

# The taking of hostages and international humanitarian law\*

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## **I. Introduction**

It is generally acknowledged by the international community that the taking of hostages is one of the most vile and reprehensible of acts. This crime violates fundamental individual rights—the right to life, to liberty and to security—that are protected by binding legal instruments such as the 1966 International Covenant on Civil and Political Rights on the worldwide level, and the 1969 American Convention on Human Rights and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms on the regional level.<sup>1</sup> The United Nations General Assembly has stated that the taking of hostages is an act which places innocent human lives in danger and violates human dignity.<sup>2</sup>

Moreover, under domestic legislation in each country murder, kidnapping, abduction and extortion are regarded as extremely serious crimes and are severely punished.

As was acknowledged during the discussions preceding the adoption of the International Convention against the Taking of Hostages in 1979, this crime forms part of the wider problem of international terrorism, and, as such, must be condemned and combated.<sup>3</sup> The preamble to the said Convention refers to all acts of taking of hostages as manifestations of international terrorism. The taking of hostages for political motives

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\* The author's opinions are not necessarily those of the institutions where he works.

<sup>1</sup> See Arts. 6 and 9 of the International Covenant on Civil and Political Rights, Arts. 4 and 7 of the American Convention on Human Rights and Arts. 2 and 5 of the European Convention on Human Rights.

<sup>2</sup> Resolution 31/103 approved by the United Nations General Assembly on 15 December 1976.

<sup>3</sup> See the statement of the delegate of Poland before the *ad hoc* Committee on the drafting of an international convention against the taking of hostages. UN doc. A/33/39, 1978.

is one of the most dramatic and striking forms of contemporary terrorism.<sup>4</sup>

Indeed, in such cases the hostages are usually taken in a spectacular operation mounted with the political aim of making known the hostage-takers' position in conflict situations. They demand either the release of prisoners or the publication of political manifestos, often under threat of executing the hostages. Only rarely is the motive to demand a ransom.

In 1979, with the adoption of the International Convention against the Taking of Hostages, this crime was condemned and punished by the international community not only under the law of war but also under peacetime law, since the Convention supplemented already existing provisions governing specific cases, such as the ICAO and New York Conventions covering hostage-taking with reference to the safety of civil aviation and the protection of internationally protected persons.<sup>5</sup>

Moreover, on the regional level, we should mention the Convention to Prevent and Punish the Acts of Terrorism taking the Form of Crimes against Persons and Related Extortion that are of International Significance, signed in Washington on 2 February 1971, and the European Convention on the Suppression of Terrorism of 27 January 1977, both of which cover the crime of hostage-taking.<sup>6</sup>

Without losing sight of the general ban on hostage-taking in international law, especially international humanitarian law, this article will focus on the specific rules defining and sanctioning this type of crime in the law of war. This study will therefore be limited to situations of armed conflict, since international humanitarian law is applicable only in such circumstances. The expression "armed conflict" as defined in international law refers to any conflict between States or within a State characterized by open hostilities and involvement of armed forces.

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<sup>4</sup> Aston, Clive C. "Political Hostage Taking in Western Europe", *Conflict Studies*, Vol. 157, 1984.

<sup>5</sup> The Convention for the Suppression of Unlawful Seizure of Aircraft signed in The Hague on 16 December 1970 states that any person who unlawfully, by force or threat thereof, or by any other form of intimidation, seizes an aircraft, commits an offence.

The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed in Montreal on 23 September 1971 states that any person commits an offence if he performs an act of violence which is likely to endanger the safety of an aircraft in flight.

The UN Convention adopted on 14 December 1973 in New York made it a crime, among other things, to kidnap an internationally protected person within the meaning of the treaty.

<sup>6</sup> See Arts. 1 and 2 of the Washington Convention of 1971 and Art. 1(d) of the European Convention of 1977.

## II. Definition and general features of the ban on hostage-taking in international law

According to the definition given in Art. 1 of the 1979 International Convention against the Taking of Hostages, it can be stated in general that the crime of hostage-taking is committed by any person who seizes another person—the hostage—or detains him and threatens to kill, injure or continue to detain him in order to compel a third party to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.

Thus the crime of hostage-taking involves three elements:

- (a) the seizure or detention of the hostage;
- (b) the threat to kill, to injure or to continue to detain the hostage;
- (c) the attempt to compel a third party to act in a given way.

According to Verwey,<sup>7</sup> it is the second element which distinguishes hostage-taking from kidnapping.

The third element is explicit when the perpetrators demand as a condition for the release of the hostage that the government release political prisoners, pay a ransom or extradite a political figure; it is implicit when certain demands are made on the government without the express statement that they are a condition for the release of the hostage.

