as a category susceptible for grave breaches

With respect to the provision of **article 85 Para 4(b) Protocol I** a definition of **prisoners of war** is needed:

Article 4 Third Convention

> "a. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> 1. Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> 2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict ad operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) That of being commanded by a person responsible for his subordinates;
>
> (b) That of having a fixed distinctive sign recognizable at a distance;
>
> (c) That of carrying arms openly;
>
> (d) That of conducting their operations in accordance with the laws and customs of war.
>
> 3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
>
> 6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war."

4.15 The grave breach of attacking without sufficient precautions to protect the civilian population and civilian objects

Article 57 (2)(a)(iii) Protocol I, mentioned in article 85 (3)(b and c) Protocol I reads:

> "2. With respect to attacks, the following precautions shall be taken:
>
> (iii) Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;"

So to launch an attack affecting the civilian population or civilian objects, in the knowledge that such attack will cause loss of civilian life or damage to civilian objects in a measure that would be excessive in relation to the **concrete** and **direct** military advantage anticipated would be indiscriminate and, as a consequence, a **grave** breach of Protocol I.

So far the list of **grave** breaches, according to the **Geneva Conventions** and **Protocol I**.

4.16 Character of 'repression' and 'suppression' of breaches of the Geneva Conventions and Protocol I

Article 85 par.1 Protocol I

> "Repression of breaches of this Protocol
>
> 1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol."

Article 86 Protocol I first part

> "Failure to act
>
> 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so."

Article 148 Fourth Convention

> "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article."

Article 131 Third Convention is identical.

So, according to **Protocol I** reiterates, just as the **Fourth Convention** already did, that not only the parties to the conflict itself, but all High Contracting Parties, are bound **to repress** such grave breaches.

Just as not only the parties to the conflict itself are bound **to take measure to suppress** all other breaches of the Convention and Protocol I, but all High Contracting Parties as well.

'**Repression**' implies the establishment of domestic law, prosecution and trying of suspects, no matter their nationality, by all High Contracting Parties, or extradition for a prima facie case to other Parties.

'**To take measures to suppress**' supposes at least the enactment of legislation by all High Contracting Parties, in order to provide with an instrument to be entitled to such '**measures**'.

4.17 Obligation to States for mutual assistance with respect to 'repression' and 'suppression' of breaches of the Geneva Conventions and Protocol I

With a view to co-operation in prosecution of breaches of the Convention and Protocol I, it is stated in:

Article 88 Protocol I

> "Mutual assistance in criminal matters

> 1. The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions of this Protocol.
>
> 2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.
>
> 3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters."

And, less far-reaching, **the Fourth Convention** in:

Article 149 Fourth Convention

> "At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.
>
> If agreement has not been reached concerning the procedure for enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.
>
> Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay."

So with regard to the issue of co-operation and mutual enforcement of **grave** breaches of the **Geneva Conventions** and **Protocol I**, **the Protocol** is clearly an extension of **the Convention**.

As this principle of full application is also laid down in **the preamble of Protocol I**:

Preamble of Protocol I

> "The High Contracting Parties,
>
> (…)
>
> Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused or attributed to the Parties to the conflicts, have agreed on the following: (…)"

Nota bene: the solemn declaration that '**the provisions of the Geneva Convention and this Protocol must be fully applied in all circumstances**.'

So this is a firm injunction, binding for all States, party to **the Protocol**.

4.18 Principle of universal repression of war crimes in UNGA Resolution 3074 (XXIII)

The principle that violations of **the Geneva Convention(s)** and **Protocol I** should be '**repressed in all circumstances**', or at least should be '**suppressed by appropriate measures**', is also expressed in:

UNGA RES. 3074 (XXVIII) of 3 December 1973 on the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity

This **resolution** states, inter alia:

> "- Declares that the United Nations, in pursuance of the principles and purposes set forth in the Charter concerning the promotion of co-operation between peoples and the maintenance of international peace and security, proclaims the following principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity:
>
> 1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.
>
> (…)
>
> 8. States shall not take any legislative or other measures, which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.
>
> 9. In co-operation with a view to the detection, arrest and extradition of persons against whom there is evidence that they have committed war crimes and crimes against humanity and, if found guilty, their punishment, States shall act in conformity with the provisions of the Charter of the United Nations and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

So by means of this unanimous **UNGA resolution**, all UN member states have - once again - reconfirmed that they are under the obligation to make people who are suspects of war crimes and crimes against humanity 'subject to investigation, tracing, arrest, extradition or trial and, if found guilty, to punishment', and that 'wherever they are committed'.

This implies that, by this resolution, the UN member-states have re-committed themselves to the principle of universal jurisdiction by their legal authorities with respect to war crimes and crimes against humanity.

4.19 Civil liability for violations of the Geneva Conventions and Protocol I

Article 91 Protocol I finally states:

> "Responsibility
>
> A Party to the conflict, which violates the provisions of the Conventions or of this Protocol, shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

So here is clearly stipulated, under **Protocol I**, that the State Party should be responsible for all acts, committed by persons forming part of their armed forces.

5 Commitment to Prosecution of Genocide, War Crimes, Crimes against Humanity and the Crime of Aggression, Based on the Rome Statute of the International Criminal Court (ICC), the Nuremberg Charter, the Geneva conventions and/or additional Protocol I

5.1 Acceded Parties to the Rome Treaty - jurisdiction of the ICC with respect to 'serious crimes' against international humanitarian law

Many States, including most western States, are by now also a party to **the Rome Statute of the International Criminal Court, t**his with the exception of the US, which is extremely opposing this treaty and rejects **the ICC** as a clear and present danger to its interests.

The US exerts strong pressure upon States all over the world to enter in bilateral agreements, promising not to extradite US nationals and nationals of US allies to the **ICC**.

Many other States have adopted the jurisdiction of **the International Criminal Court (ICC)** with respect to, what is called in **the Rome Statute**, **serious** crimes against international humanitarian law, as enumerated in that **Statute**.

And those States have, by this acceptance of the jurisdiction of the ICC, just as that adopted the duty to assist **the ICC** in tracing, persecution and arrest of suspects, wanted by **the ICC**.

5.2 'Serious crimes' in the meaning of the Rome Statute

Article 5 par. 1 Rome Statute reads:

> "1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
>
> (a) The crime of genocide;
>
> (b) Crimes against humanity;
>
> (c) War crimes;
>
> (d) The crime of aggression.

5.3 'Elements of crimes' according to the Rome Statute

For a better interpretation of the crimes indicated in the **Rome Statute**, there are created, pursuant to article 9 of the **Rome Statute**, further criteria to clarify the outlines of these various crimes. This is done with the help of **a regulation**, called '**The Elements of Crimes**'.

Article 9 Rome Statute states:

> "1. Elements of Crimes shall assist the Court in the interpretation of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
>
> 2. Amendments to the Elements of Crimes may be proposed by:
>
> (a) Any State Party;
>
> (b) The judges acting by an absolute majority;
>
> (c) The Prosecutor.
>
> Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
>
> 3. The Elements of Crimes and amendments thereto shall be consistent with this Statute."

5.4 'Intend' and 'knowledge' as elements of crimes according to the Rome Statute

Regarding these elements of crimes, it is stated in the General Introduction of that regulation '**Elements of Crimes**'

> "1. Pursuant to article 9 [Rome Statute], the following Elements of Crimes shall assist the Court in the interpretation and application of the articles 6, 7 and 8, consistent with the Statute. The provisions of the Statute, including article 21 and the general principles set out in Part 3, are applicable to the Elements of Crimes.
>
> 2. As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies. Exceptions to the article 30 standard, based upon the Statute, including applicable law under its relevant provisions, are indicated below.
>
> 3. Existence of intent and knowledge can be inferred from relevant facts and circumstances.
>
> 4. With respect to mental elements associated with elements involving value judgement, such as those using the terms "inhumane" or "severe", it is not necessary that the perpetrator personally completed a particular value judgment, unless otherwise indicated."

Article 30 Rome Statute, as mentioned above in 2 of the General Introduction of the Elements of Crimes reads:

"Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if the material elements are committed with intend and knowledge.

2. For the purposes of the article, a person has intent where:

In relation to conduct, that person means to engage in the conduct;

In relation to the consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'Knowingly' shall be construed accordingly."

5.5 Other general remarks in respect of the elements of crimes

The **General Introduction** of the **Elements of Crimes** continues:

"5. Grounds for excluding criminal responsibility or the absence thereof are generally not specified in the elements of crime listed under each crime.

6. The requirement of 'unlawfulness' found in the Statute [i.e. the **Rome Statute**] or in other parts of international law, in particular international humanitarian law, is generally not specified in the elements of crimes.

7. The elements of crimes are generally structured in accordance with the following principles:

As the elements of crimes focus on the conduct, consequences and circumstances associated with each crime, they are generally listed in that order;

When required, a particular mental element is listed after the affected conduct, consequence or circumstance;

Contextual circumstances are listed last.

8. As used in the Elements of Crimes, the term "perpetrator" is neutral as to guilt or innocence. The elements, including the appropriate mental elements, apply, mutatis mutandis, to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute [i.e. the Rome Statute].

9. A particular conduct may constitute one or more crimes.

10. The use of short titles for the crimes has no legal effect."

Now the various categories of crimes of article 5 **Rome Statute** will be considered.

Firstly:

6 THE CRIME OF GENOCIDE

6.1 'Causing serious bodily or mental harm to members of a group' with the intention to destruct that group, as an aspect of genocide according to the Rome Statute

For the purpose of this Statute "genocide" means, according to Article 6 Rome Statute:

> "…any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (…)".
> **'Causing serious bodily or mental harm to members of a group'**
> So the **Rome Statute** determines, inter alia, as '**genocide**'
> 'causing serious bodily or mental harm to members of a group'.

6.2 Elements of crimes with respect to 'causing serious harm to members of a group' as an aspect of genocide

The following elements of crime are listed here in are listed in Article 6 (b) Elements of Crimes:

> "1. The perpetrator caused serious bodily harm to one or more persons. (3).
> (3) This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhume or degrading treatment.
> 2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
> 3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
> 4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."

6.3 'Inflicting conditions of life to members of a group calculated to bring its physical destruction in whole or in part', as an aspect of genocide according to the Rome Statute

The next element of Article 6 Rome Statute, considering the crime of genocide under c, reads:

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

The following **Elements of Crimes** are listed here

> "1. The perpetrator inflicted certain conditions of life upon one or more persons.
>
> 2. Such person or persons belonged to a particular national, ethnical, racial or religious group.

3. The perpetrator intended to destroy, in whole of in part, that national, ethnical, racial or religious group, as such.

4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part. (4)
(4) The term "conditions of life" may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.

5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."

6.4 Incitement to genocide

It finally has to be stressed that, according to **article 25 (3)(e) Rome Statute**, there is already in existence criminal responsibility for genocide, if a person 'in respect of the crime of genocide, directly and publicly incites others to commit genocide'.

Article 25 (3) (e) Rome Statute reads:

"In accordance with this Statute, a person shall be criminal responsible and liable for punishment for a crime within the jurisdiction of the Court if that person

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide."

Next category of crimes is the category of:

7 CRIMES AGAINST HUMANITY

Firstly the category of **crimes against humanity** will be considered in view of the **Nuremberg Charter** and the **Nuremberg Principles.**

Subsequently the category of **crimes against humanity** will be regarded in view of the **Rome Statute**.

And finally the category of **crimes against humanity** will be considered in view of the **Geneva Conventions** and **Protocol I**.

7.1 'Crimes against humanity' according to the Nuremberg Charter and Nuremberg Principles

The Nuremberg Charter defines in Article 6 Nuremberg Charter crimes against humanity as:

> "…namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

And **the Nuremberg Principles** define **crimes against humanity** as: INVULLEN!

7.2 Crimes against humanity according to the Rome Statute

Relevant crimes against humanity according to **the Rome Statute** are mentioned in **article 7 Rome Statute**.

Article 7 Rome Statute reads, as far as relevant here:

> "1. For the purpose of this Statute, "**Crime against humanity**" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of attack:
>
> (a) Murder;
>
> (b) Extermination;
>
> (…)
>
> (k) Other inhumane acts of similar character intentionally causing great suffering or serious injury to body or to mental health.
>
> 2. For the purpose of paragraph 1:
>
> (a) "Attack directed against any 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 attack;

(b) 'Extermination' includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(…)"

7.3 Elements of crimes with respect of crimes against humanity, according to the Rome Statute

In the **Introduction** regarding **article 7 Rome Statute** it is stated in **the Elements of Crime**:

"1. Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.

2. The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.

3. "Attack directed against a civilian population" in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population. (6)
(6) A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such policy cannot be inferred solely from the absence of governmental or organizational action."

7.4 'Murder', when committed as a part of a widespread or systematic attack directed against the civilian population, as a crime against humanity according to the Rome Statute

In respect of the crime against humanity of 'murder', mentioned in Article 7 (1)(a) Rome Statute, is stated in the Elements of Crimes:

> "1. The perpetrator killed (7) one or more persons.
>
> (7) The term "killed" is interchangeable with the term "caused death". This footnote applies to all elements, which use either of these concepts.
>
> 2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population."

7.5 'Extermination', when committed as a part of a widespread or systematic attack directed against the civilian population, as a crime against humanity according to the Rome Statute

In respect of 'extermination' of Article 7 (1)(b) Rome Statute, it is stated in the Elements of Crimes:

> "1. The perpetrator killed (8) one or more persons, including by inflicting conditions of life calculated to bring about destruction of part of a population (9)
>
> (8) The conduct could be committed by different methods of killing, either directly or indirectly.
>
> (9) The infliction of such conditions could include the deprivation of access to food and medicine.
>
> 2. The conduct constituted, or took place as part of, (10) a mass killing of members of a civilian population.
>
> (10) The term "as part of" would include the initial conduct in a mass killing.
>
> 3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
>
> 4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."

7.6 'Other inhumane acts, when committed as part of a widespread or systematic attack directed against the civilian population, causing intentionally great suffering or serious injury to body or health', as crimes against humanity according to the Rome Statute

In respect of 'the crime against humanity, constituted by 'other inhumane acts' of Article 7(1)(k) Rome Statute, it is stated in the Elements of Crimes:

"1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.

2. Such act was of a character similar to any other referred to in article 7, paragraph 1, of the Statute. (30)

(30) It is understood that "character" refers to the nature and gravity of the act.

3. The perpetrator was aware of the factual circumstances that established the character of the act.

4. The conduct was committed as part of a widespread or systematic attack directed against the civilian population.

5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."

7.7 'Causing great suffering or serious injury to body or health' as a grave breach of the Fourth Convention and Protocol I

'Causing great suffering or serious injury to body or health' is also mentioned as a **grave breach** of the Convention, as stipulated in **article 147 Fourth Convention**, **Article 130 Third Convention** and **article 85 Para. 2 Protocol I.**

However, the element '**intentionally**', which is part of the description of this crime against humanity within the framework of **the Rome Statute**, is absent in the description of this '**grave** breach' in the sense of **the Convention.**

Next category is the category of:

8 WAR CRIMES

8.1 War crimes according to the Nuremberg Charter and the Nuremberg Principles

Article 6 Nuremberg Charter defines war crimes as:

> "…violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;"

The **Nuremberg Principles** define '**war crimes**' as: INVULLEN !

8.2 War crimes according to the Rome Statute

Article 8 Rome Statute reads, as far as relevant here:

> "1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
>
> 2. For purpose of this Statute, "war crimes" means:
>
> (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> (i) Wilful killing;
>
> (…)
>
> (iii) Wilfully causing great suffering, or serious injury to body and health;
>
> (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
>
> (…)
>
> (b) Other serious violations of the laws and customs applicable in international conflict, within the established framework of international law, namely one of the following acts;
>
> (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled tot the protection given to civilians or civilian objects under international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(…)

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(…)

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases and all analogous liquids, materials and devices;

(…)

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(…)

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

8.3 Elements of crimes with respect to war crimes according to the Rome Statute

First of all back to the **Elements of Crimes**.

In the '**Introduction**' with regard to war crimes is stated in the **Elements of Crimes**:

> "The elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea."
>
> With respect to the last two elements listed for each crime:
>
> ~ There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
>
> ~ In that context there is no requirement for awareness by the perpetrator for the facts that established the character of the conflict as international or non-international;
>
> ~ There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with".

8.4 'Wilfully killing' as a war crime according to the Rome Statute

In respect of the war crime of 'wilful killing' of Article 8 (2)(a)(i) Rome Statute it is stated in the Elements of Crimes:

> "1. The perpetrator killed one or more persons. (31)
> (31) The term "killed" is interchangeable with the term "caused death". This footnote applies to all elements which use either of these concepts.
>
> 2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
>
> 3. The perpetrator was aware of the factual circumstances that established that protected status (32) (33).
> (32) This mental element recognizes the interplay between articles 30 and 32. This footnote also applies to the corresponding element in each crime under article 8 (2) (a), and to the element in other crimes in article 8 (2) concerning the awareness of factual circumstances that establish the status of persons or property under the relevant international law of armed conflict.
> (33) With respect to nationality, it is understood that the perpetrator needs only to know that the victim belonged to an adverse party to the conflict. This footnote also applies to the corresponding element in each crime under article 8 (2) (a).
>
> 4. The conduct took place in the context of and was associated with an international armed conflict (34).
> (34) The term "international armed conflict" includes military occupation. This

footnote also applies to the corresponding element in each crime under article 8 (2) (a).

5. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict."

8.5 'Wilfully killing' as a grave breach of the Fourth Convention and Protocol I

'Wilfully killing' is also mentioned as a grave breach of the Convention, as stipulated in Article 147 Convention and Article 85 Para. 2 Protocol I.

With respect to such **grave breaches** there is, according to **article 146 Convention**, a universal jurisdiction and a general commitment of all States to prosecute, all over the world. And States are also under the obligation to establish universal jurisdiction with respect to such crimes

8.6 'Wilfully causing great suffering' as a war crime according to the Rome Statute

In respect of the war crime of 'wilfully causing great suffering' of Article 8 (2)(a) (iii) Rome Statute is stated in the Elements of Crimes:

"1. The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.

2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.

3. The perpetrator was aware of the factual circumstances that established that protected status.

4. The conduct took place in the context of and was associated with an international armed conflict.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

8.7 'Wilfully causing great suffering' as a grave breach of the Fourth Convention and Protocol I

'Wilfully causing great suffering' is also mentioned as a **grave** breach of the Convention, as stipulated in **article 147 Convention** and **article 85 par. 2 Protocol I**.

So also with regard to such **grave** breach there is, according to **article 146 Fourth Convention**, a general commitment of all States to prosecute, all over the world, under universal jurisdiction.

8.8 'Destruction of property' as a war crime according to the Rome Statute

With regard to the war crime of 'destruction and appropriation of property' of Article 8(2)(a)(iv) Rome Statute is stated in the Elements of Crimes:

> "1. The perpetrator destroyed or appropriated certain property.
>
> 2. The destruction or appropriation was not justified by military necessity.
>
> 3. The destruction or appropriation was extensive and carried out wantonly."

8.9 'Extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly', as a grave breach of the Fourth Convention and Protocol I

In the same description as **article 8(2)(a)(iv) Rome Statute**, the '**destruction of property**' is also defined as a grave breach of the Convention, as stipulated in **article 147 Convention** and **article 85 par. 2 Protocol I**.

So also with respect to such a **grave** breach there is a general commitment to enact any legislation necessary to provide effective penal sanctions.

8.10 'Attacking civilians' as a war crime according to the Rome Statute

In respect of the war crime of Article 8 (2)(b)(i) Rome Statute of 'attacking civilians' is stated in the Elements of Crimes:

> "1. The perpetrator directed an attack.
>
> 2. The object of the attack was a civilian population as such or individual civilians not taking part in hostilities.
>
> 3. The perpetrator intended the civilian population as such or individual civilians not taking part in hostilities to be the objects of the attack.
>
> 4. The conduct took place in the context of and was assisted with an international armed conflict.
>
> 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

8.11 Definition of 'civilians' and 'civilian population' according to Protocol I

Very helpful are here also the following articles of **Protocol I**

Article 50 Protocol I

"Definition of civilians and civilian population

1. (…) In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."

Article 48 Protocol I

"Basic rule

In order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

These articles are additional to the **Geneva Conventions**.

Article 49 Protocol I

"(…) scope of application

4. The provisions of this section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in Part II thereof, and in other international agreements binding upon the High Contracting parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities."

8.12 Protection entitled to civilian population according to Protocol I

Article 51 Protocol I

"Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

(a) Those which are not directed at a specific military objective;

(b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in article 57."

8.13 Due precautions with respect to attacks in view of protection of the civilian population and civilian objects, according to protocol I

Article 57 Protocol I states:

"Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) Those who plan or decide upon an attack shall:

(i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them ;"

Article 52 Protocol I

"General protection of civilian objects

1. Civilian objects shall not be the object of attack or reprisals. Civilian objects are all objects, which are not military objects as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."

8.14 Definition of 'military objectives' according to Protocol I

Especially **paragraph 2** of **article 52 Protocol I** must be written in gold.

It provides a clear definition of what shall be considered as a '**military objective**'.

And it must be stressed that this definition limits '**military objectives**' to those objectives which:

a. make an **effective** contribution to military action,
and moreover:

b. whose neutralization offers a **definite** military advantage,
and:

c. in the circumstances of the time.

Those conditions are cumulative.

Only when a military attack will meet these requirements, it could be considered al legitimate military attack.

All other attacks are prohibited according to international humanitarian law.

8.15 Further precautions with concern to attacks, as prescribed by Protocol I

Back to the continuation of Article 57(2)(a) Protocol I on the stipulated precautions in attack:

"With respect to attacks, the following precautions shall be taken:

(a) Those who plan or decide upon an attack shall:

(ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

(iii) Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Article 57(2)(b) Protocol I

An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Article 57(2)(c) Protocol I

Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

Article 57(3) Protocol I

When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

Article 57(4) Protocol I

In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

Article 57(5) Protocol I

No provisions of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects."

8.16 'Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities' as a grave breach of Protocol I

'Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities' shall be, in the wording of Article 85, par 3 (a) Protocol I, also a grave breach of Protocol I.

This **grave** breach is laid down in **Protocol I**.

Article 85 par. 2 Protocol I, as already cited above, reads, as far as relevant here:

> "...the following acts shall be regarded as grave breaches of this protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:
>
> (a) Making the civilian population or individual civilians the object of attack."

8.17 'Attacking civilian objects' as a war crime according to the Rome Statute

With regard to the war crime of Article 8 (2)(b)(ii) Rome Statute of 'attacking civilian objects' is stated in the Elements of Crimes:

> "1. The perpetrator directed an attack.
>
> 2. The object of the attack was civilian object, that is, objects which are not military objectives.
>
> 3. The perpetrator intended such civilian objects to be the object of the attack.
>
> 4. The conduct took place in the context of and was associated with an international armed conflict.
>
> 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

8.18 'Committing excessive incidental death, injury or damage to civilians, civilian objects or long-term damage to the natural environment, as a war crime according to the Rome Statute

In respect of the war crime of 'excessive incidental death, injury, or damage to civilians, civilian objects or long-term damage to the natural environment' of Article 8 (2)(b)(iv) Rome Statute is stated in the Elements of Crimes:

> "1. The perpetrator launched an attack.
>
> 2. The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated (36).
> (36) The expression "concrete and direct overall military advantage" refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war of other rules related to the jus ad bellum. It reflects the proportionality requirement inherent in

determining the legality of any military activity undertaken in the context of an armed conflict.

3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated (37.)
(37) As opposed to the general rule set forth in paragraph 4 of the General Introduction, this knowledge element requires that the perpetrator make the value judgement as described therein. An evaluation of that value judgement must be based on the requisite information available to the perpetrator at the time.

4. The conduct took place in the context of and was associated with an international armed conflict.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

With regard to attacks directed against the civilian population or civilian objects there is also another war crime, which constitutes a **grave** breach of Protocol I, in the wording of

8.19 Launching an attack 'affecting the civilian population or civilian objects and which will cause excessive loss of life', as a grave breach of Protocol I

Article 85, par 3 (b) Protocol I:

"Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii)".

Precautions should be taken to prevent attacks, which may turn out indiscriminate in the meaning of **Protocol I**.

So Article 57 paragraph 2 (a) (iii) Protocol I reads:

"2. With respect to attacks, the following precautions shall be taken:

(a) Those who plan or decide upon an attack shall:

(iii) Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

8.20 Launching an attack against 'installations containing dangerous forces', as a grave breach of Protocol I

Characterized as a **grave breach** of **the Protocol** is also:

Article 85 par 3 (c) Protocol I :

> "(b) Launching an *attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive lose of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii), …when committed wilfully, in violation* of the relevant provisions of this Protocol, and causing death or serious injury to body or health;"

Article 56 Protocol I

> "Protection of works and installations containing dangerous forces
>
> 1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.
>
> 2. The special protection against attack provided by paragraph 1 shall cease:
>
> (a) For a dam or dyke only if it is used for other than normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
>
> (b) For a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
>
> (c) For other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.
>
> 3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection ceases and any of the works, installations or military objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces."
>
> (…)
>
> 5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1.

> Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations."

8.21 'Attacking personnel or objects involved in humanitarian assistance', as a war crime according to the Rome Statute

With regard to the war crime of Article 8 (2)(b)(iii) Rome Statute of 'attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission' is stated in the Elements of Crimes:

> "1. The perpetrator directed an attack.
>
> 2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
>
> 3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
>
> 4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.
>
> 5. The perpetrator was aware of the factual circumstances that established that protection.
>
> 6. The conduct took place in the context of and was associated with an international armed conflict.
>
> 7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

8.22 Acts, described in the Geneva Conventions as grave breaches, directed against 'medical or religious personnel, medical units or medical transports', which are under control of the adverse party and are protected by protocol I

Acts, described in the **Geneva Conventions,** as '**grave** breaches' against the medical or religious personnel, medical units or medical transports which are under control of the adverse Party and are protected by Protocol I' shall also, according to **article 85, par 2 Protocol I**, be **grave** breaches of **Protocol I**.

8.23 'Attacking protected objects' as a war crime according to the Rome Statute

In respect of the war crime of 'attacking protected objects' (45 of Article 8 (2)(b)(ix) Rome Statute is stated in the Elements of Crimes:

> "(45) The presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective.
>
> 1. The perpetrator directed an attack.
>
> 2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.
>
> 3. The perpetrator intended such buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.
>
> 4. The conduct took place in the context of and was associated with an international armed conflict.
>
> 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

8.24 'Attacking objects or persons using Geneva Convention distinctives' as a war crime according to the Rome Statute

In respect of the war crime of 'attacking objects or persons using the distinctive emblems of the Geneva Conventions' of Article 8 (2)(b)(xxiv) Rome Statute is stated in the Elements of Crimes:

> "1. The perpetrator attacked one or more persons, buildings, medical units or transports or other objects, in conformity with international law, using a distinctive emblem or other method of identification indicating protection under the Geneva Conventions.
>
> 2. The perpetrator intended such persons, buildings, units or transports or other objects so using such identification to be the object of the attack.
>
> 3. The conduct took place in the context of and was associated with an international armed conflict.
>
> 4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

8.25 Definition of 'medical units' according to Protocol I and Protocol I provisions protecting 'medical units' and 'medical vehicles'

Article 8 Protocol I

> "Terminology
>
> For the purposes of the protocol
>
> (e) "Medical units" means establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment - including first-aid treatment - of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary;"

Protocol I provides, moreover, the following provisions with respect to the protection of '**medical units**', '**medical vehicles**' and declares some breaches of the concerned regulations **grave** breaches.

Article 12 Protocol I

> "Protection of medical units
>
> 1. Medical units shall be respected and protected at all times and shall not be object of attack.
>
> (…)
>
> 4. Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so seated that attacks against military objectives do not imperil their safety."

Article 13 Protocol I

> "Discontinuance of protection of civilian medical units
>
> 1. The protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded."

Article 21 Protocol I

> "Medical vehicles
>
> Medical vehicles shall be respected in the same way as mobile units under the Conventions and this Protocol."

8.26 Attacking 'medical units' and 'wounded' as a grave breach of the Fourth Convention and Protocol I

Acts described as **grave breaches** in the **Conventions** are also **grave** breaches of **Protocol I**, and consequently war crimes in the sense of the **Geneva Conventions**, if committed against medical units and medical transports which are under control of the adverse Party and are protected by this **Protocol**.

The same applies to acts described as **grave** breaches in the meaning of the Conventions committed against the wounded, sick and shipwrecked of the adverse Party who are protected by this **Protocol**.

Article 85 Para. 2 Protocol I

> " Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, religious personnel, medical units or medical transports which are under control of the adverse Party and are protected by this Protocol."

8.27 Definition of 'the wounded', 'sick' and 'enemies hors de combat' - special protection for those categories according to Protocol I

Article 8 Protocol I

> "Terminology
>
> For the purposes of the Protocol:
>
> (a) "Wounded" and "sick" mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, newborn babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility;
>
> (…)

Article 10 Protocol I

> "Protection and care
>
> 1. All wounded, sick (…), to whichever Party they belong, shall be respected and protected.
>
> 2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

Article 11 Protocol I

> "Protection of persons
>
> [Prohibition of crimes against humanity and other cruelties directed against prisoners of war and other persons in the power of the adverse party]

8.28 Attacking 'enemies hors de combat' as a grave breach of Protocol I

Article 41 Protocol I

> "Safeguard of an enemy hors de combat
>
> 1. A person who is recognized or who, in the circumstances, should be recognized to be hors de combat shall not be made object of attack.
>
> 2. A person is hors de combat if:
>
> (a) He is in the power of an Adverse Party;
>
> (b) He has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape."
>
> (b) He clearly expresses an intention to surrender;"

As a **grave breach** of the **Protocol** and, as a consequence, a war crime whereto exists an universal jurisdiction, is also determined:

Article 85 par. 3 (d) Protocol I

> "(e) Making a person the object of attack in the knowledge that he is hors de combat, …when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health."

8.29 'Protected persons' in the meaning of the Fourth Geneva Convention and Protocol I

Protected persons are:

Article 4 Fourth Convention

> "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
>
> (…)

> Persons protected by the (…) Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention."

8.30 Privileged position of 'protected persons'

Article 27 Fourth Convention

> "Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially
> against all acts of violence or threats thereof and
> against insults and public curiosity.
>
> Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.
>
> Without prejudice to the provisions relating to their state of health, age and sex, all protected person shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion."
>
> "However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war."

All parties to the conflict are required to provide information on prisoners of war (**article 122 Third Geneva Convention**) and 'protected persons' (civilian nationals) in their custody

(**article 136 Fourth Convention**).

Article 122 Third Convention

> "Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall institute an official Information Bureau for prisoners of war who are in its power.
>
> Within the shortest possible period, each of the Parties to the conflict shall give its Bureau the information (…) regarding any enemy person belonging to one of the categories referred to in Article ? who has fallen into its power.
>
> The Bureau shall immediately forward such information by the most rapid means to the Powers concerned, through the intermediary of the Protecting Powers and likewise of the central Agency provided for in Article 123.
>
> This information shall make it possible quickly to advise the next of kin concerned."

