

The background of the entire page is a repeating pattern of small, teal-colored stars or snowflakes on a light cream or off-white background. The pattern is dense and covers the entire surface.

Customary international humanitarian law

edited by Jean-Marie Henckaerts and Louise Doswald-Beck ;
with contributions by Carolin Alvermann ..

128. At the CDDH, the Netherlands stated that it understood the phrase "military deployment" in paragraph 3(b) of draft Article 42 AP I (now Article 44) to mean "any tactical movement towards a place from which the attack is to be launched".¹²⁴

129. At the CDDH, Portugal abstained in the vote on draft Article 42 AP I (now Article 44) and considered that "the exceptional rule in the second sentence of the [third] paragraph did not ensure reasonable protection for the civilian population".¹²⁵

130. At the CDDH, Spain abstained in the vote on draft Article 42 AP I (now Article 44) because:

The text presented does not guarantee the safety of the civilian population, which is the essential aim of the instruments under consideration. In the view of this delegation, the terms in which the article is drafted could favour the development of the new phenomenon known as urban guerrilla warfare and, therefore, a certain form of terrorism, thus constituting a grave danger to the security of States and a step on the road to international subversion.¹²⁶

131. At the CDDH, Switzerland abstained in the vote on draft Article 42 AP I (now Article 44) because it was afraid that "the article would only have the effect of doing away with the distinctions between combatants and civilians. The consequence would be that the adverse party could take draconian measures against civilians suspected of being combatants."¹²⁷

132. At the CDDH, the UAE stated that it agreed with the interpretation given by Egypt of the expression "military deployment".¹²⁸

133. At the CDDH, the UK abstained in the vote on draft Article 42 AP I (now Article 44) and stated that "any failure to distinguish between combatants and civilians could only put the latter at risk. That risk might well become unacceptable unless a satisfactory interpretation could be given to certain provisions of Article 42."¹²⁹ The UK further stated that it considered that "the situations in which a guerrilla fighter was unable to distinguish himself from the civilian population could exist only in occupied territory" and that the word "deployment" must be interpreted as meaning "any movement towards a place from which an attack was to be launched".¹³⁰

134. At the CDDH, Uruguay abstained in the vote on draft Article 42 AP I (now Article 44) and referred to the statements made by Argentina and Switzerland

¹²⁴ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 142, § 6.

¹²⁵ Portugal, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 148, § 36.

¹²⁶ Spain, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.55, 26 May 1977, p. 138.

¹²⁷ Switzerland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 131, § 68.

¹²⁸ UAE, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 146, § 25.

¹²⁹ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 132, § 73.

¹³⁰ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 132, § 74.

and to its own statement in Committee III in which it had expressed its concern about "the foreseeable consequences of the lack of a clear distinction between the combatants and the civilian population, which would expose the civilian population to a quite unnecessary risk".¹³¹

135. At the CDDH, the US explained its vote in favour of draft Article 42 AP I (now Article 44) as follows:

The article conferred no protection on terrorists. It did not authorize soldiers to conduct military operations while disguised as civilians. However, it did give members of the armed forces who were operating in occupied territory an incentive to distinguish themselves from the civilian population when preparing for and carrying out an attack . . . As regards the second sentence of paragraph 3, it was the understanding of [the US] delegation that situations in which combatants could not distinguish themselves throughout their military operations could exist only in the exceptional circumstances of territory occupied by the adversary or in those armed conflicts described in Article 1, paragraph 4, of draft Protocol I . . . The sentence was clearly designed to ensure that combatants, while engaged in military operations preparatory to an attack, could not use their failure to distinguish themselves from civilians as an element of surprise in the attack. Combatants using their appearance as civilians in such circumstances in order to aid in the attack would forfeit their status as combatants . . . Combatants must distinguish themselves from civilians during the phase of the military operation which involved moving to the position from which the attack was to be launched.¹³²

136. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "the executive branch regards [the provision of Article 44(3) AP I, second sentence] as highly undesirable and potentially dangerous to the civilian population and of course does not recognize it as customary law or deserving of such status".¹³³

137. In a memorandum issued in 1988, the Office of the Legal Adviser of the US Department of State stated that:

Article 44 grants combatant status to irregular forces in certain circumstances even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the existing laws of war. This was not acceptable as a new norm of international law. It clearly does not reflect customary law.¹³⁴

¹³¹ Uruguay, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 144, § 18; Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.55, 22 April 1977, p. 160, § 32.

