STATE RESPONSIBILITY FOR WARLIKE ACTS OF THE ARMED FORCES

From Article 3 of Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and Beyond

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I. INTRODUCTION

Every State is responsible for its internationally wrongful acts,¹ i.e. for conduct attributable to it under international law and which constitutes a breach of an international obligation of the State.² Among the various forms of conduct attributable to the State, conduct of its organs holds pride of place.³

The armed forces furnish a striking example of an organ whose acts may be so attributable and hence engage the responsibility of the State. They—or, rather, the innumerable individuals who compose their ranks—are called upon to do their duty whenever their country gets involved in an international or internal armed conflict or other situations of lesser violence.⁴ To that end they are equipped with a broad range of weapons the use of which may be expected, and is in fact calculated, to bring grave if not fatal harm to human beings and things alike. And significantly, their acts are not beyond the grasp of the law: the applicable rules of international law, no matter how tolerant in principle of basic considerations of military necessity, effectively set limits to the ways and means by which the armed forces may wish to perform their functions.

In consequence, a State may have to bear international responsibility for the comportment of its armed forces whenever they actively participate in an armed conflict. Numerous such occasions have arisen in the recent past or persist to this day. While the greater part were internal or

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2. Draft Art.3.
3. Draft Art.5.
4. Armed forces are also frequently deployed in situations of lesser disturbance not amounting to an armed conflict in the proper sense of the term. We shall not enter into this aspect of the matter.
mixed\textsuperscript{5} armed conflicts, the war\textsuperscript{6} between Iran and Iraq, 1980–1988, provides an example of a major international armed conflict, and one noticeable for the frequency of serious violations of basic precepts of the law, including maltreatment of prisoners of war, use of chemical weapons, and attacks wilfully directed against the civilian population. The United Nations repeatedly raised its voice against such practices.\textsuperscript{7}

While all this could already serve to remind us of the responsibility of States for the warlike conduct of their armed forces, the topicality of the subject was highlighted once again by the Iraqi invasion and occupation of Kuwait on 2 August 1990, with the tumultuous events that followed. This time, the Security Council formally reminded Iraq more than once of its liability in respect of the losses, damage and injury arising as a result of the acts committed by its armed forces in occupied Kuwait, and it is taking steps to ensure that these formal reminders will lead to practical results.\textsuperscript{8}

The question of responsibility of States for the conduct of their armed forces can be considered from various angles. There are, first of all, the aspects of breach of the peace and act of aggression on the one hand and, on the other, the right of self-defence (\textit{ius ad bellum}). Then, even if one simply takes instances of recourse to armed force as a fact (as will be done in this article) and thus restricts the discussion to the conduct of armed forces actively engaged in such acts, issues that come to mind include the nature and scope of responsibility of the State in respect of war crimes (matters of prevention, discipline and punishment) and, in that connection, questions of responsibility \textit{erga omnes} or, as an even more futuristic development, international criminal responsibility of the

5. The rules of international law applicable in armed conflicts do not recognise a separate category of “mixed” armed conflicts, i.e. conflicts within the territory of one State but with outside intervention on one or both sides. Yet in practice, such situations present sufficient special features to warrant separate attention. See e.g. Martin Hess, \textit{Die Anwendbarkeit des humanitären Völkerrechts, insbesondere in gemischten Konflikten} (The applicability of international humanitarian law, in particular in mixed conflicts) (1985); the author examines in particular the conflicts in Afghanistan, Angola, Cambodia, Chad and the Lebanon.

6. The term “war” is used here in its non-technical sense as a synonym for armed conflict, i.e. as a factual notion not involving the legal consequences traditionally attached on the international level to a formal state of war between two or more States. On this see, generally, Yoram Dinstein, \textit{War, Aggression and Self-Defence} (1988).


State; and, somewhat more down to earth, its responsibility for damage done to enemy or neutral individuals or States. An intriguing question in regard to each of these issues is how to define the armed forces that can so engage the responsibility of a State.

This article is confined to an examination of the rules of international law that govern the question of responsibility of the State for damage done by its armed forces engaged in armed conflict. The greatest attention will be paid to the rules that regulate the conduct of war and the behaviour of armed forces (ius in bello). Where appropriate, these will be set against the rules of general international law governing the international responsibility of the State.

The relevant rules of ius in bello are embodied in treaties on the law of armed conflict, notably the Hague Convention of 1907 on land warfare, the four Geneva Conventions of 1949 for the protection of war victims, and Additional Protocol I of 1977 for the protection of the victims of international armed conflicts. The main focus will be on the provisions in the Hague Convention of 1907 and Protocol I of 1977: they both deal expressly with the responsibility of a State for all acts committed by members of its armed forces in the course of an armed conflict; however, while closely similar in language, they are not necessarily identical in meaning. The rules on responsibility in the Geneva Conventions of 1949 are of somewhat lesser import to our central theme and accordingly will be dealt with in a more cursory manner. In the Epilogue, attention is paid to two recent developments: first, certain phrases in the judgment of the World Court in the case of Nicaragua v. The United States of America, that have a bearing on the possible


10. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) Relative to the Treatment of Prisoners of War; Convention (IV) Relative to the Protection of Civilian Persons in Time of War; all four Conventions signed at Geneva, 12 Aug. 1949; authentic texts in Final Record of the Diplomatic Conference of Geneva of 1949 (hereinafter Final Record), Vol.1, pp.205, 225, 243, 297; texts also in Schindler and Toman, idem, pp.373, 401, 423, 493.

11. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted at Geneva, 8 June 1977; Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977) (hereinafter O.R.), Vol.1, p.115; text also in Schindler and Toman, idem, p.621. It should be noted here that while some 100 States are now party to Protocol I, the remaining ones are not as a matter of treaty law bound by those of its provisions that lay down new law. Among the non-parties are the US, France and, at the time of writing, the UK.
responsibility of a State for the conduct of armed forces not its own; and second, the measures, referred to above, taken by the Security Council to implement its decision that Iraq is liable for its wrongful deeds in Kuwait.

II. ARTICLE 3 OF HAGUE CONVENTION IV OF 1907

The treaty law governing armed conflict has long contained a special rule on the responsibility of States for the wartime conduct of their armed forces. Article 3 of the Hague Convention on land warfare 1907 reads as follows:

A belligerent party which violates the provisions [of the Regulations on Land Warfare annexed to the Convention] 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.

What does this text really mean? The main point at issue concerns the type of responsibility the authors had in mind. A related point of interest, to be dealt with briefly, is the meaning of the term “armed forces”.

A. Responsibility vis-à-vis Individual Persons

The records of the conference that adopted the text, i.e. the Second Hague Peace Conference 1907, provide convincing evidence that the delegates sought not so much to lay down a rule relating to the international responsibility of one State vis-à-vis another, as one relating to a State’s liability to compensate the losses of individual persons incurred as a consequence of their direct (and harmful) contact with its armed forces.

The matter came up in the course of the revision of the original, 1899, Hague Convention on land warfare with annexed Regulations. This is itself silent on the question of State responsibility. Yet Section III of the Regulations, on “Military Authority over Hostile Territory”, refers in two places to the obligation of an occupying power to pay indemnities. Article 52 establishes such a duty in respect of requisitions in kind “demanded from communes or inhabitants . . . for the necessities of the army of occupation” (to be paid for, as far as possible, “in ready money; if not, their receipt shall be acknowledged”); and Article 53, especially for “railway plant, land telegraphs, telephones, steamers and other

13. Supra n.9.
OCTOBER 1991] State Responsibility for Armed Forces 831

ships” etc. (to be “restored at the conclusion of peace, and indemnities paid for them”).

Note that neither of these provisions refers to unlawful conduct in particular: on the contrary, they appear to cover primarily cases where, under the rules in force, the requisitions were perfectly in order. Another point of interest is that the Articles clearly envisage the direct (and speedy) settlement of individual claims, by the armed forces: they represent, in effect, an early attempt to curb the tendency of land armies to “live off the land” without payment.

In the course of the 1907 Conference the Russian delegation submitted a proposal to amend Article 52 of the Regulations with a clause requesting the commanding officers of occupation forces to settle the payment of such receipts as soon as possible. This modest suggestion was soon completely overshadowed, however, by a much broader German proposal to introduce two new articles. One required a belligerent party to indemnify neutral persons as soon as possible for any detriment suffered as a consequence of violations of the Regulations; and it specified that such a party would be responsible for all acts committed by individual members of its armed forces. The other article provided that if the victims of the violation were persons belonging to the adverse party, the question of indemnification would be settled on the conclusion of peace.