As the Uruguayan lawyer Eduardo Jiménez de Arechaga has pointed out,<sup>8</sup> the rules prohibiting the taking of hostages have the force of *jus cogens*. They thus form part of a body of principles recognized by the international community as safeguarding values of vital importance to humanity and corresponding to fundamental moral standards. Such principles concern all the States and protect interests which are not limited to one State or group of States, but affect the international community as a whole.

These notions were confirmed and specified by the International Court of Justice in an *obiter dictum* appearing in its judgment of

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<sup>7</sup> Verwey, Wil D., "The International Hostages Convention and National Liberation Movements", *American Journal of International Law*, Vol. 75(1), 1981, p. 70, footnote 6.

<sup>8</sup> See Jiménez de Arechaga, Eduardo, *El Derecho Internacional Contemporáneo*, Madrid, 1980, pp. 80-84. Jiménez de Arechaga considers that the concept of *jus cogens* goes beyond the ban on hostage-taking to include the prohibition of the use or the threat of force and violence, the prevention and suppression of genocide, piracy, the slave trade, racial discrimination and terrorism.

5 February 1970 in the “Barcelona Traction” case. The Court stated: “An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”

Article 53 of the 1969 Vienna Convention on the Law of Treaties also endorses the concept of *jus cogens*, stating that: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

Moreover, the taking of hostages is one of the exceptions to the general principle according to which responsibility for breaches of international law falls upon States and gives rise to claims for compensation. Indeed, hostage-taking constitutes a crime against international law involving individual penal responsibility, and qualifies as a war crime under humanitarian law.

However, in this case as in so many others, international law is inadequate in its scope since it does not lay down any sanctions, leaving internal legal systems to decide on and impose punishment.

This is an example of the double standard expounded by Scelle. Since international law lacks institutions capable of enforcing penal responsibility, it is the internal bodies of each State which fix penalties and entrust national courts to impose them on the guilty persons in each specific case.<sup>9</sup>

### III. Historical background

In ancient times, persons captured during an armed conflict, whether combatants or civilians in occupied territory, were killed out of hand.

Later the belligerents realized that they could profit from their combatant or civilian prisoners by reducing them to slavery, either

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<sup>9</sup> See Scelle, G., *Cours du Droit international public (le fédéralisme international)*, Paris, 1947-48, p. 101 et seq.

handing them over to the victorious troops or selling them at public auctions. Compared with summary execution, this represented some progress in terms of the condition of prisoners.

In the Middle Ages, the custom became established of allowing prisoners of war the possibility of obtaining their freedom by payment of a ransom (some of which were very high, as in the case of the Kings of France Saint Louis and Francis I). Hence the necessity to spare the lives of prisoners and respect minimum standards of treatment. In the period following publication of Grotius' famous work, three main methods of ensuring respect for the law of war, based on self-defence, began to emerge. The first was recourse to reprisals; the second was a system of hostage-taking in order to ensure proper conduct on the part of the adversary; and the third was the punishment of war criminals who fell into the hands of the enemy.

Thus the taking of hostages, as well as being a means of making money, became a mode of enforcement of the law of war.<sup>10</sup> Indeed, if any further breaches occurred, the hostages could be killed.

Another method, which was considered rather as a form of reprisal, consisted in taking hostages and killing them as a response to illegal acts on the part of the enemy. This state of affairs persisted until the 18th century. At that time there were some important changes linked to the French revolutionary and Napoleonic wars, during which there were negotiations for the exchange and release of prisoners, without payment of ransom. Nevertheless, the practice of demanding ransom persisted in wars between Christian nations and other powers.

As Pilloud<sup>11</sup> pointed out, this change of behaviour in the international community can be linked to some extent to the fact that at the same time slavery was beginning to disappear. The passing of the two phenomena can be attributed to an idea which was gradually gaining ground, that is, that human beings cannot be sold or traded and that any transaction intended to deprive an individual of his life or liberty should be considered void by the courts of all civilized countries.

Thus even at the time of the first attempts to codify the law relating to prisoners of war (Brussels, 1874), the practice of paying ransom for

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<sup>10</sup> Draper, G.I.A.D., "The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1977", *Collected Courses of The Hague Academy of International Law*, Vol. 164 (III), 1979, pp. 32-34.

<sup>11</sup> Pilloud, Claude, "La Rançon", in: *Studies and Essays on international Humanitarian Law and Red Cross Principles, in Honour of Jean Pictet*, Swinarski, C., ed., ICRC Martinus Nijhoff, Geneva/The Hague, 1984, pp. 515-520.

their release was not envisaged in the international law governing armed conflicts between States.