Article 123 Third Convention

> "A Central Prisoners of War Information Agency shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency.
>
> The function of the Agency shall be to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as rapidly as possible to the country of origin of the prisoners of war or to the Power on which they depend. It shall receive from the Parties to the conflict all facilities for effecting such transmissions."

Article 140 Fourth Convention first part is identical.

Article 136 Fourth Convention

> "Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall establish an official Information Bureau responsible for receiving and transmitting information in respect of the protected persons who are in its power.
>
> Each of the Parties to the conflict shall, within the shortest possible period, give its Bureau information of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned. It shall, furthermore, require its various departments concerned which such matters to provide the aforesaid Bureau promptly with information concerning all changes pertaining to these protected persons, as, for example, transfers, release, repatriations, escapes, admittances to hospitals, births and deaths.
>
> Each national Bureau shall immediately forward information concerning protected persons by the most rapid means to the Powers of whom the aforesaid persons are national, or to the powers in whose territory they resided, through the intermediary of the Protecting Powers and likewise through the Central Agency provided for in Article 140. The Bureaux shall also reply to all enquiries which may be received regarding protected persons.
>
> Information Bureaux shall transmit information concerning a protected person unless its transmission might be detrimental to the person concerned or to his or her relatives. Even in such a case, the information may not be withheld from the Central Agency which, upon being notified of the circumstances, will take the necessary precautions indicated in Article 140."

Article 142 Fourth Convention

> "Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organizations assisting the protected persons, shall receive from these Powers, for themselves or their duly accredited agents, all facilities for visiting the protected persons, for distributing relief supplies and material from any source, intended for educational, recreational

or religious purposes, or for assisting them in organizing their leisure time within the places of internment. Such societies or organizations may be constituted in the territory of the Detaining Power, or in any other country, or they may have an international character.

The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision, on the condition, however, that such limitation shall not hinder the supply of effective and adequate relief to all protected persons.

The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times."

Article 5 Fourth Convention

"Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

8.31 Violation of the privileged position of 'protected persons' as a breach of the Geneva Conventions and Protocol I

Not respecting the privileged position of person protected by the **Conventions** or **Protocol I** will be also a breach in those instruments, and consequently constitutes a war crime.

8.32 'Protecting Powers'

Protecting Powers and **substitutes** are, according to the definition of Protocol I:

Article 2 Protocol I

"For the purposes of this Protocol:

(c) "Protecting Power" means a neutral or other State not a Party to the conflict which has been designed by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol;

(d) "Substitute" means an organization acting in place of a Protecting Power in accordance with Article 5.

Article 5 Protocol I

"Appointment of Protecting Powers and their substitutes

1. It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this protocol

by the application of the system of Protecting Powers, including inter alia the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.

2. From the beginning of a situation referred to in Article 1 each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall, likewise without delay and for the same purpose, permit the activities of a protecting Power which has been accepted by it as such after designation by the adverse Party.

3. If the Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may, inter alia, ask each Party to provide it with a list of at least five States which that Party considers acceptable to act as protecting Power on its behalf in relation to an adverse Party, and ask each adverse Party to provide a list of at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt of the request; it shall compare them and seek agreement of any proposed State named on both lists.

4. If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Conventions and this Protocol.

5. In accordance with Article 4, the designation and acceptance of Protecting Powers for the purpose of applying the Conventions and this Protocol shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory.

(…)

7. Any subsequent mention in this Protocol of a Protecting Power includes also a substitute."

And Article 9 Fourth Convention states:

"The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the parties to the conflict. For this purpose, the Protecting Parties may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals

> or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.
>
> The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the protecting Powers.
>
> The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of the State wherein they carry out their duties."

Article 8 Third Convention is identical.

Article 11 Fourth Convention

> "The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the Present Convention."

Article 10 Third Convention first part is identical

Article 143 Fourth Convention

> "Representatives or delegates of the Protecting Power shall have permission to go to all places where protected persons are, particularly to places of internment, detention and work.
>
> They shall have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter.
>
> Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. Their duration and frequency shall not be restricted.
>
> Such representatives and delegates shall have full liberty to select the places they wish to visit. The detaining or Occupying Power, the Protecting Power and when occasion arises the Power of origin of the person to be visited, may agree that compatriots of the internees shall be permitted to participate in the visits.
>
> The delegates of the International Committee of the Red Cross shall also enjoy the above prerogatives. The appointment of such delegates shall be submitted to the approval of the Power governing the territories where they will carry out their duties."

Article 126 Third Convention is identical to the first part of article 143 Fourth Convention.

Article 10 Third Convention second part

> "If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of a humanitarian organization, such as the International Committee of the Red Cross, to assume the

humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a positions to undertake the appropriate functions and to discharge them impartially.

Whenever in the present Convention mention is made of a Protecting Power, such mention applies to substitute organizations in the sense of the present Article."

Article 11 Third Convention

"In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for the prisoners of war, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict a person belonging to an neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting."

Article 140 Fourth Convention final part:

"The foregoing provision shall in no way be interpreted as restricting the humanitarian activities of the International Committee of the Red Cross and of the relief Societies described in Article 142."

In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be."

8.33 'Employing poisoned weapons' as a war crime according to the Rome Statute

In respect of the war crime of 'employing poison or poisoned weapons' of Article 8 (2)(b)(xvii) Rome Statute is stated in the Elements of Crimes:

"1. The perpetrator employed substance or a weapon that releases a substance as a result of its employment.

2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.

3. The conduct took place in the context of and was associated with an international armed conflict.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

As will be elaborated below under '**employing forbidden weapons or methods of warfare**', there are much arguments in favour of the analysis that munitions with depleted uranium should be considered a 'poisoned weapon', also in the sense of **article 8(2)(b)(xvii) Rome Statute**.

8.34 'Employing prohibited gases' as a war crime according to the Rome Statute

With regard to the war crime of 'employing prohibited gases, liquids, materials and devices' of Article 8 (2)(b)(xviii) Rome Statute is stated in the Elements of Crimes:

"1. The perpetrator employed a gas or other analogous substance or device.

2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties (48).
(48) Nothing in this element shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to the development, production, stockpiling and use of chemical weapons.

3. The conduct took place in the context of and was associated with an international armed conflict.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

8.35 'Employing forbidden weapons or methods of warfare, as regulated in the Rome Statute

As long as **article 8 (2)(b) (xx) Rome Statute** stipulates, as a precondition in relation to be applicable only with respect to weapons which cause superfluous injury or unnecessary suffering, this prohibition will only be applicable within the framework of the **Rome Statute**, if such weapons or methods 'are included in an annex to this Statute'.

However, such an annex is not yet available.

So a direct appeal to this provision before **the ICC** will be excluded.

8.36 General international law provisions potentially applicable in order to establish a ban on certain weapons or methods of warfare, like the use of cluster bombs and of munitions with depleted uranium (DU)

In respect of the war crime of 'employing forbidden weapons, projectiles or materials or methods of warfare' of Article 8 (2)(b) (xx) Rome Statute, listed in the Annex to the Statute, is stated in the Elements of Crimes:

> "[**Elements will have to be drafted once weapons, projectiles or material or methods of warfare have been included in an annex to the Statute**.]"

Nonetheless, this doesn't affect the potential application of other international law instruments, provided for by others than **the ICC**.

And it even doesn't affect, moreover, the possible applicability of other provisions under **article 8 Rome Statute.**

There are already in existence important general provisions, which bring about far reaching limitations to the choice of weapons and methods of warfare.

Though maybe not (yet) falling within the competence of the **ICC**, as long as not included in the annex of **the Rome Statute**, the violation of these principles will nevertheless constitute war crimes, according to customary law principles.

These general provisions are, are those general provisions, within the context here at issue, especially relevant with regard to the use of **cluster bombs** and the use of **weapons with depleted uranium**.

And further there are also already in existence **specific provisions** of treaty law, this with respect to the use of **anti-personnel mines**. Most Western States are bound to the treaty here at issue.

8.37 De Martens Clause

The most important international law provision is here the **De Martens clause**, as general principle of humanitarian customary law. Reconfirmed in **article 1** of **Protocol I** as a treaty law provision.

Article 1 Protocol I

> "2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictate of public conscience."

So also the use of, for example, **cluster munitions** and **munitions with depleted uranium**, shall be acceptable only when they meet the requirements of this De Martens clause, stipulating that such use must uphold civilians and combatants in such a position that they will remain under protection of customary law principles, also those which should be derived from public conscience.

It should be observed that public conscience, all over the world, is now vehemently opposing the use of **cluster bombs** and **arms with depleted uranium**.

This may constitute, at least, a strong indication that these weapons are on an acute suspicion to be contrary to international humanitarian law.

8.38 The legal duty to assess new weapons and methods of warfare

However, there is more. All new weapons should be assessed from a view of acceptability, for they must be in accordance with all requirements of international law, as is reconfirmed by:

Article 36 Protocol I

> "New weapons
>
> In the study, development, acquisition or adoption of a new weapon, means or methods of warfare, a High Contracting party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

None of the Parties to the **Geneva Conventions** or to the **Protocol** has ever been completed such an assessment with respect to **cluster munitions** as well as **weapons with depleted uranium** before introducing those new weapon into their armouries.

This strengthens further the already existing suspicion that the use of these specific weapons should be contrary to international humanitarian law standards.

8.39 The choice of methods or means of warfare as not unlimited - general prohibition to employ weapons or methods of warfare that cause superfluous injury or unnecessary suffering, or may expected to cause widespread, long-term and severe damage to the natural environment

Moreover, **article 35 protocol I** reiterates:

Article 35 Protocol I

> "Basic rules
>
> 1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
>
> 2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
>
> 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause wide-spread, long-term and severe damage to the natural environment."

This treaty provision is also a reflection of already existing customary law.

So newly developed weapon systems must manage to come through the test of **article 36 Protocol**, while **article 36 Protocol** gives further indications about the requirements, which new weapons have to meet.

Important criteria are that such weapons may neither cause superfluous injury, nor unnecessary suffering, nor widespread, long-term and severe damage to the natural environment.

The same applies also to '**means of warfare**' and '**methods of warfare**'.

With respect to the requirement that **the natural environment** should be protected against '**widespread, long-term and severe damage**' of '**means of warfare**', there is also the provision of **article 55 Protocol I**.

Article 55 Protocol I

> "Protection of the natural environment
>
> 1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population."

8.40 Inherently indiscriminate weapons

Also the use of **weapons**, which are, according to their nature, not able to discriminate, shall be prohibited.

As well as **means or methods of warfare** with certain weaponry, if inherently turning out indiscriminate.

This principle is laid down in **article 51 (4)(c) Protocol I**, as already cited above:

> "Indiscriminate attacks are prohibited. Indiscriminate attacks are:
>
> (c) Those which employ a method or means of combat the effect of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."

There are no explicit treaty provisions, which prohibit the use of **arms with depleted uranium** or **cluster munitions**.

However, the question is whether the use of **anti-personnel mines**, **cluster bombs** and **arms with depleted uranium** could meet all accumulated legal preconditions, set out here above.

There are convincing arguments that the use of such weapons, or at least certain methods of

use of these types of weapons, cannot meet all these standards.

So there are convincing indications, to be diverted from the concourse of customary law provisions, that the deployment of **depleted uranium weapons** and **cluster bombs** in combat should be considered prohibited according to international humanitarian law standards.

8.41 The ban on anti-personnel mines

Most Westerns States have ratified the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction (Ottawa Treaty), including the United Kingdom.

Though the United States has not ratified this treaty, there are nevertheless strong arguments in favour of the view that at least the use of anti-personnel mines is also prohibited under international law for the United States.

After all, anti-personnel mines, according to their nature, cannot distinct between combatants and civilians.

So they are, by their very nature, **inherently indiscriminate weapons**.

As a matter of customary law, the use of **indiscriminate weapons** is prohibited under customary international humanitarian law.

The US, before the 2003 war against Iraq, had been stockpiling thousands of anti-personnel mines off the coast of the British territory of Diego Garcia for use in Iraq.

If anti-personnel mines had entered the territory of Diego Garcia, this would appear a breach of the UK's obligations under the **Ottawa Treaty**, and under the **UK Land Mines Act**.

So this would appear a crime against international humanitarian law, as well as against British domestic law.

As far as the US has actually might have been employed such mines in Iraq - or during preceding wars - this would be a violation of the principle that the use of **indiscriminate weapons** is prohibited.

8.42 Cluster bombs

The fact that **cluster munitions** are to be conceived, as weapons, of which the actual use shall be forbidden, should be derived, first of all, from the factor that the use of cluster munitions is inevitably connected with the production and spread of very high percentages of **duds**.

These **dud munitions** actually function as **de facto antipersonnel mines**.

8.43 Cluster bombs as indiscriminate weapons

So, next to the fact that it is yet impossible to deploy cluster munitions with a high degree of accuracy, the fact that the use of cluster munitions is also inescapably connected with the spread of huge amounts of **duds** will make cluster munitions definitely **indiscriminate weapons**.

The customary law character of the principle that the use of indiscriminate weapons is prohibited, implies that also the United States should refrain from the use of indiscriminate weapons.

And just as well should refrain from the use of **cluster munitions**, which inhere, automatically and inescapably, the employment of such high percentages of **de facto antipersonnel mines**.

Even when, in another kind of reasoning, the conclusion would be drawn that, with respect to the use of cluster bombs the necessities of war should prevail, and that, accordingly, as long as the use of cluster bombs shall not be prohibited explicitly, such employment, in general, cannot be considered as illegal, than it must be recalled that it is also a principle of customary law that not only '**the right to choose means of warfare is not unlimited**', but that the same goes for the '**methods of warfare**'.

This principle can also not remain without implications as regards the use of cluster munitions.

At least the use of cluster bombs **in the vicinity of civilians or civilian objects** than must be considered as such a forbidden '**method of warfare**', according to international humanitarian law. This in view of the high risks of civilian casualties resulting from the already in itself indiscriminate nature of those weapons and the inherent spread of high percentages of **dud sub munitions**, constituting as many **de facto antipersonnel mines**, resulting from the employment of such weapons.

If nevertheless, from a certain point of view and attributing disproportional weight to the necessities of war, it would be concluded that the use of cluster munitions is acceptable, than the precautions which have to be taken with respect to an attack, prescribed by **article 57(2)(b) Protocol I**, require at least that intended attacks with cluster munitions were to be '**suspended**' or even '**cancelled**' when they '**may be expected to cause incidental loss of civilian life**' or '**injury to civilians**', '**which would be excessive in relation to the concrete and direct military advantage anticipated**.'

If, in spite of all that, it would be intended to go through with such attack in the vicinity of civilians, so bringing about high risks for civilian casualties, than **article**

57(2)(c) Protocol, at the very least, stipulates that '**an effective advance warning shall be given, unless circumstances do not permit**'.

Anyhow, the active use of cluster munitions in the vicinity of civilian objects or civilians, implying high risks for civilian casualties, shall perform, at any rate, a forbidden **method of warfare**, according to international humanitarian law standards, when such attack will result in civilian deads and injuries, and the attacker will have omitted to '**give an effective warning**' in advance.

Human Rights Watch has called for a global moratorium on the use of cluster munitions until the humanitarian problems of cluster munitions are addressed.

And also **Amnesty International** has stated that an immediate moratorium on the use of cluster weapons must be established "because such weapons present a high risk of violating the prohibition on indiscriminate military attacks."

In its document '**Cluster Munitions a Foreseeable Hazard in Iraq**' of March 2003, **Human Rights Watch** stresses the following:

> The use of cluster munitions results in great dangers to the civilians. Based on the experiences in the Persian Gulf War in 1991, Yugoslavia/Kosovo in 1999, and Afghanistan in 2001 and 2002, these dangers are both foreseeable and preventable.
>
> Cluster munitions
>
> 1. cannot be targeted with precision;
>
> 2. cause damage over a very large and imprecise area; and
>
> 3. due to the large numbers used and high failure rate, leave behind a great many unexploded "dud" sub munitions that become **de facto antipersonnel landmines**.

The said **Human Rights Watch** document concentrates on this latter aspect of cluster munitions becoming **de facto antipersonnel landmines**.

The **Human Rights Watch** report states furthermore:

> Identified are four types of cluster munitions in particular that are currently in the inventory of the United States, United Kingdom, and other nations.
>
> Those four types of cluster munitions have a recent history of showing, either in testing or in recent combat operations, the production of high numbers of hazardous sub munitions duds.
>
> In addition to these **four cluster munitions**, also many of the **older Vietnam-era cluster munitions**, now not longer serviceable and prohibited from use, were used in large numbers in the 1991 Gulf war in Iraq and Kuwait. And the US military is still retaining such older cluster munitions to make up shortfalls in the inventories of newer, allegedly more reliable cluster munitions.
>
> For example, an older type of **105mm artillery projectile (designated M444)**, which has a sub munitions dud rate of 12 percent.
>
> High dud rates have also been documented in testing of two of the afore referred types of cluster munitions, namely the **Multiple Launch Rocket System (MLRS) M77 sub munitions,** stockpiled in Denmark, France, Germany, Greece, Bahrain, Italy Israel, Japan, Netherlands, Norway, Turkey United Kingdom and United States, and the **155mm artillery projectiles with M42 and M46 Dual Purposes Improved Conventional Munitions (DPICM) sub munitions**, stockpiled in Canada, Jordan, Netherlands, Pakistan, South Korea, Turkey, and United States.

These two cluster munitions and their reported failure rates include:

- **MLRS with M26 warhead**: 16 percent dud rate for the **M77 sub munitions**. (1)

(1) Office of the Under Secretary of Defence for Acquisition, Technology and Logistics, "Unexploded Ordnance Report", table 2-3, p. 5. No date, but transmitted to the US Congress on February 29, 2000.

Some lots were reported to have dud rates as high as 23 percent, based on testing done to accept newly produced batches. (2).

(2) US General Accounting Office, "GAO/INSIAD-92-212:OPERATION DESERT STORM: Casualties Caused by Improper Handling of Unexploded US Sub munitions", August 1993, pp. 5-6.

Each M26 warhead contains 644 sub munitions. Thus, the standard volley of twelve MLRS rockets would like to result in more than 1.200 dud sub munitions scattered randomly in a 120.000 to 240.000 square meter impact area.

The US Stockpile of MLRS rockets contains over 309 million sub munitions. (3)

(3) US Army Material Systems Analysis Activity, "Unexploded ordnance (UXO) Study", April 1996, p.7.

This could equate to more than 49.4 million explosive duds.

- **155mm DPICM M483A1 & M864 artillery projectiles**: 14 percent dud rate for the **M42 and M46 DPICM sub munitions**. (4)

(4) US Army Defence Ammunition Centre, Technical Centre for Explosives Safety, "Study of Ammunition Dud and Low Order Detonation Rates", July 2000, p. 9.

The M483A1 artillery projectile contains sixty-four M42 and twenty-four M46 DPICM sub munitions. Based on the dud rate established by testing existing stocks of these projectiles, each M483A1 round fire would result in twelve dud sub munitions and each M864 round will result in ten dud sub munitions.

The US Stockpile of 155mm projectiles contains over 434 million sub munitions. (5)

(5) US Army Material Systems Analysis Activity, "Unexploded Ordnance (UXO) Study", April 1996, p. 7.

This could equate to more than 60.7 million hazardous duds.

Two types of air-dropped cluster munitions - older **Rockey (CBU99/CBU100) bombs**, stockpiled in Canada, Denmark, Egypt, France, Israel, Norway, Oman, Turkey, United Kingdom and United States, and newer **Combined Effects Munitions (CBU-87)**, stockpiled in Egypt, France, Germany, Italy, Japan, Netherlands, Norway, Poland, Saudi Arabia, South Korea, United Arab Emirates,

United Kingdom and United States - have produced high numbers of hazardous duds in combat operations in Iraq, Kuwait, Yugoslavia, and Afghanistan.

- **Rockeye CBU-99/CBU-100**: Each Rockeye bomb contains **247 Mk 118 sub munitions**. These cluster bombs were used extensively in the 1991 Persian Gulf War. While no reliable estimate of the failure rate is available, clearance agencies in Kuwait encountered a very large number of dud Rockeye sub munitions in their operations. (6)

(6) Colin King, "explosive Remnants of War; A Study on Sub munitions and other Unexploded Ordnance", commissioned by the International Committee of the Red Cross, August 2000, p. 16 and p. E-2; US General Accounting Office, "GAO-02-1003: MILITARY OPERATIONS: Information on the US Use of Land Mines in the Persian Gulf War", September 2002, p. 27. The Department of Defence UXO report to Congress in 2000 cites a 98 percent sub munitions reliability rate for the Rockeye sub munitions - a claim not supported by the Kuwait evidence.

One US company reported clearing 95.799 M118 Rockey sub munitions in their sector of Kuwait, which constituted 18% of the total area cleared. (7)

(7) US Army Armament, Munitions, and Chemical Command, "Contract DAAA21-92-M-0300 Report by CMS, Inc", Undated; data cited by GAO 1993, GAO 2002, King 2000, and the Army Material Systems Analysis Activity, 1996.

In 2002, still 451 Rockeye sub munitions were detected and destroyed by nine clearance teams and explosive ordnance disposal teams in Kuwait. (8)

(8) Complied from December 2001 to December 2002 editions of Kuwait Ministry of Defence, "Monthly Ammunition and Explosive Destroyed/Recovered Report", Annex A.

Rockeyes, which were developed in the 1950s, were also used in great numbers in the Vietnam War. The number of Rockeye bombs currently in the US arsenal is unknown, but it is still believed to be high.

- **Combined Effects Munitions CBU-87**: dud rates of at least 5 to 7 percent for the BLU-97 sub munitions in the war in Yugoslavia/Kosovo and Afghanistan. (9)

(9) In Kosovo, on the basis of the clearance rate by march 2001 of unexploded sub munitions, the United Nations Mine Action Coordination Centre estimated that 7 percent of the BLU-97 sub munitions failed to explode on impact. See International Campaign to Ban Landmines (ICBL), Landmine Monitor report 2001, (New York: Human Rights Watch, the US Department of Defence used a 5 percent figure. See Human Rights Watch, "Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan", A Human Rights Watch report, vol. 14, no. 7 (G), December 2002, p. 37. The Department of Defence UXO report to Congress in 2000 cites a 98 percent sub munitions reliability rate for the BLU-97 sub munitions.

The CBU-87 is an air-dropped bomb that contains 202 BLU-97 sub munitions. Using the 7 percent sub munitions failure rate documented in Kosovo, each bomb

dropped will result in fourteen explosive dud munitions over an area about the size of a US football field. The US used a total of 10.035 CBU-87s, with more than 2 million sub munitions, during the 1991 Persian Gulf War. That implies the collateral production of 140.000 duds - and so the deposition of 140.000 de facto antipersonnel mines -, resulting from the use, by the Americans, of this specific type of cluster bombs alone, during the Gulf War !

The size of the US Stockpile of this older version of the Combined Effect Munitions (CBU-87), which was first produced in 1984, is not known. But large numbers are believed to be held, even though newer models (CBU-103) are being fielded with improved accuracy, due to the Wind Corrected Munitions Dispenser, and fuse modifications.

Aerial-delivered cluster munitions accounted for about one quarter of the bombs dropped on Iraq and Kuwait during the 191 Persian Gulf War. Between January 17 and February 28, 1991, the United States and its allied coalition used a total of 61.000 air-dropped cluster munitions, releasing twenty million sub munitions. About fifteen percent of those were CBU-87s, then the new US arsenal. But also Vietnam-era cluster munitions were used in surprising large numbers, including CBU-52, CBU-58, CBU-71, and early versions of the Rockeye. (12)

(12) See Human Rights watch, “Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan”, A Human Rights Watch Report, vol. 14, no. 7 (G), December 2002, pp 40-41.

The number of cluster munitions delivered by surface-launched artillery and rocket systems during the Gulf War is not known, but one source estimates that over thirty million DPICM sub munitions were used in the conflict. (13)

(13) Colin King, “explosive Remnants of War: A Study on Sub munitions and other Unexploded ordnance”, commissioned by the International Committee of the Red Cross, August 2000, p. 16, citing Donald Kennedy and William Kincheloe, “Steel Rain: Sub munitions”, US Army Journal, January 1993.

Taking into account an aforesaid estimated failure of 14 %, that amount would result in 1,2 million dud sub munitions, - and thus 1,2 million antipersonnel mines -, spread around during the first Gulf War in Kuwait and Iraq.

From the end of the conflict in 1991 through December 2002, 108 metric tons of cluster munitions were discovered and destroyed by mine clearance and explosive ordnance disposal teams in Kuwait. (14)

(14) Kuwait Ministry of Defence, Headquarters Land Forces Command, “Monthly Ammunition and Explosive Destroyed/Recovery Report”, Annex A, December 21, 2002.

In the year 2002, more than a decade after the fighting stopped, 2.400 explosive dud cluster munitions were detected and destroyed. These included: M42/M46/M77 (DPICM), Mk-118 (Rockeye), BLU-61A/B, BLU-77B, BLU-91B (Gator anti-vehicle mine), BLU-92B (Gator antipersonnel mine), BLU-97 (CBU-87), and Belouga (a fresh air-dropped cluster munitions). (15)

(15) Kuwait Ministry of Defence, Headquarters Land Forces Command, "Monthly Ammunition and Explosive Destroyed/Recovery report. According to this document, a similar number of cluster munitions was cleared in 2001.

These average of nearly seven per day is all the more stunning in that one of the most extensive and expensive clearance operations in history was carried out immediately after the war. (16)

(16) See, for example, ICBL, Landmine Monitor Report 1999, p. 891.

Hazardous dud cluster munitions continue to be uncovered in Kuwait. In February 2003, soldiers with the US 3rd Infantry Division discovered a dud BLU-63 cluster munitions on one of their urban combat training ranges in the Kuwait desert. (17)

(17) Juan Tamayo, "10 Million Land Mines Lie in Wait inside Iraq, Troops also face '91 War Leftovers", Miami Herald, February 20, 2003.

While less information is available on the problem in Iraq, after the 2003 war, this country is still severely affected by landmines, cluster munitions duds, and other types of unexploded ordnance (UXO) from the 1991 Gulf War.

The International Committee of the Red Cross in 2001 identified unexploded cluster bombs and other UXO as the main treat to communities living in southern Iraq. (19)

(19) Laurence Desvignes, "Red Cross/Red Crescent Mine Action Involvement in the Middle East", Journal of Mine Action, Issue 5.3, Fall 2001, p. 13.

Despite recent efforts in the United States to improve the reliability of newly produced cluster munitions and to fit new cluster sub munitions with self-destruct fuses, this new policy permits continued use of existing cluster munitions. The services may retain 'legacy' sub munitions until employed or superseded by replacement systems.

And the US stockpiles more than one billion of these 'legacy' sub munitions…!

8.44 Cluster bombs as inherently inflicting superfluous injury and unnecessary suffering

However, not only the inherent **indiscriminate** nature of cluster weapons, causing that such arms cannot be targeted with precision and that they result in damage over a very large and imprecise area, as well as the fact that they produce also inherently, as a by-product, a high rate of **de facto antipersonnel mines** put the use of those weapons in the dock for the indictment of being contrary to international humanitarian law.

The same indictment raises also from another inherent aspect of cluster munitions.

The use of cluster bombs will result inevitably in horrible injuries. The victims will run an overwhelming risk of going to be mutilated very badly, civilians or combatants all the same.

And, like it is also stated in **article 35(2) Protocol I**, according to customary law it is

prohibited '**to employ weapons of an nature to cause superfluous injury**'.

There is no reason why this prohibition should be considered as not applicable to the use of cluster munitions, causing, by their very nature, such superfluous injury. By rains of steel particles, tearing people apart or inflicting horrendous mutilations.

Pictures of human beings victimized by cluster bombs will soon be entered in the PC's web site **www.natosued.com**.

8.45 DU weapons - characteristics and health consequences of employment

Depleted uranium weapons are super hard weapons made with waste uranium-238. DU ammunition was employed for the **first time** as battlefield weaponry during the 1991 Gulf War.

Prized for its high density, DU is used in munitions for piercing armour plate and, in the 2002 war against Afghanistan and the 2003 war against Iraq, for bunker buster aims.

Shot from planes the DU shells are called "tank killers". And DU hardened missiles are now also used as "ground penetrators".

At least five types of US munitions contain DU, which is also used in casings for bombs and shielding on tanks.

Starmet Corporation in Concord, Mass., Aerojet Corp. in Sacramento, Cal. and others makes DU shells. **Alliant Techsystems** in Minneapolis (formerly **Honeywell Corp.**) assembled over 15 million DU shells for the US Air Force in the 1990s.

DU originating as **a left-over from the uranium enrichment process** contains especially the **uranium isotope U-238**.

U-238 is mainly an emitter of **alpha radiation**.

Alpha radiation has not the potential of easily penetrating human tissue.

The alpha particle radiation, emitted by DU, travels less than an inch and can be stopped by cloth or even by tissue paper.

So fresh-from-the-factory DU tank shells are normally handled with gloves, to minimize the health risk, and shielded with a thin coating.

But when the DU material burns, dangerous radioactive oxides are created. When DU devices explode, they develop a temperature level that rises up to 5000 degrees Celsius, which, together with the developed energy through pressure, causes the pulverization of the uranium. DU "penetrators" burn on impact and up to 70 percent of the DU is aerosolized as dust. Consequently the uranium-dust aerosol is spread out in the environment and falls onto the ground or on the plants. With the wind this material can be transported up to distances of 40 km or more.

The particles that weigh around 5 my (micron) can be inhaled easily and therefore enter the

biological cycle.

Another important way is ingestion.

DU particles have a **toxic** as well as a **radioactive** component, which both affect the cells with which the DU particles make contact. One of the most **toxic** effects for the people exposed to DU is damage of the kidneys.

Part of the ingested or inhaled DU-particles will leave the human body in the natural way. But other DU particles remain enclosed in the body and cause there, from their trapped position, emission of radiation, which will affect the cells and can slowly damage their metabolism or its DNA code. And create cancer and other radiation illnesses.

Between 300 and 800 tons of DU munitions were blasted into Iraq and Kuwait during the 1991 Gulf War.

The Pentagon says the US fired about 10.800 DU rounds - close to **3 tons** - into Bosnia in 1994/95.

During NATO's 1999 war against Yugoslavia around **10 tons** of DU is used in around 32.000 rounds.

An anonymous informant of the US Special Operations Command admitted that the U.S and Great Britain fired at least **500 tons** of DU munitions in Iraq during the 2003 Gulf War. But other estimations reach even to **1000 tons or more**.

The American authorities don't give official figures.

Though not yet officially confirmed, it is certain that bunker busters with DU warheads were used in the cities, especially in Baghdad, during the 2003 war against Iraq. But not only bunker busters. Tons of DU have been used in Iraqi major population centres.

So in this 2003 war against Iraq civilian areas were deliberately targeted with DU ammunition. It was the first time that DU has been used in densely populated areas.

According to the informants of the Special Operations Command who remained unnamed but whose identity has been verified, over **100 tons** of DU munitions were used in and around Baghdad alone, but a lot more fighting went on around the Northern cities and Basra. According to those sources even buildings in downtown Baghdad have been shelled with DU munitions.