The German delegate, Major-General Von Gündell, introduced the proposal in terms that made clear where it differed from the earlier provisions in Articles 52 and 53: it was narrower, he explained, in that it applied solely to cases of violation of the Regulations; and it was broader in that it was not confined to events occurring in occupied territory. The Convention of 1899 contained just one general rule on implementation, and this concerned the duty of signatory powers to issue instructions to their armed land forces in conformity with the Regulations (Article 1). This, he said (with marked understatement), did not suffice to guarantee respect of the law in all cases, since not only governments but a great number of individuals were involved in the actual waging of the war.

There was thus a need to envisage the consequences of infractions. Since in his (optimistic) view, these would not usually be the result of

15. Actes, op. cit. supra n.9, Vol.3, at p.142; 2nd Commission, 1st sub-commission, 4th sess., 31 July 1907: Mr Tcharykow introduces proposal; text of amendment: idem, p.248. The proposal resulted in the addition of a clause at the end of Art.52, para.3, specifying that “the payment of the amount due shall be made as soon as possible”—unfortunately, the practical effect of the Art. was negligible and it remained virtually a dead letter.


negligence on the part of the government, it was necessary to get away from the notion of subjective fault of the government as an element of liability; after all, it would be unacceptable for a victim to be able to claim damages only from the officer or soldier guilty of the infraction. Governments should therefore be held responsible for all unlawful acts, without exception, committed by members of their armed forces in violation of the Regulations. As for the fact that the amendment distinguished between enemy and neutral persons, the delegate confined himself to underscoring the practical need for such a distinction.

The principle underlying the German proposal was never a matter of controversy at the Conference. On the contrary, it found broad support among the delegates, as may be evident from the following passage in the report of the competent Commission:18

As the rules of the Regulations on the laws and customs of war must be observed, not only by the commanding officers of belligerent armies but, generally, by all officers, non-commissioned officers and other ranks, the German delegation has considered it useful to propose that the Convention extend to the Law of Nations, for all cases of infraction of the Regulations, the principle of Private Law according to which the master is responsible for his subordinates or agents. The principle of the German proposal has not encountered any objection.

Such criticism as there was focused on the distinction made in the proposal between enemy and neutral persons. According to the critics this reflected a general doctrine of the German delegation, apparent elsewhere in the Conference, which purported to favour neutral persons over persons belonging to the adverse party.19 In spite of Von Gundell’s repeated assurances that the distinction was not a matter of principle but solely concerned the method and moment of payment, and in spite of the Swiss delegate’s support for his position,20 the Conference removed this element from the proposal and, combining the two draft articles into a single one, arrived at the text as ultimately adopted.21

B. Scope of Application of Article 3

In attempting to determine the scope of application of this Article, we may conveniently start out from the character of the Regulations annexed to the Hague Convention IV of 1907. In the perception of the

draftsmen these were primarily designed, as well as basically suited, to be implemented by the armies of the contracting States, it being left to each State to make such adjustments as might be necessitated by the national situation. Therefore, even though the Regulations form an integral part of the Convention and to that extent lay down rules of treaty law, they were not so much conceived as a set of rules defining obligations of the contracting States but, rather, as model instructions directly addressed to their armed forces. The Regulations do in fact provide rules of conduct for the wide range of situations these forces could expect to come across in the course of their military operations, including contact with members of the enemy armed forces as well as (enemy or neutral) civilians and their property.

As regards Article 3 in particular, its drafting history and, indeed, its internal logic make clear that its two sentences must be read together as an indivisible whole. This is to say that it specifically addresses the liability of a State to indemnify enemy or neutral persons for damages incurred as a result of acts committed by members of its armed land forces in contravention of the Regulations.

I. Civilians as sole beneficiaries

It is suggested that even so, not all acts in contravention of the Regulations are meant to fall under the scope of the Article. Although none of the delegates made the point explicitly, it seems highly unlikely that they would have thought of the Article as designed, or even suitable, to cover combatants’ complaints, say, of maltreatment while detained as prisoners of war, or about wounds inflicted treacherously or with the aid of forbidden means of warfare. Indeed, it appears entirely justified to regard enemy and neutral civilians as the sole intended beneficiaries of Article 3.

22. See the paragraph from the report, quoted supra n.18.

23. That the drafters were not entirely oblivious of the conventional character of the Regulations may be deduced e.g. from Art.2 of the Convention. This provides that “The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.”

24. Regulations, Art.4. The ICRC mentions this example in its commentary to Art.12 of the Third Convention of 1949, where it notes that damages may ensue e.g. from “the physical and mental injury suffered by prisoners who, despite the individual safeguards provided in the Convention, have been brutally treated while in captivity”; ICRC, The Geneva Conventions of 12 August 1949, Commentary Published under the General Editorship of Jean S. Pictet: III Geneva Convention (1960), p.130. The ICRC published commentaries to each of the four Conventions; the English versions were published as follows: Convention I: 1952; II: 1960; III: 1960; IV: 1958; they will be referred to hereinafter as ICRC Commentary I, II, III or IV.

2. **Small-scale events**

A further restriction, once again implicit in the drafting history rather than openly expressed, appears to be that, always in the perception of the draftsmen, the Article would be designed to cover fairly small-scale events. The reader gains this impression from some of the words Von Gündell used in introducing the German proposal: it would be unacceptable, he said, if a victim could claim damages only from the officer or soldier guilty of the infraction. This suggests events involving direct, personal contact between offender and victim, rather than impersonal, large-scale, military operations such as a long-distance bombardment, where the victim does not get to know the identity of the offender.

3. **Armed forces**

While Article 3 refers to the “armed forces” of the State, Article 1 of the Regulations determines in some detail to whom the “laws, rights and duties of war” apply: these include, besides the regular armies, “militia and volunteer corps” that fulfil a set of four conditions.\(^\text{26}\) In effect, even those involved in a *levée en masse* in unoccupied territory may under certain conditions be “regarded as belligerents”.\(^\text{27}\) Are all these categories of “belligerents” (or combatants, as we would say) covered by the notion “armed forces” in Article 3 of the Convention? And what of armed resistance in occupied territory?

The records of the Conference of 1907 provide no specific information as regards the intentions of the draftsmen. The single clue lies in the fact that the Article was included in the Convention (rather than, as originally proposed, in the Regulations). The phrase “armed forces” in Article 3 must therefore be deemed to have the same meaning here as in Article 1 of the Convention (which is identical to Article 1 in the Convention of 1899).\(^\text{28}\) Unfortunately, the records of the Conference of

\(^{26}\) The conditions (in the version of 1907) are: 1. to be commanded by a person responsible for his subordinates; 2. to have a fixed distinctive emblem recognisable at a distance; 3. to carry arms openly; and 4. to conduct their operations in accordance with the laws and customs of war.

\(^{27}\) Regulations, Art.2; the conditions are that they “spontaneously take up arms to resist the invading troops without having had time to organise themselves in accordance with Article 1” and that they “carry arms openly” and “respect the laws and customs of war”.

\(^{28}\) This impression is gained both from the introduction of the German proposal and from the inclusion of the Art. as ultimately adopted in the Convention (where it is a logical sequel to the obligation of Art.1) rather than in the Regulations. In the closing phase of the Conference Louis Renault, reporting on the work of the Drafting Committee of the Conference, explained that because the article based on the German proposal lays an obligation on governments it was incorporated in the Convention rather than in the Regulations, which contain instructions to the armed forces; *Actes, op. cit. supra* n.9, at p.581: 10th Plenary Session (17 Oct. 1907).
1899 are equally silent. In these circumstances, the logical conclusion to be drawn from the text of Article 1 must be that the crucial element lies in whether a particular “armed force” has sufficiently close links with the government of a belligerent State to be effectively subject to its instructions. This construction doubtless includes its regular armed forces (the “armies” of Article 1 of the Regulations). It equally unmis-
takably excludes the levée en masse in unoccupied territory and, a for-
tiori, armed resistance in occupied territory. As for the “militia and volunteer corps”, the conditions for “belligerency” specified in the Regulations do not in so many words require them to be effectively subject to the instructions emanating from the central political and military authorities; yet, this may be deemed to represent the decisive factor for the State to bear responsibility for their acts.