Sad to say, during the Second World War the Third Reich took and killed hostages, on a massive scale, in reprisal for acts of resistance in occupied territories. The killing of “hostages” was one of the accusations made before the international military tribunal of Nuremberg in the so-called “Hostage Case”.<sup>12</sup>

All these factors helped convince the international community that the taking of hostages is an illegal act that should be condemned in all circumstances. As Pilloud says: “Nowadays, both morality and the law condemn any act which subjects the life or liberty of an individual captured in time of war to payment of a sum of money or fulfilment of a set condition”.<sup>13</sup>

Thus the ban on hostage-taking is one of the most firmly established rules of international humanitarian law, dating back to Arts. 46 and 50 of the Regulations annexed to the 1907 Hague Convention concerning the Laws and Customs of War on Land, the article relating to prisoners of war in the 1929 Geneva Convention, the 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Allied Powers’ Statement of 30 October 1949 relating to responsibility for ill-treatment inflicted on hostages.

As we shall see later, this process culminated in the approval of the Fourth Geneva Convention of 1949 relating to the protection of civilian persons, Art. 34 of which prohibits the taking of hostages. This prohibition was reaffirmed in Art. 75, para. 2 of 1977 Additional Protocol I.

## **IV. The ban on hostage-taking in international armed conflicts**

### **(a) Protected persons**

The law of Geneva affords protection for all those who, as a consequence of an armed conflict, have fallen into the hands of the adversary. The protection envisaged here is, hence, not protection against the violence of war itself, but against the arbitrary power which one belligerent party acquires in the course of the war over persons belonging to the other party.<sup>14</sup>

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<sup>12</sup> *Annual Digest*, 1948, Case No. 215, p. 632.

<sup>13</sup> Pilloud, *op. cit.*, p. 520.

<sup>14</sup> Kalshoven, Frits, *Constraints on the Waging of War*, International Committee of the Red Cross, Geneva, 1987, p. 40.

The essence of the system of protection established by the 1949 Geneva Conventions can be defined as the principle according to which protected persons must be respected and protected in all circumstances and must be treated humanely, without any adverse distinction founded on sex, race, nationality, religion, political opinions or any other similar criteria.

This principle can be found in Art. 12 of the First Geneva Convention relative to the wounded and sick in armed forces in the field, Art. 12 of the Second Convention relative to wounded, sick and shipwrecked members of armed forces at sea, Art. 16 of the Third Convention relative to prisoners of war and Art. 27 of the Fourth Convention relative to civilian persons.

International humanitarian law bans the deliberate use of terror as a means of warfare, so any recourse to terrorist methods of waging war is absolutely unacceptable. Here we should set out the comprehensive ban on the crime of hostage-taking under international humanitarian law. The Fourth Geneva Convention relative to the protection of civilian persons in time of war is the only one of the 1949 Geneva Conventions in which the word “terrorism” is used explicitly. Art. 33, one of the provisions common to occupied territories, states that “all measures of intimidation or of terrorism are prohibited”. This provision supplements the general rule according to which the belligerents must treat enemy civilians in their power humanely (Art. 27).

In connection with the ban on terrorism as a means of warfare, we would mention some special supplementary provisions such as the ban on taking hostage (Art. 34) and on pillage (Art. 33, para. 2).

The prohibition on the taking of hostages in international armed conflicts, that is, conflicts between States and comparable situations described in Art. 1(4) of 1977 Protocol I,<sup>15</sup> is expressed in two basic provisions.

The first of these is Art. 34 of the Fourth Geneva Convention of 1949, which prohibits the taking of hostages. Thus the law of Geneva prohibits the taking of civilians as hostages; Art. 50(1) of 1977 Proto-

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<sup>15</sup> Article 1, para. 4, of 1977 Protocol I states, with regard to its scope of application, that international armed conflicts include those in which “peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and co-operation among States in accordance with the Charter of the United Nations”.

col I defines civilians as persons who do not belong to one of the categories of persons that are regarded as combatants.<sup>16</sup>

Now, not all civilians are protected by the Fourth Geneva Convention. Indeed, Art. 4 excludes the following categories: (1) nationals of a State which is not bound by the Convention; and (2) nationals of a neutral State if that State has normal diplomatic representation in the State in whose hands they are.

These exceptions are of little significance when one considers that the substantive rules of the Geneva Conventions, by virtue of the large number of adherents among the international community (166 States party to the Fourth Convention) and the scope of its provisions (humanitarian rules), have now become part of customary law, and as such are binding upon States which are not party to the Conventions.

Moreover, Art. 75, para. 2(c) of 1977 Additional Protocol I reaffirms the ban on the taking of hostages at any time and in any place whatsoever, whether by civilian or by military agents. The same article also prohibits threats to commit this act, among others,<sup>17</sup> and extends protection to persons who do not benefit from more favourable treatment under the Conventions or under the Protocol, thus filling a loophole in the law.

The ban on the taking of hostages with respect to civilians also applies to other persons protected by the Geneva Conventions who fall into enemy hands.