When the T.V. showed any bombs hit buildings in Baghdad, there was an easy way to tell if it was DU. When there were those little secondary white fires burning in the air in the blast: that was DU burning off. DU burns with a whitish orange flame, almost like a firework shell burning.

It is also stated by this inside informants that, during the military operations, the American command wanted the complete destruction of any military vehicle in Iraq. The objective was to make sure that there is no way that any fighting force could ever use those vehicles in any way. The US army command wanted to decimate the Iraqi army and make sure they were never able to fight again. This took an enormous amount of ammunition, mostly DU tipped 25mm, 30mm, and 125mm penetrator rounds.

During the latest Iraq conflict Abrams tanks, Bradley fighting vehicles and A-10 Warthog aircraft, among other military platforms, all fired the DU bullets from desert war zones to the heart of Baghdad.

The Pentagon, NATO and the British Ministry of Defence have always downplayed the danger of DU saying that it was only containing **natural U-238 isotopes**, even in lower frequencies than in uranium ore. So it were even "less radioactive than uranium ore".

However, while the Pentagon says there's no risk to residents, already in 1993 the Pentagon issued an internal memorandum on DU-weapons and how to handle them, in which was written: "When soldiers inhale or ingest DU-dust, they incur a potentially increased risk of cancer…".

And still US soldiers are taking their own precautions in Iraq. In some cases they have handed out warning leaflets and put up signs.

The **Christian Science Monitor of May 15, 2003** quotes a sergeant in Baghdad from New York, assigned to a Bradley, who asked not to be further identified.

He says:

> "After shooting something with DU, we're not supposed to go around it, due to the fact that it could cause cancer. We don't know the effects of what it could do. If one of our vehicles burnt with a DU round, we wouldn't go near it, even if it had important documents inside. We play it safe."

According to this Christian Monitor's article

> "…six American vehicles struck with DU 'friendly fire' in 1991 were deemed to be too contaminated to take home, and were buried in Saudi Arabia. Of 16 more brought back to a purpose-built facility in South Carolina, six had to be buried in a low-level radioactive waste dump.
>
> US military guidelines developed after the first Gulf War - which have since been considerably eased - required any soldier coming within 50 yards of a tank struck with DU to wear a gas mask and full protective suit. Today soldiers say they have been told to steer clear of any DU.
>
> In the US, stringent **Nuclear Regulatory Commission Rules (NRC)** rules govern any handling of DU, which can legally only be disposed of in low-level radioactive waste dumps. The US military holds more than a dozen **NRC** licenses to work with it".

In Iraq, during the 2003 war,

> "DU was not just fired at armoured targets. Video footage from the last days of the war shows an A-10 aircraft strafing the Iraqi Ministry of Planning in downtown Baghdad. A visit to site yields dozens of spent radioactive DU rounds, and distinctive aluminium casings with two white bands, that drilled into the tile and concrete rear of the building. DU residue at impact clicked on the Geiger counter at a relatively low level, just 12 times background radiation levels. But the finger-sized bullets themselves - littering the ground where looters and former staff are

> often walking - were the "hottest" items the Monitor measured in Iraq, at nearly 1.900 times background levels.
>
> There is a warning now at the Doura intersection on the southern outskirts of Baghdad.
>
> In the days before the capital fell, four US supply trucks clustered near an array of highway off-ramps caught fire, cooking off a number of DU tank rounds. American troops wearing facemasks for protection arrived a few days later and bulldozed the topsoil around the site to limit the contamination. The troops taped handwritten warning signs in Arabic to the burned vehicles, which read: "Danger - Get away from this area." These were the only warnings seen by this reporter among dozens of destroyed Iraqi armoured vehicles littering the city.
>
> Despite the troops' bulldozing of contaminated earth away from the burnt vehicles, black piles of pure DU ash and particles are still present at the site. One pile of jet-black dust yielded a readout of 9.839 radioactive emissions in one minute, more than 300 times average background levels registered by the Geiger counter. Another pile of dust reached 11.585 emissions in a minute.
>
> Western journalists who spent a night nearby on April 10, 2003, the day after Baghdad fell, were warned by US soldiers not to cross the road to this site, because bodies and unexploded ordnance remained, along with DU contamination. Here found the Monitor a 3-foot-long DU dart from a 120 mm tank shell, producing radiation at more than 1.300 times background levels. It made the instrument's staccato bursts turn into a steady whine."

So far from the May 15, 2003 edition of the Christian Science Monitor.

A March 2002 report by the UK's Academy of Science, the Royal Society, recommends also that soldiers who may have been exposed to DU should be tested for the presence of uranium in their kidneys and in their urine.

Written by some of the country's leading scientists, the report also suggest that DU may contaminate water supplies - putting civilians at risk.

The Society's recommendations include annual water sampling in areas of high contamination and more research into the health of veterans who may have been exposed to DU.

According to Professor Brian Spratt from Imperial College in London, and one of the authors of the Royal Society report, local civilian populations could be also at risk if DU leaked into water sources. Professor Spratt suggests that water sampling is carried out every year as it could take up to 40 years for the DU to filter into the water.

A **previous report by the Royal Society, published in May, 2001**, suggested the radioactivity associated with DU might increase the risk of individuals developing lung cancer.

The **March 2002 report by the Royal Society** suggests that most soldiers on the battlefield will be exposed to levels of DU that are unlikely to cause heavy metal poisoning. But those who inhale large enough quantities may experience short-term kidney problems. Currently, according to the report, there is not enough data to assess the long-term consequences.

April 16, 2003, the scientists of the Royal Society spelled out the dangers of DU, in reaction to the Pentagon's claim that it had the backing of the Society in saying DU was not dangerous.

Professor Brian Spratt, chairman of the Royal Society working group on depleted uranium, said that a recent study by the Society had found that the soil around the impact sites of depleted uranium penetrators may be heavily contaminated, and could be harmful if swallowed by children for example. "In addition, large numbers of corroding depleted uranium penetrators embedded in the ground might pose long-term threat if the uranium leaches into water supplies", he stated. "We recommend that fragments of depleted uranium penetrators should be removed, and areas of contamination should be identified and, where necessary, made safe." He added: "We also recommend long-term sampling, particularly of water and milk, to detect any increase in uranium levels in areas where depleted uranium has been used."

Among those campaigning against DU is also Professor Doug Rokke, a one time US Army colonel who is also a former director of the Pentagon's depleted uranium project, and a former professor of environmental science at Jacksonville University. He has said a nation's military personnel cannot contaminate any other nation, cause harm to persons and the environment and then ignore the consequences of their actions.

He has called on the US and UK to "recognize the immoral consequences of their actions and assume responsibility for medical care and thorough environmental remediation."

Also **the UN Environmental Programme (UNEP)** has been tracking the use of DU, especially in the Balkans. And found it leaching into the water table.

Seven years after the use of DU in Bosnia **the UNEP** has recommended the decontamination of buildings where DU dust is present to protect the civilian population against cancer.

April 2003 the UNEP issued a report, the **UNEP Desk Study on Environment in Iraq**, which was prepared by UNEP's **Post-Conflict Assessment Unit**.

In this report the UNEP expressed its concern about the DU, used in Iraq. It calls "a scientific assessment of sites struck with weapons containing DU" a priority activity.

The report concludes: "The intensive use of DU weapons has likely caused environmental contamination of as yet unknown levels or consequences."

April 26, 2003 The Guardian reported that, according to the British Ministry of Defence, soldiers returning to Britain from the Gulf will be offered tests to check levels of depleted uranium in their bodies to assess whether they in danger of suffering kidney damage and lung cancer as a result of DU dust exposure.

The Guardian of April 26, 2003 continues:

> "The ministry was responding to a warning on Thursday from the Royal Society, Britain's premier scientific body, that soldiers and civilians might be exposed to dangerous levels. It challenged earlier reassurances from the Defence Secretary, Geoff Hoon, that depleted uranium was not a risk.

> A ministry spokeswoman said that if soldiers followed instructions correctly and wore respirators in areas where depleted uranium might have been used they would not suffer dangerous exposure, but all would be offered urine tests. The overall results will be published.
>
> The ministry said it would also publish details of where and how much depleted uranium was used, and hoped the United States would do the same. Professor Brian Spratt, chairman of the society's working group on depleted uranium, said: "It is highly unsatisfactory to deploy a large amount of a material that is weakly radioactive and chemically toxic without knowing how much soldiers and civilians have been exposed to it.
>
> Civilians in Iraq should be protected by checking milk and water samples for depleted uranium over a long period, he said."

And now it is time to introduce a complicating element, which makes the dangers of DU even more acute.

The depleted uranium, used for weaponry, is mostly said to come from the uranium enrichment plants.

As a result from the uranium enrichment process, DU is left after uranium ore has gone through the diffusion process that removes most of the fissionable **uranium isotope-235**, needed for the production of nuclear weapons or for the manufacturing of nuclear fuel rods, used in nuclear power plants.

However, the discovery, in spent DU munitions in Kosovo, of uranium isotopes, different from natural uranium ore, namely **U-236 isotopes** instead of **U-238 isotopes**, revealed the use of DU not coming from the uranium enrichment process.

So it is certain now that there are also **two other important sources** for the production of DU ammunition, namely **first** of all **the refuse of nuclear weapons**, which are dissolved, and **secondly** the radioactive waste of **reactor fuel reprocessing activities**.

That specific nuclear waste, originating from those two sources, up to some 700.000 tons in the United States, is now labelled as 'resource material', a legal definition that saves the US Energy Department the cost of managing DU also from those origins as radioactive waste.

It is necessary to distinct those various sources, especially in relation to the radioactive isotopes which they contain.

For DU coming from the dissolution of **aged nuclear weapons** and the reprocessing of **spent nuclear fuel rods** not only contains **U-238 isotopes**, but also a wide range of **other radioactive isotopes**, which not only emit **alpha radiation**, but also **beta and gamma radiation**, so sometimes radiation of a far greater penetrating ability than **U-238**.

Those **isotopes**, which are artificially created as a by-product either from the burning of nuclear fuel rods in nuclear power plants, either from the reprocessing activities itself, or from the manufacturing of nuclear weapons, are also **incomparably more radiotoxic**.

As early as January 2000, the US Department of Energy (DOE) admitted that the US DU munitions are spiked with **plutonium, neptunium and americium** - transuranic fission

wastes from inside nuclear reactors.

The health consequences are fearsome.

This official admission of the United States' that its DU contains **plutonium** and other reactor borne **fission products** are far more radioactive and toxically - so far more carcinogenic - than **uranium-238**, caused a wildfire of publicity.

At least half of the DU (250.000 metric tons) is left over from the reprocessing of spent reactor fuel, leaving it salted with **fission products**.

The most dangerous of these isotopes are the **plutonium-isotopes**. DU "contains a trace amount of **plutonium**", said the DOE's Assistant Secretary David Michaels, who wrote to the Military Toxics Project's Tara Thomton, January 20, 2000.

Dr. Von Hippel says in the Bulletin of Atomic Scientists that **plutonium-239** is **200.000 times more radiotoxic than U-238.**

Plutonium "is probably the most carcinogenic substance known", according to Dr. Ajun Makijani, President of IEER, writing in his book 'Plutonium'.

And David Michaelis wrote: "Recycled uranium, which came straight from our production sites, e.g., Hanford, would routinely contain transuranics at a very low level".

And he pointed out: "We have initiated a project to characterize the level of transuranics in the various depleted uranium inventories."

Dr. Michael Repacholi of the World Health Organization (WHO) says: "If it has been through a reactor, it does change our idea on depleted uranium".

The WHO has demanded to know how much **plutonium** is in DU ammunition. The US DOE is still working on an answer to that question.

However, on January 19, 2001, after a one-week 'investigation', NATO officials said: "traces of highly radioactive elements such as plutonium and americium were not relevant to soldiers' health because of their minute quantities".

This public relations ploy failed to bring the intended result, especially in view of leak of a July 1, 1999, 'hazard awareness' memo issued by the Pentagon.

This memo warned military personnel entering Kosovo against touching spent DU ammunition, suggested the use of protective masks and skin covering while in contaminated areas, and recommended follow-up health assessments.

The warning was sent to defence ministries in Europe, but was not given to civilians.

AP reported February 3, 2001: "US officials have said the DU shells contained mere traces of plutonium, not enough to cause harm."

This comment must be immediately rejected as totally irresponsible. Transuranics, like plutonium, are so incomparable toxic, that even the smallest traces of these elements present a deadly danger.

It must be stressed that the above-mentioned reports of the Royal Society didn't take into consideration the newly presented fact that much DU contains also traces of such far more radioactive and radiotoxic isotopes than **U-238**. Neither did the UNEP reports.

So they are still far too optimistic about the health risks of DU.

This sheds also a new light on the great numbers of birth defects in Iraq since the 1991 Gulf War, often associated with the use of DU.

Iraqi health officials said they had recorded a 200 % rise since 1991 in cancer and leukaemia cases, particularly in young children, in Basra. That southern city was close to the battlefields of the 1991 war. They have stated that there is no other explanation for this outbreak of birth defects and of all forms of cancer, including the rarest forms of leukaemia, than the radiation coming from DU.

The fearsome content of DU, only just revealed but not yet investigated to its health impact, stresses one of the conclusions of the report by M. Fahey, "Science or Science Fiction: Facts, Myth and Propaganda in the Debate Over DU Weapons":

> "Science and common sense dictate it is unwise to use a weapon that distributes large quantities of a toxic waste in areas where people live, work, grow food, or draw water."

8.46 Prohibition, according to EU law as well as national law of the US and the UK, of exposure to excessive radiation

In scientific circles it is beyond discussion that, as expressed by the expert on molecular biology and cell biology John W. Gofman of the Berkeley University in an 1999 open letter to the American government:

> "By any reasonable standard of biomedical proof, there is no safe dose [of exposure to radiation], which means that just one decaying radioactive atom can cause permanent mutation into the cell's genetic molecules."

Article 8 and 9 of the Directive 96/29/Euratom of 1 may 1996 establishes the explicit prevention for people under the age of 18 to be exposed to any kind of radiation in a work area where uranium and its by-products including depleted uranium, as a waste material, are processed.

Furthermore Directive 96/29/Euratom establish that people above 18 can be exposed to a maximum of **100 Millie Sievert (mSv)** radiation **in a period of 5 years** with an effective dose of not more than **50 mSv** in a single year. Especially when people come in close contact with DU contaminated weapon rests, producing hundreds, or even thousands times background levels of radiation, these limits will be hugely exceeded.

The risks, brought about by even the lowest levels of radioactive exposure, are not only recognized by scientists, but also already echoed legally in judgements. Even at the highest echelon. So **the Japanese Supreme Court** established, by verdict of 18 July 2000, in the case Hideko Matsuya v. the Minister of Public Health of Japan, that the principal danger and the damaging effect of radiation as a consequence of the use of nuclear material in war with

respect to the health of human beings, is scientifically recognised and incontestable and that therefore the burden of proof rests with the State of Japan, which means that the State of Japan had to prove that the illness of the plaintiff had been caused by other factors.

Mrs. Matsuya was exposed to a level of radiation that is considered low while she was in a position several kilometres away from the epicentre of the explosion of the bomb that hit Nagasaki. Her health problems and specifically her psychological problems had not been recognised by the Japanese State as an effect of the nuclear bomb.

8.47 No assessment executed of the admissibility of DU weapons, in accordance with the requirements of article 36 Protocol I

Certainly, if ever a full compliance with the regulations of **Article 36 Protocol I** demanding an assessment of the admissibility of newly developed weapons should have been indispensable, than, anyhow, also with respect to DU weapons!

8.48 Legal consequences of this flaw

Since such a test remained undone by all States now possessing DU weapons, the burden of proof that the use of such weapons - even within cities, on farmland and near water supplies - is acceptable, rests with those States.

8.49 Meaning of the De Martens Clause with respect to the employment of DU weapons

Again it has to be stressed that, in cases not covered by whatever written provision of international law, civilians remain always under the protection and authority of the principles of international law derived from the principles of humanity and from the dictates of public conscience.

And that in any armed conflict, the right to choose methods or means of warfare is not unlimited.

As set out before, the **De Martens Clause** and the basic rules, reconfirmed in the **articles 1(2)** and **36 Protocol I**, provide, together with other principles of humanitarian customary law, with a framework that outreaches the law of conventions.

So the fact that there is no convention explicitly forbidding the use of DU weapons, is not at all decisive.

Official comments of NATO and the USA that depleted uranium “has never declared illegal by any war convention” are therefore not conclusive.

8.50 Meaning of the customary law principle, also laid down in the articles 35(3) and 55 Protocol I, that forbids 'to employ means of warfare which, may be expected to cause widespread, long-term and severe damage to the natural environment' with respect to the employment of DU munitions

Moreover, customary international law, also expressed in the **Articles 35(3)** and **55 Protocol I**, forbids 'to employ means of warfare which...may be expected to cause widespread, long-term and severe damage to the natural environment'.

And all indications go imperatively in the direction that DU-weapons may be expected to cause such wide-spread, long-term and severe damage.

Furthermore, Article 23(a) the Hague Convention IV stipulates:

> "It is especially forbidden: To employ poison or poisoned weapons."

8.51 Meaning of the Geneva Gas Protocol with respect to the employment of DU munitions

And the Geneva Gas Protocol of 1925 outlaws:

> "...asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices."

The toxic properties of radioactive isotopes are beyond discussion. The toxicity of transuranics is even unrivalled.

8.52 Meaning of the prohibition of 'employing poison or poisoned weapons' in the sense of article 8 (2)(b)(xvii) Rome Statute

For the same reason, it should be evidenced by the States which take the position that the use of DU munitions were permitted under international humanitarian law, that DU weapons are not also in direct contravention with the prohibition of **'Employing poison or poisoned weapons'**, in the sense of **article 8 (2)(b)(xvii) Rome Statute**.

8.53 Provisional view of the sub-commission of the UN Commission on Human Rights with respect to the character of cluster bombs and DU-weapons as weapons of mass destruction

A sub-commission of the **UN Commission on Human Rights** is dealing with the question as to whether **cluster munitions** and **DU weapons** must be qualified as **weapons of mass destruction**.

The United States and other Western countries are obstructing the progress of this work done by this sub-commission as much as possible.

Nevertheless the working group of the sub-commission, dealing with this issue, came in 2002 with a working paper, containing the proposal to condemn **cluster bombs**, as well as **DU**

weapons, to be **indiscriminate weapons** and **weapons of mass destruction**, contrary to a whole range of international humanitarian regulations.

Even when it would be sure that cluster bombs and DU ammunitions were not contrary to whatever provision of the **Rome Statute** and when, moreover, would be ascertained that also the use of such weapons, in itself, should not be, or not yet, in contravention with the **Rome Statute**'s regulations, even than it cannot be sure that a case against such weapons might not overcome possible limitations for admissibility originating from some provisions of the **Statute**.

Just because of the impact of **article 21 Rome Statute.**

8.54 The extent of applicable law within the framework of the Rome Statute - applicability of all principles of international law as well

Article 21 Rome Statute reads:

"Applicable law

> "1. The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws and legal systems of the world including, as appropriate, the national laws of the States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
>
> 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
>
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender (…), age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."

8.55 Legal duty for the ICC even to apply national regulations

So the Court is bound to apply not only the **Statute**, but also other established **international** humanitarian law. And, failing that, even **national** regulations, primarily those of the States involved.

Thus the fact that the **Rome Statute** is still not yet finished on certain points, certainly doesn't mean that the Court should waive jurisdiction with respect to those unfinished issues.

On the contrary, the Court shall be under the obligation to apply, additionally, other **internationally**, or failing that

nationally recognized law.!

8.56 'Outrages upon personal dignity', as a war crime according to the Rome Statute

In respect of the war crime of 'outrages upon personal dignity' of Article 8 (2)(b)(xxi) Rome Statute is stated in the Elements of Crimes:

> "1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons. (49)
>
> (49) For this crime, "persons" can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.
>
> 2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.
>
> 3. The conduct took place in the context of and was associated with an international armed conflict.
>
> 4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

8.57 'Starvation as a method of warfare', as war crime according to the Rome Statute

With regard to the war crime of 'starvation as a method of warfare' of Article 8 (2)(b)(xxv) Rome Statute is stated in the Elements of Crimes:

> "1. The perpetrator deprived civilians of objects indispensable to their survival.
>
> 2. The perpetrator intended to starve civilians as a method of warfare.
>
> 3. The conduct took place in the context of and was associated with an international armed conflict.
>
> 4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

8.58 Starvation as a forbidden method of warfare according to Protocol I

Article 54 Protocol I

> "Protection of objects indispensable to the survival of the civilian population
>
> 1. Starvation of civilians as a method of warfare is prohibited.
>
> 2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive."

8.59 Free passage of emergency relief according to the Fourth Convention

Article 10 Fourth Convention

> "The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the parties to the conflict concerned, undertake for the protection of civilian persons and for their relief."

8.60 Relief actions in time of warfare

Article 70 Protocol I

> "Relief actions
>
> 1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this protocol, are to be accorded privileged treatment or special protection.
>
> (…)

Article 71 Protocol I

> "Personnel participating in relief actions

1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.

2. Such personnel shall be respected and protected.

3. Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel referred to in paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

4. Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated."

8.61 Enabling Red Cross humanitarian activities in time of warfare, according to Protocol I

Article 81 Protocol I

"Activities of the Red Cross and other humanitarian organizations

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

2. The Parties to the conflict shall grant to their respective Red Cross (Red Crescent, Red Lion and Sun) organizations the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict, in accordance with the provisions of the Conventions and this Protocol and the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.

3. The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the assistance which Red Cross (Red Crescent, Red Lion and Sun) organizations and the League of Red Cross Societies extend to the victims of conflicts in accordance with the provisions of the Conventions and this Protocol and with the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.

4. The High Contracting Parties and the Parties to the conflict shall, as far as possible, make facilities similar to those mentioned in paragraphs 2 and 3 available to the other humanitarian organizations referred to in the Conventions and this Protocol which are duly authorized by the respective Parties to the conflict and

which perform their humanitarian activities in accordance with the provisions of the Conventions and this Protocol.

Article 23 Fourth Convention

"Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases."

8.62 Remaining grave breaches of Protocol I

Remaining **grave** breaches of the Protocol are:

Article 85 par. 4 Protocol I

"(a) 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 parts of the population of the occupied territory within or outside this territory, …when committed wilfully and in violation of the Conventions or of the Protocol;

(b) Unjustifiable delay in the repatriation of prisoners of war or civilians, …when committed wilfully and in violation of the Conventions or of the Protocol;

(e) Depriving a person protected by the Conventions [or in the power of the adverse Party] of the rights of fair and regular trial, …when committed wilfully and in violation of the Conventions or of the Protocol."

8.63 Violation of the principles of proportionality and necessity as war crimes

In its Advisory Opinion of **8 July 1996,** regarding **the legality of the Threat or Use of Nuclear Weapons**, General List No. 95, the International Court of Justice considered under 41:

"41. The submission of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning **Military and paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America) (I.C.J. Reports 1986, p. 94, Para. 176)**: "there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law". This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed."

When these principles of **proportionality** and **necessity** must prevail, even in case of legitimate self-defence against an armed attack, the more they must be observed in case of any other armed conflict not conducted within the context of self-defence!

So definitely, the violation of these customary law principles will be a war crime under all circumstances.

The enormous destructions the western States, especially the United States, used to bring about during the wars they have been conducted in the last decade, in terms of civil infrastructures and in terms of destruction of enemy forces, not only constitute breaches of the demand to restrict military attacks purely to military targets only, but represent also structurally continuous and serious **breaches into the principles of proportionality and necessity**.

8.64 Violation of the Chemical Weapons Treaty

The large-scaled use of **Agent Orange** by the US during the Vietnam war as a defoliant certainly was a violation of the **Chemical Weapons Treaty**.

At the same time it was a breach of the customary law prohibition to cause widespread, long-term and severe damage to the natural environment, as also laid down in the **article 35(3)** and **article 55 Protocol I**.

Until today the enormous quantities of this chemical dust, thrown out above Vietnam create dramatic problems for the people's health in Vietnam and causes huge numbers of birth defects.

8.65 The crime of aggression as a war crime

And as far as **the crime of aggression** also is to be considered a war crime - like to be discussed below - there is the same duty for all UN member-states to 'investigate, trace, arrest, extradite or try, and if found guilty, to punish' all suspects of aggression, 'wherever that **aggression** is committed'.

9 THE CRIME OF AGGRESSION

9.1 The crime of aggression according to the Rome Statute

Article 5 par. 1 Rome Statute reads:

> "1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
>
> (a) The crime of genocide;
>
> (b) Crimes against humanity;
>
> (c) War crimes;
>
> (d) The crime of aggression."

Genocide, crimes against humanity and war crimes now being elaborated above, **the crime of aggression** is next.

The fact that **the Rome Statute** characterizes aggression as '**a serious crime**', demonstrates already clearly that aggression constitutes **a major crime** under international law.

9.2 Obstruction by the western States of the implementation of a definition of aggression according to the Rome Statute

Although the western States do pay lip service to this rule, their practices are more and more routinely in sharp contradiction with this prohibition.

This is also the reason why western States are obstructing, till today, the actual implementation of the **ICC**'s jurisdiction over this specific crime. This by means of preventing the general acceptance of a legal definition of aggression within the framework of the **Rome Statute**, needed to make the jurisdiction of the **ICC** over the crime of aggression operational.

9.3 Other efforts by the western States to invalid the prohibition of aggression

Western States, aided and abetted by their domestic judiciaries, also try to invalid the enforcement of the prohibition of aggression by making it appear as if aggression, as a crime under the category 'ius ad bellum' should be treated completely different from war crimes, belonging to the category of 'ius in bello'. Submitting that judicial intervention, and the possibilities thereto, should be considered far more restrictive in respect of the 'ius ad bellum', and consequently also in respect of crimes against the 'ius ad bellum', than in respect of the 'ius in bello', and crimes against the 'ius in bello'.

By pretending this western States try to safeguard themselves from any judicial intervention in the midst of the growing stream of wars of aggression they currently undertake.

The western States' classic defence in court is: the 'ius ad bellum' were not self executing, so consequently acts against the 'ius ad bellum' should be exonerated from judicial assessment.

Using the same line of reasoning, courts in different western States threw out lawsuits directed against undertaking of, or participation in, aggression by western States.

9.4 The crime of aggression as the supreme war crime

The western States' efforts to frustrate expansion of the **ICC**'s jurisdiction over the crime of aggression, and to bypass jurisdiction of domestic courts, are the more highly improper since aggression is not just a major crime under international humanitarian law, but constitutes, as such, even the **supreme crime**.

Moreover, any notion that the category of 'crimes of aggression' is, as a specific legal category, completely separated from the category of 'war crimes', should be not only highly artificial but also a completely wrong conception.

As it is stated during **the Nuremberg trial**:

> "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole" (H.M. Attorney-General (ed.); The Trial of the German Major War Criminals, Part 22, HSMO (London 1959), p. 421).

So the **Nuremberg Tribunal** clearly considers the 'crime of aggression' actually to a large extent a **speciale** of the **genus** 'war crime' and more specifically: the **supreme** war crime !

9.5 Weight of the prohibition of aggression according to international law

After all, the prohibition of aggression is not only **customary law**, as it will be explained here below. It's more. It is the cornerstone of international legal order. And the whole **Charter of the United Nations** is built around this issue.

Therefore, the prohibition of aggression is not only customary law; it is also ius cogens.

Prevention of aggression is by far the most prominent concern of the UN Charter.

Article 1 UN Charter

> De doelstellingen van de Verenigde Naties zijn:
>
> 1. De internationale vrede en veiligheid te handhaven en, met het oog daarop: doeltreffende gezamenlijke maatregelen te nemen ter voorkoming en opheffing van bedreigingen van de vrede en ter onderdrukking van daden van agressie of andere vormen van verbreking van de vrede, alsook met vreedzame middelen en in

overeenstemming met de beginselen van gerechtigheid en internationaal recht, een regeling of beslechting van internationale geschillen of van situaties die tot verbreking van de vrede zouden kunnen leiden, tot stand te brengen;

(ZIE VERTALING)

Article 2 par. 4 UN Charter

"4. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 103 UN Charter

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

(Goed vertaald?)

And also the Preamble of **Protocol I** stipulates clearly:

"The High Contracting Parties,

Proclaiming their earnest wish to see peace prevail among peoples,

Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

(…)

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations, etc."

These shows the enormous weight, attached by these major international instruments, to the abstinence from **aggression**.

9.6 The crime of aggression in juxtaposition with other war crimes, within the framework of the Nuremberg Charter

Anyhow, there is no place for any construction that aggression, as a crime belonging to the category 'ius ad bellum', should be distinguished from other war crimes, belonging to the category 'ius in bello', in a measure that crimes of aggression should fall outside the reach of judicial competence.

That crimes of aggression, belonging to the category 'ius ad bellum' and other war crimes,

belonging to the category 'ius in bello', are not opposed to each other but, on the contrary, are in line with each other, may be diverted also from the fact that the **Charter of Nuremberg** places crimes of aggression and - other - war crimes in juxtaposition. And this in one and the same article.

Article 6 Nuremberg Charter reads:

> "(…) The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:-
>
> (a) **Crimes against peace**: namely, planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for accomplishment of any of the foregoing;
>
> (b) **War crimes**: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) **Crimes against humanity**: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in *execution* of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plans."

9.7 The said outdated status and non-applicability of the Nuremberg Charter

However, by now it is frequently heard that the **Charter of the International Military Tribunal of 8 August 1945 (Charter of Nuremberg)** should be considerated obsolete and/or was only applicable to the then axis-suspects.

This assertion is irrefutably wrong.

The content of **the Charter of Nuremberg** has become beyond any doubt part of the corpus of international humanitarian law, like the Secretary-General of the UN explicitly reconfirms it at the occasion of the establishment of the International Tribunal for Yugoslavia (ICTY).

In **the report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808 (1993) of 3 may 1993, S/25704** it is stated, regarding article 1 of the ICTY Statute:

> "34. In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of

> international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.
>
> 35. The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; 3/ the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; 4/ the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; 5/ and the Charter of the International Military Tribunal of 8 August 1945."

So, being undeniably part of customary law, at least the material law content of the Charter of Nuremberg has acquired lasting and general applicability.

That material content of the **Nuremberg Charter** is also restated in the **Nuremberg Principles**, codified by the **International Law Commission**.

9.8 Validity of the Nuremberg Charter's and Nuremberg Principles' definitions of war crimes, crimes against humanity and the crime of aggression according to international law

This means that also the definitions of 'crimes against peace' - i.e. the crime of aggression -, 'war crimes' en 'crimes against humanity', set forth in **article 6 Nuremberg Charter**, are existing law and are now generally applicable for all States.

It is the explicit intention of **the Rome Statute**, governing the International Criminal Court (ICC), to respect the rules of existing law.

So Article 10 Rome Statute reads:

> "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

9.9 The existence of an adequate definition of aggression provided by the Nuremberg Charter and Nuremberg principles

The **Nuremberg Charter**'s definition of aggression is definitely such a rule of international law, not prejudiced by the **Rome Statute**.