4. Subsequent State practice

While it is submitted that the above accurately reflects the meaning and scope of application of Article 3 according to the intentions of its draftsmen, there remains the matter of its practical application. The draftsmen stopped far short of providing individual beneficiaries with precise rules for the presentation and settlement of their claims (“war damages refunded at this window”), let alone that they would have held out prospects of effective remedies against doubtful or even obviously unjust rejections. Yet, the Article is unmistakably designed to enable

29. The records of the Peace Conference of 1899 tell us no more than that Art. 1, like the other articles of the Convention (as opposed to those of the Regulations) stems from the Drafting Committee. There is no report on the work of that Committee, and the Plenary Conference accepted their proposals for articles to be included in the Convention without a word in comment. Conference internationale de la Paix, La Haye 18 mai–29 juillet 1899, records published by the Netherlands Ministry of Foreign Affairs (new edn, 1907), 1st part, p.152.

30. While the inhabitants of unoccupied territory who participate in such a spontaneous effort of armed resistance against an invading enemy force may under certain conditions, as Art. 2 of the Regulations stipulates, be “regarded as belligerents”, they do not belong to the class of organised armed forces a government may hope to reach with its instructions and whose conduct could therefore engage the direct responsibility of the State.

31. This had proved an insoluble problem to the Conference of 1899. On that occasion the discussions resulted in the so-called Martens clause in the preamble to the Convention, by which the contracting States declared “that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience”.

32. Obviously, their status as “armed forces” is beyond dispute when they are not just “commanded by a person responsible for his subordinates” (being the first, rather vague condition laid down in Art. 1 of the Regulations) but actually “constitute the army, or form part of it”—in which case, as expressly (and somewhat redundantly) specified in para. 2 of that Art., “they are included under the denomination ‘army’.”
these people to present their bills directly to the State, i.e. to its competent (military or other) authorities, either during or after the war. On this score, State practice has proved disappointing. The Hague Convention and Regulations of 1907 are generally held to have long since entered into the domain of customary international law, and there is no obvious reason to exclude Article 3 from this appreciation. At the same time, it should be recognised that, like Article 52 of the Regulations, Article 3 of the Convention has in important respects remained "law on the books". In particular as regards damage incurred by persons of enemy nationality, application of the Article, with its right of direct individual access to, and compensation by, the State, has largely been replaced by a practice of lump sum settlements concluded after the war by and between the one-time belligerent States. The agreements usually lay an obligation on the vanquished State to pay a more or less random amount, determined more by its perceived financial capabilities than by any serious attempt to assess the damage caused by the unlawful acts of either party's armed forces; and the victor State may or may not distribute (part of) the money to individual claimants.

This development perhaps should not surprise too much. Even the original German proposal suggested that if the victims of a violation of the Regulations were persons belonging to the adverse party, the question of indemnification could be settled only on the conclusion of peace. And today, enemy persons will apparently find no effective remedy in the courts of England: as related by Colonel Rogers, "where [in a situation of martial law such as arises during war] the armed forces of the Crown are engaged on active service abroad, acts done against an alien enemy cannot be the subject of proceedings in an English court as the defence of act of State is always open to the Crown in respect of them". On the face of it, this need not exclude direct settlement by other (administrative) authorities. Yet the evident futility of recourse to the courts in the event of their rejecting a claim might reduce to vanishing point any inclination they might otherwise have felt to hand out significant amounts of money to individual enemy claimants, either during or after the war. And it may safely be assumed that the English example is not unique.

The lack of actual application of the Article, at least as far as persons of enemy nationality are concerned, has resulted in its original meaning


and purpose receding into the background. Owing to the same lack of practice there is, however, insufficient ground to assume that it has acquired any other clear, specific, meaning instead (for instance, including damage to combatants or large-scale events, or claims by States). In this situation one cannot simply disregard the original meaning of the Article as this results from its drafting history, with as its core element the attribution to individual victims of a right to claim compensation for war damages directly from the responsible State.

C. Article 3 and the General Rules on State Responsibility

How does Article 3 compare with the general rules on State responsibility? To answer this question we shall rely on some of the non-controversial draft articles elaborated by the International Law Commission,\(^{36}\) which may be deemed faithfully to render the traditional customary law on the subject.

For an act of a State organ to be considered as an act of that State under international law, the draft articles require that the organ "was acting in that capacity in the case in question", and this "even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity".\(^{37}\) The sole condition appears to be, therefore, that the organ in question was acting "in that capacity".

Applying these rules to the armed forces, it follows that an internationally unlawful act, committed in the course of an armed conflict by a member of the armed forces, engages the responsibility of the State irrespective of whether the actor was competent to perform that particular act and whether in performing it he abided by the instructions issued to him (indeed, the instructions themselves may have been against the applicable rules of international law). He must, however, have been acting in his capacity as (a member of) an organ of the State.

In this regard, Article 3 is broader in that it encompasses all violations of the Regulations committed by persons belonging to the armed forces, irrespective of whether these were done in that capacity or otherwise. The point is relevant because members of an armed force at war stand a greater chance than do other State organs of becoming entangled in ambiguous situations where it may be unclear whether they were acting in their capacity as an organ of the State. What, for instance, of the incidents that allegedly happened in the course of the invasion and occupation of Kuwait: can all acts of wanton brutality or savagery done by members of the Iraqi army be regarded as committed in that capacity?

36. Supra n.1.
37. Draft Arts.5, 10.
This one example may suffice to illustrate that putting the acts of an armed force to the test whether they were committed "in that capacity" may set an uncertain and certainly undesirable limit on the responsibility of the State. In other words, the wider scope of Article 3 is definitely to be preferred.

For the rest, Article 3 in several respects is more restricted than the draft articles. It is expressly limited to violations of the Regulations committed by members of the armed land forces. It is plausibly limited, according to the intentions of the draftsmen, to acts doing harm to enemy or neutral civilians, thus excluding enemy combatants. And it has probably been designed to cope especially, if not exclusively, with relatively small-scale events.

As a related point, the question of responsibility of one State vis-à-vis another apparently never entered the minds of the draftsmen. Accordingly, the possible relationship of the matter at issue with general rules on diplomatic protection simply did not arise in the debate.

Obviously, there is nothing to suggest that Article 3 could ever have been designed to exclude the applicability of any existing general rules on the responsibility of States for acts of war committed by their armed forces. It may be the case, though, that at the time of the Second Hague Peace Conference the general rules were of little practical import in relation to the problem the delegates sought to solve, so that in tackling it they were more or less oblivious of such general rules. At any rate, the rule they purported to lay down in Article 3, with its special characteristics, adapted to the perceived needs of the situation, even today is entirely capable of coexisting with, and supplementing, the general rules on State responsibility.

III. INTERLUDE: THE GENEVA CONVENTIONS OF 1929 AND 1949

The treaties on humanitarian law concluded between the world wars, contribute hardly anything of interest to the present subject. One notable exception is Article 28 of the Prisoners of War Convention of 1929.38 Dealing with the situation where a prisoner of war is set to work for private individuals, i.e. outside the sphere of direct control of the detaining authorities, it provides in such a situation, the detaining power "shall assume entire responsibility" for their maintenance, care and treatment and wages. This effectively removes any lingering doubt that a State could perhaps deny such responsibility on the argument that, after all, the conduct of private persons is none of its business. In the system of the International Law Commission's draft articles, the

38. Convention relative to the Treatment of Prisoners of War, signed at Geneva, 27 July 1929; Schindler and Toman, op. cit. supra n.9, at p.339.
case would seem to be covered by the provision that such conduct is attributable to the State if “it is established that [they were] in fact acting on behalf of that State”\textsuperscript{39} (and in the case at issue, at its behest or at all events with its full consent).

More of interest is to be found in the four Conventions of 1949.\textsuperscript{40} Here too, however, we shall be brief, as the additions brought by these instruments are somewhat marginal to the main line of argument of this article.

Article 57 of Convention III or the “Prisoners of War” Convention of 1949 reaffirms the rule in Article 28 of the 1929 Convention. Article 12 lays down the general rule that irrespective of any individual responsibilities, the detaining power is responsible for the treatment of prisoners of war from the moment of their capture. Article 29 of Convention IV or the “Civilians” Convention provides likewise that:

> The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.