Although this prohibition refers explicitly only to civilians, we should not forget that common Art. 3, relating to minimum humanitarian treatment during non-international armed conflict, prohibits at any time and in any place whatsoever the taking as hostages of persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.

It should be stressed, moreover, that Art. 72 of Protocol I stipulates that the provisions of Section III of Part IV, which includes the ban on hostage-taking, "are additional to the rules concerning humanitarian protection of civilians and civilian objects ... as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict".

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<sup>16</sup> Article 50, para 1, of 1977 Additional Protocol I states: "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian".

<sup>17</sup> Article 75, para 2(e) of 1977 Additional Protocol I.



Thus any unjustified delay in the release and repatriation of prisoners of war in violation of Art. 118 of the Third Geneva Convention amounts to a mass holding of hostages.<sup>18</sup>

Article 85, para. 4(b) of Protocol I states that this is a grave breach, as is unjustifiable delay in the repatriation of civilians.

**(b) Persons bound by the prohibition; repression and sanctions**

This review of the international rules that prohibit the taking of hostages and that are applicable in international armed conflict raises the question to whom they are directed.

The Geneva Conventions, the 1977 Additional Protocols and, in this respect, public international law as a whole, are addressed primarily to the States. The States are under the obligation (1) not to have recourse to hostage-taking, and (2) to do all in their power to prevent the perpetration of such acts by individuals or on territory under their jurisdiction. This imposes a direct obligation on persons acting as agents of the State, including members of the armed forces, the police and similar bodies.

International humanitarian law imposes no direct obligation on individuals who do not represent the State in any way. However, the States are under an obligation to enact the necessary internal legislation to guarantee respect for the rules of public international law.

As for the system of sanctions for breaches of their provisions, the Geneva Conventions distinguish between “grave breaches” and other violations. Each Convention contains a precise definition of acts that constitute grave breaches; these are Art. 50 (C. I), Art. 51 (C. II), Art. 130 (C. III) and Art. 147 (C. IV). The taking of hostages is one of the grave breaches listed in Art. 147 of the Fourth Geneva Convention.

By virtue of Art. 146 of the Fourth Convention the States party “undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches...”.

Even more remarkable here is the affirmation of the principle of universal jurisdiction, *aut dedere, aut judicare*. This same Art. 146 states: “Each High Contracting Party is under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regard-

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<sup>18</sup> See Solf, Waldemar A., “International Terrorism in Armed Conflict” in: *Terrorism, Political Violence and World Order*, Han, H. H. ed., 1984, p. 470.

less of their nationality, before its own courts”, unless it prefers to “hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case”.

According to Art. 85 of 1977 Protocol I, grave breaches of that Protocol shall be regarded as war crimes. In view of the above, and in accordance with the established principle of universal jurisdiction, the presumed perpetrators of war crimes, the hostage-takers, have to be tried by the authority holding them, whether this power is a party to the conflict or any other State party to the Geneva Conventions or Protocol I, unless it prefers to extradite the presumed criminals to another State wishing to try them. This obligation to prosecute or extradite is a special feature of instruments of humanitarian law.

Nevertheless, it should be made clear that neither the Fourth Geneva Convention of 1949 nor Protocol I considers hostage-taking as a grave breach and therefore an extraditable offence unless the victim can be described as a protected person.

This loophole is covered by Art. 12 of the 1979 International Convention against the Taking of Hostages.<sup>19</sup> The effect of this provision is to make the said Convention, with its well-developed system of prosecution or extradition, applicable to acts of hostage-taking during an armed conflict, in cases in which the Geneva Conventions and their Protocols do not impose the obligation to try or extradite the hostage-taker.

Article 12 is a “compromise solution” between the position of the Third World States, which feel that the Convention should not call into question the legitimacy of the struggle of national liberation movements and should make it clear that acts committed by such movements are, by definition, not to be regarded as acts of terrorism, and that of the Western States, which are unwilling to admit any exceptions to the

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<sup>19</sup> Article 12 of the International Convention against the Taking of Hostages of 1979 reads as follows: “In so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.”

definition of the crime, basing their argument on the absolute ban on hostage-taking under the law of armed conflicts.<sup>20</sup>

This compromise was reached on the basis of the following factors:

- (a) The reaffirmation in the preamble of the Convention of the legitimacy of struggles of national liberation movements, and the reference to acts of hostage-taking as manifestations of international terrorism.
- (b) The establishment of a link between the Convention and the rules of international law applicable in the event of armed conflict, with the aim of excluding from the scope of application of the Convention acts of hostage-taking committed during armed conflict.
- (c) The comprehensive and unconditional definition of the crime, ensuring that the States party to the Convention are obliged to extradite or bring to trial, with due process of law, the perpetrators, including members of national liberation movements, unless the States are obliged to do so under the Geneva Conventions.