So the international community of States have already a definition of aggression at its disposal.

This statement of **article 10 Rome Statute** cannot remain without implications for the issue of absence of a definition on the crime of aggression within the framework of the **Rome**

Statute.

Article 5 par 2 Rome Statute points out:

> "2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."

So **the ICC** is not yet exercising jurisdiction over the crime of aggression, since a definition in the framework of the **Rome Statute** is not yet available.

9.10 The ICC as already holding jurisdiction with respect to the crime of aggression, though not actually exercising

However, in spite of the fact that the Court is not yet actually exercising its jurisdiction with respect to the crime of aggression, the Court nevertheless already holds jurisdiction over crimes of this category.

That **the ICC** already holds jurisdiction with respect to the crime of aggression is also explicitly acknowledged by the States Parties of the Rome Treaty - so including by the Netherlands - by means of their acceptance of **article 12 par. 1 Rome Statute**.

Article 12 Para. 1 Rome Statute reads:

> "1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5."

And one of the crimes enumerated in **article 5 Rome Statute** is actually the crime of aggression.

So it must be concluded - as it has become already completely accepted by all treaty parties, based on **article 12 Para. 1 Rome Statute** - that **the ICC** already possesses **full jurisdiction** also with respect to the crime of aggression.

9.11 Due application of the crime of aggression by domestic courts within the national legal order of the western States

The very fact that the Court is still actually not yet able to exercise its already existing jurisdiction over crimes of aggression, may not withheld the States Parties' domestic courts from a complete recognition and application of aggression as a crime according to international and, likewise, domestic law.

9.12 Due domestic legal performance against actual aggression as already part of national law systems - additional arguments

The **International Criminal Court** is complementary to national judicial institutions.

This principle is laid down in **article 17** of **the Rome Statute**.

Article 17 Rome Statute reads, as far is relevant here:

> "1. (…) the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State, which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;"

The fact that **domestic courts** should have priority above **the Rome Court** in the field of investigation and prosecution of the crimes referred in **article 5 Rome Statute** - so at least in principle also with respect to the crime of aggression -, is another undeniable indication that the prohibition of aggression is to be considered an integrated and applicable part of domestic rule.

Otherwise such a rule that **domestic courts** should have priority above **the ICC**, also with respect to the crime of aggression, would be senseless.

So it is also **the Rome Treaty** that expresses the fact that all States are under the obligation to consider aggression, according to customary law, as one of the most serious crimes.

As already stressed here above, the prohibition of aggression is not only **customary law**. It is also ius cogens. The ban on force in international relations between States and the principle of non-intervention are the core issues of the international legal order.

So it is also **The Rome Treaty** that establishes the obligation, for all Treaty Parties, to create national penal provisions. In order to enable domestic courts practically to give shape to their position of priority with respect to prosecution of - also - that specific major crime, the crime of aggression.

9.13 The Nuremberg Charter's and Nuremberg Principles' regulations with respect to aggression as a substitute for lacking domestic regulations

However, what situation may exist as long as a definition of aggression within the framework of **the Rome Treaty** and national law systems is not yet established?

There will be than still in existence the generally accepted definition of aggression, constituted by **the Nuremberg Charter** and **The Nuremberg Principles**.

This definition by the **Nuremberg Charter**, being by now customary law, states that:

"planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in an common plan or conspiracy for accomplishment of any of the foregoing", should be a **crime against peace**, and consequently **a crime of aggression**.

So the fact that within the framework of **the Rome Statute** a definition of aggression is not yet available, and the same would be the case for domestic legal systems, would let unimpeded that the definition of aggression, set forth by **the Nuremberg Charter** and **the Nuremberg Principles**, constitutes a generally accepted definition according to international humanitarian law.

Which can act as a substitute definition within the legal orders of national states.

The fact that this definition of **the Nuremberg Charter** and **the Nuremberg Principles** represents customary law of **ius cogens**, and accordingly reflects consensus, will be sufficient for that.

9.14 Final conclusion and summary with respect to the applicability of the norm of prohibition of aggression before domestic courts in western States

In the perspective of **the Charter of Nuremberg** as well as **the Rome Treaty**, **domestic courts** of the States Parties of the Rome Treaty may no longer deny the prohibition of aggression as a self-executing legal principle in their domestic law systems.

This was already indicated after the **Nuremberg** and **Tokio trials**, where the principle of personal responsibility and liability for crimes of aggression has been established, but is now - as a result of the process towards establishment of **the ICC** - for everybody beyond any doubt.

Also the fact that it has repeatedly stated in **the Rome Statute** that **the ICC** already has jurisdiction with respect to the crime of aggression and is only not yet able actually to exercise that jurisdiction, cannot stay without consequences.

So domestic courts of national States cannot avoid any longer to articulate this principle of the prohibition of aggression in their judgments and to apply as much as possible this principle in their own domestic law systems. Using the definition of aggression of the **Nuremberg Charter** and the **Nuremberg Principles** as a guideline.

And this implies also that what is stated in **article 6 Nuremberg Charter** regarding the responsibility of 'leaders, organizers, instigators and accomplices' for war crimes, crimes against humanity and crimes against peace is equally well still valid as a matter of customary law.

According to the **Nuremberg Charter** nobody can claim impunity in front of suspicion of war crimes, crimes against humanity and **crimes of aggression**.

So even government's leaders may be subject of prosecution of these most serious categories of crimes, the crime of aggression included.

However, this is not only an imperative, to derive from the customary law-character of the

Nuremberg Charter, but even more urgently prompted by the **Rome Statute** itself. As such reconfirming in a very convincing way that also crimes of aggression are crimes of the utmost gravity, which cannot remain unpunished.

9.15 Prominent position in the Rome Statute for the necessity to counteract aggression

The weight attached by the international community to counteract aggression is also prominently expressed in the **Rome Statute**.

The Preamble of the Rome Statute, as far as relevant here, reads:

> "The States Parties to this Statute,
>
> (…)
>
> Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
>
> Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,
>
> Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,
>
> Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the treat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,
>
> Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,
>
> (…)
>
> Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions (par. 10)
>
> Resolved to guarantee lasting respect for and the enforcement of international justice, (…)".

9.16 The Rome Statute's system of penalties as a substitute for western State's lacking penalties systems with respect to the crime of aggression

So also **the International Criminal Court (ICC)** is built upon the principle of no impunity for crimes against international law, including the crime of aggression.

It is from this view that the **Rome Statute** might provides for a detailed system, inherently accepted by all State Parties, of penalties which could also be applied to the crime of aggression.

Article 77 Rome Statute establishes:

> "Applicable penalties
>
> 1. (…) the Court may impose one of the following penalties on a person convinced of a crime referred to in article 5 of this Statute:
>
> (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years, or
>
> (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
>
> 2. In addition to imprisonment, the Court may order:
>
> (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
>
> (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties."

Rule 146 Rules of Procedure and Evidence of the International Criminal Court reads:

"imposition of fines under Article 77

> 1. In determining whether to order a fine under article 77, paragraph 2(a), and in fixing the amount of the fine, the Court shall give due consideration to the financial capacity of the convicted person, including any orders for forfeiture in accordance with article 77, paragraph 2(b), and, as appropriate, any orders for reparation in accordance with article 75. The Court shall take into account (…) whether and to what degree the crime was motivated by personal financial gain.
>
> 2. A fine imposed under article 77, paragraph 2(a), shall be set at an appropriate level. To this end, the Court shall, in addition to the factors referred to above, in particular take into consideration the damage and injuries caused as well as the proportionate gains derived from the crime by the perpetrator. Under no circumstances may the total amount exceed 75 per cent of the value off the convicted person's identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants.
>
> 3. In imposing a fine, the Court shall allow the convicted person a reasonable period in which to pay the fine. The Court may provide for payment of a lump sum or by way of instalments during that period.
>
> 4. In imposing a fine, the Court may, as an opinion, calculate in according to a system of daily fines. In such cases, the minimum duration shall be 30 days and the maximum duration five years. The Court shall decide the total amount in accordance with sub-rules 1 and 2. It shall determine the amount of daily payment

in the light of the individual circumstances of the convicted person, including the financial needs of his or her dependants.

5. If the convicted person does not pay the fine imposed with the conditions set above, appropriate measures may be taken by the Court (…). Where, in cases of continued wilful non-payment, the Presidency, on its own motion or at the request of the Prosecutor, is satisfied that all available enforcement measures have been exhausted, it may as a last resort extend the term of imprisonment for a period not to exceed a quarter of such term or five year, whichever is less. In the determination of such period of extension, the presidency shall take into account the amount of the fine, imposed and paid. Any such extension shall not apply in the case of life imprisonment. The extension may not lead to a total period of imprisonment in excess of 30 years.

6. In order to determine whether to order an extension and the period involved, the Presidency shall sit in camera for the purpose of obtaining the views of the sentenced person and the Prosecutor. The sentenced person shall have the right to be assisted by counsel.

7. In imposing a fine, the Court shall warn the convicted person that failure to pay the fine in accordance with the conditions set out above may result in an extension of the period of imprisonment as described in this rule."

And Article 78 Rome Statute determines:

"Determination of sentences

1. In determining the sentence, the Court shall, in accordance with the Rules of procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstance of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77 Paragraph 1(b)."

Rule 145 of the Rules of Procedure and Evidence of the IIC reads:

"Determination of sentence

1. In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall:

(a) Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person;

(b) Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted and the crime;

(c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, inter alia, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

2. In addition to the factors mentioned above, the Court shall take into account, as appropriate:

(a) Mitigating circumstances such as:

(i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as a substantial diminished mental capacity or duress;

(ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court;

(b) As aggravating circumstances:

(i) Any relevant prior conviction for crimes under the jurisdiction of the Court or of similar nature;

(ii) Abuse of power or official capacity;

(iii) Commission of the crime where the victim is particularly defenceless;

(iv) Commission of the crime with particular cruelty or where there were multiple victims;

(v) Commission of the crime for any motive involving discrimination (…);

(vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

3. Life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances."

Article 80 Rome Statute states:

"Non-prejudice to national application of penalties and national laws

Nothing in this part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part."

In other words: if the system of penalties and determination of the sentences provided for by

the **Rome Statute** and the **Rules of Procedure and Evidence of the ICC** is not in contradiction with any national law of a State which is a party to the **Rome Statute,** and if the specific State concerned do not provide for penalties on a basis of national law in respect of the crime of aggression, nothing will stand in the way to apply directly this **Rome Statute**'s system of penal provisions and determination of sentences in the **national** legal system of criminal justice, unless this would lead to an explicit collision with the national law of that specific State.

Under these preconditions everything shall be ready for direct application of the detailed and sophisticated **Rome Statute**'s system of penalties and determination of sentences in respect of the crime of aggression into the **national** legal systems of those State parties to the **ICC**, which have failed, wilfully or not, to implement such provisions with respect to the crime of aggression in their domestic penal law system by own national legislation.

9.17 The obligation, binding for all western States, to prosecute crimes of aggression as a duty which can already be met

Therefore the duty stipulated by customary law, as expressed in the **Nuremberg Statute** and reconfirmed nowadays in the **Rome Statute**, prescribing that persons against whom is evidence that they have committed a **crime of aggression** were to be traced, arrested, tried and, if found guilty, punished, should be considered in no way a duty which cannot be fulfilled, but is, on the contrary, a binding legal obligation for all states, that can be met.

After all, it should be assumed that the ius cogens-character of the prohibition of aggression, in combination with the customary law characteristics of definition of aggression in the **Nuremberg Charter** and the obligations endorsed under the **Rome Statute** to create a domestic legal system capable of implementing the position of priority with respect to, also, the trying of crimes of aggression, is putting upon the various States an imperative framework to deal with the adjudication of criminal law measures regarding such crimes of aggression also on domestic level.

Such obligation can be met, even when national penal law provisions with respect to the crime of aggression fail. The **definition of aggression**, to be diverted from the **Nuremberg Charter**, is not only undisputed on the level of international law, but also clear enough to be valid within the national legal systems.

And furthermore the **ICC**'s treaty regulations provide the domestic judges also with adequate guidelines for **penalties** and **determination of sentences** in respect of the crime of aggression.

9.18 When might be there 'a war in violation of international treaties, agreements or assurances', as defined in article 6 Nuremberg Charter?

Next question is: when there is a specific war threatening or going on, should that war be seen as a war 'in violation of international treaties, agreements or assurances', as stated in article 6 of **the Charter of Nuremberg**?

As soon as there is enough evidence that such will be the case and that:

1. the specific war at issue is threatening or being conducted in contravention with the prohibition of aggression as a prohibition according to customary law, which has found also explicit expression in treaty law, for instance, art. 2 par. 4 of **the Charter of the United Nations**;

2. there is not a situation of legal self-defence according to article 51 of **the UN Charter** and

3. there is no mandate for the use of force by the Security Council according to Chapter VII of **the UN Charter**,

there will rise, under **national criminal law**, automatically the obligation to take legal steps towards the States, responsible for that aggression and towards the 'leaders, instigators and accomplices' of it, as formulated in the **Nuremberg Charter**.

9.19 If penal law action against aggression definitively is turned down, nevertheless there is always the prospect of civil law action, based on tort

However, if the adjudication of **penal law** diverted from these **international** instruments, in domestic legal affairs, in respect of the crime of aggression, substituting failing national legal provisions, nevertheless might be turned down - - and that in the light of the fact that the national States concerned are even not remotely intending to fulfil their legal duties to make the crime of aggression liable by means of national legislation -, than such outcome still doesn't mean that the perpetrators of aggression and their accomplices might remain completely beyond the reach of domestic law.

Even than, at least, **national** law instruments of **civil law** character remain applicable in the struggle against aggression. For whether those States are failing to create domestic law provisions which will make aggression punishable according to national law or not, the character of aggression as a major crime to international law always also may be invoked for pleading **tort** in case of aggression.

After all, the fact that acts of aggression would be criminal implies that they are **torts**.

And that permit private parties to bring these claims in **civil** court as well.

Consequently, the firmly established nature of aggression as a major crime at least provides persons who are victims of aggression, or are threatened by it, furthermore the opportunity to claim, **on the basis of tort**, to end such crime of aggression, or (complicity to) the preparation of it, before domestic courts of the States, which commit that aggression or act as accomplices.

9.20 Definition of 'victims' according to the Rome Statute

The Rules of Procedure and Evidence of the ICC provides for a definition of victims:

Rule 85 of the Rule of Procedure and Evidence of the ICC

"Definition of victims

For the purposes of the Statute and the Rules of Procedure and Evidence:

(a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, and or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."

9.21 Civil law aspects of this international criminal law definition of 'victims'

Obviously, this constitutes a **criminal law definition** of 'victims'.

The standard for 'victims' as applicated in **criminal cases** is going to be much stricter than that used in **civil cases**.

If any suspect might be convicted of being a perpetrator or an accomplice to the crime of aggression, which should have been made victims, it would seem paraxial not to hold the same suspect responsible for the same actions under the less rigorous **civil law standard**.

And of course it would be anomalous that any act should be considered as a supreme crime according to international penal law standards, but the perpetrators and their accomplices would incur no civil liability for it !

With respect to whatever conduct, all western States recognize in their legal systems standards, which lead to liability for crimes as being not **criminal** conduct alone, but also **tortuous conduct**.

The same counts also for **complicity** to crimes, as tortuous conduct.

For instance the American law system recognizes, with respect such complicity, the **Restatement Second of Torts**, which says in part:

"For harm resulting to a third person from tortuous conduct of another, one is subject to liability if he:

(a) orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortuous if it were his own, or (b) conducts an activity with the aid of the other and is negligent in employing him, or (c) permits the other to act upon his premises or with his instrumentalities, knowing or having reason to know that the other is acting or will act tortuously..." (Restatement (Second) of Torts, Para. 877 (1965).

9.22 Prospects of civil law action in western States by non-western victims of western aggression

So there always remains the opportunity of **civil law action**, if **criminal law action** may be turned down.

Following this way, States committing aggression, as well as their accomplices, and person who share the criminal responsibility for it, can still be hold accountable for their criminal acts by the victims.

So these victims will have not only an actionable claim **to end aggression** by a judicial decision, but also they will have an actionable claim to **seek damages** in civil litigation before the domestic courts of the aggressor-States and their accomplices.

9.23 Possibilities to file criminal law complaints against acts of aggression at the ICC's prosecutor office already now

The very fact that the jurisdiction of **the ICC** with respect to aggression is already in existence, however it still is not yet possible for **that Court** to exercise this jurisdiction, since all aspects of a definition are not yet implemented, determines that it may be possible already **now** to file complaints at **the ICC**'s Registrar wit respect to acts of aggression.

The ICC must such complaints than consider admissible, though they cannot yet be considered by now.

This should also be deduced from the opening words of the **articles 13**, **14** and **15** of **the Rome Statute**, mentioning all together the element that initiation of an investigation by the Prosecutor may be possible in case of the alleged commission of: "a crime **within the jurisdiction of the Court**", this, in combination with the fact that, according to **article 12 jo. Article 5 Rome Treaty**, the ICC **has** already jurisdiction with respect to the crime of aggression.

So any complaint about aggression should be accepted and registered by the prosecutor of the **ICC** and subsequently should kept in store at the prosecutor's office.

Till the moment has been arrived that an official definition of aggression may be implemented in **the Rome Statute**.

Than such a complaint should still be considered by the prosecutor.

After all, with respect to such major crimes against international humanitarian law as aggression no limitation applies.

So the prosecutor should, save complaints about aggression up till further instructions.

Thus as soon as it will be clear that the **domestic** Prosecutor of a western State will turn down a complaint about aggression for whatsoever reason, that complaint might be transferred to the Prosecutor of **the ICC**.

And stored there in the archives of the Prosecutor, in order to be dealt with later on, when

there may be created a definition of aggression, suitable within the framework of **the Rome Statute** for all States Parties to **the Rome Treaty**.

9.24 In search for already generally accepted criteria for definition of the crime of aggression within the framework of the Rome Statute

As already explained above, as long as a treaty-based definition of aggression within the framework of **the ICC** will be absent, there is the substitute of the definition of **'crimes against peace'** as laid down in article 6 of **the Charter of Nuremberg** and in **the Nuremberg Principles**.

So legal action, initiated to claim, according to **civil law standards** and based on **tort**, to end aggression and/or to seek damages before domestic court, will always remain without predominant problems in respect of a proper definition of aggression.

However, also within the framework of **the Rome Treaty** there is already in motion a permanent process of search for a definition of aggression, which may suit all Rome Treaty Parties with a view to the application of, specifically, this **Rome Treaty**. Westerns countries nowadays block the search, in order to prevent any outcome. Nevertheless this present malicious behaviour of the western States don't succeed in preventing that at least the outlines for such a definition, to develop in view of **the Rome Treaty** as a specific treaty, nevertheless are already appearing clear.

First of all, all States Parties agree on the starting point that at least the essence of the UNGA Aggression Definition Resolution should be encountered again in the Rome Treaty definition of aggression.

9.25 UNGA Resolution 3314 (XXIX) on Aggression

The core of the UNGA Definition of Aggression Resolution, **namely Resolution 3314 (XXIX) of 14 December 1974**, reads as follows:

> "art. 1. Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.
>
> Art. 2. The first use of armed force by a State in contravention of the Charter shall constitute **prima facie** evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of the relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.
>
> Art.3. Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression:

a. The invasion or attack by armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

b. Bombardment by armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

c. The blockade of the ports or coasts of a State by the armed forces of another State;

d. The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;"

9.26 Broadly accepted elements by the States Parties of the Rome Statute in respect of a definition of aggression

All these elements can be recovered in most of the propositions for a definition of aggression, made by the various States Parties of the Rome Treaty, as submitted to **the Preparatory Commission for the International Criminal Court**.

As an example of these proposals will follow here the proposal submitted to **the Preparatory Commission** by Algeria, Bahrain, Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates and Yemen. It reads:

Article 5

Crimes within the jurisdiction of the Court

Crime of aggression option 2

Amend paragraph 1 as follows:

"1. For the purpose of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State against another State, or deprive other peoples of their rights to self-determination, freedom and independence, in contravention of the Charter of the United Nations, by resorting to armed force to threaten or violate the sovereignty, territorial integrity or political independence of that State or the inalienable rights of those peoples.

2. Acts constituting aggression include the following:

(a) The invasion or attack by armed forces of a State of the territory of another State, or any military occupation, however temporarily, resulting from such an invasion or attack, or any annexation by the use of force of the territory of another State of part thereof;

> (b) Bombardment by the armed forces of a State of the territory of another Statute or the use of any weapons by a State against the territory of another State;
>
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;
>
> (d) An attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State;
>
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;
>
> (f) The action of a State in allowing its territory, which it has placed at disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
>
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

9.27 The infamous nonsense of absence of self-execution with regard to the norm of prohibition of aggression

Especially the basic formula:

> "For the purpose of this Statute, **the crime of aggression is committed by a person who is in the position of exercising control or capable of directing political/military actions in his State against another State**", constitutes an element, one may find back in most of the proposals for definition of the crime of aggression submitted by the Member States (proposal submitted by Italy and Egypt, proposal by Germany, by Cameroon, by Cuba, etc.).

Also in the light of this formula, namely '**the crime of aggression is committed by a person**, etc.', it is a total mystery how any State could hold in civil law proceedings before western domestic courts that the prohibition of aggression, as a norm of customary law, should not be a self-executing norm! As it is usually be done by the Western States' representatives in such legal proceedings, so has been experienced in the recent past. This is obviously in order to keep at a distance victims and potential victims of acts of aggression, committed by those Western States.

A number of Japanese high officials and military are hanged, after the end of World War II, for their commission of the crime of aggression.

So how should it be possible to be hanged for violation of a norm that were not self-executing?

The more it is incomprehensible that many western judges are prepared to reward such

complete legal nonsense that the prohibition of aggression should not be a self-executing norm, when such aggression manifestly has been committed by western States.

So one can see the true face of so-called Western judicial independence, when there is the estimation - right or wrong! - that fundamental interests of the Western state or states concerned are at stake !

9.28 Other pseudo-legal pretexts, usually put forward by western States' legal representatives and followed by westerns judges in order to bounce off legal claims coming from (potential) victims of aggression to end western acts of aggression and to seek damages

Claims filed at the domestic courts of the Western aggressor-States in order to demand ending of aggression, or directed at reparations for the damage inflicted upon the victims of such western aggression, are mostly also countered by the argument that war making, or support to that, is a matter of politics, more specific a matter of foreign and defence politics.

Next step than is to argue that the separation of powers in a democratic society and the principles of due process may determinate that matters of politics belong to the prerogatives of the executive.

All the more this should be the case with respect to what are considered to be issues of foreign and/or defence policy.

This allegedly because that foreign and defence politics are highly interlinked with relationships between states.

And diplomatic and other relations on the level of states are a field from which the judiciary has to keep distance, so this kind of reasoning concludes.

So the conclusion that allegedly has to be drawn from this complex of arguments is that the judiciary must keep out of affairs of warfare. And cannot take notice of questions as to whether or not a specific waging of war constitutes aggression.

This outcome is wrong, especially since this approach is wrong.

If this thesis would make sense, than there never might have been such international rules, like the **Nuremberg Charter** and the **Rome Statute**, that make aggression liable to punishment !

The whole legal concept of attaching penalties to aggression than might not even remotely have been able to occur !

This is definitely sufficient to finish with this thesis! So perhaps not necessary also this, additionally, the lapse already starts here with the course of reasoning. It is a misrepresentation to present the question as to whether or not a waging of war may be a war of aggression as a matter distracted to the judiciary, only since it is allegedly **a matter of (foreign/defence) politics**.

To its very nature this question is a **legal** question according to international law, and this just pre-eminently.

After all, when there is instituted a claim at a domestic court, demanding an end to (participation in) aggression, that claim primarily amounts to request the court concerned to assess the legitimacy and legality of the warfare at issue.

This request to such assessment of the legality of the war is purely a request for **a judgement on a particularly legal matter**.

All the more this is pre-eminently **a judgement on a** legal **matter**, since the outcome of that judicial assessment will ascertain whether the conduct of that specific war, or the participation therein, may be the commission of **a major crime**, or complicity in such a crime.

And the assessment as to whether there is the conduct of **a serious crime** or not, just as much as claims aimed at such an assessment, cannot be characterized otherwise than as **legal affairs par excellence**!

So dealing with the question whether or not a specific waging of war should be considered as aggression, is not a matter - at least not primarily - of dealing with politics, but, first of all, dealing with a legal question.

9.29 Opinion of the International Court of Justice on the legal character of international humanitarian law issues, interwoven with politically sensitive aspects

That a question which, with the help of a certain kind of reasoning, could be reduced to a political issue, however nevertheless may constitute, from a legal point of view, pronouncedly a legal question, is also emphasized by **the International Court of Justice** in its Advisory Opinion of 8 July 1996, General List No. 95, with regard to the Legality of the Threat or Use of Nuclear Weapons.

The International Court of Justice states in this respect:

> "13. The Court must furthermore satisfy itself that the advisory opinion requested does indeed relates to a "legal question" within the meaning of its statute and the United Nations Charter.
>
> The Court has already had occasion to indicate that questions "framed in terms of law and rais[ing] problems of international law...are by their very nature susceptible of a reply based on law...[and] appear...to be questions of a legal character" (**Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 18, Para. 15**).
>
> The question put to the Court by the General Assembly is indeed a legal one, since the Court is asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law.
>
> The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to

deprive it of its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute" (**Application for review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p.172, Para 14**). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invite it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. **Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, I.C.J. Reports 1947-1948, pp 61-62; Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, pp 6-7; Certain Expenses of the United Nations (article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 155).**

Furthermore, as the Court said in the Opinion it gave in 1980 concerning the **Interpretation of the Agreement of 25 March 1951 between 1951 between the WHO and Egypt**:

"Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate…" **(Interpretation of the Agreement of March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 87, Para. 33**).

The Court moreover considers that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion."

So the opinion of **the International Court of Justice** is evident: a legal question cannot be reduced simply to **a political question**, just because there are political aspects included.

9.30 Opinion of the Ontario Supreme Court on the basically legal character of a specific international humanitarian law issues, interlinked with politics

This opinion is reflected in the verdict, issued by the Canadian **judge Wright** in the case of **Aleksic et al v. Canada** before **the Ontario Supreme Court**.

In this case is at issue a claim for damages, directed against the Canadian State, by Yugoslav victims of NATO's bombardments during NATO's 1999 war of aggression against Yugoslavia.

In spite of the fierce defence by the Canadian State that this is all to be considered as a matter of politics, and consequently a prerogative of the Crown, judge Wright stated as follows.

Unfortunately, only the authorized German translation of the original English version is here available:

"**Begründung der Urteils durch Mr. Justice Wright**

(1) In dem vorliegenden fall haben sich kanadische Staatsangehörige mit Ansprüchen auf Schadenersatz wegen ihnen angeblich van der Exekutive der kanadischen Regierung zugefüchter Körper- und Vermögensschäden an ein kanadisches Gericht gewandt. Die Executive hat das Gericht gebeten, diese Ansprüche ohne Verfahren abzuweisen und diesen kanadischen Bürgern ihren "Tag vor Gericht" zu verweigern. Der Vertreter der Executive macht geltend, dass bei diesen Ansprüchen Fragen der "Hohen Politiek" betroffen seien, die nicht justiziabel seien, dass heisst also Fragen, die sich einer gerichtlichen Prüfung entziehen.

(2) Der Untersuchungsrichter Mr. Justice Sedgewick stimmte dem nicht zu. Er lehnte die Abweisung ab. Ich schliesse mich seiner Entscheidung an.

(3) Meiner Meinung nach ist die einzige Frage der "Hohen Politik" in diesem Fall die Frage, ob Kanada ein Rechtsstaat ist oder ob es Zeiten in unserem nationalen Leben gibt, in denen die Executive den Bürgern Schaden zufügen kann ohne Rücksicht auf das innerstaatliche Recht, das Völkerrecht oder feierliche Vereinbarungen zwischen der Krone und andere Staaten.

(4) Lord Bingham schreibt in seimen Buch "The Business of Judging" (Oxford University Press, 2000) Seite 208 (als Berater im Fall der Civil Service Unions v. Minister for the Civil Service (1988) AO 374): "Das House (of Lords) hat klargestellt, dass nahezu jede Ausübung öf-fentlicher Gewalt, gleich aus welcher Quelle diese Befugnis gespeist wird, von den Gerichten nachgeprüft werden kann."

(5) Aus meiner Sicht stelt sich die Frage der Justiziabilität nicht. Bei diesem Fall handelt es sich um eine einfaches Verfahren um Schadenersatz wegen Körper-und Vermögensschäden.

(…)

(10) Selbst wenn die Executive die kanadische Streitkräfte im Rahmen der Prärogative zum Einsatz bringen kann, bedeitet das nicht, dass sie dadurch über unbeschränkte Befugnisse verfügt. "Die Prärogative ist ein Zweig des Common Law, weil sie sowohl von Gerichtsentscheidungen begründet als auch vom Umfang her festgelegt worden ist. Kurz gesagt, "Die Prärogative besteht aus "den Befugnissen und Privilegien, die das Common Law der Krone zugebilligt hat." Peter Hogg, Constitutional Law in Canada. Loose-Leaf Edition (Toronto) Carswell 1995, auf 1,9 (Black v. Chrenen (2001) 54 O.R. (3d) 215 auf Seite 224, Abs. 26).

(11) Seit dem "Case of Proclamations" und der "Glorious Revolution" unterliegt die Ausübung von befugnissen durch die Executive einschliesslich ihrer Anwendung der Prärogative der Herschaft des Rechtes. Heute wäre es ein Schock für das Gewissen, wenn sich die Executive auf die prärogativen Rechte berüfen könnte, um unrechtmässige oder im Widerspruch zu unseren internationalen Verpflichtungen stehende Handlungen oder Unterlassungen zu rechtfertigen. Zur Wahrung der Ehre der Krone müssen die Gerichte dafür sorgen, dass sich die Exekutive nicht auf solche Gesetze berufen kann, um ihre unerlaubten Handlungen zu rechtfertigen.

> (12) Meiner Ansicht nach kann bei der Beurteilung der Angemessenheit der Handlungen oder Unterlassungen der Executive das Prozessgericht nicht nur ihre Legalität gemäss innerstaatlichem Recht, sondern auch nach dem Völkerrecht prüfen. Ausserdem kann ihre Legitimität im Lichte unserer internationalen Verpflichtungen geprüft werden.
>
> (…)
>
> (15) Meiner Ansicht nach gibt es keine Begründung für ein Abweisen der Klage in diesem Stadium."
>
> (Ontario Superior Court, Steven Aleksic et al v. Canada, nr. Az.:01-DV-000583, authorized translation in German, filed annexed at the motion of Germany in the case Milenkovic c.s. / Germany, Landgericht Bonn, 19 December 2002)

So also judge Wright states it here very clear: the only matter of "high politics" here is the question as to whether Canada constitutes a constitutional state, or whether there might be periods in history of Canada's national existence, in which it should be permitted to the executive to inflict damages to citizens without any consideration of the law between states, international customary law and agreements between states.