In its commentary on these Articles,\textsuperscript{41} published shortly after the adoption of the Conventions, the International Committee of the Red Cross (ICRC) emphasised the distinction between the principles of individual liability for punishment for infractions of the Conventions, and of responsibility of the State; and it derived from the latter principle “an obligation on the Parties to the conflict to instruct their agents in their duties and their rights”.\textsuperscript{42} The principle also “demands that a State whose agent has been guilty of an act in violation of the Convention, should be required to make reparation”. In this context the ICRC referred to Article 3 of the Hague Convention of 1907, thus going beyond the original meaning of that Article: for one thing, because the delegates never intended it to cover reparation to enemy combatants;\textsuperscript{43} and for another, because it is expressly limited to damage done by members of the armed forces (and not other State agents, who would be likely to be involved in the treatment of interned civilians).\textsuperscript{44} In other words, the ICRC appeared to read Article 3 as if it were, and had always been, the statement of a general principle rather than a specific rule.

\textsuperscript{39} ILC draft arts., Art.8.

\textsuperscript{40} Supra n.10.

\textsuperscript{41} ICRC Commentary, op. cit. supra n.24, III at pp.129–131, IV at pp.209–211.

\textsuperscript{42} The commentary refers in this connection to common Art.1, which binds the contracting States “to respect and ensure respect for the Conventions in all circumstances”, and to the undertaking of the contracting States “to disseminate the text [of the Conventions] as widely as possible” (Convention III, Art.127, Convention IV, Art.144).

\textsuperscript{43} Text at supra n.23.

\textsuperscript{44} In Section IV we shall revert to the latter point.
This suggests that even at that stage, the experts of the ICRC had lost sight of the original meaning of the Article. There remains an article common to the four Geneva Conventions of 1949, on “liability” of the contracting States in respect of grave breaches of the Conventions. The article (51 of Convention I, 52 of Convention II, 131 of Convention III and 148 of Convention IV) reads as follows:

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.

The “preceding Article” defines the grave breaches of the Conventions which the contracting States are obliged to prevent or repress in accordance with the article preceding the “preceding Article”, i.e. Article 49, 50, 129 or 146 respectively. The notion of grave breaches belongs to the sphere of individual criminal liability for war crimes, whereas prevention and repression, i.e. the enactment of any necessary legislation and the application of existing legislation to individual perpetrators of grave breaches, represent obligations of the State. So the question arises: what “liability” of the State is meant here? This is far from self-evident.45 Neither do the records of the discussions lead to any unequivocal answer. Yet some attention should be given to the proceedings that eventually resulted in the adoption of the above text.

The Article stems from an Italian amendment, originally introduced as a rider to a provision on special agreements between contracting States46 and which purported to preclude the conclusion of such an agreement “even should it take the form of a clause to a Treaty intended to regulate matters which have remained in suspense at the conclusion of an armed conflict” and the effect of which would be to “relieve any Party from the responsibilities it has incurred by its failure to observe” one of the Conventions. As explained by the Italian delegate, Mr Marcesa, the amendment related in particular to the case of an agreement between victor and vanquished, with the former imposing on the latter “a renunciation of ... claims to which it might be entitled owing to the non-observation of the Conventions in time of war, such as for instance the payment of an indemnity to prisoners who had been wounded while

45. A literal interpretation, to the effect that they would exclude the possibility for a State to absolve itself or other contracting States of any “liability” in respect of their legislative and other obligations, clearly makes no sense. The ICRC states without hesitation that the Arts. do “not, of course, affect the obligation to prosecute and punish the authors of infractions, since that obligation is absolute”; ICRC Commentary, op. cit. supra n.24, 1, at p.373.

46. This ultimately became Art.6 common to Conventions I–III (Art.7 of Convention IV). Its crux lies in that no such special agreement is permitted to affect adversely the situation of persons protected by the Convention in question.
carrying out dangerous tasks such as were prohibited by the Convention”.

When it met with strong opposition it was withdrawn by its proponents, only to be reintroduced subsequently as a separate text with a slightly different wording and dealt with in the entirely different context of the prevention and repression of breaches of the Conventions. This led to another round of somewhat inconclusive debate, with Maresca intervening more than once in ways that, instead of contributing to greater clarity, led to increased confusion. At any rate, the

47. Final Record, op. cit. supra n.10, Vol.IIB, at p.17: 3rd meeting of the Joint Committee, 29 Apr. 1949. When the proposal came up for discussion at the Special Committee of the Joint Committee, Maresca reiterated that: “The purpose of the amendment submitted by the Italian delegation was to prevent the victor from forcing the vanquished to renounce claims which a possible non-compliance with the Conventions would entitle him to make” idem, p.55: Special Committee of the Joint Committee, 10th meeting, 27 May 1949.

48. This came, first, from Miss Gutteridge (UK); in her assertion, “A peace treaty did not represent violence, but the acceptance by a defeated Power of terms which it found itself able to accept.” Another sceptical delegate, M. Lamarle (France), held that “the Convention could not amend the clauses of a treaty which was already signed, nor give directives on the contents of a future treaty”. (He probably overlooked the fact that the draft Article to which the Italian amendment was to be added, actually purported to “give directives on the contents” of future agreements: idem, pp.55, 56; see also the First Report drawn up by the Special Committee of the Joint Committee, 27 June 1949; idem, p.109).

49. The new text proposed that “No contracting Party shall be allowed to absolve itself or any other contracting Party of any liability incurred by itself or by another contracting Party as a result of a failure to observe the present Convention”:

idem, p.76: 23rd meeting of the Special Committee, 14 June 1949.

50. Although the proposal was introduced immediately after the adoption of the Article on special agreements, the records of the meeting specify that it would be examined later, in the entirely different context of the draft articles on breaches of the Conventions. On that later occasion the Chairman noted, probably by way of explanation of the shift, that “the Italian delegation had modified its proposal by replacing the words ‘as a result of failure to observe the present Convention’ by ‘as a result of breaches provided for in the preceding Article’ ”: idem, p.91: 33rd meeting of the Special Committee, 29 June 1949. The Special Committee adopted the new text without discussion (and by a vote of four in favour and two against, with four abstentions) and with that forwarded it to the Joint Committee for further decision; ibid.

51. The Rapporteur of the Special Committee had written that: “The State remained responsible for breaches of the Convention and could not refuse to recognise its responsibility on the ground that the individuals concerned had been punished. There remained, for instance, the liability to pay compensation”: idem, p.118: Fourth Report drawn up by the Special Committee, 12 July 1949. Maresca subsequently, and rather surprisingly, requested, and obtained, the deletion of the second sentence: idem, p.31: 10th meeting of the Joint Committee, 16 July 1949. This induced the French delegate to reverse his former position and express himself in agreement with the proposal precisely on the grounds that “recent peace treaties had provided for agreements between former adversaries in full settlement of debts between them”: ibid. The Australian delegate, Colonel Hodgson, chose this moment to enquire “what was the meaning” of the Art. (idem, p.32) and thereby induced Maresca to state that: “The new concept contained in this Article was that prior to their own responsibility, the perpetrators of violations had involved the responsibility of their State, and that the latter stood liable, even after individual penalties had been inflicted on the offenders who had acted as agents of that State”: ibid.
proposed text failed to gain consensus: 52 it was ultimately adopted in Committee by a majority vote that showed clearly how controversial the Article had remained to the very last. 53

The final round came with the presentation of the Report of the Joint Committee to the Plenary Assembly. As the relevant paragraphs in the Report provide what seems to be the most generous and lucid presentation of the views expressed at various stages by Maresca and others, they deserve to be quoted at some length: 54

This is a new provision . . . intended to render null and void, in advance, any contractual exemption by which a victor State could prevail upon the conquered State to cease to hold the victor responsible for any violations of the Conventions committed by the organs of the latter; any clauses of this kind might render useless the prosecution of individual guilty persons, for where a State has obtained a promise that it shall not be held responsible, it would be extremely difficult to condemn an individual agent acting under its orders. This provision was the only means of ensuring that the compulsory character of the prosecution, as proclaimed in the preceding Article, should continue in force.

The scope of this Article is comparatively restricted. It does not cover special financial arrangements under which a State can finally liquidate a claim to damages by an agreed lump sum payment or a settlement in compensation. . . . The minority criticised the Article as wanting in clearness.

Presented thus, the Article was adopted in Plenary without a further word: 55 an outcome that was probably as much the result of Italian insistence as of any intrinsic merits of the new provision. For there can be no doubt that the Article has remained “wanting in clearness” to the bitter end.