Thus the Convention excludes from its scope of application acts of hostage-taking in time of international armed conflicts, including the struggles of national liberation movements; on the other hand, it does apply to all acts of hostage-taking in peace-time and in situations of non-international armed conflict.

However, since the Geneva Conventions, and in particular Arts. 34, 146 and 147 of the Fourth Convention, at present apply to national liberation movements only if the colonial, racist or foreign power is party to Additional Protocol I (or accepts and applies its provisions)—and since, as Schindler<sup>21</sup> points out, there is a rule of customary law with respect to the principle of self-determination of peoples but not with respect to the application of the Geneva Conventions to wars of national liberation—the 1979 International Convention against the Taking of Hostages does apply to acts of hostage-taking committed by a national liberation movement in situations where the colonial, racist or foreign power is not a party to or does not apply Additional Protocol I. In these circumstances the Convention could be invoked and on that basis extradition called for. Such an act committed by a national liberation movement would constitute the offence of hostage-taking,

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<sup>20</sup> de Solá Domingo, Mercedes, “La Convención internacional contra la Toma de Rehenes”, *Revista española de Derecho Internacional*, Vol. 35(1), 1983, p. 88.

<sup>21</sup> *Ibid.*, p. 91, note 23.

by virtue of Art. 1,<sup>22</sup> even if it were not a breach of international humanitarian law because, for example, the persons involved are not protected persons, in which case humanitarian law imposes no ban on their being taken as hostages. The Convention will also apply if the State calling for extradition or the State on whose territory the presumed hostage-taker happens to be is not party to the Geneva Conventions and therefore not bound by Arts. 146 and 147 of the Fourth Convention.

In this connection the representative of France pointed out that: "A hostage-taker would be prosecuted or extradited either under the Convention itself or under the Geneva Conventions and Protocols thereto. The new Convention would therefore provide a basis for prosecution or extradition in all cases where the Geneva Conventions or their Additional Protocol did not apply, for example, because one of the States concerned was not a party to the Geneva Conventions".<sup>23</sup>

By virtue of the content of the 1979 Convention, together with the provisions of the Fourth Geneva Convention of 1949 and Additional Protocol I of 1977, it can be stated that the principle *aut dedere, aut judicare* applies to all cases of hostage-taking, whatever the circumstances in which it occurs, and at any time and in any place.

## **V. The ban on hostage-taking in non-international armed conflicts**

With regard to non-international armed conflicts, however short and succinct the wording of Art. 3 common to the four Geneva Conventions, "it leaves absolutely no doubt as to the fact that . . . terrorist acts

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<sup>22</sup> Article 1 of the 1979 International Convention against the Taking of Hostages reads as follows:

1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the 'hostage') in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for release of the hostage commits the offence of taking of hostages ('hostage taking') within the meaning of this Convention.
2. Any person who:
  - (a) attempts to commit an act of hostage-taking, or
  - (b) participates as an accomplice of anyone who commits or attempts to commit an act of hostage-takinglikewise commits an offence for the purposes of this convention."

<sup>23</sup> UN doc. A/C. 6/34/SR. 62, Art. 7 (1979).

of any kind against persons not taking part in the hostilities are absolutely prohibited".<sup>24</sup>

Article 3 prohibits, among other things, "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and "taking of hostages", the subject of this paper.

Thus Art. 3 common to the four Geneva Conventions of 1949 prohibits, at any time and in any place whatsoever, the taking as hostages of persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.

Article 4 of Additional Protocol II of 1977 reaffirms this prohibition, expressly banning in paragraph 2(d) any acts of terrorism. Moreover, this Protocol introduces provisions for the protection of civilians which go as far as to affect the conduct of hostilities. In particular, the second paragraph of Art. 13 entitled "Protection of the civilian population" stipulates that "acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited".

A close examination of Art. 3 of the Geneva Conventions and the above-mentioned provision of Protocol II discloses, as Verwey has pointed out,<sup>25</sup> three gaps in the prohibition: (1) members of armed forces who can still take part in the hostilities are not protected; (2) parties to a conflict in which the challenged government is not party to the humanitarian conventions are not affected—unless the provisions of common Art. 3 have become generally binding customary law, which might be difficult to prove, in particular in the case of hostage-taking, because of a lack of relevant State practice; and (3) acts of hostage-taking committed outside the territory of a contracting party are not covered. This last observation derives its practical relevance not only from the fact that parties to the conflict may try to harm supporters of their adversary abroad, but also from the fact that the UN General Assembly has declared, without a dissenting vote, that "the territory of a colony or other Non-Self-Governing Territory has,

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<sup>24</sup> For a discussion on terrorism and international humanitarian law, see Gasser, Hans-Peter, "Prohibition of Terrorist Acts in International Humanitarian Law", *International Review of the Red Cross*, No. 253, July-August 1986, p. 200.