¹³² US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, pp. 149–150, § 43.

¹³³ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

¹³⁴ US, Memorandum prepared by the Office of the Legal Adviser of the Department of State, 29 March 1988, reprinted in Marian Nash (Leich), *Cumulative Digest of United States Practice*

III. Practice of International Organisations and Conferences

138. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

139. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

140. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

In situations where, owing to the nature of hostilities an armed combatant cannot distinguish himself, he keeps his status as a combatant if he carries his arms openly:

- a) during every military engagement;
- b) as long as he is visible to the enemy while he is engaged in a military deployment, that is in any movement towards a place from which or where a combat action is to take place.¹³⁵

VI. Other Practice

141. At the CDDH, the PLO stated that the phrase "during such time as he is visible to the adversary" used in paragraph 3 of draft Article 42 AP I (now Article 44) must be interpreted as meaning "visible to the naked eye" and that the phrase "while he is engaged in a military deployment preceding the launching of an attack" could only mean "immediately before the attack, often coinciding with the actual beginning of the attack".¹³⁶

B. Spies

Definition of spies

I. Treaties and Other Instruments

Treaties

142. Article 29 of the 1899 HR provides that:

An individual can only be considered a spy if, acting clandestinely, or on false pretences, he obtains, or seeks to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

in International Law, 1981–1988, Department of State Publication 10120, Washington, D.C., 1993–1995, p. 3441.

¹³⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 49.

¹³⁶ PLO, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, pp. 147–148, § 31.

Thus, soldiers not in disguise who have penetrated into the zone of operations of a hostile army to obtain information are not considered spies. Similarly, the following are not considered spies: soldiers or civilians, carrying out their mission openly, charged with the delivery of despatches destined either for their own army or for that of the enemy. To this class belong likewise individuals sent in balloons to deliver despatches, and generally to maintain communication between the various parts of an army or a territory.

143. Article 29 of the 1907 HR provides that:

A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, entrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.

144. Article 46(2) AP I provides that:

A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

Article 46 AP I was adopted by consensus.¹³⁷

Other Instruments

145. Article 88 of the 1863 Lieber Code states that "a spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy".

146. Article 19 of the 1874 Brussels Declaration provides that "a person can only be considered a spy when acting clandestinely or on false pretences he obtains or endeavours to obtain information in the districts occupied by the enemy, with the intention of communicating it to the hostile party".

147. Article 22 of the 1874 Brussels Declaration provides that "soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies".

148. Article 24 of the 1880 Oxford Manual provides that "individuals may not be regarded as spies, who, belonging to the armed force of either belligerent, have penetrated, without disguise, into the zone of operations of the enemy".

¹³⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 111.

II. National Practice

Military Manuals

149. Argentina's Law of War Manual defines spies with reference to Article 29 of the 1907 HR and considers that this definition implies that members of the armed forces who wear their uniform while gathering information are not considered to be spies.¹³⁸

150. Australia's Commanders' Guide defines spies as "combatants who conduct covert espionage operations in enemy occupied territory, while not in uniform".¹³⁹

151. Australia's Defence Force Manual defines espionage as "the clandestine collection of information behind enemy lines or in the area of operations with the intention of communicating that information to a hostile party to the conflict".¹⁴⁰

152. Belgium's Law of War Manual defines a spy as:

an individual who gathers or attempts to gather, clandestinely or on false pretences, information in the zone of operations of a belligerent with the intention of communicating it to the adverse party. The "zone of operations" comprises zones where no land operations are taking place but which may be hit by aerial bombardment (including bombardment by long-range missiles). This interpretation is very wide. Neutral territory on which a spy may operate cannot, however, be considered as a "zone of operations".¹⁴¹

153. Cameroon's Instructors' Manual states that "spying is to be distinguished from military intelligence. The latter is legal while the former is vigorously condemned in all national and international jurisdictions. Spying is an unlawful search for information."¹⁴²

154. Canada's LOAC Manual defines espionage as "the collection of information clandestinely behind enemy lines or in the zone of operations while wearing civilian clothing or otherwise disguised or concealed. Spies are those who engage in espionage."¹⁴³ The manual specifies that "members of the armed forces of a party to the conflict who gather or attempt to gather information while wearing the uniform of their armed forces will not be considered as engaging in espionage".¹⁴⁴ (emphasis in original)

155. Ecuador's Naval Manual defines a spy as:

someone who, while in territory under enemy control or the zone of operations of a belligerent force, seeks to obtain information while operating under a false claim of non-combatant or friendly forces status with the intention of passing that

¹³⁸ Argentina, *Law of War Manual* (1989), § 1.09(1); see also *Law of War Manual* (1969), § 2.009(1).