It may be commented, first, that in accordance with the explanations offered from the outset by the Italian delegate, the liability to which it refers cannot very well be understood as anything but the financial liability incurred during the war by a victor State in relation to the vanquished State or its nationals. Indeed, when one substitutes Italy for the vanquished party, the suggestion is strong that the idea behind the proposal was to exclude the possibility of the victors of the Second World

52. The UK delegate, Sir Robert Craigie, once again criticised the Art. for its attempt “to bind States . . . in particular, in their liberty to conclude a treaty of peace at the end of a war. Special agreements between States for financial settlements would be interfered with”: idem, p. 36: 12th meeting of the Joint Committee, 20 July 1949. And Colonel Hodgson, who at this stage, confused by the proceedings, introduced but rapidly withdrew an amendment of his own, did not hide the fact that the Australian delegation would prefer to see the Art. deleted: idem, p. 35.

53. The vote in the Joint Committee was 18 in favour to 16 against, with three abstentions: idem, p. 36.

54. Idem, p. 133.

War (such as the United Kingdom, which opposed the Italian amendment to the very last) contracting out of any obligations they might have incurred to pay compensation for wrongs suffered by Italy or its nationals at the hands of its former enemies.

Another point is that at no time in the course of the proceedings did the Italian delegate succeed in convincingly explaining the alleged link of the new proposal to the preceding Articles on grave breaches. The choice of that context may therefore have been no more than a fortuitous solution. And lastly, the statement in the final Report of the Joint Committee that the Article “does not cover special financial arrangements under which a State can finally liquidate a claim to damages by an agreed lump sum payment or a settlement in compensation” was in accordance with what the Italian delegate had said at a late stage of the proceedings and was not contradicted by anyone else; it may therefore be taken as an authentic interpretation of the limited scope of the Article.

The upshot of it all appears to be that a victor State cannot after the war openly contract out of any financial liability it might have incurred as a result of grave violations of the Conventions. Claims under this heading on the part of the vanquished State or its nationals may, on the other hand, be dealt with in the context of a post-war lump sum agreement between the two sides. In somewhat cynical terms, this outcome may in practice be difficult to distinguish from plain disregard of those claims.

The ICRC commentary, qualifying Article 51 of the First Convention as “an entirely new Article… the sense of which is not altogether clear”, goes on to assert, rather surprisingly, that:56

In this matter of material reparation for infractions of the Convention it is not possible, at any rate as the law at present stands, to imagine an injured party being able to bring an action individually against the State in whose service the author of the infraction was. Only a State can put forward such claims against another State.

In saying this, the ICRC appears to disregard the fact that Article 3 of the 1907 Hague Convention (to which the commentary specifically refers) undeniably accords such a capacity to individual injured parties, be they enemy or neutral persons. True, as far as persons of (former) enemy nationality are concerned, practice has moved away from Article 3, making it increasingly difficult to imagine such a person bringing his claim “individually against the State in whose service the author of the infraction was”. Yet this development does not necessarily affect “the

56. ICRC Commentary, op. cit. supra n.24, I, at p.373.
law as it stands”, unless it be shown that State practice has purposely set aside Article 3 in regard to enemy persons; a proposition for which this author has found no convincing evidence. At all events, Article 51 has no influence whatsoever on the capacity of neutral persons individually to claim damages incurred as a result of violations of the law of armed conflict, grave breaches of the Geneva Conventions of 1949 included.

IV. ARTICLE 91 OF PROTOCOL I

SEVENTY years after the introduction and adoption of Article 3, the matter of its reaffirmation was brought up in the course of the final (1977) session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 1974–1977. An amendment to that effect, proposed by Vietnam, with Algeria and Yugoslavia as co-sponsors, resulted in the adoption of Article 91 of Additional Protocol I of 1977. The new Article reads as follows:

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.

As may be seen, the wording of the new Article follows closely that of its predecessor. One minor difference (irrelevant in the present context) is that its opening words do not refer to a “belligerent party” but, in more contemporary language, to a “Party to the conflict”. Greater importance attaches to another textual difference: whereas the first sentence of Article 3 confines its scope to violations of the Regulations, Article 91 speaks in much broader terms of violations of the 1949 Conventions and the 1977 Protocol. We shall come back to this point shortly. A first question to answer is whether the identical words in the two Articles are in effect intended to carry the same meaning.

A. Responsibility vis-à-vis a State or a People

The recorded drafting history of Article 91 contains little more than an introduction by the delegate of Vietnam. As he explained, the amendment was designed, on the one hand, to restate the principle of reparation laid down in Article 3 of the Hague Convention and, on the

58. Supra n.11.
other, to reaffirm the principle of non-exoneration from responsibility as embodied in the 1949 Geneva Conventions.60 The sponsors, he said, had taken their inspiration from “the destruction and ravages resulting from the wars of colonial and neo-colonial aggression inflicted on the home territory of weak and ill-armed people in Asian countries, as had happened in Viet Nam and in some African countries”. These wars had unavoidably delayed their development. The speaker recalled that the UN General Assembly in 1974, and the Conference of Heads of State or Government of Non-Aligned Countries in 1976, had “called for reparations for the developing countries victims of foreign occupation, which had caused them serious losses in life and property while reducing and degrading the natural and other resources of such States, territories and peoples”.

With that, the proposal was referred to a working group. From this it emerged a few days later in its present, considerably reduced form. The record merely shows that the working group had regarded inclusion of the second paragraph as superfluous since it “reproduced existing provisions in the Geneva Conventions”. “In order to achieve a consensus, and in a spirit of conciliation”, the sponsors had accepted this reduction of their proposal. They apparently had also accepted that the text no longer, as their original proposal had done, referred specifically to “grave breaches”: at all events, the report places on record that “the text thus adopted” in the working group reads in conformity with the present Article 91.61

It may be noted in passing that the quoted phrase in the report of the working group may be deemed to settle a question that might otherwise have remained somewhat obscure: viz., whether the “Italian” provisions in the Geneva Conventions on non-exoneration of a State’s liability in respect of grave breaches62 apply to the provisions on grave breaches in the Protocol as well. Article 85 of the Protocol provides that the provisions of the Conventions “relating to the repression of

60. The proposed text read as follows (idem, Vol.3, p.347: CDDH/I/335 and Add.1 and 2):

1. A Party to the conflict which violates the provisions of the Conventions and of the present Protocol, and in particular commits grave breaches as defined in Articles 11 and 74 [85 in the final version] of the present 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.
2. 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 the violations and breaches referred to in paragraph 1 of this Article.”
62. Supra Section IV.B.
breaches and grave breaches . . . shall apply to the repression of breaches and grave breaches of this Protocol". While the “Italian” articles in the Conventions follow immediately after the articles that directly dealt with grave breaches and other violations and were presented as linked to those articles, it was seen that this link was tenuous at best. However, in the eyes of the working group, the link was evidently sufficiently close to regard these articles as “relating to” the breaches provisions. The matter is not without importance, since Article 85 of the Protocol considerably extends the scope of the breaches and grave breaches system to encompass acts that in traditional terms belong to the law of The Hague rather than Geneva. 63

At any rate, as far as Vietnam was concerned, the immediate political goal behind the proposal may have been to obtain an express reaffirmation of (its understanding of) the principles of 1907 and 1949 with a view to the war crimes allegedly committed by the American armed forces in the course of the Vietnam war. Not, of course, in the hope that the proposed article could become retroactively applicable as treaty law to the events of that armed conflict. Rather, because in future negotiations with the United States the official and solemn reaffirmation of the principle might serve to buttress Vietnamese claims of compensation for the damages caused by the American armed forces.

The main point to be distilled from the above remarkably brief drafting history of Article 91 is that Vietnam and its co-sponsors evidently were no longer thinking in the first place, as their predecessors in 1907 had done, of a State’s duty to indemnify individual enemy or neutral victims of infractions of the law of war. Indeed, they may have been totally unaware of this earlier meaning of the text they sought to reaffirm, nor would they probably have greatly cared. As the introduction clearly shows, the object they had in mind was compensation due to a State (or the collectivity of “a people”) for the “destruction and ravages” of war it had suffered, notably as a result of (alleged) criminal breaches of the law of armed conflict by a brutal invader or occupant. And the complete silence of other delegates may indicate that they too were no longer aware of the original significance of Article 3, or alternatively, considered it of insufficient interest to raise the point.