<sup>25</sup> Verwey, *op. cit.*, p. 79

under the Charter, a status separate and distinct from the territory of the State administering it".<sup>26</sup>

Now, unlike what happens in international armed conflicts, in non-international armed conflicts the States party are under no obligation to prosecute or extradite hostage-takers since, as Verwey says, this obligation emanates from Art. 34 of the Fourth Convention, which applies exclusively to international armed conflicts;<sup>27</sup> neither common Art. 3 nor Additional Protocol II establishes any system for the "suppression" of breaches.

In effect, the violation of humanitarian rules applicable in internal armed conflicts is subject to sanction only according to the national legislation of the States party.<sup>28</sup> In view of the content of Art. 12 of the 1979 Hostages Convention, its provisions are fully applicable to the taking of hostages during non-international armed conflicts and hence such acts are subject to the rules it lays down for prosecution or extradition.

It should be stressed that under the 1979 International Convention against the Taking of Hostages the extradition option is limited by Arts. 9 and 15. Article 9, which was negotiated by the Arab States so that they could accept the Convention as a whole, stipulates that a request for the extradition of an alleged offender, pursuant to the Convention, shall not be granted if the requested State party has substantial grounds for believing that the request for extradition for an offence of hostage-taking has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion or that the person's position may be prejudiced for any of the reasons mentioned or because communication with him by the appropriate authorities of the State entitled to exercise rights of protection cannot be effected.

The obligation not to extradite does not impair the obligation to prosecute and is aimed at ensuring that the presumed offender may benefit from due process of law without interference from factors extraneous to the offence. It guarantees the right to the protection

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<sup>26</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation amongst States in accordance with the Charter of the United Nations. GA Res. 2625 (XXV) of 24 October 1970.

<sup>27</sup> Verwey, *op. cit.*, p. 83.

<sup>28</sup> The only provision relating to the application of humanitarian rules governing non-international armed conflicts and sanctions for the violation of those rules is Art. 19 of Protocol II, which merely states that the Protocol shall be disseminated as widely as possible.

provided by the subject's State of citizenship or residence; moreover, the reasons cited above are common to many extradition treaties.

This obligation to prosecute affirmed in Art. 8 of the Convention, as Rosenstock points out,<sup>29</sup> applies whether or not there is an extradition requirement, since the State party is bound to submit the case to its competent authorities for the purpose of prosecution, "without exception whatsoever" and whether or not the offence was committed on its territory.

It is considered that the taking of hostages, as one of the most vile and outrageous of terrorist acts, can in no case be regarded as a political offence, whatever its motivation; and this prevents any such exception being cited in connection with an extradition request.<sup>30</sup>

This has been stated explicitly in some Conventions, such as the 1977 European Convention on the Suppression of Terrorism<sup>31</sup> and the Supplementary Treaty to the Treaty of Extradition between the United States and the United Kingdom of Great Britain and Northern Ireland of 1972, signed in 1985.<sup>32</sup>

## **VI. Action taken by the International Committee of the Red Cross**

As Swinarski has said, the International Committee of the Red Cross is, in fact as in law, an international agent for the application and implementation of the law of Geneva, being in fact the guardian of the principles of the Conventions.<sup>33</sup>

This is demonstrated by the acknowledgement of the institution's "right of initiative", itself based on the Conventions; in the event of

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<sup>29</sup> Rosenstock, Robert, "International Convention against the Taking of Hostages: Another International Community Step against Terrorism", *Denver Journal of International Law and Policy*, Vol. 19(2), 1980.

<sup>30</sup> See the remarks made by the delegate of Chile before the *ad hoc* Committee on the drafting of an international convention against the taking of hostages, Doc. UN AG, Supplement No. 39(A) 32/39.

<sup>31</sup> Article 1(d) of the European Convention on the Suppression of Terrorism expressly excludes an offence involving kidnapping, the taking of a hostage or serious unlawful detention from the category of offences inspired by political motives.

<sup>32</sup> Article 1(d) and (h) of the Supplementary Treaty of Extradition between the United States and the United Kingdom states that none of the offences cited in the 1979 International Convention against the Taking of Hostages may be regarded as political offences.

<sup>33</sup> Swinarski, Christophe, *Introducción al Derecho Internacional Humanitario*, CICR, San José/Geneva, 1984.

international or non-international armed conflict this gives it the right to take steps in its own initiative to protect the victims.