9.31 Requirements of the constitutional state - position of the national parliaments in the debate on legality of warfare

Requirements of the constitutional state - position of the national parliaments

Thus to keep on arguing that the issue as to whether some acts of war may constitute acts of aggression will remain, as **a matter of politics**, beyond the reach of the national juridiciary, means to hold on to deny itself, in a State that considers itself a constitutional State, the possibility for judicial assessment as to whether or not acts conducted by the state are crimes in violation of international law.

As a response to this, one may hear that if the parliament may have agreed with a war, or with support to such a war, it has to be supposed that a test as to whether or not that war should be legal and legitimate is fulfilled. And that subsequently may be assumed that the legality and legitimacy of that action are for certain.

So the judge has to stay aside.

This view represents also a misconception of where a constitutional State stands for.

Eventually, in a constitutional State, it is **the judge** who determines what should be legal or illegal. And also when in many affairs the parliament of course should be the first chain to decide on the legitimacy and legality of performances of the state, it remains, within the framework of a constitutional State, eventually the judge who has **to decide finally** as to whether or not there is legitimacy and legality in a specific performance by the State.

9.32 Necessity for a double assessment about the legality of warfare

This means that, in a democracy, there shall be needed finally, in respect of various issues, a **double assessment**. Before one eventually may decide about legitimacy and legality of performances by the State.

All the more such a double assessment, in questions as to whether a specific warfare should be seen as a performance of aggression, shall be inescapable because, as it will be elaborated below, such questions are not - at least not primarily - a matter of politics, but first of all, from a legal point of view, not only a matter as to whether or not the State which conducts such acts, or support them, is committing crimes according to international and national law standards, but also as to whether the State, by such acts, may affect basic human rights of individuals who are victims of those acts of war.

So, in essence, to deal with the issues of legality and legitimacy of a war, is to deal with the issue as to whether or not there is severely criminal behaviour at stake and a violation of human rights of the victims of that specific war.

To assess that should be pre-eminently a **judicial task**.

9.33 Aggression as the conduct of certain common crimes according to national penal law of western States - true legal nature of the outcome of acts of war, stemming from aggression, in the perspective of national penal law

Anyhow, all States, no matter as to whether they are party to the **Geneva Conventions** and/or the **Rome Statute** or not, must face the obligations, resulting from their **own domestic penal provisions**.

Consequently, this also in respect of acts taking place at the time of what is called “war”, and committed by persons who find themselves within the **common criminal law jurisdiction** of those States.

So first of all acts committed, in that situation of said “war”, by the own nationals of those States. Who are, after all, within the war conducting States’ own national jurisdiction.

Aggression involves inevitably acts of war.

Aggression is illegal. Since aggression only may find expression in war acts, it should be accepted that the illegal character of aggression also extends over those acts of war.

So these acts of war are equally illegal.

There is no argument why this should be perceived otherwise.

9.34 The untenable thesis that illegal war could give birth to legal acts of war

Any other view on this issue, arguing that in case of aggression there still might be legal acts of war, fails owing to the outcomes of such acts of war.

The outcomes of such acts of war are after all - and this is inherent in the very nature of acts of war, legal and illegal equally - destruction, death, injured and, generally speaking, other infringements of subjective rights.

Such acts, indicated as common crimes by the States' own **national penal regulations**, committed by their own nationals and perpetrated during what is indicated as "a war", should be prosecuted and sentenced by the States' own national judiciary.

So to advance the thesis that - illegal - aggression might generate legal acts of war, would imply to advance the thesis that from an illegal war could stem legal destruction, legal death, legal injuries, and legal infringement of subjective rights.

How such an **illegal** war might give birth to **legal** destruction, in the broadest sense of destruction of goods and humans, than remains without explanation and likewise inexplicably.

Still there are adherents to the theory that the legality of acts, causing harm to humans and goods, during what is called "a war", should be regarded as distinct from the legality of the same kind of acts, causing harm to human and goods during what is **not** to be called "a war". And this irrespective as to whether what is called "a war" were a **legal** or an **illegal** war.

According to the adherents to this theory, whatever acts are committed during what is called "a war", such acts have to be considered as never falling within the category of **common criminal offences** according to **national law**.

So according to this theory, even the most serious crimes, committed by the nationals of a state, conducting or participating in what is called "a war", were never to qualify in terms of violations of the own national penal regulations of the concerned State or States. No matter as to whether that "war" were **legal** or **illegal**.

Apparently this conception is also reflected in the view of the Attorney General of Canada, expressed in the already mentioned case **Aleksic v. Canada** before **the Ontario Superior Court of Justice**.

He asked in this case the following question - unfortunately also here only the authorized German translation is available -:

> "(38) Wenn ein kanadischer Bürger nach Jugoslawien gereist wäre, eine Bombe unter das Haus einer beliebigen Person gelegd und es in die Luft gesprengt hätte, wodurch dem Bewohner Schaden zugefügt worden wäre, dann gäbe es kaum Zweifel, dass der Bewohner nach Kanada kommen und der Täter wegen Körperverletzung und auf Ersatz des erlittenen Vermögensschadens verklagen könnte. Ist es etwas anderes, wenn dasselbe Haus nicht van einem Staatsangehörigen, sondern von der Regierung mittels einer van einem kanadischen Flugzeug abgeworfenen Bombe in die Luft gesprengt wird, wobei dies auf die Entscheidung der kanadischen Regierung, an der Bombardierung Jugislawiens durch die NATO teilzunehmen, zurückzuführen ist?"

According to the Attorney General of Canada the answer must be affirmative, just because in the second case the illegal destruction would be based upon **political decisions**.

So this Attorney-General dares to claim that when death and destruction were inflicted

illegally from high in the skies and instigated illegally by a State's government, this should be considered as totally different from inflicting illegally death and destruction from below on the ground, conducted illegally not by a State's government.

In the first situation, to his opinion, only regulations of **international law** were applicable, while **national penal provisions** were excluded in relation to the perpetrators and other responsible persons.

In the second case, to his opinion, the perpetrators and their co-responsibles should face prosecution according to **national criminal law**.

Eighty years after the first steps to outlaw the use of illegal force between States, i.e. to outlaw aggression, by the Briand Kellogg Pact, and more than fifty years after the definitive ban upon force, confirmed by the UN Charter, there is no ground anymore for such a distinction.

The consequences of illegal inflicting of death and destruction are in both situations completely the same, namely the same illegally inflicted grief and damage for the victims and the same infringement of the legal order.

And secondly, it is a misconception that the first case should be regarded as a **matter of politics**. As pointed out above, it is primarily, from a **legal point of view as well as from the outlook of the victims, who are addressing the judge for his judgment**, a matter of illegal breaches in their subjective rights.

So, as long as a legal foundation behind those acts fails, it doesn't matter that, in the first case, one speaks in terms of "a war", based upon political decisions, and in the second situation one doesn't.

What is prevailing than will be the fact of the same illegality in both cases.

Which makes that, in both cases, **national criminal law** shall be applicable.

Any opposite perception is absolutely wrong.

An example will make this clear.

Take the case of, for instance, Belgium starting, after a period of growing tensions between the two countries, military attacks and bombardments against the Netherlands. Not in a situation of legal self-defence or sanctioned by a Security Council authorization, but only because Belgium feels threatened by the Netherlands and intends to inflict a decisive pre-emptive military blow. However, Belgium restricts its attacks and bombardments strictly to what is to considered military targets: military barracks, military installations, concentrations of troops, etc. In the course of its military actions, Belgium's military force kill and injure thousands of Dutch soldiers and inflicts damages for tens of millions of euros. As a side effect they kill and injure also hundreds of Dutch civilians, but all purely to be blamed on 'collateral damage'.

According to the view that such an **illegal** war is going to produce **legal** outcomes of military actions in terms of casualties and material losses, as long as those military actions are directed at military targets, all these thousands of Dutch casualties were to be seen as **legal** casualties, and all those material destructions were to be regarded as **legal** damage.

So far, in terms of that view, all what has been inflicted by Belgium with military means were total **legal** and **legitimate** in sense of international law.

The European Charter on Human Rights indeed forbids arbitrary killing of people, yet this killings by Belgium were not arbitrary, but the result of **legal** acts of war. So they were **legal** killings. And neither the Netherlands as a State, nor the victims of this Belgian acts of war and their surviving relatives as individuals, who are duped, might have any form of legal redress.

Nobody may believe that this should be a correct interpretation of international law !

9.35 All destruction in terms of human lives and goods stemming from a war of aggression as being not only violations of international humanitarian law, but as bearing also the characteristics of common offences according to national criminal law

So it has to be faced that, since the moment in history that war (without authorization of the Security Council and not instigated by legal self-defence) is outlawed, not only the conduct of war should be illegal and criminal, but also all destruction, originating from such an illegal and criminal war, should be considered illegal and criminal as well.

This implies that all destruction of goods, all injuries, all casualties and all other modalities of infringements of subjective rights, resulting from a war of aggression, are likewise to be qualified as penal acts, as offences according to the **national** criminal codes of the national States, which are involved in the aggression at the side of the aggressor-State(s), as well as victims at the side of the victim-State(s).

So the victims of aggression have to be qualified as victims of crimes also in the sense **national criminal law** standards.

National criminal law standards, laid down in the **penal codes** of the aggressor-State(s) as well as of the victim-State(s).

The intention to target (military) objects than should consequently be qualified as intention of committing the crime of destruction, the intention to target (military) human beings, should consequently be qualified as commission of the crime of attempted murder, or at least attempted manslaughter, etc., all in the sense of the common **penal codes of the national States** involved.

Thus the performers of military actions which are part of aggression shall be guilty of the crime of destruction, attempted murder, attempted murder, manslaughter, inflicting injuries, etc., according to their own national **criminal law** provisions. So all to be judged as common offences according to the **national** penal codes of the States involved.

9.36 To sentence aggression as upholding human rights

However, dealing with aggression by the judiciary is, besides, also a matter of upholding and safeguarding fundamental human rights.

And the latter is possibly the most prominent judicial task!

According its very nature warfare implicates gross violations of human rights of the people who have to suffer the consequences of that war. So when individuals, who threaten to be victimized by a war, appeal to the domestic judiciary of the Western state which is conducting that war, and they set forth that their fundamental human rights are jeopardized by acts which are to be considered aggression committed by that judiciary's homeland, than it should be unacceptable and impossible that the judge who is appealed by those (potential) victims, may back out of any judgement as asked for by those whose human rights are really in danger, by the argument that this is all a matter of politics !

9.37 Again the strategic requirement that (potential) victims of aggression should act as plaintiffs

The lesson that may be learned from this, is that it may be of great importance that (potential) victims who are originating from, and inhabitants of, the countries, which are conducting or supporting warfare, personally shall perform as plaintiffs in the legal proceedings, which will be initiated.

And that those indigenous plaintiffs will put indeed that there fundamental human rights are at stake.

In that way it will be possible greatly to strengthen the case!

To realize that indigenous people of the States threatened by western aggression may perform as plaintiffs in legal proceedings before the courts of the western States, involved in acts of aggression, is purely a matter of organization!

Anyhow, it should be repeated here:

If the thesis that de judge should have to stay outside decisions related to aggression would make any sense, than there never might have been such international rules, like the **Nuremberg Charter** and the **Rome Statute**, that make aggression liable to punishment !

This is already in itself enough evidence to turn down this tale!

10 Exercise of Jurisdiction by the International Criminal Court

10.1 The danger of selective justice and neo-imperialism by the ICC

As already stated in the prelude, it must be stressed here again:

> "The greatest challenge awaiting **the ICC** will be to prove that it is neither a political organ, nor an instrument of selective justice, nor even the embodiment of some form of judicial neo-imperialism. Even at the risk of dashing the hopes placed in **the ICC**, the court must no become a system of justice for the powerful that would prosecute only pariah States and the weakest governments.
>
> However, such a risk is real.
>
> Subjugated to the political and financial support of the most powerful States, the office of the Prosecutor will rely on the international cooperation to prepare its indictments. Furthermore, the strongest States - those with vast intelligence services, including spy satellites and sophisticated phone-tapping devices - will make decisions based upon their best interests and their willingness to transmit evidence to **the ICC** Prosecutor."

10.2 Preconditions to the exercise of jurisdiction by the ICC

Article 12 Para 2 Rome Statute reads:

> "2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
>
> (b) The State of which the person accused of the crime is a national.
>
> 3. If the acceptance of a State, which is not Party to this Statute, is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

Article 13 Rome Statute

> Exercise of jurisdiction

"The Court may exercise its jurisdiction with respect to a crime referred in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15."

10.3 Admissibility of cases before the ICC - complementary character of the ICC

Article 17 Rome Statute

Issues of admissibility

"1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent."

So the jurisdiction of **the ICC** is clearly **complementary** to the national jurisdiction of the State Parties.

10.4 Other requirements for admissibility

By virtue of **article 17 Rome Statute**, **the ICC** must declare a case to be inadmissible if a State having jurisdiction in such a case:

1. has already opened an investigations;

2. has decided not to prosecute;

3. if the case is not sufficiently serious.

Nonetheless, derogations may be granted if it is determined that the State is genuinely unwilling, or unable, to carry out the investigation, or the prosecution, or if the States waives such options.

Article 17, Para 2, Rome Statute specifies several factors that can be used to determine the willingness of a State to prosecute.

And **article 17, Para 3, Rome Statute** specifies how to determine the inability of a State to prosecute.

Article 17, Para 3, Rome Statute reads:…

> The aim of these provisions is to ensure that **the ICC** is not held hostage by the bad faith of a State and/or by mock criminal proceedings.

Other requirements are:

Article 18 Rome Statute

> "Preliminary rulings regarding admissibility
>
> 1. When a situation has been referred to the Court pursuant article 13 (a) and the prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to article 13 (c) an 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. (…)."

Article 19 Rome Statute

> "Challenges to the jurisdiction of the Court or the admissibility of the case
>
> 1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
>
> 3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

10. If the Court has decided that a case is inadmissible under article 17, the prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17."

10.5 Prosecution of suspects within the framework of the ICC

Article 14 Rome Statute stipulates:

"1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation."

Article 15 Rome Statute

"1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-trial Chamber a request for authorization of an investigation, together with any supporting material collected.

Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable

basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence."

So **article 15 Rome Statute** explicitly stipulates that the Prosecutor may open an investigation on the basis of information provided by the victims or NGO's.

Who may constitute a '**victim**' in the sense of **the Rome Statute** is already pointed out above. Citing the definition of 'victims' as laid down in **Rule 85** of **the Rules of Procedure and Evidence**.

10.6 Complaints filed by or on behalf of victims of 'serious crimes' at the prosecutor's office

So victims may file complaints and relevant evidence with the Office of the Prosecutor. Such elements may convince the Prosecutor to initiate an investigation. The Prosecutor may also seek out and gather information from government and non-governmental organizations.

Victims and witnesses may request an audience with the prosecutor. This does not yet signify that the complaint is admissible, or that it falls within the jurisdiction of the court.

What actually may determine that there is a reasonable basis to proceed with an investigation?

Rule 48 Rules of procedure and Evidence

"In determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c)."

Article 53 paragraph 1 Rome Statute

"Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case would be admissible under article 17, and

(c) Taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

> If the prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber."

So the Prosecutor may decide not to initiate an investigation if he considers that the information that was provided to him is insufficient, or fails to constitute a sound basis for such an investigation. He must then promptly so inform those persons who have provided the information to him, giving them the reasons for his refusal.

Such notification must indicate the possibility of forwarding "new facts or evidence regarding the same situation".

Rule 49 Rules of procedure and Evidence

> "1. Where a decision under article 15, paragraph 6, is taken, the prosecutor shall promptly ensure that notice is provided, including reasons for his or her decisions, in a manner that prevents any danger to the safety, well-being and privacy of those who provided information to him or her under article 15, paragraphs 1 and 2, or the integrity of investigations or proceedings.
>
> 2. The notice shall also advise of the possibility of submitting further information regarding the same situation in the light off new facts and evidence."

10.7 Possibility that the pre-trial chamber orders the prosecutor to initiate an investigation

The Pre-Trail Chamber may, under certain conditions, order the prosecutor to initiate an investigation, particularly at the victim's request, when the prosecutor has refused to do so because, in his estimation, an investigation would not serve "the interests of justice."

In order to reach this decision, the prosecutor must take into account the seriousness of the crime, as well as the interests of the victims.

The prosecutor will notify the victims of his decision. The victims may make representations before the Pre-trial Chamber in order to induce the latter to order the prosecutor to open an inquiry:

Article 68

> "3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court (…) Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of procedure and Evidence."

10.8 Participation of the victims in ongoing proceedings

Rule 89 Rules of Procedure and Evidence

"Application for participation of victims in the proceedings

"1. In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. (…)

2. The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings.

3. An application referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled."

Rule 92 Rules of procedure and Evidence

"1. This rule on notification to victims and their legal representatives shall apply to all proceedings before the Court, except in proceedings provided for in Part 2.

2. In order to allow victims to apply for participation in the proceedings in accordance with rule 89, the Court shall notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the situation or case in question. (…)

4. When a notification for participation as provided for in sub rule 2 (…) has been given, any subsequent notification as referred to in sub-rules 5 and 6 shall only be provided to victims or their legal representatives who may participate in the proceedings in accordance with a ruling of the Chamber pursuant to rule 89 and any modification thereof.

6. Where victims or their legal representatives have participated in a certain stage of the proceedings, the registrar shall notify them as soon as possible of the decisions of the Court in those proceedings."

10.9 Position of the victims if the ICC's prosecutor refuses to take any action

The most interesting case - which is not clearly resolved in the Statute - is one in which the Prosecutor refuses to take any action: in certain situations, the victims may lodge a complaint concerning the Prosecutor's refusal. But what would occur if the prosecutor were to fail to respond?

At this point, it should be recalled that the Pre-trial Chamber is invested with extensive

powers, and it is no exaggeration to recall that **article 15 Rome Statute** would never have been adopted without the existence of some sort of control over all of the Prosecutor's actions, whether positive or negative. It is thus entirely feasible that victims may one day raise before the Pre-Trial Chamber the issue of the Prosecutor's inaction and the Pre-Trial Chamber's power to review both the Prosecutor's action, or lack thereof.

The Prosecutor's power to initiate an investigation before the ICC is not an exclusive power, though it has priority over all the others, inasmuch as the Prosecutor is the first person to decide what action should be taken concerning the information received. But he is not alone in making this determination and is subject - particularly at the request of the victims - to the supervisory power of the Pre-Trial Chamber.

10.10 Authorization to the prosecutor to initiate an investigation - position of the victims

The Prosecutor must obtain the authorization of the Pre-Trial Chamber before initiating an investigation.

If the Prosecutor plans to initiate an investigation and request authorization to do so from the Pre-Trial Chamber, he must inform the victims, either individually or collectively. He may also inform them through their counsel.

The victims may also make written representations to the Pre-Trial Chamber to assert their views and to induce it to grant their authorization.

The Chamber may then request additional information from the victims, as well as from the Prosecutor. It may also hold a hearing.

Rule 50 Rules of Procedure and Evidence

"Procedure for authorization by the Pre-Trial Chamber of the commencement of the investigation

> 1. When the Prosecutor intends to seek authorization from the Pre-Trial Chamber to initiate an investigation pursuant article 15, paragraph 3, the Prosecutor shall inform victims, known to him (…) or their legal representatives, unless the prosecutor decides that doing so would pose a danger to the integrity of the investigation or the life or well-being of victims and witnesses. The Prosecutor may also give notice by general means in order to reach groups of victims if he or she determines in particular circumstances of the case that such notice could not pose a danger to the integrity and effective conduct of the investigation or to the security and well-being of victims and witnesses. (…)
>
> 2. A request for authorization by the Prosecutor shall be in writing.
>
> 3. Following information given in accordance with sub-rule 1, victims may make representations in writing to the Pre-Trial Chamber within such time limits as set forth in its regulations.
>
> 4. The Pre-Trial Chamber, in deciding on the procedure to be followed, may request additional information from the Prosecutor and from any of the victims

who have made representations, and, if it considers it appropriate, may hold a hearing.

5. The Pre-Trial Chamber shall issue its decision, including its reasons, as to whether to authorize the commencement of the investigation in accordance with article 15, paragraph 4, with respect to all or any part of the request by the Prosecutor. The Chamber shall give notice of the decision to victims who have made representations.

6. The above procedure shall also apply to a new request to the Pre-Trial Chamber pursuant article 15, paragraph 5."

10.11 Conclusion by the prosecutor that there is no sufficient basis for prosecution - possibility of reconsideration

Article 53 second part Rome Statute

"2. If, upon investigation, the Prosecutor concludes that there is not sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) the case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

the Prosecutor shall inform the Pre-Trail Chamber and the State making a referral under article 14 or the security-Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion."

3 (b). ...the Pre-trial Camber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider whether to initiate an investigation or prosecution based on new facts or information."

10.12 Duty of the ICC's registrar to support the legal representatives of the victims

According to rule 16 of the Rules of Procedure and Evidence, An important task for the Registrar will be, under the **ICC** provisions,

"1. (b) (…) providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty (…)."

10.13 Entitlement of the victims to reparations

Within the framework of the **ICC**, victims are entitled to **reparations**.

Article 75 Rome Statute

"Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensations and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted persons, victims, other interested persons or interested States.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the right of victims under national or international law.

10.14 Provisions with respect to reparations

So according to sub-article 6, the claiming of reparations under **civil law** also remains, additionally, an option.

Article 79 Rome Statute reads:

"1. A Trust Fund shall be established by decision of the Assembly of the State Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

> 3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties."

Article 109 Rome Statute

> "1. States Parties shall give effect to fines or forfeitures ordered by the Court under part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.
>
> 2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.
>
> 3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State party as a result of its enforcement of a judgement of the Court shall be transferred to the Court."

So the States agree to carry out the decisions of the Court in respect of reparations.

In certain cases, the States will also be required, under the terms of international law, or of their own legislation, to ensure that the victims are compensated, in cases where the convicted person is unable to do so or the State is also responsible for the crime committed.

It is uncertain whether the capacity of the **Trust Fund** will be sufficient to pay damages to the victims in cases in which the convicted persons are insolvent.

Anyhow, the drafters of the **Statute** did not retain the pecuniary liability of the States, or that of companies.

So only **natural persons** shall be required to pay for reparations.

The State and legal entities (companies, banks, State owned or semi-public business units) will not have to pay for them.

Of course this will be completely different in case of, alternatively or additionally, suing for damages under specific **civil law** conditions.

This option remains always in existence, separately.

The **ICC** has not yet quantified the pecuniary value of suffering.

Neither the Statute, nor the **Rules of Procedure and Evidence** have provided a definition of the damages, or limits thereof, to which direct or indirect victims might be entitled. It will be the **ICC** judges who will determine standards for such reparations.

As for the **ICC**, it is not hard to conceive that reparations may be limited in the totally plausible eventuality that tens of thousands - if not hundreds of thousands - of victims were to lodge a complaint or have sufficient grounds to make a request for reparations.

Obviously, the outcome would depend on the financial allocation available to the Trust Fund. If the forfeited assets of the accused were inadequate - as might well be expected - the voluntary contributions in the Trust Fund would be used to compensate for any shortfall, as

far as possible.

10.15 Evil efforts by the US to destroy the ICC - position of US nationals in face of the ICC

The US is not a Party to the **Rome Statute.** On the contrary, the US is doing the utmost to destroy **the ICC**. In order to eradicate even the slightest chance that ever any American citizen, or a national of any State, acting in alliance with the US, might by prosecuted by the this **international court**.

After all, under certain conditions, **the ICC** may prosecute American soldiers and politicians, or nationals of any other State that has not ratified **the ICC Statute**.

Under the assumption that they were to commit crimes that fall within the jurisdiction of the Court, they could be prosecuted, tried and sentenced by **the ICC** under **Article 12 Para 2 (a)**, though provided that crimes by Americans had been committed on the territory of a State Party to the **ICC Statute**.

The US put also all means of diplomatic and economic pressure upon every State in the world in order to force it to enter into specific bilateral agreements with the US, stipulating exclusion of extradition of American citizens to **the ICC** by the State concerned.

Tens of States, even western ones, have already entered in such bilateral agreements.

And finally the US manages to extort from the **United Nations Security Council** periodically, by Security Council Resolution, a safeguarding for all American nationals who might take part in military operations, authorized by **the Security Council**, from extradition to **the ICC**.

10.16 US threats to the Netherlands - - American Service member Protection Act (ASPA)

The Netherlands, domicile of **the ICC**, even are openly threatened with military intervention and military force, if the Court ever dares to detain an American citizen. The American Congress passed a specific law allowing the US army to free by military force any American detainee from custody in the Hague, the **American Service member Protection Act (ASPSA)**, as ominously credited with the name **'The Hague Invasion Act'**.

10.17 Bilateral agreements with the US not to extradite US nationals to the ICC, as a breach of the obligations under the Rome Treaty

States that have been entered in the **Rome Treaty with respect to the ICC**, are acting in contravention with their obligations under this treaty, when they also acceded to a specific agreement with the US, excluding the extradition of Americans to **the ICC**.

They are breaching by that into their obligation to carry out the **Rome Treaty** in good faith. As it is stipulated by:

Article 59 Rome Statute

> "1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of part 9."

Anti-fascist and peace movement organisations, specifically into the western States, which accepted such totally contradictory international obligations, should enquire into possibilities to overcome this illegal practice by means of legal and political action against their own State's administration.

It's clear now to everybody who's not gone out of is mind that the United States of America is the great enemy of international law. The US represents a clear and present danger for the international legal order, nowadays inescapably visible to everyone, and acts in the world as the mother of aggression.

10.18 In case of US blockades of access tot the ICC, extra responsibility for the national prosecutor at issue

Anyhow, any time that the way to **the ICC** may be blocked as a result of US pressure, claimants may divert from this a demand directed at any national State holding jurisdiction with respect to their complaints, that there should be an obligation for the **national** prosecutor and other appropriate **domestic judicial institutes** to deal with claimant's complaints even more properly and thoroughly.

This duty to consider complaints against violations of international humanitarian law, under these specific conditions, even more carefully, stems directly from **article 146 Fourth Convention**.

Just because their is no alternative left, excepting such a domestic assessment.

10.19 Position of the Near East in view of the ICC

The Near East is for 90% not directly concerned by the implementation of **the ICC**. In fact, to date, only Jordan had ratified the treaty instrumenting the new court. Neither Israel nor Egypt, Syria, Iraq, Libya, nor Lebanon have adhered to the **Rome Statute**. As for the Palestinian Authority, it is not yet recognized as a State in its own right and therefore cannot be a party to the **ICC Statute**. It would therefore require a Security Council Resolution to refer any Palestinian matter to the court.

Some legal experts contend that Jordan governed the West Bank from 1948 to 1967 and that although the Hashemite Kingdom of Jordan may have formally relinquished all claims to the West bank, it could denounce crimes that may have been committed by the State of Israel committed in the Occupied Territories. But the prevailing opinion among jurists tends to be that Jordan has never formally enjoyed any sovereignty over the West Bank and therefore cannot avail itself of **the ICC**.

However, if Israeli soldiers were to commit violent acts in Jordan, **the ICC** would have

jurisdiction.

11 Individual Criminal Responsibility for Crimes against International Humanitarian Law

11.1 Distinction between responsibility according to criminal law and according to civil law

In respect of responsibility and liability for war crimes, crimes against humanity, crimes of aggression and other gross violations of international humanitarian law has to be distinguished between responsibility and liability according to **criminal law** and responsibility and liability according to **civil law**.

In general, it can be established that, whenever may be determined that for acts at issue shall exist responsibility according to **criminal law standards**, there has been come at the same time also in existence responsibility and liability according to **civil law standards**.

Once that acts have been marked as violations of international humanitarian law, they constitute at the same time also intentional torts, which permits private parties to bring these claims, originating from those violations, in **civil courts** as well.

11.2 Responsibility standards for criminal law cases more strict than the standards for civil law cases

Additionally, as already stressed above, the standard used in **criminal cases** is much stricter than that used in **civil cases**.

When a party could be hold responsible for committing a crime against international humanitarian law, than the same party could also be hold responsible for the same actions under the less rigorous **civil standard**.

11.3 Application of bodies of law of the various western States against responsibles for violations of international humanitarian law in criminal law complaints as well as in civil law proceedings

All western States have a fully developed body of law on when actors are responsible for harm.

Which can be used by the (potential) victims of breaches in international humanitarian law and consequently can be directed at filing **civil suits** directed against the perpetrators of crimes against international humanitarian law and those who act in complicity with them.

Lawsuits before domestic courts of the western States in order **to claim that such violations shall be ended** as well as lawsuits **seeking damages**, both categories to be initiated by (potential) victims of those breaches of international humanitarian law.

So wherever criminal law responsibility may be established, in general, there should be assumed at the same time the existence of **civil law responsibility and liability** as well.

Decisions on **civil law responsibility and liability** for alleged violations of international humanitarian will be, for the most part, a matter of **national courts**.

11.4 Standards for criminal law responsibility to be diverted from the Nuremberg Charter, the Rome Statute and contemporary ad hoc tribunals

Standards for **criminal law responsibility** with respect to violations of international humanitarian law may be diverted from international instruments as the **Nuremberg Charter** and, to the opinion of many writers, from the Charters of other, more contemporary ad hoc-tribunals, and their jurisprudence, as well as from other international sources, like the **Rome Statute of the ICC** on the one hand, and **national penal provisions** and the jurisprudence originating from their application by domestic courts on the other hand.

11.5 Individual criminal responsibility according to the Nuremberg Charter and the Nuremberg Principles

So based also on **the Nuremberg Charter**, as a source of generally accepted customary law, all States are committed to the principle, as it is defined in **article 6 Charter**, that performers of war crimes, crimes against humanity and crimes against peace (i.e. crimes of aggression) shall bear individual (penal) responsibility.

This according to the principle, recorded during the **Nuremberg trial** that:

> "Crimes against international law are committed by man, not by abstract entities, and only by punishing individuals who commit such crimes the provisions of international law [can] be enforced."
>
> (Annual Digest, 13 (1946), p. 221)

Which, of course, does not mean that not also (State) entities could be hold liable for the consequences of crimes against international law according to **civil law** standards.

However, not only the performers are guilty of such offences against international law, but, according to **the Nuremberg Charter**-criteria, also all individuals belonging to the categories of 'leaders, organisers, instigators and accomplices'.

11.6 Individual criminal responsibility according to the Rome Statute

According to **the Rome Statute**'s criteria are also guilty of these crimes, the persons who commit such offences 'through another person, regardless as to whether that other person is criminal responsible' (**article 25 (3)(a) Rome Statute**); the persons who 'order, solicit or induce' such crimes (**article 25 (3)(b) Rome Statute**); the persons who, 'for the purpose of facilitating the commission' of 'such crimes, 'aid, abet or otherwise assist in their commission, including providing the means for their commission' (**article 25 (3)(c)Rome Statute**) and the persons who 'in any other way contributes to the commission or attempted commission' of such crimes 'by a group of persons acting with a common purpose' (**article**

25 (e)(d)

Rome Statute).