The Vietnamese intervention and the silence that followed could never by themselves deprive Article 3 of its original meaning. Yet in interpreting Article 91 the intention expressed by the delegate of Vietnam must obviously be taken into account. The result is that in the rela-

63. It is of interest to note that the ICRC Commentary (op. cit. supra n.33) refers neither in relation to the section of the Protocol on repression of breaches, nor to Art. 85 in particular, to the “Italian” Articles on State liability: it does mention them, though, in its commentary on Art.91: p.1054, para.3648.
tions between the parties to the conflict, the old and the new articles may together be assumed to provide for compensation both to the State and to individual victims. And of course, all this leaves the rights of neutrals and neutral States entirely unaffected.

B. "Armed Forces"

The introductory statement by the Vietnamese delegate also makes clear that the sponsors were thinking of damage caused by the regular armed forces of a State party to the conflict, notably those of a colonial power engaged in a war of national liberation against a people struggling for its self-determination. But here they may have been overlooking two things. In the course of its first (1974) session the Diplomatic Conference had by a strong majority vote accepted the principle that wars of national liberation, as defined in Article 1, paragraph 4 of the Protocol, would be counted among the category of international armed conflicts. And in the course of the 1976 session, always well before the introduction of the Vietnamese amendment, it had reached consensus on a completely new definition of "the armed forces of a Party to the conflict".65

By virtue of the first-mentioned decision, supported vigorously by Vietnam and its consorts, a liberation movement waging such a war would henceforth be regarded in all respects as a "Party to the conflict" in the sense of the Geneva Conventions of 1949 and the Protocol. One consequence is that such a liberation movement must be deemed to bear responsibility, in the terms of Article 91, "for all acts committed by persons forming part of its armed forces". Viewed from this angle, the principle expressed in the Article might even have backfired against Vietnam in its eventual negotiations with the United States.66

The plausible objection that liberation movements often have no "regular" armed force in the accepted sense of the term brings us to the second point the proponents of the amendment on responsibility may have been overlooking. The "armed forces", as now defined in Article 43 of Protocol I, "consist of all organised armed forces, groups and units

64. See e.g. Georges Abi-Saab, "Wars of National Liberation in the Geneva Conventions and Protocols" (1979–IV) 165 Hag. Rec. 353–446.
66. More accurately, this consequence would arise as a matter of treaty law with the entry into force of the Protocol and as between ratifying States. In view of the attitude of Vietnam at the Conference, however, the US would doubtless be able to use the above argument as a political tool in negotiations with that State on reparations for war damages.
which are under a command responsible to that Party for the conduct of its subordinates”. 67 This definition does not admit of any distinction between regular and irregular armed forces; and obviously so, since it was the declared purpose of the authors to do away with the traditional distinction between those two categories of armed forces. 68

This brings us back to Article 91. The records provide no indication that Vietnam and consorts would have wished for the phrase “armed forces” to have a different connotation here from that it had acquired in Article 43. The latter Article had been brought about with their active co-operation, and they cannot be deemed to have been oblivious of its existence and significance just one year after its adoption. In the absence of any such indication, the sound principle of interpretation must apply that a term used more than once in a treaty has the same meaning everywhere. The principle applies a fortiori if the treaty makers have gone out of their way to provide an authentic definition of the term, as they did on this occasion with “armed forces”.

Admittedly, it may not always be easy to submit irregular forces fighting on one’s side to instructions similar to those a State normally issues to its regular armed forces. But this is a purely practical problem. 69

There is, in short, nothing in the drafting history or the text of Protocol I to detract from the conclusion that the effect of Article 91, read in conjunction with Article 43, is to make a party to such an international armed conflict equally responsible for the conduct of all its armed forces, whether regular or irregular.

67. Art.43, para.1 reads as follows: “The armed forces of a Party to the conflict consist of all organised armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognised by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.”

68. See, recen George H. Aldrich, “Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions” (1991) 85 A.J.I.L. 1, 8. The effect of the equality of regular and irregular armed forces extends to all international armed conflicts, including the case where such a force of a resistance movement conducts its operations in or outside occupied territory. Art.43 requires that it be under a command that is responsible to a party to the conflict for the conduct of its subordinates. It also specifies that the armed force “shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict”. Once these conditions are met (and they are not necessarily prohibitive), any armed force, no matter how irregular, must be regarded as an “armed force” in the sense of Art.43.

69. Moreover, Protocol I no longer maintains the close connection between the rule on responsibility and the duty to issue instructions. The latter obligation, embodied in Art.80(2) and providing that “The High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution”, applies in time of peace as in time of war and is not restricted to the armed forces (but, rather, in abstract terms, requires the issue of instructions “to ensure observance of the Conventions and this Protocol”).
C. Scope of Application of Article 91

There remains the marked textual difference, noted earlier, between Article 3 of 1907 and Article 91 of 1977: whilst the former speaks of violations of provisions of the Regulations, the latter refers to violations of “the provisions of the Conventions or of this Protocol”. The question is what effect the difference in wording has on the scope of the new article.

As mentioned before, the Regulations were primarily designed to serve as model instructions for the armed forces. The same can no longer be maintained of the Geneva Conventions of 1949 and the Protocol of 1977. These instruments contain many provisions that are either designed to be implemented by other persons or institutions besides the armed forces, or are even entirely unsuited, and were never intended, to provide rules for the conduct of military operations by armed forces. Again, numerous provisions address the “Parties to the conflict” without further specification. As practice shows, each and every one of these provisions is open to violation by the respective addressees. And in the event of individual damage, such violations may at least in theory give rise to claims for compensation.

This raises the question of the right interpretation of Article 91. Like its predecessor of 1907 it is composed of two sentences, with the first one positing the principle of liability to pay compensation and the second that of responsibility of the State for “all acts committed by persons forming part of its armed forces”. The construction of Article 3 of the 1907 Convention meant that the first sentence was read not as serving to repeat a general principle of State responsibility, but as forming part and parcel of a special rule on the liability of a State to pay compensation first and foremost for damage incurred by individual persons as a result of infractions of the Regulations committed by members of the

70. This is true of the provisions relating to the wounded and sick, both in the Conventions and the Protocol, prescribing conduct not only to military medical personnel (which is properly regarded as part of the armed forces) but to civilian medical doctors and other personnel as well, including Red Cross or Red Crescent volunteers. E.g. Convention I, Art.26 (personnel of aid societies); Convention IV, Art.91 (medical attention to internees in the territory of a party to the conflict or in occupied territory); definition of medical personnel in Art.8(c) of the Protocol, which places military and civilian personnel on an equal footing.

71. This applies e.g. to the entire Section II of Part III (“Status and Treatment of Protected Persons”) of the Fourth Convention, dealing with “Aliens in the Territory of a Party to the Conflict”. Articles in this Section concern such matters as the right to leave the territory, means of existence, employment, and internment: Arts.35, 39, 40 and 41–46.

72. Thus, they are required to take measures for the protection of children under 15 who are orphaned or separated from their families as a result of the war (Convention IV, Art.24); and it is for each of them to establish and operate an official information bureau for prisoners of war and other protected persons in their power (Convention III, Art.122, Convention IV, Art.136). Then, the “High Contracting Parties” are obliged to facilitate the passage of relief consignments (Convention III, Arts.73–75, Convention IV, Art.23, Protocol I, Art.70).
State's armed forces. The drafters of Article 91 were no longer thinking
in terms of claims of individuals; but must the two sentences of Article
91 nevertheless be read as a single construction or does the first sentence
stand on its own?

If interpreted in the latter sense, the single feature distinguishing the
sentence from a simple restatement of a general principle of State
responsibility lies in its explicit restriction to the parties to the conflict,
thus leaving out the generality of the contracting States. This interpreta-
tion might have the effect of restricting the sentence, and by inference
the entire Article, to acts done by the organ in question, whether mili-
tary or civilian, in its capacity as an organ of the State.

Another interpretation appears at least as plausible, however. It is
that the restatement of the Article has left the meaning of the first sen-
tence unaffected. This interpretation takes inspiration from the intro-
duction by the Vietnamese delegate, who was evidently thinking only of
the wrongful acts imputed to the American armed forces. In effect, the
records provide no indication whatever of an intention to place a new
and different interpretation on the sentence—or any interpretation at
all, for that matter. In the light of this utter silence, this author sees
good grounds to treat the sentence as unchanged in its meaning, and to
continue to regard the two sentences that compose Article 91 as an indis-
visible whole in the same sense, and with the same consequences, as
Article 3 of the 1907 Convention.