The right of initiative is wider in the event of international armed conflict, during which the institution's delegates are entitled to visit any place where persons protected by the Geneva Conventions, whether prisoners of war or civilian internees, are to be found. Moreover, the delegates must be granted all the facilities necessary to enable them to carry out their humanitarian functions.<sup>34</sup>

In internal armed conflicts, the right of the ICRC to offer its services is recognized but the parties are not obliged to accept the offer. The exercise of this "Convention-based right of initiative" cannot be regarded by the parties to the conflict as incompatible with the principle of non-interference in the internal affairs of a State, and this cannot be used as a pretext for denying the right of initiative.

In situations of internal disturbances or tension, ICRC action is based mainly on what is known as its "statutory right of initiative".

Indeed, Art. 5 of the Statutes of the International Red Cross and Red Crescent Movement, adopted in October 1986 by the Twenty-fifth International Conference, defines the major roles of the ICRC. Paragraph 2 states that one of those roles is "to endeavour at all times—as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife—to ensure the protection of and assistance to military and civilian victims of such events and of their direct results".

Paragraph 3 of the same article states: "The International Committee may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution".

It should be mentioned here that the Statutes of the International Red Cross and Red Crescent Movement were approved by the Movement's International Conference which is held every four years and brings together, together with the representatives of all the National Red Cross and Red Crescent Societies and representatives of the ICRC and the League of Red Cross and Red Crescent Societies, representatives of the States party to the Geneva Conventions, each of which have one vote. Thus the decisions of the Conference do not emanate merely

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<sup>34</sup> See Art. 126 of the Third Geneva Convention, Art. 143 of the Fourth Geneva Convention and Art. 81 of Protocol I.



from a non-governmental organization; they also express the will of the governments of the States party to the Geneva Conventions.

Faced with a breach of international humanitarian law, such as the taking of hostages, the ICRC decision on what attitude to adopt is based essentially on one criterion: the interest of the victims it is responsible for protecting and assisting. In such circumstances, its specific mission to act as a neutral intermediary between parties to a conflict and its duty to treat all the victims of armed conflict without discrimination oblige the ICRC to delay taking action until it has carefully calculated the consequences that its reaction might entail for the victims.

The International Committee of the Red Cross has taken humanitarian action during several notorious episodes of hostage-taking that took place in situations outside the scope of application of international humanitarian law.

For example, ICRC delegates visited the hostages held in the United States Embassy in Iran. This visit made it possible to establish the identity of all the hostages (a question that had hitherto remained vague) and to ascertain the conditions in which the hostages were being detained, to bring them moral support and to enable their relatives to hear from them.<sup>35</sup>

Similarly, the ICRC had a role to play when hostages were taken at the Dominican Embassy in Bogotá, Columbia. It carried out several visits to the hostages held at the embassy, for the purpose of checking the conditions of detention and the detainees' state of health and giving moral support to them and their families. The ICRC also intervened in the final phase of the affair, the release of the hostages, in accordance with the wishes of the Columbian government and the people occupying the embassy.<sup>36</sup>

In addition to the interventions on humanitarian grounds described above, the ICRC has in several cases acted as mediator. It is not always easy for the ICRC to decide whether or not to intervene in such cases when it is asked to do so. Among other considerations, it has to bear in mind that failure to take action just as much as the failure of any action taken could have adverse effects on its humanitarian work worldwide.

On the other hand, ICRC delegates cannot take part in negotiations which might compromise its vital neutrality, for on this depend the trust and confidence of all in its humanitarian work.

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<sup>35</sup> *Annual Report 1980*, International Committee of the Red Cross, p. 53.

<sup>36</sup> *Ibid.*, pp. 28-29.

If the ICRC tried to put pressure on the authorities to give in to the hostage-takers' demands, it could be accused of encouraging similar acts in the future. If, on the contrary, it takes the side of the authorities, there is the risk that the hostage-takers might refuse to let it visit the hostages, thus possibly placing the latter's lives in danger.

To sum up, the ICRC cannot give the impression that it is playing any role in the decision to yield to or refuse the demands of the hostage-takers. Following several bitter experiences in which the ICRC appeared to be the object of political manipulation, as in the case of hostage-taking that took place at Athens airport in July 1970, the Zeka affair of September 1970 and the taking of hostages at Lod airport in Tel-Aviv on 9 May 1972,<sup>37</sup> the humanitarian organization laid down strict conditions for its intervention.

Thus, four months after Israeli soldiers made their surprise attack on the hijacked plane at Lod airport, overpowering the Palestinian commando responsible, the institution decided to set out the following criteria for any future action in favour of hostages:<sup>38</sup>

- I. *The ICRC condemns violations of legal and humanitarian principles, especially acts which involve the deaths or threaten the lives of innocent people. In doing so, it is guided solely by concern for the victims and the will to help them.*
- II. *ICRC delegates may materially assist hostages and, by their presence, provide moral comfort. As a general rule, however, participation in negotiations between authorities and the perpetrators of such violations does not come within the delegates' purview.*
- III. *In the victims' interest and in so far as there is no other intermediary or direct contact, the ICRC may, as an exception, intervene at the request of one party and with the agreement of others. The parties shall renounce the use of force, take no step detrimental to the welfare of the hostages, and shall grant the delegates freedom of action without let or hindrance so long as they maintain contact between the parties.*
- IV. *The delegates will ask for all facilities to assist victims and, whenever possible, for all persons entitled to special consideration, such as*

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<sup>37</sup> Freymond, Jacques, *Guerres, Révolutions, Croix-Rouge: Réflexions sur le rôle du CICR*, Graduate Institute of International Studies, Geneva, 1976.