¹³⁹ Australia, *Commanders' Guide* (1994), § 707, see also § 913.

¹⁴⁰ Australia, *Defence Force Manual* (1994), § 717.

¹⁴¹ Belgium, *Law of War Manual* (1983), p. 21.

¹⁴² Cameroon, *Instructors' Manual* (1992), pp. 36 and 60.

¹⁴³ Canada, *LOAC Manual* (1999), p. 6-3, § 23.

¹⁴⁴ Canada, *LOAC Manual* (1999), p. 3-4, § 33.

information to an opposing belligerent. Members of the armed forces who penetrate enemy-held territory in civilian attire or enemy uniform to collect intelligence are spies. Conversely, personnel conducting reconnaissance missions behind enemy lines while properly uniformed are not spies.¹⁴⁵

156. France's LOAC Manual defines spies with reference to Article 29 of the 1907 HR.¹⁴⁶

157. Germany's Military Manual defines spies as "persons who clandestinely or on false pretences, i.e. not wearing the uniform of their armed forces, gather information in the territory controlled by the adversary".¹⁴⁷

158. Kenya's LOAC Manual defines spies as:

persons who, acting clandestinely or on false pretences, gather information in the territory of a belligerent party with the intent of communicating it to the enemy . . . If members of the armed forces gather intelligence in occupied territory, they may not be treated as spies provided they are in uniform.¹⁴⁸

159. The Military Manual of the Netherlands defines spies with reference to Article 29 of the 1907 HR and states that this definition implies that combatants gathering information in uniform are not considered as spies.¹⁴⁹

160. New Zealand's Military Manual defines spies as "people, wearing civilian clothing or otherwise disguised, who collect information clandestinely behind enemy lines or in the zone of operations with the intention of communicating that information to a hostile Party".¹⁵⁰

161. Nigeria's Manual on the Laws of War states that:

Soldiers or civilians acting clandestinely or on false pretences to obtain information about a belligerent with the intention to communicate it to his enemy are engaged in espionage . . . Soldiers wearing their uniform when penetrating the enemy zone of operations are not spies and if captured, should be treated as prisoners of war.¹⁵¹

162. South Africa's LOAC Manual states that espionage "entails acting clandestinely in order to obtain information for transmission back to one's own side".¹⁵²

163. Spain's LOAC Manual states that "a member of the armed forces who gathers information is not considered to be engaged in espionage if that person is wearing regular uniform or is a resident in an occupied territory and is collecting information in that territory on behalf of the occupied power".¹⁵³

¹⁴⁵ Ecuador, *Naval Manual* (1989), § 12.8.

¹⁴⁶ France, *LOAC Manual* (2001), p. 64.

¹⁴⁷ Germany, *Military Manual* (1992), § 321.

¹⁴⁸ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 9.

¹⁴⁹ Netherlands, *Military Manual* (1993), p. III-5.

¹⁵⁰ New Zealand, *Military Manual* (1992), § 506(2).

¹⁵¹ Nigeria, *Manual on the Laws of War* (undated), § 31.

¹⁵² South Africa, *LOAC Manual* (1996), § 34(d).

¹⁵³ Spain, *LOAC Manual* (1996), Vol. I, § 1.4.a.

164. Switzerland's Basic Military Manual defines a spy as "an individual who, acting clandestinely or on false pretences, gathers or attempts to gather information in the zone of operation of a belligerent with the intention of communicating it to the adverse party".¹⁵⁴

165. The UK LOAC Manual defines spies as "persons who, acting clandestinely or on false pretences, gather information in the territory of a belligerent with intent to communicate it to the enemy".¹⁵⁵

166. The US Naval Handbook defines a spy as:

someone who, while in territory under enemy control or the zone of operations of a belligerent force, seeks to obtain information while operating under a false claim of noncombatant or friendly forces status with the intention of passing that information to an opposing belligerent. Members of the armed forces who penetrate enemy-held territory in civilian attire or enemy uniform to collect intelligence are spies. Conversely, personnel conducting reconnaissance missions behind enemy lines while properly uniformed are not spies.¹⁵⁶