Even so, in certain other respects the significance of the Article may
have perceptibly changed, at least as compared to the intentions of the
draftsmen of 1907. For one thing, as argued above, the delegates at that
earlier Conference plausibly had in mind comparatively small-scale
events, where the victim of the damaging act could identify the culprit
and only by way of last resort, as a safer method of recovering his
damages, needed to be given an individual right of access to the compe-
tent authorities behind that guilty person. This mode of thinking was
certainly very far from what the Vietnamese and other delegates in 1977
had in mind.

Not that small-scale, man-to-man actions no longer occur in the type
of armed conflict they were familiar with; witness My Lai,\textsuperscript{73} to give just
the one example. The example makes starkly clear, however, that the

\textsuperscript{73} On 16 Mar. 1968, an attack by some 80 American infantrymen under the command
of 1st Lt. William L. Calley, Jr. on the My Lai No.4 hamlet of Son My village in South
Vietnam resulted in the slaughter of more than 400 Vietnamese civilians. On this massacre
see, e.g., Telford Taylor, \textit{Nuremberg and Vietnam: An American Tragedy} (1970); Richard
A. Falk (Ed.), \textit{The Vietnam War and International Law} Vol.3 (1972) p.327 \textit{et seq}.; Peter
D. Trooboff (Ed.), \textit{Law and Responsibility in Warfare: The Vietnam Experience} (1975)
\textit{passim}; Leon Friedman, \textit{The Law of War, A Documentary History} Vol.2 (1972) p.1703:
instructions from the military judge to the court members in the trial of William L. Calley,
notion of direct compensation for losses suffered at the hands of the enemy is very far from the reality of such situations. Furthermore, as hinted earlier, actions of an entirely different character have long since taken over the role of major damaging factor, in particular where damage to the civilian population is concerned. The oft-described main factor here was the development of the air arm, with its dual capability of stand-off air support to ground forces and independent long-distance operations against targets deep inside enemy-held territory. To this can now be added the increased sophistication of munitions and their guidance systems. In these circumstances, there can no longer be any question of a victim "claim[ing] damages from the officer or soldier guilty of the infraction"—if infraction there was, of course. Even if one accepts that Article 91 at least also envisages claims by individual persons of enemy nationality, such claims can at best be addressed to the State behind the actual but unknown offender. The probability that in such a case the State rather than the individual victim will be the actual claimant is all that much greater.

The virtual substitution of the individual enemy national by his State as principal claimant may entail yet another expansion of the scope of Article 91, as compared with its predecessor of 1907. There are no longer any good grounds to conclude, as we did in respect of Article 3 of 1907, that Article 91 does not cover damage suffered by combatants as a result of unlawful acts of their adversaries. To the extent that such damage falls under the scope of Article 91, practices such as the use against the enemy armed forces of forbidden weapons or methods of warfare (e.g. chemical weapons, or a refusal of quarter) may lead to claims for compensation on the part of the victim or, rather, his State. And the same would apply to claims arising out of maltreatment by members of the armed forces of enemy combatants detained as prisoners of war.

All this applies to damage suffered by persons of enemy nationality. Matters may be different when it comes to neutral persons: there is no valid reason why they should be cut off from the possibility (or indeed, where the requirement of exhaustion of local remedies obtains, the necessity) to submit their claims personally and directly to the proper authorities of the responsible State. In this regard, the ICRC asserts that "apart from exceptional cases, persons with a foreign nationality who have been wronged by the unlawful conduct of a Party to the conflict should address themselves to their own government, which will submit their complaints to the Party or Parties which committed the

74. Such use is prohibited under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva, 17 June 1925; Schindler and Toman, op. cit. supra n.9, at p.115.
violation"). This author sees no good grounds for this assertion, even as a matter of general theory. And of course, it goes directly against the purport of Article 3 of the Hague Convention of 1907 which, as the ICRC itself notes, is not abrogated by Article 91 “in any way, which means that it continues to be customary law for all nations”.

**D. Article 91 and the General Rules on State Responsibility**

Compared to the International Law Commission’s draft articles on State responsibility, one striking feature of Article 91 is that apart from States it can be construed to apply to liberation movements as well. This expands the notion of international responsibility for acts of war to cover entities other than States. In principle, there is nothing against this: as long as the movement’s struggle for self-determination lasts, the situation is sufficiently similar to the one contemplated in the Commission’s draft articles to justify applying the notion of international responsibility. A difficulty will arise, though, when the war is over and the liberation movement has lost: it then ceases to exist as a (temporary) international subject, and with that its capacity to be held liable for any damages unlawfully caused under its responsibility.

Another interesting feature of Article 91, though not one that sets it apart from the Commission’s draft articles, is that its scope of application encompasses irregular armed forces besides the regular ones. The former will not normally have the status of organs of the State under its internal law and therefore cannot be brought under the scope of draft article 5 to make their conduct directly attributable to the State. They may, on the other hand, be counted among the “groups of persons . . . in fact acting on behalf of the State” whose conduct, according to draft article 8, is equally “considered as an act of the State under international law”. It may be repeated that in order to qualify as an armed force under Article 43 of Protocol I, they must be “under a command that is responsible [to the State] for the conduct of its subordinates”; moreover, their actions are generally seen to be for the benefit of the State.

76. ICRC Commentary, op. cit. supra n.33, pp.1053–1058, at p.1056. The argument in the text does not purport to deny that in certain circumstances neutral States may take the initiative in claiming damages, including those caused to their nationals. A (rather unusual) case in point concerns the Swiss claims lodged after the Second World War against Germany, for damages German bombs had caused on Swiss soil, in the neighbourhood of Schaffhausen; see Maurice Jacquard, “Über Neutralitätsschäden in der Schweiz während des Zweiten Weltkrieges” (1951) 87 Zeitschrift des Bernischen Juristenverbandes 225–251.

77. ICRC, idem, p.1053.

78. This may be different in countries with an “all people’s defence” system. This point will not be examined here.
For the rest, some of the comments made earlier with respect to Article 3 of the Hague Convention apply with equal force here. Most importantly, like Article 3, Article 91 as interpreted above is broader than the Commission’s draft articles in that it makes the State responsible for “all acts committed by persons forming part of its armed forces”, not just those performed by an organ “acting in that capacity in the case in question”. This is no slight extension of the responsibility of the State, but once again, one entirely justified by the specificities of the situation. The State should bear responsibility, not merely for (unlawful) acts of war properly so called, but equally for those acts of wantonness or savagery committed by members of its armed forces outside the sphere of duty but in violation of the law of armed conflict. This applies to acts against civilians and enemy combatants alike. A (not entirely imaginary) instance of the latter category is that of the soldier who, in the aftermath of an engagement in which he lost many close comrades, out of sheer frustration and despair wilfully kills an enemy his unit had taken prisoner. No matter how far deviating from sound military practice and entirely outside the sphere of duty, such irrational conduct falls indubitably under the scope of the same rule on responsibility of the State as do acts of war in the proper sense.

V. EPILOGUE: STATE RESPONSIBILITY FOR ACTS OF ARMED FORCES, THE INTERNATIONAL COURT OF JUSTICE AND THE SECURITY COUNCIL

In the case of Nicaragua v. The United States of America the International Court of Justice came up against the interesting question under what conditions, if any, a State can be held responsible for conduct of armed forces which cannot be regarded as “its” armed forces, not even in the sense of Article 43 of Protocol I.

In the perception of Nicaragua, the contras were no more than a mercenary army “conceived, created and organised” by the United States.79 While the Court did unreservedly accept this proposition, it recognised that the influence of the United States over the contras was generally strong; indeed, it held it established that the US authorities “largely financed, trained, equipped, armed and organised” the force.80 It then posed itself the question, in terms taken straight from the International Law Commission’s draft articles on State responsibility, “whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that

Government”. It rapidly concluded, implicitly, that they could not be equated to an organ of the United States, and in express terms, that “there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf”.\(^{81}\) Even so, the Court stressed once again “that a degree of control by the United States Government . . . is inherent in the position in which the contra force finds itself in relation to that Government”.\(^{82}\)

Was this “degree of control” sufficient to justify the Nicaraguan claim that the United States was responsible for activities of the contras to such an extent that it could be held itself “to have violated an obligation of international law not to kill, wound or kidnap citizens of Nicaragua”?\(^ {83}\) In this regard, the Court considered that “United States participation, even preponderant or decisive, in the financing, organising, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua”. And it continued:\(^ {84}\)

> All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

This, the Court held, had not been the case:\(^ {85}\) “The Court does not consider that the assistance given by the United States to the contras warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State.”