<sup>38</sup> *The International Committee of the Red Cross and Internal Disturbances and Tensions*, International Committee of the Red Cross, Geneva, August 1986, p. 16.

*the wounded, the sick, children, and so forth, to be removed to safety.*

- V. *Whether delegates participate in negotiations or merely act as couriers, responsibility for proposals transmitted, for decisions and action, lies solely with the parties. Delegates shall not guarantee the implementation of decisions or the observance of conditions laid down by the parties.*

These principles make it clear that the ICRC does not normally intervene in cases of hostage-taking that occur outside the scope of application of the Geneva Conventions. However, exceptionally it may feel that it is essential, for humanitarian reasons, to become involved, depending on various objective criteria. It will provide material assistance and moral comfort only if the following conditions are fulfilled:

- (a) the principal parties concerned must give their agreement;*
- (b) all parties concerned must promise not to take advantage of ICRC action to play a trick on the other party or parties and, consequently, on the ICRC;*
- (c) communications must be kept open at all times with ICRC headquarters and with the hostage-takers, as far as materially possible;*
- (d) all parties must promise not to have recourse to violence, not only while the delegates are providing assistance but also and at least during the time they take to reach the hostages and to return to their base.<sup>39</sup>*

Moreover, the ICRC alone may accept, exceptionally, the role of intermediary, which the institution understands as entailing mainly the passing on of proposals from one party to the other.

This task of mediation will be possible only if:

- (a) There is no direct contact between the parties.*
- (b) The ICRC is the most suitable body to undertake the task of mediation.*
- (c) The parties renounce any act of violence during the time it takes the ICRC to complete its work. The parties must promise not to use violence, as in assistance operations, not only during the time it takes for the delegates to reach the hostages, carry out their visit and return to the base, but also during the entire period of negotiations.*

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<sup>39</sup> *Ibid.*, Annex IV, *Attitude of the Red Cross to the taking of hostages*, pp. 34-35.

(d) *The ICRC is free to cease its activity as mediator at any time and to communicate this decision to the parties.*<sup>40</sup>

## VII. Conclusions

Since the Second World War, the idea has gained ground that human rights must be supported by international guarantees. This trend has not only led to the drafting of international instruments on the matter, it has also given a strong impetus to international humanitarian law, reflecting a growing convergence of and complementarity between the two branches of the law.

Moreover, the rise in international terrorism has created a new awareness on the part of the States, the principal protagonists on the international scene, of the need to adopt rules to prevent and suppress such practices. Although there has been no consensus among the world community on the adoption of a universal convention on the subject, owing mainly to failure to agree on a definition and on the advisability of taking causes and motives into account in such legislation, some conventions have been signed condemning and setting out measures to combat the most outrageous manifestations of terrorism on the international level.

This is the background to the international ban on the taking of hostages. The relevant provisions pertain to both international humanitarian law and international human rights law. They place hostage-taking in the category of international crimes and set up a co-ordinated system for sanctioning such offences, based mainly on the principle of universal jurisdiction, the individual being directly responsible for this breach of international law.

Not only is there complementarity between the provisions of the law of war and those of the law of peace, they are also co-ordinated, thus making it very difficult to commit this terrorist act with impunity.

Indeed, by virtue of Article 12 of the 1979 International Convention against the Taking of Hostages, which we hope will one day reach the high level of ratification achieved by the Geneva Conventions, its provisions apply to all situations in which the principle *aut dedere, aut judicare* is not established by humanitarian law, thus increasing protection against this form of international terrorism by giving full effect to that principle.

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<sup>40</sup> *Ibid.*, p. 35.

In conclusion, prominence should be given to the work done in this connection by the International Committee of the Red Cross. Despite the risks presented in certain cases for respect of its status as an independent and impartial institution, the ICRC has carried out an important mission. On several occasions it has successfully accomplished the valuable but difficult task of bringing assistance to and mediating in favour of hostages and their families, acting as an indispensable auxiliary to the parties when other channels for negotiation were blocked or exhausted. This is further evidence of the growing importance of the ICRC's role, not only in situations covered by international humanitarian law but also in circumstances outside its scope, but calling for the institution's intervention because of the principle of humanity by which it is guided.

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