The full text of this **Rome Statute article** reads:

Article 25 Rome Statute

"1. The Court shall have jurisdiction over natural persons to this statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with the Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminal responsible;

(b) Orders, solicits or induces the commission of such a crime, which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or in its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court, or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law."

11.7 Entering into the Rome Treaty as a voluntary act of waiver of the Head of State's sovereignty

Those States which entered into the **Rome Treaty** waived, by acting like this, of their own free will, even the protection of their head of State's sovereign immunity, attributed to them by customary international law against non-domestic criminal prosecution.

So Article 27 Rome Statute states:

> "Irrelevance of official capacity
>
> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

National criminal law provisions, established by national States, directed at prosecution of non-national suspects of crimes against international law, are not able to break through this firmly established customary law principle of sovereign immunity for heads of states and prominent representatives of state government and are consequently void, as it is reconfirmed by the **International Court of Justice** in its decision of 14 February 2002 in the case **Congo vs. Belgium**.

Since national States cannot claim criminal jurisdiction over each other's heads of state, even not with respect to grave breaches of international humanitarian law, only the **ICC** holds here competence.

This of course besides the State's own jurisdiction in respect of its own domestic head of state.

It is evident that the credibility of the **ICC** will depend upon its determination not to allow the western leaders of this world to go unpunished.

11.8 Command responsibility according to Protocol I

The principle of **command responsibility** is already laid down in **Protocol I**:

Article 86 Protocol par. 2

> "2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was

committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Article 87 Protocol I

"Duty of commanders

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of armed forces under their command and other persons under their control, to prevent and, when necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol;

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or of this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof."

11.9 Command responsibility according to the Rome Statute

However, this **command responsibility** is even extended in the **Rome Statute**:

Article 28 Rome Statute

"Responsibility of commanders and other superiors

"In addition to other grounds of criminal responsibly under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes, and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relation-

ship not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior, and

(iii) The superior failed to take all necessary and reasonable means within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

11.10 Limitations of individual criminal responsibility according to the Rome Statute

Limitations of **individual criminal responsibility** are provided for in:

Article 31 Rome Statute

Grounds for excluding criminal responsibility

"1. In addition to other grounds for excluding criminal responsibility, provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person_ capacity to appreciate the unlawfulness of.., unless...;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force (…).

The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence."

An alleged perpetrator of international crimes may also be relieved of his criminal responsibility if it is impossible to prove that he intended to commit the crime and that he knew that he was committing a crime:

Article 30 Rome Statute

"mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if the material elements are committed with intent and knowledge.

2. For the purpose of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) in relation to a consequence, the person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purpose of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly."

Article 32 Rome Statute

"Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Any appeal to superior orders should fail, except for some reservations:

Article 33 Rome Statute

> "Superior orders and prescription of law
>
> 1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
>
> (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
>
> (b) The person did not know that the order was unlawful; and
>
> (c) the order was not manifestly unlawful.
>
> 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

So **article 33 Rome Statute** provides that the alleged perpetrator may be relieved of responsibility for a crime if he was under "a legal obligation to obey orders", and did not know that "the order was unlawful", and "the order was not manifestly unlawful".

These three criteria are cumulative and may only be invoked by perpetrators of war crimes, since **article 33 (2) Rome Statute** specifies, "orders to commit genocide or crimes against humanity are manifestly unlawful".

12 Fundamental Guarantees to Persons not Benefiting from the more Favourable Treatment under the Geneva Conventions or Protocol I

12.1 Fundamental guarantees to persons who have taken part in hostilities and who are not entitled to prisoner of war-status

Article 3 Third Convention

> In case of armed conflict not of an international character occurring in the territory of one of the High Contracting parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 2. The wounded and sick shall be collected and cared for.

Article 45 Protocol I final part

> "3. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, an such person, unless he is held ad a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention."

12.2 Position of mercenaries

Article 47 Protocol I

> "Mercenaries
>
> 1. A mercenary shall not have the right to be a combatant or a prisoner of war.
>
> 2. A mercenary is a person who:
>
> (a) Is specifically recruited locally or abroad in order to fight in an armed conflict;
>
> (b) Does, in fact, take a direct part in the hostilities;
>
> (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;
>
> (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
>
> (e) Is not a member of the armed forces of a Party to the conflict; and

> (f) Has not been sent by a State which is not Party to the conflict on official duty as a member of its armed forces."

12.3 Regulations with respect to fairness of trial provided for by the Fourth Convention and by Protocol I

As already mentioned above in **article 85 (4)(e) Protocol I** 'depriving a person protected by the Conventions [or in the power of the adverse Party] of the rights of fair and regular trial, …when committed wilfully and in violation of the Conventions or of the Protocol', shall be a **grave** breach of **Protocol I**.

With respect to the fair trial standards applicable to protected persons, Article 74 Fourth Convention establishes:

> "Representatives of the Protecting Power shall have the right to attend the trial of any protected person, unless the hearing has, as an exceptional measure, to be held in camera in the interests of the security of the Occupying Power, which shall then notify the Protecting Power. A notification in respect of the date and place of trial shall be sent to the Protecting Power.
>
> Any judgment involving a sentence of death, or imprisonment for two years or more, shall be communicated, with the relevant grounds, as rapidly as possible to the Protecting Power."

In respect of minimum standards for fair and regular trial Article 71 Fourth Convention first part states in general furthermore, regarding protected persons and non-protected persons alike:

> "No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial.
>
> Accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them, and shall be brought to trial as rapidly as possible."

And, additionally, especially with respect to protected persons:

Article 71 Fourth Convention second part:

> "The Protecting Power shall be informed of all proceedings instituted by the Occupying Power against protected persons in respect of charges involving the death penalty or imprisonment for two years or more; it shall be enabled, at any time, to obtain information regarding the state of such proceedings. Furthermore, the Protecting Power shall be entitled, on request, to be furnished with all particulars of these and any other proceedings instituted by the Occupying Power against protected persons."

And subsequently, again in general, with concern to protected and non-protected persons alike:

Article 71 Fourth Convention last part:

> "Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence."

And:

Article 73 Fourth Convention

> "A convicted person shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within he may do so.

And:

Article 146 Fourth Convention final part

> "In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the treatment of Prisoners of War of August 12, 1949."

Article 105 Fourth Convention reads:

> "Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.
>
> Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such a person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.
>
> In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be."

Protocol I extends these minimum standards.

Article 75 Protocol I

> "Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practises of all such persons.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) No one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; (…)

(d) Anyone charged with an offence is presumed innocent until proved guilt according to law;

(e) Anyone charged with an offence shall have the right to be tried in his presence;

(f) No one shall be compelled to testify against himself or to confess guilt;

(g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him or to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(i) Anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and

(j) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within they may be exercised;

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(a) Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) Any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provisions of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.”

13 Military Occupation and International Humanitarian Law

13.1 Applicability of the Fourth Convention during occupation

Article 6 Fourth Convention

> **"The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2."**

Article 2 Fourth Convention

> **"The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting party, even if the said occupation meets no armed resistance."**
>
> **Article 2 of the Convention relative to Treatment of Prisoners of War** is identical.

13.2 Basic principles of law on military occupation

13.3 Basic principles of international humanitarian law underlying military occupation and further duties of occupying forces

The following explanation is derived from **Human Rights Watch** and **Amnesty International** documents.

> International law on belligerent occupation does not address the question of the reason or background of the occupation. Its rules apply to any occupying power for the sole fact that it is in control of the territory, whatever the reason for this situation. Recognizing the applicability of these rules in the given situation does not constitute a judgment on the legal status of the territory under occupation.
>
> The provisions of the law on belligerent occupation are found in international humanitarian law, also known as the laws of war or the laws on armed conflict. As such, they take as point of departure the military and security concerns of the occupying power, balancing them against the interests of the persons who find themselves under its authority.

13.4 Sources of law applicable on occupation

The sources for the obligations under international humanitarian law applicable to belligerent occupation are found in:

- **The Hague Convention (IV) respecting the Laws and Customs of War of 1907 (Hague Convention) and its annexed Regulations respecting the Laws and Customs of War on Land (Hague Regulations) of 18 October 1907;**

- **The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) of 12 August 1949;**

- **Article 75 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I);**

- **Rules of customary international law.**

In fact, most of the basic rules on occupation are of a customary law character, binding. None allow for any derogation.

At the domestic level, the provisions of international humanitarian law have been incorporated in instructions for members of national armed forces in **military manuals**. They include the manual of armed forces of the UK (**The Law of War on Land, Part III, 1958**) and the **US Manual on Land Warfare, FM 27-10, Department of the Army Field Manual, 1956**).

A key issue is that, in line with international humanitarian law, any occupying power is under the obligation to respect the provisions of the human rights treaties to which the country whose territory is partially or totally occupied is a party, especially when, as for example is the case with Iraq, such treaties are incorporated in the occupied country's legal system.

Further, the Human Rights Committee, and other bodies monitoring the implementation of their human rights obligations under the treaties they have ratified, have concluded that such obligations extend to any territory in which a State exercises jurisdiction, including territories occupied as a result of military action.

In administering, for example, Iraq the occupying powers must therefore respect their own international human rights obligations in addition to international humanitarian law.

International **human rights** law complements provisions of international **humanitarian** law, for example by providing content and standards of interpretation, such as on the use of force to respond to disorders outside combat situations. In some respects, for example the safeguards applicable to anyone held in detention, **human rights** standards offer greater protection than provisions of international **humanitarian** law and should be applied. The result is a protection framework firmly embedded in international obligations.

13.5 Duty to maintain law and order

What are the duties of an occupying force to ensure security ?

An occupying power has a duty to restore and ensure public order and safety under its authority. Under customary international law, this duty begins once a stable regime of occupation has been established. But under the 1949 Geneva Conventions, the duty attaches as soon as the occupying force exercises control or authority over civilians of that territory,

that is, at the soonest possible moment.

This principle is reflected in **article 6 Fourth Convention**.

International humanitarian law provides that once an occupying power has assumed authority over a territory, it is obliged to restore and maintain, as far as possible, public order and safety.

See **article 43 1907 Hague Convention (IV), Respecting the Laws and Customs of War on Land and Regulations, further: Hague Convention**).

Article 43 Hague Convention (IV) reads:

> "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

Military commanders on the spot must prevent and where necessary suppress serious violations involving the local population under their control or subject to their authority.

The occupying force is responsible for protecting the population from violence by third parties, such as newly formed armed groups or forces of the former regime. See **article 47 Hague Convention**.

Article 47 Hague Convention (IV)

> "Pillage is formally forbidden."

Occupying forces may have to be deployed to secure public order until the time local or international police can be mobilized for such responsibilities. Unless such forces are facing hostilities, the use of force is governed by international standards for law enforcement. That is, only absolutely necessary force may be used and only to the required extent,

in accordance with the principle of proportionality.

In order to carry out this duty, the occupying power is entitled to, according to the wording of:

Article 27 Fourth Convention

> "(…) take such measures of control and security in regard to protected persons as may be necessary as a result of the war."

Such measures may include the use of force.

However any use of force in circumstances outside combat, whether by soldiers of police officers, must be consistent with international law enforcement standards, including **the 1979 UN Code of Conduct for Law Enforcement Officials (Code of Conduct)** and **the 1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Basic Principles)**.

Article 3 of **the Code of Conduct** reflects the principles of necessity and proportionality: law enforcement officials "**may use force only when strictly necessary and to the extent required for the performance of their duty**".

The Commentary to this article specifies that the use of firearms is an extreme measure.

Article 3 Code of Conduct for Law Enforcement Officials

> "Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities."

13.6 Looting and 'shoot on sight' orders

May an occupying power issue 'shoot on sight' orders to soldiers or police in order to stop looters or otherwise maintain security?

'Shoot on sight' orders are prohibited under international human rights law.

The International Covenant on Civil and Political Rights, to which also the United States is a party, states: "No one shall be arbitrarily deprived of his life".

The Human Rights Committee, the body that monitors compliance with the Covenant, has said that the deprivation of life by state authorities, including arbitrary killing by their own security forces, is 'a matter of the utmost gravity'. A state must strictly limit the circumstances in which the authorities might deprive persons of their lives.

The **U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials** providing guidance on the use of force and firearms by those enforcing the law, including soldiers stipulate that where the lawful use of force is unavoidable, law enforcement officials must exercise restraint and act in proportion to the seriousness of the offence and the legitimate objective to be achieved. They must minimize injury, and respect and preserve human life.

The **Basic Principles** further provide that the intentional lethal use of firearms may only be made 'when strictly unavoidable in order to protect life'.

Exceptional circumstances such as internal instability or other public emergency may not be invoked to justify a departure from these basic principles.

According to the Basic Principles, law enforcement officials faced by disorders, including violent assemblies: "shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."

Combat troops do not usually have the training or the proper equipment for performing policing functions, and should not be expected to do so. However, occupying powers have a duty to plan for the breakdown of law and order in the areas where they establish military control.

For example in Iraq, much planning and resources seem to have been devoted to securing Iraqi oilfields. And there has been, for a long time, a clear and present lack of similar levels of planning and allocation of resources for securing public and other institutions essential for the survival and well being of the population. The response to disorder has been shockingly inadequate.

Under international humanitarian law, the occupying power is obligated to restore and ensure public order and safety. Achieving security must however be in conformity with international human rights law standards. These standards apply to all those acting under the authority of the occupying power, including, for instance, local police and coalition forces.

13.7 To respect fundamental human rights as an obligation to the occupying powers

Under the **Fourth Geneva Convention**, the occupying power must also respect the fundamental human rights of the territory's inhabitants, including non-citizens.

As is laid down in:

Article 29 Fourth Convention

> "The Party to the conflict in whose hands protected persons [i.e. civilians] may be is responsible for the treatment to them by its agents, irrespective of any individual responsibility which may be incurred."

And Article 47 Fourth Convention

> "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as a result of the occupation of a territory, into the institutions of government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."

13.8 Basic principles underlying occupation

Four basic principles of international law underlie an occupation:

1) The occupying power does not, through occupation, gain sovereignty over the occupied territory.

2) Occupation is considered a transitory phase in which the rights of the population must be respected by the occupying power until formal authority is restored.

3) When exercising authority, the occupying power must take into account the interest of the inhabitants as well as military necessity.

4) The occupying power must not use its authority to exploit the population or local resources for the benefit of its own population and territory.

13.9 Definition of belligerent occupation

The definition of belligerent occupation is given in **Article 42 of the Hague Regulations Respecting the Laws and Customs of War on Land**.

Article 42 the Hague Regulations War on Land

> "Territory is considered occupied when it is actually placed under the authority of the hostile army.
>
> The occupation extends only to the territory where such authority has been established and can be exercised."

The US Manual FM 27-10 (Para 351) simply refers to that definition. **The UK Manual** (Para 350) follows the same line by underscoring that invading forces must have taken the place of the national authorities in the exercise of actual control over a territory.

The sole criterion for deciding the applicability of the law on belligerent occupation is drawn from facts: the **de facto** effective control of territory by foreign armed forces coupled with the possibility to enforce their decisions, and the **de facto** absence of a national governmental authority in effective control. If these conditions are met for a given area, the law on belligerent occupation applies. Even though the objective of the military campaign may not be to control territory, the sole presence of such forces in controlling position renders applicable the law protecting the inhabitants. The occupying power cannot avoid its responsibilities as long as a national government is not in a position to carry out its normal tasks.

The question may arise whether the law on occupation still applies if new civilian authorities set up by the occupying power from among nationals of the occupied territories are running the occupied territory's daily affairs. The answer is affirmative, as long as the occupying forces are still present in that territory and exercise final control over the acts of the local authorities.

The local responsibility of the occupying power does not mean responsibility for each and every act of the local civilian administration. But if the local administration lacks, for example, the means to provide adequate health care, it is the duty of the occupying power to take remedial action. I cannot relinquish its basic responsibility for the well-being of the territory's inhabitants by claiming that local authorities are in charge.

13.10 Restrictions of action put upon occupation by international law

The core idea of international law on belligerent occupation is that occupation is transitional.

The occupying power assumes, for a limited period, responsibility for the security and well-being of the occupied territory's inhabitants.

As a caretaker for the absent national government, the occupying power has to take over responsibility for the functions, which are directly related to the administration of the territory. As such it may set up a temporary civil administration, but has no right to change the existing structures of the State.

For example, it cannot engage in a major reform of the criminal justice system, even though, for instance in Iraq, this is badly needed to bring it in line with international humanitarian law and standards. There should be called for a UN commission of experts to start working immediately, in close consultation with Iraqi civil society, to develop proposals for reform.

These proposals will have to be implemented either by a new Iraqi government or a UN transitional administration.

13.11 Allocating control to more occupying powers in different parts of occupied territory

If several occupying powers allocate control and administration of different parts of the territory to each one of them (as in occupied Germany after 1945), each State is fully responsible for what happens under its authority.

However, one fundamental obligation of international humanitarian law, reflected in **Article 1** common to **all Geneva Conventions**, is the undertaking not only to respect but also to "**ensure** respect for the present Convention in all circumstances".

Article 1 Fourth Convention

> "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."

Under this obligation all Occupying Power, wherever, and all other parties to the Geneva Conventions, must take measures towards each other, should there be a need to prevent or redress violations of international humanitarian law.

They must also ensure that armed groups allied to them respect fully international humanitarian law.

13.12 Penal law legislation in occupied territory: limited scope to introduce changes

In line with the transitional nature of belligerent occupation, Article 64 Fourth Geneva Convention stipulates that:

> "The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the

> effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws."

The **Commentary to this Article** (pages 335-336) stresses that a basic principle of the law on occupation is "the idea of continuity of the legal system" of the occupied territories, which "applies to the whole of the law (civil law and penal law)."

It explains that the reason for the express reference in the Fourth Geneva Convention "only to respect for penal laws was that it had not been sufficiently observed during past conflicts; there is no reason to infer a contrario that the occupation authorities are not also bound to respect the **civil law** of the country and to its **constitution**."

Any criminal laws enacted must be publicized; ex post facto (retroactive) laws are prohibited.

So long as they can ensure the effective administration of justice, the courts of the occupied territory shall continue to function. Where this is not possible, the occupying power may set up "properly constituted, non-political military courts" with local or foreign judges to sit in the occupied countries; such courts must apply international fair trial standards.

This excludes all 'special tribunals'. The occupying power's own courts may only prosecute violations of international humanitarian law and crimes of universal jurisdiction.

> "(…) penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases, where they constitute a threat to its security or an obstacle to the application of the present Convention."

There are only two exceptions to the rule preserving existing laws.

The first relates to the security of the occupying power, which, as **the ICRC Commentary** explains, "**must obviously be permitted to cancel provisions such as those concerning recruiting or urging the population to resist the enemy**."

The second "**is in the interests of the population**", and makes it possible to abrogate, for example, discriminatory measures.

The occupying powers cannot abrogate or suspend the laws for any other reason - and not, in particular, merely to make it accord with their own legal conceptions.

13.13 Further limited legislative powers of the occupying power

An Occupying Power has a limited scope to enact its own legal provisions.

Article 64(2) Fourth Geneva Convention states that the occupying power may

> "(…) subject population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying

> forces or administration, and likewise of the establishments and lines of communications, used by them."

The Commentary (page 337) sets out the matters in which an Occupying Power may exercise its legislative power. They are limited to provisions 'required for the application of the Convention 'in areas such as child welfare, labour, food, hygiene and public health'; other provisions necessary to 'maintain the orderly government of the territory',

and penal provisions 'for its own protection'.

Under Article 65 Fourth Convention, any

> "penal provisions enacted by the Occupying Power shall not come into force, before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of this penal provisions shall not be retroactive."

13.14 Criminal jurisdiction during occupation

Under **the Fourth Geneva Convention**, occupying powers may not alter the status of judges, like that of public officials.

See **article 54 Fourth Convention**.

Article 54 Fourth Convention reads:

> "The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.
>
> This prohibition (…) does not affect the right of the occupying power to remove public officials from their posts."

Existing tribunals shall continue to function, retaining their jurisdiction over offences of domestic criminal law by inhabitants of the occupied territory.

See **Article 64(1) Fourth Convention**.

Article 64 Fourth Convention first part stipulates:

> "The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws."

However, in the absence of a functioning judicial system, the occupying power may establish its own courts to perform the functions of the ordinary judiciary, provided they apply existing laws.

Article 66 Fourth Convention provides that in case of an Occupying Power enacts legislative provisions; it may also establish its own "properly constituted, non-political military courts", which shall sit in the occupied territories, while court of appeal shall "preferably sit in the territories".

Article 66 Fourth Convention

> "In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country."

Military courts set by the Occupying Power must respect detailed procedural guarantees with respect to sentencing protected persons, as prescribed in **Articles 67** and **69 to 75 Fourth Convention**.

Article 67 Fourth Convention

> "The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportioned tot the offence. They shall take into consideration the fact that accused is not a national of the Occupying Power."

Article 69 Fourth Convention

> "In all cases, the duration of the period during which a protected person accused of an offence is under arrest awaiting trial or punishment shall be deducted from any period of imprisonment awarded."

Article 70 Fourth Convention

> "Protected persons shall not be arrested, prosecuted or convinced by the Occupying Power for acts committed of for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.
>
> Nationals of the Occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace."

Article 71 Fourth Convention

> "No sentence shall be pronounced by the competent courts of the Occupying Power except after regular trial.
>
> Accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the

charges preferred against them, and shall be brought to trial as rapidly as possible. The Protecting Power shall be informed of all proceedings instituted by the Occupying Power against protected persons in respect of charges involving the death penalty or imprisonment for two years or more; it shall be enabled, at any time, to obtain information regarding the state of such proceedings. Furthermore, the Protecting Power shall be entitled, on request, to be furnished with all particulars of these and any other proceedings instituted by the Occupying Power against protected persons.

The notification to the Protecting Power, as provided for in the second paragraph above, shall be sent immediately, and shall in any case reach the Protecting Power three weeks before the date of the first hearing. Unless, at the opening of the trial, evidence is submitted that the provisions of this Article are fully complied with, the trial shall not proceed. The notification shall include the following particulars:

(a) Description of the accused;

(b) Place of residence or detention;

(c) Specification of the charge or charges (with mention of the penal provisions under which it is brought);

(d) Designation of the court, which will hear the case;

(e) Place and date of the first hearing.

Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.

Failing a choice by the accused, the Protecting Power may provide him with an advocate or counsel. When an accused person has to meet a serious charge and the Protecting Power is not functioning, the Occupying Power, subject to the consent of the accused, shall provide an advocate or counsel.

Accused persons shall, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court. They shall have the right at any time to object the interpreter and to ask for his replacement."

Article 73 Fourth Convention

"A convicted person shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

The penal procedure provided in the present Section shall apply, as far as it is applicable, to appeals. Where the laws applied by the Court make no provision for appeals, the convicted person shall have the right to petition against the finding and sentence to the competent authority of the Occupying Power."

Article 74 Fourth Convention

> "Representatives of the Protecting Power shall have the right to attend the trial of any protected person, unless the hearing has, as an exceptional measure, to be held in camera in the interests of the security of the Occupying Power, which shall then notify the Protecting Power. A notification in respect of the date and place of trial shall be sent to the Protecting Power.
>
> Any judgment involving a sentence of death, or imprisonment for two years or more, shall be communicated, with the relevant grounds, as rapidly as possible to the Protecting Power. The notification shall contain a reference to the notification under made under Article 71, and in case of sentences of imprisonment, the name of the place where the sentence is to be served. A record of judgments other than those referred to above shall be kept by the court and shall be open to inspection by representatives of the Protecting Power. Any period allowed for appeal in the case of sentences involving the death penalty, or imprisonment for two years or more, shall not run until notification of judgment has been received by the Protecting Power."

Article 75 Fourth Convention

> "In no case shall persons condemned to death be deprived of the right of petition for pardon or reprieve.
>
> No death sentence shall be carried out before the expiration of a period of at least six month from the date of receipt by the Protecting Power of the notification of the final judgment confirming such a death sentence, or of an order denying pardon or reprieve.
>
> The six months period of suspension of the death sentence herein prescribed may be reduced in individual cases in circumstances of grave emergency involving an organized threat to the security of the Occupying Power or its forces, provided always that the Protecting Power is notified of such reduction and is given reasonable time and opportunity to make representations to the competent occupying authorities in respect of such death sentences."

Moreover, under the heading 'fundamental guarantees, **Article 75(1) Protocol I** has codified all the guarantees of fair trial, also to uphold in trials against **non-protected persons**. The content of **Article 75 Protocol I** is recognized, including by the USA, which has not ratified **Protocol I**, as reflecting customary international law.

These guarantees are likewise the essence of modern international human rights law, as codified in **Article 14 of the ICCPR** and other international standards.

The **Fourth Geneva Convention** affirms the principle of individual criminal responsibility, and prohibits collective penalties. See **article 33 Fourth Convention**, as already reproduced under .....

Protected persons accused or convicted of a criminal offence must be detained in humane conditions and kept in detention facilities within the occupied territory.

They have the right to receive visits by the delegates of the ICRC

See **Article 76 Fourth Convention**.

Article 76 Fourth Convention

> "Protected persons accused of offences shall be detained in the occupied territory, and if convicted they shall serve their sentences therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country.
>
> They shall receive the medical attention required by their state of health.
>
> They shall also have the right to receive any spiritual assistance which they may require.
>
> Women shall be confined in separate quarters and shall be under the direct supervision of woman.
>
> Proper regard shall be paid to the special treatment due to minors.
>
> Protected persons who are detained shall have the right to be visited by delegates of the protecting Power and of the International Committee of the Red Cross (…)
>
> Such persons shall have the right to receive at least one relief parcel monthly."

Public opinion has long been concerned at the operation of the Iraqi criminal justice system, including the lack of independence of judges; the use of torture, and grossly unfair trials by Iraqi special and other courts. However, Amnesty International believes that military tribunals established by the USA and the UK would be undesirable, since they risk being perceived as "victors' justice". Amnesty International believes that military courts should not be used to try civilians and members of armed forces.

In addition, certain proposals such as the use of US military commissions, which are not even courts, with respect to persons arrested by the Americans in Afghanistan and Iraq, would be grossly contradictory to international law.

13.15 Law enforcement and continuation of the administration in occupied territory

What responsibilities does an occupying power have with respect to the legal system of the occupied territory ?

An occupying power has a duty to restore public order and safety. The criminal laws of the occupied country remain in effect. The occupying power may only set aside or modify laws that contradict international legal standards or which pose a security threat to the occupying power.

See **article 64 Fourth Convention**.

An occupying power may not compel public officials to stay inn their jobs. It is permitted to remove officials from their posts.

See **article 54 Fourth Convention**.

Article 54 Fourth Convention

> "The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.
>
> This prohibition does not prejudice the application of the second paragraph of Article 51. It does not affect the right of the Occupying Power to remove public officials from their posts."

13.16 Protection of property and natural resources during occupation

The Hague Regulations require the Occupying Powers to respect 'private property'.

See **article 46 The Hague Regulations**.

They 'shall be regarded only as administrator[s]' of publicly owned buildings and of 'natural resources' such as 'forests, and agricultural estates'

See **article 55 The Hague Regulations**.

As such, the USA and the UK must not appropriate or otherwise dispose of public property or of the **natural resources** of Iraq.

The 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly', should a war crime, more specifically a **grave** breach of **Article 147 Fourth Geneva Convention**.

13.17 Role of the International Committee of the Red Cross (ICRC) during occupation with respect to the protection of civilians

A fundamental safeguard for the protection of civilians in occupied territory is constituted by the work of the ICRC. Under the **Fourth Geneva Convention** the occupying powers must accept the services of the ICRC.

See **article 143(5) Fourth Convention**.

Its delegates have the right to take up any matter relating to the law of occupation. They must be granted free movement throughout the entire occupied territory. In particular, they must be given free access to all detention facilities and to all categories of detainees.

Another task of the Red Cross in occupied territory is protecting civilian hospitals, medical personnel, the wounded and the sick.

Medical personnel, including recognized Red Cross/Red Crescent societies, shall be allowed to carry out their duties

See **article 63 Fourth Convention**.

Article 63 Fourth Convention

> "Subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power:
>
> (a) Recognized national Red Cross (Red Crescent, Red Lion and Sun) Societies shall be able to pursue their activities in accordance with the Red Cross principles, as defined by the International Red Cross Conferences. Other relief societies shall be permitted to continue their humanitarian activities under similar conditions.
>
> (b) The Occupying Power may not require any changes in the personnel or structure of these societies, which would prejudice the aforesaid activities.
>
> The same principles shall apply to the activities and personnel of special organizations of an non-military character, which already exist or which may be established, for the purpose of ensuring the living conditions of the civilian population by the maintenance of the essential public utility services, by the distribution of relief and by the organization of rescues."

13.18 Public officials in occupied territory

Is an occupying power required to pay the salaries of state employees?

International humanitarian law does not specify that an occupying force is required to pay the salaries of all state employees. However, an occupying power has an obligation to ensure public order and safety, and provide necessary services as health care. Public officials are needed for this and they must be paid a salary. The **Fourth Geneva Convention** on occupation provides that while an occupying power has the right to remove government employees, it also cannot compel persons to work without payment. From this the conclusion can be drawn that an occupying power must ensure that wages be paid to those state employees retained in their positions.

13.19 Occupation and fundamental rights of the local population

What are the obligations of an occupying power towards the local population?

An Occupying Power is responsible for respecting the fundamental human rights of the population under its authority. All persons shall be treated humanely and without discrimination. This includes respecting family honour and rights, the lives of persons, and private property, as well as religious and customary convictions and practice.

Woman shall be especially protected against any attack, in particular against rape, enforced prostitution, or any form of indecent assault. Everyone shall be treated with the same consideration by the occupying power without any adverse distinction based, in particular, on race, religion or political opinion. Private property may not be confiscated.

See **article 46 Hague Convention** and **article 27 Fourth Convention**)

Article 46 Hague Convention (IV)

> "Family honours and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.
>
> Private property cannot be confiscated."

13.20 Prohibition of forcibly transferring of civilians during occupation

The occupying power is prohibited from forcibly transferring protected persons outside of the occupied territory for whatever reason.

See **article 49 Fourth Convention**.

Article 49 Fourth Convention

> "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
>
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons does demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.
>
> The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.
>
> The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.
>
> The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demands.
>
> The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

13.21 Prohibition of reprisals and collective penalties during occupation

An occupying power is specifically prohibited from carrying out reprisals and collective penalties against persons or their property. In general, no one can be punished for acts, which

he or she has not personally committed.

See **article 33 Convention**.

Article 33 Fourth Convention

> "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.
>
> Pillage is prohibited.
>
> Reprisals against protected persons and their property are prohibited."

13.22 Internment and assigned residence during occupation

The **Fourth Geneva Convention** permits the internment or assigned residence of protected persons for 'imperative reasons of security'. This must be carried out in accordance with a regular procedure permissible under international humanitarian law and allow for the right of appeal and for review by a competent body at least every six months.

See **article 78 Fourth Convention**.

Article 78 Fourth Convention

> "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 shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power."

The Fourth Geneva Convention provides detailed regulations for the humane treatment of internees.

13.23 Responsibility of the occupying power for the occupied population's well-being and health

What are the obligations of an occupying power to provide for supplies and healthcare to the population?