Two comments seem pertinent. First, the argument that acts contrary to the relevant law could “well be committed by members of the contras without the control of the United States” seems rather unfortunate: even members of the most regular of a State’s armed forces are apt to

\(^{81}\) Idem, para.109.
\(^{82}\) Idem, p.53. para.111.
\(^{83}\) Idem, para.113.
\(^{84}\) Idem, p.64, para.115.
\(^{85}\) Idem, p.65, para.116.
commit such acts without the control of their State or, indeed, against pertinent instructions and direct orders. After all, Article 3 was introduced into the Hague Convention IV of 1907 precisely with an eye to that eventuality.

Second, and more importantly, although the Court in the case before it came to a negative conclusion, it did recognise the possibility in principle for a State to become directly responsible for conduct of a foreign armed force that cannot, under the terms of Article 43 of Protocol I, be regarded as part of its armed forces, or, for that matter, as an organ of the State in the sense of Articles 5 and 6 of the International Law Commission’s draft articles, or even as a group of persons acting on its behalf in the sense of Article 8. For this direct responsibility to arise, the Court requires proof “that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed”.

There remains the question of which circumstances could warrant the conclusion that a State actually has such effective control. When one rereads the long list of factors the Court regarded as insufficient “for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua”, because they “would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of acts contrary to human rights and humanitarian law alleged by the applicant State”, one wonders how a State could ever achieve the required high level of control over a body of men operating in another country without actually incorporating it in its armed forces.

Be this as it may, it remains to be seen whether, and how, this view of the Court on the effect of “effective control” over armed forces is going to influence the doctrine of responsibility of States for breaches of the international humanitarian law of armed conflict.

Meanwhile, another recent development, of greater practical interest, ensued from the Iraqi invasion, occupation and purported annexation of Kuwait in August 1990. As mentioned in the Introduction, the Security Council has included in the impressive list of resolutions adopted in connection with that event measures to ensure that Iraq effectively compensates the damage caused by its unlawful actions. One aspect, viz., the patent illegality of the aggression against Kuwait as a matter of ius ad bellum, need not be discussed here. On the other hand, of obvious interest in the present context is Iraq’s liability for damage resulting from unlawful acts of war committed by members of its armed forces in the course of their operations: how to give effect to it?

It need hardly be emphasised that simple application of the principle embodied in Article 3 of the Hague Convention IV of 1907 could be of little avail here: the sheer number and size of potential individual claims
against Iraq would overwhelm even the most diligent administration (and it may be doubted whether the present Iraqi administration falls in that category). The other traditional solution, conclusion of lump sum agreements between Iraq and other States, would be equally unsatisfactory in that it would fail to guarantee a just and effective settlement of individual claims.

To overcome these and other problems involved in the matter at issue, the Security Council has taken an entirely new departure. By its Resolutions 687 (1991) of 3 April 1991 and 692 (1991) of 20 May 1991, and in accordance with the suggestions in the Secretary-General’s report of 2 May 1991, it has created a UN Compensation Fund, to be established by the Secretary-General as a special account of the United Nations. To administer the Fund, the UN Compensation Commission is established as a subsidiary organ of the Council and charged with the task of addressing the numerous issues connected with the settlement of claims. These issues can roughly be grouped under the following headings: how to get and evaluate the claims, and how to make Iraq pay money into the Fund.

As regards the filing of claims, the Secretary-General recommends “that the Commission should entertain, as a general rule, only consolidated claims filed by individual Governments on their own behalf or on behalf of their nationals or corporations”. As he explains, “The filing of individual claims would entail tens of thousands of claims to be processed by the Commission, a task which could take a decade or more and could lead to inequalities in the filing of claims disadvantaging small claimants.”

If the Commission is to entertain only consolidated claims, it will be for each State to consolidate both its own claims and those of its nationals and corporations. The Secretary-General mentions the possibility of a categorisation: by type (“for example, claims for loss of life or personal injury and property damage, environmental damage or damage due to the depletion of natural resources”), by size (small, medium and large), and according to whether a loss has been incurred by the government or by a national or corporation. While recommending that a fixed period be established for the filing of all claims, he suggests by way of alternative that the Commission could set different limits for different types of claims “to ensure that priority is given to certain claims, for example, loss of life or personal injury”. This leads him to give as his “opinion that there would be some merit in providing for a priority consideration of small claims relating to losses by individuals so

that these are disposed of before the consideration of claims relating to losses by foreign Governments and by corporations." 89

The “priority consideration” referred to in this phrase cannot mean anything but consideration by the Commission. If this reading of the report is correct, it follows that although the Commission is to be confronted only with consolidated claims, it will nonetheless fall within its province to evaluate individual claims included in a consolidated claim. As the Secretary-General notes, “The processing of claims [by the Commission] will entail the verification of claims and evaluation of losses and the resolution of any disputed claims. The major part of this task is not of a judicial nature; the resolution of disputed claims would, however, be quasi-judicial.” A preliminary point preceding the verification of claims will in his view be the determination whether the loss, damage or injury for which a claim is presented is, in terms of paragraph 19 of Resolution 687 (1991), “direct, . . . as a result of Iraq’s unlawful invasion and occupation of Kuwait”. 90

When one compares this planned procedure with the two existing methods, namely, application of Article 3 and the practice of lump sum agreements, it seems evident that the Security Council and the Secretary-General are making a serious attempt to avoid the drawbacks of either of these methods. The filing by governments of consolidated claims relieves individual victims of the need to go and present their claims to the Iraqi authorities; the procedure also removes the implicit difference in the treatment of enemy and neutral individuals. While this amounts to the abandonment of a method that in the circumstances would be plainly impracticable, the rejection of the lump sum method implies the avoidance of the arbitrariness and risk of injustice inherent in the latter method. 91

As mentioned above, the Secretary-General characterises the planned procedure as largely non-judicial and only partly quasi-judicial.

89. *Idem*, para.24. As a fixed time period for the filing of claims, the report suggests that “A period of two years from the adoption of the filing guidelines [by the Commission] would appear to be adequate.”

90. *Idem*, para.25.

91. An example demonstrating these features of the lump sum method may be seen in the manner in which after the Second World War claims of Dutch ex-prisoners of war and ex-civilian internees against Japan were settled in two separate agreements between the governments of the Netherlands and Japan. For the ex-POWs, the Dutch authorities accepted in 1951 a sum that amounted to Dfl.264 each (Art.16 of the Peace Treaty concluded at San Francisco on 16 Sept. 1951). As a result of further negotiations, the two governments subsequently reached an agreement settling the matter of compensation for the ex-civilian internees; the sum paid by Japan amounted to Dfl.385 per person (Protocol of Tokyo, 13 Mar. 1956). In both instruments, the Netherlands government renounced for itself and its nationals all further claims for compensation. In recent years, the gross inadequacy of the sums paid in compensation for the hardships suffered has been argued, *inter alia*, in the Dutch Parliament, but to no avail, as the government has stuck to its position that the agreements of 1951 and 1956 have definitively settled the matter.
In effect, he recognises that the Commission will have no exclusive competence to deal with claims arising out of Iraq’s recent ill-advised activities. He considers it “entirely possible, indeed probable, that individual claimants will proceed with claims against Iraq in their domestic legal systems”. Strictly speaking, such an occurrence will not amount to a reanimation of the principle of Article 3, since that would require the presentation of claims to the (military or other) authorities of the country to which the armed forces in question belong, in casu, Iraq.

In sum, the procedure as briefly summarised here seems a remarkable step forward. Obviously, to be effective, it requires an influx of money. It is not appropriate here to enter into the difficulties involved and the solutions suggested by the Secretary-General. Suffice it to say that the success or failure of the operation depends entirely on these problems being solved.

For the purposes of this article, the main point of interest in this latest development lies in the apparent determination of the Secretary-General and, presumably, the Security Council to do justice to the claims of individual persons besides those of governments and corporations. I am fully aware that all the peculiarities of the present situation do not permit of any over-hasty generalisations. Even so, one may perhaps entertain some hope that in future, States that send their armed forces into war will have to count more seriously than ever before the possibility that they will be held effectively liable for any violations of the law of armed conflict committed by these forces in the course of their operations.

92. Report, op. cit. supra n.87, at para.22.