Generally, an occupying power is responsible for ensuring that food and medical care is available to the population under its control, and to facilitate assistance by relief agencies.

An occupying force has a duty to ensure the food and medical supplies of the population, as well as maintain hospitals and other medical services, “to the fullest extent of the means available to it.”

See **article 55** en **56 Fourth Convention**.

Article 55 Fourth Convention

> “To the fullest extent of the means available to it the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.
>
> The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements.”

Article 56 Fourth Convention

> “To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public heath and hygiene in the occupied territory, with particular reference to the adoption of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.”

13.24 Special attention for children and orphaned by the occupying power

The occupying Power shall make special efforts for children orphaned or separated from their families (**article 24 Convention).**

Article 24 Fourth Convention

> “The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of 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. Their education shall, as far as possible be entrusted to persons of the similar cultural tradition.”

13.25 Duty to the occupying power to facilitate relief in case of emergency

If any part of the population of an occupied territory is inadequately supplied, the occupying power shall facilitate relief by other states and impartial humanitarian agencies. See **article 59** and **61 Fourth Convention**.

Article 59 Fourth Convention

> "If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all means at its disposal.
>
> Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuff, medical supplies and clothing.
>
> All Contracting parties shall permit the free passage of these consignments and shall guarantee their protection.
>
> All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection."

Article 61 Fourth Convention

> "The distribution of the relief consignments referred to in the foregoing Articles shall be carried out with the cooperation and under the supervision of the Protecting Power. This duty may also be delegated, by agreement between the Occupying Power and the Protecting Power, to a neutral Power, to the International Committee of the Red Cross or to any other impartial humanitarian body.
>
> (…)
>
> All Contracting Powers shall endeavour to permit the transit and transport, free of charge, of such relief consignments on their way to occupied territories."

13.26 Responsibility for the occupying power to meet the needs of population

However, the provision of assistance by other does not relieve the occupying force of its responsibilities to meet the needs of the population.

See **article 60 Fourth Convention** and **article 69 Protocol I**

Article 60 Fourth Convention

> "Relief consignments shall in no way relieve the Occupying Power of any of its responsibilities under Articles 55, 56 and 59. The Occupying Power shall in no way whatsoever divert relief consignment from the purpose for which they are intended, except in cases of urgent necessity, in the interests of the population of the occupied territory and with the consent of the Protecting Power."

Article 69 Protocol I

"Basic needs in occupied territories

> 1. In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.
>
> 2. Relief actions for the benefit of the civilian population of occupied territories are governed by Articles 59, 60, 61, 62, (…) of the Fourth Convention, and by Article 71 of this Protocol, and shall be implemented without delay.

The occupying power shall ensure that relief workers are respected and protected.

13.27 Prohibition of forced labour otherwise than under specific conditions

Article 51 Fourth Convention second part

> "The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work, which would involve them in the obligation of taking part in military operations. (…)
>
> The work shall be carried out only in the occupied territory where the persons are whose services have been requisite. Every such person shall, so far as possible, be kept in his usual place of employment. Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning workers conditions, and safeguards as regards, in particular, such matters as wages, hours of work, equipment, preliminary training and compensation for occupational accidents and diseases, shall be applicable to the protected persons assigned to the work referred to in this Article."

Should it be necessary, particularly if there is an administrative vacuum, the occupying power may set up a new civil administration.

13.28 Obligation to release prisoners of war and detained civilians

When must a prisoner of war be released?

The Third Geneva Convention provides that prisoners of war (POW's) shall be released and repatriated "without delay after the cessation of active hostilities". The **Convention** and **the ICRC Commentary** do not provide guidance on the phrase "without delay", but indicate that only practical concerns, and not political considerations, are relevant.

Article 118 Third Convention

> "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."

As already mentioned above in **article 85 (4)(b) Protocol I**, "(b) Unjustifiable delay in the repatriation of prisoners of war or civilians, when committed wilfully and in violation of the Conventions or of the Protocol", even shall be a **grave** breach of **Protocol I**.

Must there be a formal determination that the war is over for POW's are to be released?

There is no requirement that there be a formal declaration that active hostilities have ended (in the same way that no formal declaration of war is needed for the Geneva Conventions to become applicable during an armed conflict). A formal declaration by a party to the conflict would be indicative of the end of active hostilities, but it is neither required nor conclusory.

Must all POW's be released?

All POW's must be released without delay. There are two important exceptions.

POW's against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and if necessary, until the completion of any sentence.

A POW may request not to be repatriated if there are serious reasons for fearing that he or she may become subject to prosecution. Such a request must be freely made and individually examined.

13.29 Apprehension of civilians and officials implicated in crimes or posing a security threat after the close of hostilities

May civilians and officials implicated in crimes or posing a security threat be apprehended after the close of the hostilities?

The occupying power may detain a civilian in anticipation of a trial for war crimes, crimes against humanity or other criminal offences.

13.30 Obligation to respect private property en the resources of the occupied territory

What obligations exist concerning the property and resources of the occupied territory?

In general, the destruction of private or public property is prohibited unless military operations make it absolute necessary (**article 53 Convention**).

Article 53 Fourth Convention

> "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or the State, or to other public

authorities, or to social or cooperative organisations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

13.31 Entitlement to special protection of cultural property during occupation

Cultural property is entitled to special protection; the Occupying Power must take measures to preserve cultural property.

See **article 5 Cultural Property Convention**.

Article 5 Cultural Property Convention

"1. Any High Contracting Party (?) of the whole or part of the territory of another High Contracting Party shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.

2. Should it prove necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and should the competent national authorities be unable to take such measures, the Occupying Power shall, as far as possible, and in close co-operation with such authorities, take the most necessary measures of preservation."

Article 28 Cultural Property Convention

"Sanctions

The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention."

Article 36 Cultural Property Convention

"Relation to previous conventions

In the relations between Powers which are bound by the Conventions of The Hague concerning the Laws and Customs of War on Land (IV) (…), and which are Parties to the present Convention, this last Convention shall be supplementary to (…) the Regulations annexed to the aforementioned Convention (IV) (…)."

Countless Serbian cultural sites in Kosovo have been demolished, among which more than hundred Serbian Orthodox churches and monasteries, some of them being upon the UNESCO list of cultural world heritage.

Instigated by the Albanian UCK terrorists, in order to wipe out every sign of more than thousand year Serbian-Christian civilization In Kosovo.

So the wantonly failing in the duty to take measures to protect Serbian cultural property, as demonstrated by the Western occupying powers in Kosovo after the de facto occupation of

this part of Serbian territory by those powers **constitutes a violation of 'the laws and customs of war'**.

The same goes for the wantonly failing by the American/British Occupying Powers in the duty to take measures against the pillage of Iraqi museums and archaeological sites, damaging beyond repair cultural world heritage of priceless value.

13.32 Prohibition of confiscation of private property - no excessive taxation in occupied territory

As a rule, private property cannot be confiscated. Religious, charitable and educational institutions are to be treated as private property.

Taxes and tariffs may also be imposed to defray the administrative costs of the occupation, including the cost of occupying forces.

See **article 49 Hague Convention**.

Article 49 Hague Convention (IV)

> "If, in addition to the taxes mentioned in the above article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question."

13.33 Only movable government properties allowed to be seized by the occupying power

Public properties are treated as either movable or immovable property. Movable government properties that may be used for military purposes (transport, weapons) are considered "spoils of war" and may be seized without compensation.

See **article 53 Hague Convention (IV)**.

Article 53 Hague Convention (IV)

> "An army of occupation can only take possession of cash, funds and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations."

13.34 Usufruct of public buildings and estates by the occupying powers

Immovable government properties (public buildings, real estate) may not be appropriated; however they can be used and administered by the occupying power so long as their assets are maintained.

See **article 55 Hague Convention (IV)**.

Article 55 Hague Convention (IV)

> "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."

Any loss of value from their use must be compensated.

13.35 End of occupation

Belligerent occupation ends when control by the occupying power is no longer exercised.

This usually occurs when there is a political settlement of the armed conflict, and the occupying power withdraws and a new government assumes authority.

Protected persons in custody or serving sentences for offences committed in the occupied territories must be turned over to the new authorities.

Requisitioned private property and immovable government property shall be restored.

The provisions of **the Fourth Geneva Convention** relating to occupation expire one year after the general close of military operations. However, those provisions concerning fundamental rights remain in effect so long as the occupation continues. See **article 6 Fourth Convention** and **article 3 protocol I**, as already cited on page 8-9 (?)

Remaining provisions of the Third Convention

Some important provisions of the **Third Convention** are left, and have finally to be considered.

First of all the solemn declaration of **article 1 Third Convention** must be recalled:

Article 1 Third Convention

> "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."

And the definition regulation of **article 4** should be brought back in memory:

Article 4 Third Convention

> "Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> 1. Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> 2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict ad operating in or outside their own territory, even if this territory is occupied,

provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) That of being commanded by a person responsible for his subordinates;

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war."

Article 5 Third Convention

"The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

Article 7 Third Convention

"Prisoners of war may in no circumstance renounce in part or in entirety the rights secured to them by the present Convention (…)."

Article 45 Protocol I

"Protection of persons who have taken part in hostilities

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such a status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Party or the Protecting Power. Should any doubt arises as whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal."

2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the

hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held in camera in the in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly."

Treatment of prisoners of war

The **Third Convention** provides for a vast system of protecting regulations with respect to the treatment of prisoners of war.

Article 12 Third Convention

"Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity."

Article 17 Third Convention

"Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. If he wilfully infringes this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status.

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposes to any unpleasant or disadvantageous treatment of any kind."

Article 21 Third Convention

"The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanction, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary."

Article 22 Third Convention

"Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries.

Prisoners of war interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible t a more favourable climate.

The Detaining Power shall assemble prisoners of war in camps or in camp compounds according to their nationality, language and customs, provided that such prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent."

Article 25 Third Convention

"Prisoners of shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. The said conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health.

The foregoing provisions shall apply in particular to the dormitories of prisoners of war as regards both total surface and minimum cubic space, and the general installations, bedding and blankets."

Article 28 Third Convention

"Canteens shall be installed in all camps, where prisoners of war may procure foodstuffs, soap and tobacco and ordinary articles in daily use. The tariff shall never be in excess of local market prices."

Article 31 Third Convention

"Medical inspections of prisoners of war shall be haled at least once a month. They shall include the checking and the recording of the weight of each prisoner of war."

Article 53 Third Convention

"The duration of the daily labour of prisoners of war, including the time of the journey to and fro, shall not be excessive, and must in no case exceed that permitted for civilian workers in the district, who are national of the Detaining Power and employed on the same work."

Article 54 Third Convention

"The working pay due to prisoners of war shall be fixed in accordance with the provisions of Article 62 of the present Convention."

Article 62 Third Convention

"Prisoners of war shall be paid a fair working rate of pay by the detaining authorities direct."

Article 60 Third Convention

> "The Detaining Power shall grant all prisoners of war a monthly advance of pay, the amount of which shall be fixed by conversion, into the currency of the said Power (…)."

Article 55 Third Convention

> "The fitness of prisoners of war for work shall be periodically verified by medical examinations at least once a month."

Article 63 Third Convention

> "Prisoners of war shall be permitted to receive remittances of money addressed to them individually or collectively."

Article 70 Third Convention

> "Immediately upon capture, or not more than one week after arrival at a camp, even if it is a transit camp, likewise in cases of sickness or transfer to hospital or another camp, every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the central Prisoners of War Agency, provided for in Article 123, on the other hand, a card (…). The said card shall be forwarded as rapidly as possible and may not be delayed in any matter."

Article 71 Third Convention

> "Prisoners of war shall be allowed to send and receive letters and cards.
>
> Prisoners of war who have been without news for a long period, or who are unable to receive news from their next of kin or to give them news by the ordinary postal route, as well as those who are at a great distance from their homes, shall be permitted to send telegrams, the fees being charged against the prisoners of war's account with the Detaining Power or paid in currency at their disposal. They shall likewise benefit by this measures in cases of urgency."

Article 72 Third Convention

> "Prisoners of war shall be allowed to receive by post or by other means individual parcels or collective shipments containing, in particular, foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character which may need their needs, including books, devotional articles, scientific equipment, examination papers, musical instruments, sports outfits and materials allowing prisoners of war to pursue their studies or their cultural activities."

Article 78 Third Convention

> "Prisoners of war shall have the right to make to the military authorities in whose power they are, their requests regarding the conditions to which they are subjected.
>
> They shall also have the unrestricted right to apply to the representatives of the protecting Powers either through their prisoners' representative or, if they consider

> it necessary, direct, in order to draw their attention to any points on which they have complaints to make regarding their conditions of captivity.
>
> Prisoners' representatives may sand periodic reports on the situation in the camps and the needs of the prisoners of war to the representatives of the Protecting Powers."

Article 79 Third Convention

> "In places where there are prisoners of war, except in those where there are officers, the prisoners shall freely elect by secret ballot, every six months, and also in case of vacancies, prisoners' representatives entrusted with representing them before the military authorities, the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them. These prisoners' representatives shall be eligible for re-election."

Article 80 Third Convention

> "Prisoners' representatives shall further the physical, spiritual and intellectual well-being of prisoners of war."

Article 99 Third Convention

> "No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed."

Article 119 Third Convention

> "Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence."

Article 129 Third Convention

> **Committing crimes against international law implying also, at the same time, the commission of common crimes according to domestic law - true nature of the outcome of the acts of war stemming from aggression, actual war crimes and crimes against humanity**

All States, no matter whether they are party to the **Geneva Conventions** and/or the **Rome Statute** or not, have face the obligations, resulting from the provisions of their **own national penal code**.

There is no decisive reason why any act that may be criminal in terms of **international humanitarian law**, should not be considered, at the same time, as criminal in terms of **national penal law**. At least if that specific act will enclose any act, or acts, which also might be reduced to common indictable offences according to national penal law. And if that act, or those acts, is committed by persons who find themselves within the **common criminal law jurisdiction** of the state concerned.

After all, most **war crimes** and **crimes against humanity** are to be analysed in one or more - sometimes a whole series - of what are going to be specific crimes according to **national penal law** standards a the same time as well.

So **war crimes** and **crimes against humanity** may imply acts of **destruction, murder, inflicting physical injury and numerous other crimes** according to national criminal law standards.

And there is no reason why such acts, indicated as common crimes by the state's own **national penal regulations**, should not be considered - if committed by the specific state's own nationals -, at least in principle, also prosecutable and punishable as common crimes by own **national judiciary**, only because they may have been committed during what is indicated as "a war".

This not only applies to **war crimes** and **crimes against humanity**. But also to the **crime of aggression**.

Aggression involves inevitably acts of war.

Aggression is illegal. Since aggression can only find expression in war acts, it must be accepted that the illegal character of aggression also extends over those acts of war.

So these acts of war are equally illegal.

There is no argument why this should be viewed otherwise.

Any other view on this issue, arguing that in case of aggression there still might be legal acts of war, fails owing to the outcomes of such acts of war.

The outcomes of such acts of war are, as already pointed out above, after all - and this is inherent in the very nature of acts of war, legal and illegal equally - destruction, deaths, injuries and, generally speaking, other infringements of subjective rights.

So to advance the thesis that - illegal - aggression might generate **legal** acts of war, means advancing the thesis that from an **illegal** war could stem **legal** destruction, **legal** deaths, **legal** injuries, and **legal** infringements of subjective rights.

How such an **illegal** war might give birth to **legal** destruction in the broadest sense of goods and humans than remains without explanation and likewise inexplicably.

Still there are adherents to the theory that the legality of acts, causing harm to humans and goods, during what is called "a war", should be regarded as distinct from the legality of the same kind of acts, causing harm to human and goods during what is **not** to be called "a war".

And this irrespective as to whether what is called "a war" were a **legal** or an **illegal** war.

According to the adherents to this theory, whatever acts are committed during what is called "a war", such acts have to be considered as never falling within the category of **common criminal offences** according to **national law**.

So according to this theory, even the most serious crimes, committed by the nationals of a state, conducting or participating in what is called "a war", were never to qualify in terms of

violations of the own national penal regulations of the concerned State or States. No matter as to whether that "war" was **legal** or **illegal**.

Apparently this conception is also reflected in the view of the Attorney General of Canada, expressed in the already mentioned case **Aleksic v. Canada** before **the Ontario Superior Court of Justice**.

He asked in this case the following question - unfortunately also here only the authorized German translation is available -:

> "(38) Wenn ein kanadischer Bürger nach Jugoslawien gereist wäre, eine Bombe unter das Haus einer beliebigen Person gelegd und es in die Luft gesprengt hätte, wodurch dem Bewohner Schaden zugefügt worden wäre, dann gäbe es kaum Zweifel, dass der Bewohner nach Kanada kommen und der Täter wegen Körperverletzung und auf Ersatz des erlittenen Vermögensschadens verklagen könnte. Ist es etwas anderes, wenn dasselbe Haus nicht van einem Staatsangehörigen, sondern von der Regierung mittels einer van einem kanadischen Flugzeug abgeworfenen Bombe in die Luft gesprengt wird, wobei dies auf die Entscheidung der kanadischen Regierung, an der Bombardierung Jugislawiens durch die NATO teilzunehmen, zurückzuführen ist ?"

According to the Attorney General of Canada the answer must be affirmative, just because in the second case the illegal destruction were based upon **political decisions**.

So this Attorney-General dares to claim that when death and destruction were inflicted illegally from high in the skies and instigated illegally by a State's government, this should be considered as totally different from inflicting illegally death and destruction from below on the ground, instigated illegally not by a State's government.

In the first situation, to his opinion, only regulations of **international law** were applicable, while **national penal provisions** were excluded in relation to the perpetrators and other responsibles.

In the second case, to his opinion, the perpetrators and their co-responsibles should face prosecution according to **national criminal law**.

Eighty years after the first steps to outlaw the use of illegal force between States, i.e. to outlaw aggression, by the Briand Kellogg Pact, and more than fifty years after the definitive ban upon force, confirmed by the UN Charter, there is no ground anymore for such a distinction.

The consequences of illegal infliction death and destruction are in both situations completely the same, namely the same illegally inflicted grief and damage for the victims and the same infringement of the legal order.

And secondly, it is a misconception that the first case should be regarded as a **matter of politics**. As pointed out above, it is primarily, from a **legal point of view as well as from the outlook of the victims, who are addressing the judge for his judgment**, a matter of illegal breaches in their subjective rights.

So, as long as a legal foundation behind those acts fails, it doesn't matter that, in the first case, one speaks in terms of "a war", based upon political decisions, and in the second

situation one doesn't.

What is prevailing than will be the fact of the same illegality in both cases.

Which makes that, in both cases, **national criminal law** shall be applicable.

Any opposite perception is absolutely wrong.

An example will make this clear.

Take the case of, for instance, Belgium starting, after a period of growing tensions between the two countries, military attacks and bombardments against the Netherlands. Not in a situation of legal self-defence or sanctioned by a Security Council authorization, but only because Belgium feels threatened by the Netherlands and intends to inflict a decisive pre-emptive military blow. However, Belgium restricts its attacks and bombardments strictly to what is to considered military targets: military barracks, military installations, concentrations of troops, etc. In the course of its military actions, Belgium's military forces kill and injure thousands of Dutch soldiers and inflicts damages for tens of millions euros. As a side effect they kill and injure also hundreds of Dutch civilians, but all purely to be blamed on 'collateral damage'.

According to the view that such an **illegal** war is going to produce **legal** outcomes of military actions in terms of casualties and material losses, as long as those military actions are directed at military targets, all these thousands of Dutch casualties are to be seen as **legal** casualties, and all those material destructions are to be regarded as **legal** damage.

So far, in terms of that view, all what was inflicted by Belgium with military means was totally **legal** and **legitimate** in sense of international law.

The **European Charter on Human Rights** indeed forbids arbitrary killing of people, yet this killings by Belgium were not arbitrary, but the result of **legal** acts of war. So they were **legal** killings. And neither the Netherlands as a State, nor the victims of this Belgian acts of war and their surviving relatives as individuals, who are duped, might have any form of legal redress.

Nobody may believe that this should be a correct interpretation of international law !

So it has to be faced that, since the moment in history that war (without authorization of the Security Council and not instigated by legal self-defence) is outlawed, not only the conduct of war should be illegal and criminal, but also all destruction, originating from such an illegal and criminal war, should be considered illegal and criminal as well.

This implies that all destruction of goods, all injuries, all casualties and all other modalities of infringements of subjective rights, resulting from a war of aggression, are likewise to be qualified as penal acts, as offences, also according to the **national** criminal codes of the national States, which are involved. Involved in the aggression at the side of the aggressor-State(s), as well as victims at the side of the victim-State(s).

So the victims of aggression have to be qualified as victims of crimes also in the sense **national criminal law** standards.

National criminal law standards, laid down in the **penal codes** of the aggressor-State(s) as

well as of the victim-State(s).

The intention to target (military) objects than should consequently be qualified as intention of committing the crime of destruction, the intention to target (military) human beings, should consequently be qualified as commission of the crime of attempted murder, or at least attempted manslaughter, etc., all in the sense of the common **penal codes of the national States** involved.

The same principle applies also for **war crimes** and **crimes against humanity**. Those crimes against international humanitarian law imply also offences according **national** criminal law codes of the national States, which are involved.

So also here the situation exists that victims of **war crimes** and **crimes against humanity** have to be qualified as victims of **national criminal law** standards as well and that committing such crimes also has to be qualified as the commission of common crimes in the sense of the **penal codes of the States** involved.

Consequently not only those who are responsible for committing **war crimes** and **crimes against humanity**, but also the performers of, and responsibles to, the **crime of aggression** shall be guilty of crimes according to their own national **criminal law** provisions.

So all of those crimes are also to be judged as common offences according to the **national** penal codes of the States involved.

So in the field of possible criminal law action, directed at the initiation of legal action before **national courts** of the States, involved in the aggression, war crimes or crimes against humanity, which will be at issue, the victims may invoke two separate legal foundations for their complaints.

Firstly they can appeal to the written and customary principles and regulations of **international humanitarian law** and the **law of armed conflicts**.

And **secondly** they can underlie to their complaints the **common penal regulations** of the **domestic criminal codes** of the States concerned.

Law practice of the past decade - from the 1991 Gulf War, along the wars against Yugoslavia and Afghanistan, to the second 2003 war against Iraq- learns that domestic courts of western States never get tired to invent, time and again, new barriers against a full application of the principles and regulations of **the law of armed conflicts** and **international humanitarian law**.

Stating inter alia, as already above discussed above, fist of all such broadly accepted nonsense as that the international norm prohibiting **aggression** should not be self-executing, and consequently could not be invoked by the victims, even not in criminal proceedings. And further exploiting the argument that, in case of actions by force outside the country, conducted by their own military, there wouldn't be created a coming into force of a situation of being '**within their jurisdiction**' respectively '**subject to its jurisdiction**', as described in **article 1 Convention for the Protection of Human Rights and Fundamental Freedoms (European Human Rights Convention)** respectively in **article 2 Para 1 International Covenant on Civil and Political Rights**. Which subsequently will gives the arguments desired to deny completely and totally any application of the **EHRC** and the **ICCPR** with

respect to all acts of warfare conducted by western States, no matter if they may be legal or illegal.

So this way of arguing is leading to the conclusion that, for the victims of illegal acts of war, there is actually not going to be any recourse to the protection which these **two major human rights instruments** are supposed to provide. At least as long as any form of military occupation of the State under attack will fail to occur.

It has been the **European Court of Human Rights** itself, that caused this complete remove of legal protection, which the **EHRC** is supposed to provide for, also towards the victims of illegal acts of war. This by the affirmation, in the Court's

2001 verdict regarding the case of **the RTS-victims versus a number of NATO States**, of the defendants' plea that even NATO's ruthless air attacks, destroying whatever was intended to destroy, didn't mean that the Yugoslav victims in question, about whose life and dead literally was decided by NATO's countries of aggression, should have been, at that specific time, '**within their jurisdiction**' in the sense of **article 1 EHRC**.

Delivering this verdict after deciding, some years earlier, exactly the opposite in the case of some **Cypriote civilians vs. Turkey**, regarding Turkish bombardments of Cyprus.

It has to be repeated, however, that there seems to be in existence a complete different situation, if any form of actual occupation will follow after big-scaled bombardments all over the country. For, as it has already been stated before, in respect of such a circumstance customary law stipulates very clearly that the occupied territory and its inhabitants should be regarded as '**within the jurisdiction'** of the occupying power or powers.

So, as soon as any occupation actually may be effectuated, all crimes against international humanitarian law, committed from that moment, seem to come within the reach of the standards set by the **EHRC** and the **ICCPR**. However, this is not the case with crimes committed by the western military forces in the war, being the start-up phase to such occupation. The victims of western military aggression, war crimes and crimes against humanity, committed in that pre-occupation phase, should have to do without any protection of the **EHRC** and the **ICCPR**, so seems to be the predominant outcome of jurisdiction with respect to international humanitarian law provisions.

However, **national** criminal law regulations, laid down in **national criminal codes** of the various western States, seem, on the other hand, not to be subject to such limitations in respect of jurisdiction. This because the actions of the States' governments and the acts of their nationals, at least as far as serious crimes are concerned, generally remain under the jurisdiction of their own **domestic judiciary**, no matter in which country such serious crimes may have been committed.

So there seem to be no predominant objections against the acceptance that jurisdiction of **domestic courts** may exist, if, for example, a suspect of western crimes would be accused, by its victims or their surviving relatives, of, for instance, **ill-treatment** or **murder** according to **national criminal law regulations**. While, at the same time, the same **national courts** may deny jurisdiction with respect to exactly the same crimes, if they have been put forward in the form of crimes against international humanitarian law provisions.

So the best way of acting seems here to arrange to be anchored at both positions at the same

time. Arguing on the one hand that the crimes at issue should violate certain regulations of international humanitarian law, written or only of customary law character, and, on the other hand, should be also breaches into the **national penal law code** of the State, or States, concerned.

Both legal foundations explicitly presented in the complaints, in **clearly separated juxtaposition**!

However, one problem will remain at all times. That's the problem of the position of the prosecutor in all criminal law affairs as a gatekeeper.

If criminal law action actually is going to be taken against alleged perpetrators of international humanitarian law violations and their accomplices are not in hands of the victims of such violations. That will be highly dependent from the conduct of prosecutors, either when victims will seek criminal law action on the level of **national** jurisdiction, or when they will try to instigate action by an **international** court, like **the ICC**.

After the **Geneva Conventions** have laid explicitly upon all member States the duty to provide '**effective penal sanctions for persons committing...grave breaches**', '**to search for persons alleged to have committed...such grave breaches**, and '**to bring such persons, regardless of their nationality, before its own courts' (article 146 Fourth Convention)**, the prosecutor is the one who finally has to implement the final piece of this assignment, **to bring them actually in court**.

However, no matter that this assignment is clearly a treaty obligation, reconfirmed many times by United Nations General Assembly Resolutions and other international declarations, nearly all States have dressed strong barriers against a full implementation of this requirement in their domestic legislation.

Most States have established in their national laws, intended to implement the obligations arising from the **Geneva Conventions**, specific provisions, which, in practice, greatly restrict a full application of this **principle of universality of jurisdiction**.

Most important limitations, which use to be introduced, are requirements that there will only be national jurisdiction with respect if the suspects at least have any kind of relationship with the legal order of the State concerned, either by place where the crime is committed, or by the national identity of the suspect or the victim(s), or by the fact that the alleged perpetrator has some forms of residence in the State concerned.

Second barrier will be that the prosecutor, in whatever State, usually will act in conformity with the **principle of opportunity**. This means that it will be up to him, within the outlines set up by his superiors, to decide whether or not to prosecute in a specific case.

The prosecutor, a State official and at least finally subordinated to the Minister of Justice in most countries, has to act in conformity with directives regarding his prosecution policy.

So eventually it will be, in this construction, the State's government that will decide how to detail prosecution of suspects of serious crimes against international humanitarian law, and all the more if suspects of other national identities are at issue.

And, of course, western States' governments don't feel much inclined to prosecute the nationals of other western States. Since undoubted this will cause diplomatic frictions.

In fact, recent history actually proves that nearly all complaints filed at the prosecutor's office of different western States with respect to western crimes committed during the last decade of western wars against non-western states remained unsuccessfully.

However, it has to be stressed that sometimes things had been made very easy for the various prosecutors, confronted with such complaints. Of course it could have been easily foreseen that the prosecutors of the various western States at least would place forced demands on the foundations and the evidence of such complaints. Many complaints did not hold even a serious attempt to meet such an anticipated standard.

And likewise it could have been foreseen prosecutors, from all different western States, would accept the getaway opportunity, offered by those complaints, not filed by the victims of western crimes and their relatives themselves or on their behalf, but by westerns nationals and western anti-war groups on their own behalf.

Such complaints easily could have been thrown out under the pretext of lack of direct interest.

Nevertheless, there is no reason to resign oneself to this state of affairs. While learning the lesson of the recent past, the thing is persist in the filing of complaints. However, from now on as solid as possible and from now put forward exclusively on behalf of the victims of western aggression, war crimes and crimes against humanity and their surviving relatives.

In fact, there is no alternative, because the only way to get eventually access to the **International Criminal Court (ICC)** goes along the domestic prosecutors.

Only when they are going to dismiss such a complaint, or they are... as it is stated in **article... Rome Statute**, than subsequently **the ICC** will become admissible.

So in order to get access to **the ICC**, a complaint at the domestic prosecutor will be, in a general sense, the first stage.

The same course of conduct even should be recommended in respect of complaints against the crime of aggression, also when the domestic legal system of the State or States concerned may not be equipped with legal provisions making aggression punishable according to national law.

After dismissal of such complaints by reason of lack of national provisions attaching penalties to such crimes on the **national** level, the way to **the ICC** is opened. And subsequently **the ICC** can be requested to store this complaint. And to keep it pending until the moment that a definition of aggression has been introduced in the **Rome Statute**, as announced in its regulations.

If more than one western State actually has been involved in a war, and as a consequence at the same time actually more than one western State and their nationals may be hold responsible for crimes against international humanitarian law, there will be also the perspective of organizing a circulation of the complaint along the various prosecutors of the States involved. Relaying it to next prosecutor, every time that the complaint would have been dismissed by his predecessor in order to try to find any opening there, where it was denied elsewhere and instead of stepping right up to **the ICC** after dismissal of the complaint by a certain western State's appropriate judicial institutions.

The benefit of this tactics could be, moreover, more and prolonged political consternation and suspense, spreading over more western States.

So this could be the right way to maximize the political effects of such a criminal complaint.

In relation to this issue of political effects of such criminal law complaints and how to maximize them, it finally has to be recalled that all western States' law systems are provided with the opportunity to appeal against a domestic prosecutor's decision to abstain from prosecution. Mostly this opportunity of appeal rests with a judicial organ, assigned for it.

No matter how marginally the appropriate judicial organ actually may conduct its assessments of the prosecutor's decision, such appeal certainly will cause a lot of extra stress and doubt with respect to the final outcome. Since, anyhow, the State's control over the functioning of that appeal body will be even less perfect than the control of the prosecutor's performance.

So also the opportunities of lodging an appeal against the prosecutor's decision should be exploited as much as possible.

So far the opportunities of legal action provided for by **criminal law**.

However, victims of human rights violations not only have criminal law action at their disposal. They possess also opportunities for legal action provide by **national civil law**.

To the victims of violations of international humanitarian law, **civil law action** is the appropriate instrument to claim damages.

In such **civil law litigation** may be at stake demanding an end to aggression, and participation to it, as well as to other violations of international humanitarian law and/or claims for damages. Millions of dollars may become the issue of such **civil proceedings**.

Civil law action is going to have one overwhelming advantage in comparison with criminal law: if a lawsuit actually has been filed, it's going to assured that the case will came in court. That means that, at that very moment, the case is withdrawn from direct control by the involved State's administration. And this lack of direct control may raise not only uncertainty in the ranks of the State's administration, because they cannot determine the outcome anymore, but might raise also publicity.

So on the one hand the potentials of this means are perhaps even greater than the opportunities offered by **criminal law action**. But on the other hand **civil law action** is far more expensive and will take a lot of time and a lot of money.

However, the latter don't need to be a problem, since **civil law litigation** might be directed at demanding huge amounts of money for compensation. So the point is therefore to bring lawyers into the case that are prepared to work on it on the basis of '**no cure no pay**'.

There is no predominant reason why it should be impossible to find such lawyers. Especially in the US there must be good perspectives to recruit lawyers on this basis. And it certainly is reflecting the ruined nationalistic and patriotic atmosphere into the US that, till now, such lawyers not yet have been pushed themselves forward in the US with respect to potential claims of victims of US acts of aggression and other acts of war in contravention with international humanitarian law.

Anyhow, the search for such lawyers should be taken up seriously, primarily in the US, but also in other western States.

At the same time, and parallel to this, funds must be raised for undertaking lawsuits, as at issue here, on behalf of victims, and directed at demanding generous reparations. This in order to prevent that such suits would remain induces, if lawyers who may be willing on 'no cure no pay' wouldn't show up.

If western States, responsible for the crime of aggression and other crimes against international law as well as those private persons who are actually performing such crimes systematically would get summons to appear before their domestic courts, in order to account for these crimes against non-Western States, this definitely should be a wake-up call to all people involved that also western rulers and their executives may be held to the standards of liability with respect to such actions.

As it is indicated already above, all western States have established standards of liability for tort, which will make, at least in principle, the committing of crimes also tortuous according to standards of **national civil law** in relation to the victims of such crimes. So, as already stipulated, all western States are going to have a fully developed body of law on when actors are responsible for harm.

Next question is: to what extent victims and their surviving relatives, acting as plaintiffs, may hold the State, or States, as well as private parties involved liable for violations of international humanitarian law?

Here raises the same dichotomy as in the field of application of **criminal law**.

The **domestic legal systems** of the various western States differ with respect to the scope of their doctrines of tort.

Some western States are anxious to maintain a distinction between actual standards for tort, as well as responsibility for tort, under **common civil law** conditions, and the standards for liability in respect to violations of **international humanitarian law** in general or the **laws and customs of war** more specifically.

Though the basic rule remains in all cases that nobody can commit a crime and claim not to be responsible, a number of western States nevertheless hold that the committing of crimes against the laws and customs of war should be tortuous indeed, but that such a violation should be not admissible for claims submitted by private persons.

Those particular western States hold furthermore that the only party, which is going to be provided with an actionable claim as a result of violations of the laws and customs of war, should be the Victim State itself. And that regulations in the **Geneva Conventions** and in **Protocol I**, alluding to the principle of liability for damages because of breaches of the **Geneva Conventions** and this **Protocol**, would be underlining that there is no private right of action.

This view is, for example, reflected in a July 2003 verdict of the German 'Bundesgerichtshof' in the case of the surviving relatives of the Greek village **Distomo**, massacred by the German Nazis in 1944. This court held that private parties cannot act for damages in respect of war crimes, which right should be reserved to States only.

Appeal at the 'Bundesverfassungsgericht' is now the last resort against this decision.

Private parties are also cut of from any direct appeal to the protection provided for by the **EHRC** and the **ICCPR before the** national courts of the war conducting State or States either, as a potential foundation for an actionable claim for damages.

At least as long as the acts of war, to characterize as crimes against the law and customs of war, are dated from pre-occupation time.

However, this conception, expressed by the ruling of the German High Court in its **Distomo-decision**, is certainly not generally accepted in all western States.

American courts, for example, found that private persons may invoke such claims against both States and private actors.

So the various legal conceptions on that issue, as far as already crystallized in the various western States, should be scrutinized, State-by-State.

But even when such restrictions with respect to actionable claims for private persons should apply in certain western States regarding violations of **the laws and customs of war** specifically, this doesn't mean, at least not automatically, that the same restrictions should also apply to claims filed by private persons in respect of violations of **other regulations of international humanitarian law**.

Nevertheless, even when civil legal action, founded into the violation of other regulations of international humanitarian law may not provide the victims with an actionable claim as well, because of the same reasoning that only State parties should be entitled to claim damages, also with regard to all kinds of such other regulations of international humanitarian law, even than this doesn't mean that victims of crimes against the laws and customs of war and crimes against other standards of international humanitarian law alike, should have been deprived from all opportunities for private action based on tort.

After all, would legal doctrine of any western State completely rule out any possibility to an actionable claim by victims, founded in violation of whatever principle or regulation of international humanitarian law in general, or in the **laws and customs of war** specifically, than, as already stressed above, most violations of international humanitarian law are actually composed of, or are keeping up with, ordinary criminal offences according to **national criminal law standards**, and which are accordingly hold punishable in all criminal codes of western States.

So **behind** such crimes against international humanitarian law, it will be possible to detect such **common offences** like, for instance, **destruction**, **ill treatment**, **murder**, **manslaughter**, **etc.** All in the sense of **the penal codes** of the national States concerned, and consequently crimes which, though committed abroad, will fall wholly within the national legal order, at least if committed by **nationals** of the States concerned.

This fact will give the victims of such crimes the opportunity, just as with respect to their complaints in the field of **criminal law action**, to invoke also here, in the field of **civil law action**, two separate legal foundations for their claims: besides a appeal to the written and customary laws principles of the laws and customs of war and further **international humanitarian law**, they may underlie to their legal action, based on tort, also **common**

penal regulations of the **domestic criminal codes** of the State or States concerned.

And there is no dogmatic argument in whatever western State why such an appeal to the **national criminal code** wouldn't be successful.

In the Netherlands the Dutch Supreme Court ('Hoge Raad') explicitly awarded such appeal to offences in contravention of the Dutch Criminal Code, submitted to found civil law action claiming tort with respect to Dutch involvement in criminal military actions during NATO's 1999 war of aggression against Yugoslavia in **Danikovic c.s. v. The Netherlands**. This by verdict of...

So the best **litigation strategy** may be, also with respect to **civil law action**, to have recourse to both anchors and to present explicitly in the suits both legal foundations from the very beginning, so already in the summons in a separate juxtaposition, in order to underline clearly that they are invoked on an equal basis.

Civil legal action for damages by victims not only may be raised against violations of international humanitarian law caused by States or by private persons, but also against violations of international humanitarian law caused by **multinational corporations**, and that not only in times of armed conflict, but also outside situations of armed conflict.

Specifically in the US there is now already established a large law practice with respect to this issue.

Part of the **US domestic law system** is the **Alien Tort Claims Act (ATCA)**, which reads as follows: "The district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the laws of nations or a treaty by the United States."

This act, adopted in 1789, lay dormant for two centuries before being rediscovered by various groups as a way to bring multi-million-dollar lawsuits - often with the assistance of US trial lawyers - against a growing number of foreign nationals alleging direct involvement or complicity in human rights abuses all over the world.

This act is exploited more and more and has been evolved now during the last decade to the centre of a vast law practice and a stormy evolution of law.

Most remarkable characteristic of this act is that it introduces the **principle of universality** in **tort law** with respect to violations of international humanitarian law.

So this act gives American courts jurisdiction with respect to claims submitted by every non-American for damages, rising from violations of international humanitarian law, committed wherever on earth by whomever.

Law practice based on this ACTA is, up till now, just as far-reaching as this basic characteristic of this act.

Of course there are some general limitations for the ATCA with respect to its applicability. Most important are those set by the doctrine of **forum non-conveniens** and by **sovereign immunities**.

If there are no conditions that may render the State in which the violations of international humanitarian law at issue may have been committed an unacceptable forum, than the case

will be not applicable before US district courts on **forum non conveniens** grounds. And consequently the case may be dismissed. However, when there is no forum at all for such claims, or the forum available may reasonably be expected not to provide for adequate proceedings or standards with respect to such claims, the case may go forward in U.S courts.

Next major limitation will be the **Foreign Sovereign Immunities Act (FSIA)**. The **FSIA** codifies the common law doctrine that foreign sovereigns, their agencies, and their instrumentalities are generally immune from suit in US courts. The **FSIA** is subject to numerous exceptions; and if a plaintiff seeks to bring a suit against a sovereign State in US federal court, than it must produce evidence that such an exception applies.

Consequently, federal courts threw out lawsuits against the **Saudi Arabian government** for torture and against president **Jean-Bertrand Aristide of Haiti** for extrajudicial killings.

With respect to the requirements for **personal jurisdiction**, courts in general apply the **minimum contacts test** to determine whether exercising jurisdiction over a defendant is in accordance with principles of '**fair play and substantial justice**'.

The **minimum contacts test** requires that the court assess the degree of contact of the party with the US as Forum State as well as the relatedness of the contacts to the claim at issue.

So sometimes there has been ruled that the plaintiffs can only sue defendants who venture onto US soil, however putting one foot on American ground was considered sufficient.

However, a possible exception to the **minimum contacts test** arises if the alleged violation is a 'universal offence, such as slave trading, hijacking planes, genocide, and war crimes'. Any State has jurisdiction over these claims, regardless of the nationality of the parties or the place where the event-giving rise to the suit occurred.

In an ATCA claim, it is often possible that the allegations will include universal offences.

Although the **FSIA** limits the range of possible State defendants, it says nothing about **private** defendants.

By now, there is a growing stream of law practice about the ATCA, clarifying that there should be an actionable claim if a claim should present three elements: 1. alien plaintiffs; 2. suing for a tort; and 3. committed in violation of international law.

The third prong is the most heavily contested issue because "it forces American courts to identify customary international law or treaties, establish their contents, and enforce their provisions in contexts where they have seldom, if ever, been used", like a commentator wrote.

Now, most courts hold that a violation of international humanitarian law is established 'if the conduct is universally recognized as wrong through international agreements, decisions, resolutions, and scholars'.

A growing assortment of new plaintiffs has already sought to make use of the Act. **Philippine nationals** sued the family of ex-dictator Ferdinand Marcos. An **Ethiopian victim** sued his torturer and won a large judgment. A **group of Guatemalan peasants** successfully sued the country's former defence minister, whom they accused of complicity in torture and extrajudicial killings. Unable to get hearing in Japan, **a group of Chinese men** forced into

labour during the Second World War recently filed suit in the US under the **ATCA**. **East Timorese plaintiffs** are suing the Indonesian army's second-in-command, general Johny Lumintang, in a District of Columbia federal court. The lawsuit accuses him of masterminding attacks on the population of East Timor.

For plaintiffs seeking compensation, and for the networks of activists and lawyers who support them, it is not only the broad jurisdictional reach of the **Alien Tort statute** that makes US courts attractive. Pursuing claims in the US offers several other advantages. The class action mechanism and the availability of punitive damages all enhance the chance of winning large judgments.

The **Alien Tort statute** is especially of growing importance with respect to the struggle against human rights abuses by western **multinational corporations** in non-western States.

For application to the requirements for **personal jurisdiction** with respect to **multinational corporations** not based into the US also here the **minimum contacts test** is important.

In **Asahi Metal Industry Co. v. Supreme Ct.**, the Supreme Court held that where a non-US company simply paces a product in the stream of commerce in the Unites States, **minimum contacts** not have been met and jurisdiction is improper.

The **Asahi** court provided examples of activities that may subject a non-US defendant to personal jurisdiction, including advertising. Jurisdiction over corporations is also available where the level of activity in the forum state is "continuous and systematic". Notably, in a suit against a defendant that is not a US entity, the court may find that there are sufficient **minimum contacts** with the U.S, rather than any particular State.

And of course also here, a possible exception to the **minimum contacts test** arises if the alleged violation is a "universal offence", like for example war crimes, torture and slave trading, because any State has jurisdiction over claims including such universal offences.

New standard for aider and abettor liability under the ATCA

A September 2002 breakthrough decision by the US Ninth Circuit Court of Appeals in Pasadena in the **Unocal case (Doe v. Unocal)** may have far-reaching consequences for liability of **multinational corporations** with respect to the doctrines of complicity in human rights abuses and **aiding and abetting human rights violations**.

The legal battle against **Unocal** began in 1996 when **Burmese villagers** filed a suit in US federal court demanding that Unocal pay tens of millions of dollars in damages for alleged abuses committed by soldiers along the Yanada pipeline.

A federal judge found that the evidence suggest "that Unocal knew that forced labour was being utilized and that the joint ventures benefited from the practice."

But he threw out the case because the company's conduct did not raise to the level of "active participation" - a liability standard the court borrowed from the **Nuremberg war crimes trials** involving the role of German industrialists in the Nazi forced-labour program.

This liability standard diverted from the **Nuremberg Charter** was also directly invoked earlier, in the mega-suits known as the **Swiss Bank Litigation.**

In late 1996 and early 1997, Holocaust survivors and their descendants filed three suits against Swiss banks alleging that the banks knowingly profited from slave labour and stolen property during the Nazi reign in Germany. They alleged participation and complicity with the Nazi regime in perpetrating crimes against humanity, crimes against peace, and war crimes, and claimed liability under the **ATCA**.

The Eizenstat Report, officially ordered by the US government, speculates that Swiss banks prolonged the war by providing funds to the Nazis.

The Holocaust plaintiffs invoked the **Nuremberg Principles** to prove liability on the part of the banks.

The **Nuremberg Principles**, developed by the **International Law Commission**, are a restatement of the principles recognized in the **Nuremberg Charter**, the decisions of the **International Military Tribunal ("IMT")** that convicted Nazi war criminals and customary international law. **Principle VI of the Nuremberg Principles** defines crimes against peace, war crimes and crimes against humanity. **Principle VII** provides that complicity in committing a crime against peace, a war crime, or a crime against humanity, violates international law.

At the Nuremberg Trial, Frederick Flick, a German industrialist, was convicted of spoliation and plunder for his take over of a cement plant in France. The Nuremberg tribunal found Flick guilty for accepting and retaining property that he knew the Nazi regime had obtained unlawfully.

Thus, knowingly supporting and accepting looted property from war criminals is a violation of international law under the **Nuremberg Principles**.

The **Nuremberg Trials** in general, and the Flick conviction in particular strengthen the Holocaust plaintiffs' claims.

The parties to the Holocaust litigation eventually settled, and therefore, no judicial opinion was ever made regarding the legitimacy of those claims under international law.

The 9the Circuit Court overturned the dismissal of the **Unocal** case, which was based on the consideration that, according to the **Nuremberg standards**, 'active participation' should be here the right criterion for liability, but that **Unocal**'s conduct did not meet that level.

Rejecting furthermore **Unocal**'s argument that Myanmar law should govern **aider and abettor liability**, the Ninth Circuit looked to international law to provide the legal standard in this issue.

What this case was about is whether a private company can be held responsible for actions of human rights violations of a foreign regime, when the company didn't do any of the offending conduct, but was merely profiting from it.

Although the judges agreed that **Unocal** should face trial, they disagreed over what standard of liability should apply. The majority opinion said **Unocal** should be held to **the international law standard** developed by the Yugoslavia and Rwanda tribunals.

So based on the decisions of these tribunals, **Unocal** identified the nature of the act (**actus reus**) and mental state (**mens rea**) required to trigger aider and abettor liability under the

ATCA.

According to the **Unocal** court, international authorities held that "the actus reus of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime" (Id. at *45. Citing the ICTY case of Prosecutor v. Furundzija, IT-95-17/1-T (Dec. 10,1998).

Unocal sketched out the contours of this doctrine as follows in order to qualify for liability: "assistance need not constitute an indispensable element, that is, a conditio sine qua non for the acts of the principal" (Furundzija at 209; see also Prosecutor v. Kunarac, IT-96-23-T & IT-96-23/1-T, 391 (Feb. 22,2001): "The act of assistance need not to have caused the act of the principal." - www.un.org/icty/foca/trialc2/judgement/index.htm).

Rather, it suffices that "the acts of the accomplice make a significant difference to the commission of the criminal act by the principal" (Furundzija at 233).

The acts of the accomplice have the required "[substantial] effect on the commission of the crime", where "the criminal act most probably would not have occurred in the same way [without] someone acting in the role that the [accomplice] in fact assumed" (Prosecutor v. Tadic, ITY-94-1, 688 (May 7, 1997) www.un.org/icty/tadic/trialc2/judgement/index.htm. Idem at ** 45-46).

Notwithstanding its reliance on such ICTY authority, the **Unocal** majority elected to drop the reference to "moral support" from its formulation of the liability standard. Noting, "there may be no difference between encouragement and moral support" (Id. at *50 n. 28).

The court nonetheless "[left] the question whether such liability should also be imposed for moral support which has the required substantial effect to another day" (Id. at *50).

Unocal framed the intent for **aider and abettor liability** as follows: As for the **mens rea** of **aiding and abetting**, the International Criminal Tribunal for the former Yugoslavia held that what is required is actual and constrictive (i.e., "reasonable") "knowledge that [the accomplice's] will assist the perpetrator in the commission of the crime (Furundzija at 245).

Thus, "it is not necessary for the accomplice to share the mens rea of the perpetrator, in the sense of positive intention to commit the crime." In fact, it is not even necessary that the **aider and abettor** knows the precise crime that the principal intends to commit. Rather, if the accused "is aware one or a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as **an aider and abettor** (Id. at *47).

Although it relied exclusively on international law in spelling out this standard, **Unocal** noted that "at least with respect to assistance and encouragement, this standard is similar to the standard for **aiding and abetting** under domestic (i.e. American) tort law" (Id. at *49).

The **Unocal** court readily concluded that a reasonably jury could find **Unocal** liable for **aiding and abetting** the forced labour practices of the Myanmar Military under the above standard.

The Ninth Circuit found that there were **triable questions of fact** not only about whether the Myanmar Military had used forced labour to build and maintain the pipeline, but also about whether **Unocal** "gave practical assistance to the Myanmar Military in subjecting Plaintiffs to

forced labour" (Id. at *52).

Such practical assistance, according to the court, took the form (1)"of hiring the Myanmar Military to provide security and build infrastructure along the pipeline route in exchange for money and food", and 2 "of using photos, surveys, and maps in daily meetings to show the Myanmar Military where to provide security and build infrastructure" (Id. at ** 52-53).

The court likewise held that **Unocal**'s assistance to the Myanmar Military "had a 'substantial effect' on the perpetration of forced labour, which 'most probably would not have occurred in the same way' without someone hiring the Myanmar Military to provide security, and without someone showing them where to do it" (Id. at ** 53-54 (quoting Tadic at 688).

As to the **mens rea**, the court likewise found that there was a **triable issue of fact** regarding whether **Unocal** knew or should have known that its actions would "assist the perpetrator [i.e., the Myanmar Military] in the commission of the crime [of forced labour]" (Id. at * 54).

Under international law, the court noted, "it is not even necessary that the **aider and abettor** knows the precise crime that the principal intends to commit" (Id. at * 62).

Nonetheless, according to the court, "the evidence does suggest that **Unocal** knew that forced labour was being utilized and that the Joint Ventures benefited from the practice" (Id. at * 62)

The court thus concluded that "**Unocal** knew or should reasonably have known that its conduct - including the payments and instructions where to provide security and build infrastructure - would assist and encourage the Myanmar Military to subject Plaintiffs to forced labour" (Id. at ** 54-55).

13.36 Judge Reinhardt's Concurrence

In his **concurrence**, Judge Reinhardt agreed with the outcome reached by the majority, but rejected an **international law standard for aiding and abetting liability** in favour of the application of "general federal common law tort principles, such as agency, joint venture, or reckless disregard."

He offered multiple reasons for why the governing law on this issue should be derived from federal common law - not international law - in **ATCA** cases.

To begin with, Judge Reinhardt stated that because **ATCA** cases typically involve US foreign relations, "unique federal interests" "support the creation of an uniform body of federal common law to facilitate the implementation of such [**ATCA**] claims" (Id. at ** 92-93).

Judge Reinhardt also observed that "the question of when third-party liability arises is a straightforward legal matter that federal courts routinely resolve using common law principles" (Id. at * 95)"

In such a determination, Judge Reinhardt noted, federal courts could incorporate principles of **international law** into **federal common law**, without formally substituting the former for the latter (Id. at * 95-96).

Factors in favour of determining that the proper law to apply here is the **federal common law**

include “certainty, predictability and uniformity of result” and the “justified expectations” of potential parties fostered by familiarity with federal common law principles of joint liability, agency, and reckless disregard (Id. at * 98).

Moreover, in Judge Reinhardt’s view, the basic purpose of the **ATCA** - “to provide with an appropriate tort remedy for certain international law violations” - is better served by the application “of third-party liability standards generally applicable to tort cases” (Id. at * 99).

Judge Reinhardt also pointedly criticized the majority’s standard for **aiding and abetting liability**.

This standard, Judge Reinhardt asserted, was not sufficiently well established to constitute customary international law - it is “a novel standard that has been applied by just two ad hoc international tribunals and therefore cannot be applied as part of federal common law” (Id. at * 104).

For Judge Reinhardt, this standard was “far too uncertain and inchoate a rule for us to adopt without further elaboration as to its scope by international jurists” (Id. at * 105).

On the fact of the case, however, Judge Reinhardt concluded that plaintiffs had shown a **triable issue of fact** as to **Unocal**’s liability for the human rights abuses of the Myanmar Military based on theories of joint venture, agency, and reckless disregard. He stated: “[A] reasonable jury could conclude that **Unocal** freely elected to participate in a profit making venture in conjunction with an oppressive military regime - a regime that had a lengthy record of instituting forced labour, including forced child labour” (Id. at * 111).

And a commentator stated that holding companies liable for **aiding and abetting** is not a new notion in the United States: “It’s very ordinary, routine American tort law that companies are responsible for the actions of those they hire to do things for them”, he said. “So it doesn’t stretch legal principles at all. But it does make new law in this particular area of international law, in holding trans-national companies responsible. It makes this a path breaking decision.”

Unocal is particularly important in respect to the **knowledge** and **causation** for **aider and abettor liability**.

Under **Unocal**, vicarious liability requires more than simply showing that a corporation was aware of human rights abuses being carried out by a foreign government: the **mens rea** requirement entails “actual or constructive (i.e./, reasonable) knowledge that the accomplice’s actions will assist the perpetrator in the commission of the crime” (Id. art * 62).

Nonetheless, **Unocal** presents an example of when this standard may be satisfied. Crucially, the Ninth Circuit did not require that plaintiffs put forward evidence that **Unocal** knew “the precise crime that the principal intend[ed] to commit.”

Rather, it was enough that **Unocal** “knew that acts of violence would probably committed [buy the host government]” as a result of **Unocal**’s conduct, which included “payments” to the Myanmar Military and “instructions where to provide security and build infrastructure” (Id. at ** 62-63).

Unocal suggests that **ATCA** plaintiffs must show that a corporation knew - actually or constructively - that it was hiring a native security force with a documented record of human rights abuses, but not that the corporation knowingly supplied this security force with

weapons or instructed it to commit specific acts of violence in furtherance of a joint business plan.

As **Unocal** observed, citing a **Nuremberg tribunal precedent**, a corporation may be held liable where it "well knew that any expansion [of its business] would require the employment of forced labour" (Id. at * 38 n. 22).

Unocal's analysis of **causation** is equally significant.

The Ninth Circuit's rejection of the district court's "control" standard in favour of a "forseeability" test for causation removes barriers to **ATCA** suits.

The he Ninth Circuit held that **Unocal** gave "practical assistance" to the Myanmar Military by "hiring the Myanmar Military to provide security and build infrastructure along the pipeline route in exchange for money or food", and by "using photos, surveys and maps in daily meetings to show the Myanmar Military where to provide these services" (Id. at * 60).

The **Unocal** court found that this assistance had a "substantial effect" on the military's commission of human rights abuses because abuses "most probably would not have occurred in the same way without someone hiring the Myanmar Military to provide security, and without someone showing them where to do it."

In the Court's analysis, **Unocal** knew that the Myanmar Military was likely to commit human rights abuses, yet facilitated and directed the introduction of this military into its business operations. For the court, this course of conduct sufficed to create a genuine issue of material facts as to whether **Unocal aided and abetted** the human rights violations of the military.

"Those are the circumstances for liability that the plaintiffs had asked for", said Paul Hoffman, one of the lawyers representing the plaintiffs. "That's going to be of enormous significance, people around the world have been waiting for this decision."

The **Unocal** ruling should be a wake-up call to multinational companies that they may be held to western standards of liability, that it now makes even more sense for them to apply due standards in labour relations and environmental affairs and so forth in non-western States.

Apartheid victims sue global corporations

Building on the **Unocal** ruling and the establishment of far-reaching standards for **aiding and abetting** liability for multinational corporations under international law, in November, 2002 a lawsuit was filed in the New York District Court demanding reparations from **20 banks and corporations** that supplied critical support to the apartheid regime.

The case, filed in the name of the **Khulumani Support Group**, engaged in counselling more than 32,000 South Africans hurt by apartheid, seeks compensatory and punitive damages from a host of **multinational corporations**. These include US giants IBM, General Motors, Exxon Mobile, J.P. Morgan Chase, Citigroup, Caltex Petroleum Corporation, Ford Motor Company, and the Fluor Corporation.

All of these groups have been asked to provide generous compensation to help "heal the damage" caused by apartheid, according to the **Apartheid Debt and Reparations Campaign**, one of the groups behind the lawsuit.

"The corporations **aided and abetted** a crime against humanity whose persistent social damage requires urgent repair", charged **Jubilee South Africa**, another supporter.

The suit charges IBM and Fujitsu ICL with supplying technology for white South African authorities to create "passbooks" for the black population that were used to control their movement, employment and residence.

The amount of damages being sought was not specified in the court document, but the damage could be "in the billions", according to Jubilee South Africa spokesman Neville Gabriel.

The suit charges financial institutions like Citicorp with culpability for lending funds used to bolster police and armed forces under the racist regime. It claims that arms manufacturers and oil companies violated internationally agreed embargoes on sales to South Africa.

The class-action suit filed by the Washington-based firm, Cohen, Milstein, Hausfeld and Toll, is based on the **ATCA**.

Lead counsel on the case, Michael D. Hausfeld, called South Africa's apartheid regime an "institutionalized system of racial disenfranchisement". He declared that the suit "seeks a measure of justice from those entities which **aided and abetted** the commission of this atrocity."

"Apartheid could not have been maintained in the same manner without the participation of the defendants", the law firm said in a statement explaining the case.

In June 2003 the **International Labour Rights Fund (ILRF)** filed a suit against the Federal Government of the US in the New York District Court for **aiding and abetting** child slavery in Ivory Coast on the cocoa plantations. This by reckless disregard to stop the import of cacao from this country and the violation of a Act dating from 1930 prohibiting the import of products in the US, emanating from forced child labour.

The **ILFR** considers to sue also three **multinational companies**, Nestlé, Archer Daniels Midland and Cargill, for knowingly benefiting from forced labour by children in Ivory Coast, the chairman of the **ILFR** further announced.

So **civil law action**, based on tort, can be a mighty weapon to oppose violations of international humanitarian law.

And there is no reason why to think that only the US legal system could provide such broad perspectives for tort action directed against such violations. The legal systems of other western States will grant to the victims, at least in principle, the same kind of opportunities.

Although the courts of other western States, usually, may not claim universal jurisdiction in relation to such **civil law remedies**, but will restrict themselves to tortuous acts in contravention with international humanitarian law committed by actors under common personal jurisdiction.

So in the first place by their own State actors and other nationals.

However, tort law in relation to such violations of international humanitarian law may be relatively back warded in development and dormant in other western States in comparison

with the US Consequently, it should be activated.

And of course antipathy and even resistance can be expected in the ranks of the western States' courts and judges against claims based on tort in relation to violations of international humanitarian law, certainly at the beginning. All the more since these claims - mind you - will be directed against the State's own administration, its own executives and other nationals, either its own respected multinational corporations.

However, from the part of the western States' judiciaries with respect to this subject there is not only going to be face opposition, but also lack of experience and incompetence. Resulting in direct misinterpretations, also inspired by evasive conduct.

Like, for example, the persistent absurd misperformance by Dutch courts, even up to the Dutch Supreme Court, that any observation by judges with respect to the crime of aggression, in **civil law** affairs as well as **criminal law** affairs, should be impossible, because the prohibition of aggression, as a norm of customary international law, should not hold self-executing power.

American tort law of course is not that stupid and stand out, against such nonsense, as a miracle of sophistication!

Nonetheless, there are no alternatives but to take up the challenge. And to confront also other western States' courts than the US courts only with claims directed at ending immediately violations of international humanitarian law and demanding compensation for such violations. All on behalf of the victims.

And the more such claims for damages will be directed straight against those here in western States who are politically and military responsible for violations of international humanitarian law, suing those responsibles also directly as persons liable for such crimes, the more the western political and military leadership will become aware that their crimes against the laws and customs of war and against other international humanitarian law will not remain without personal consequences.

It is our quest to imprint this awareness and to deprive them of the feelings of immunity and impunity, they cherish as the rulers of this planet.

On behalf of the victims and as a contribution to possible prevention of waging new criminal adventures.

This challenge is not new.

Stated already as a fundamental issue during the **Nuremberg Trials** that "war crimes are committed by man and not by abstract entities" and that "only by punishing individuals who commit such crimes the provisions of international law can be enforced", this principle is nowadays firmly established in contemporary law with respect to the whole corpus of international humanitarian law.

So when the victims of NATO's war crimes during NATO's war of aggression against Yugoslavia, more specifically the victims of NATO's criminal attack on the RTS-studio in Belgrade and the Nis cluster bomb attacks, in 2003 watch the forced entrance of the former Dutch government top Kok, Van Aartsen, de Grave and Van Nieuwenhoven in Dutch courtroom, in order to testify in preliminary hearings with respect to these crimes, in advance

of the lawsuit for damages against them, they are only witnesses to something that ought to be quite ordinary routine.

14 Reserve

Article 6 Fourth Convention

> "The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.
>
> (…)
>
> In case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, and 143."

However, as already mentioned above, later on, within the framework of Protocol I, it is stated:

Article 3 Protocol I

> "Beginning and end of application
>
> Without prejudice to the provisions, which are, applicable at all times:
>
> (…)
>
> (b) The application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment."

So, according to **Protocol I**, the application of the Convention is fully extended until the termination of the occupation.

The USA is no Treaty Party to the **Protocol**. However, it has repeatedly declared that it nevertheless will follow the standards, set by the **Protocol**.