167. The YPA Military Manual of the SFRY (FRY) provides a definition of spies similar to that contained in Article 29 of the 1907 HR.¹⁵⁷

National Legislation

168. Chile's Code of Military Justice defines a spy as:

1) anyone who surreptitiously or with the aid of a disguise or a false name, or by concealing his status or nationality, introduces himself in time of war and without justified aim in a war zone, a military post or among troops in the field; 2) anyone who conveys communications, messages or sealed documents from the enemy without being compelled to do so, or who being so compelled does not hand them over to the national authorities; 3) anyone who engages in reconnaissance, draws up plans or makes sketches of the terrain; 4) anyone who conceals, causes to be concealed or places in a safe place a person whom he knows to be an enemy spy, agent or member of the military.

The Code also provides that "enemy soldiers who, wearing their uniforms, openly enter the national territory for, *inter alia*, the purpose of engaging in reconnaissance of the terrain or observing troop movements" shall not be considered as spies but shall be subject to the rules of war as laid down by international law.¹⁵⁸

169. Mexico's Code of Military Justice as amended defines a spy as someone who has penetrated a defended place or troops in the field with the aim of collecting useful information and communicating it to the enemy.¹⁵⁹

¹⁵⁴ Switzerland, *Basic Military Manual* (1987), Article 42.

¹⁵⁵ UK, *LOAC Manual* (1981), Section 3, p. 9, § 6.

¹⁵⁶ US, *Naval Handbook* (1995), § 12.8.

¹⁵⁷ SFRY (FRY), *YPA Military Manual* (1988), § 109.

¹⁵⁸ Chile, *Code of Military Justice* (1925), Articles 252–253.

¹⁵⁹ Mexico, *Code of Military Justice as amended* (1933), Articles 206–207.

170. A publication on Philippine military law states that:

A spy is a person who, without authority and secretly, or under a false pretext, contrives to enter within the lines of an army for the purpose of obtaining material information and communicating it to the enemy; or one who, being by authority within the lines, attempts secretly to accomplish such purpose.¹⁶⁰

National Case-law

171. No practice was found.

Other National Practice

172. No practice was found.

III. Practice of International Organisations and Conferences

173. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

174. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

175. No practice was found.

VI. Other Practice

176. No practice was found.

Status of spies

Note: For practice concerning summary execution of spies, see Chapter 32, section M.

I. Treaties and Other Instruments

Treaties

177. Article 30 of the 1899 HR provides that "a spy taken in the act cannot be punished without previous trial". Article 31 specifies that "a spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage."

¹⁶⁰ Claro C. Gloria, *Philippine Military Law*, Capitol Publishing House, Quezon City, 1956, p. 263.

178. Article 30 of the 1907 HR provides that "a spy taken in the act shall not be punished without previous trial". Article 31 specifies that "a spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage".

179. Article 46(1) AP I provides that:

Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

Article 46 AP I was adopted by consensus.¹⁶¹

180. Article 45(3) AP I provides that "any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol". Article 45 AP I was adopted by consensus.¹⁶²

Other Instruments

181. Article 88 of the 1863 Lieber Code states that "the spy is punishable with death by hanging by the neck, whether or not he succeeded in obtaining information or in conveying it to the enemy".

182. Article 20 of the 1874 Brussels Declaration states that "a spy taken in the act shall be tried and treated according to the laws in force in the army which captures him". Article 21 adds that "a spy who rejoins the army to which he belongs and who is subsequently captured by the enemy is treated as a prisoner of war and incurs no responsibility for his previous acts".

183. Article 23 of the 1880 Oxford Manual states that "individuals captured as spies cannot demand to be treated as prisoners of war".

184. Article 25 of the 1880 Oxford Manual states that "in order to avoid the abuses to which accusations of espionage too often give rise in war, it is important to assert emphatically that no person charged with espionage shall be punished until the judicial authority shall have pronounced judgment".

185. Article 26 of the 1880 Oxford Manual states that "a spy who succeeds in quitting the territory occupied by the enemy incurs no responsibility for his previous acts, should he afterwards fall into the hands of that enemy".

II. National Practice

Military Manuals

186. Argentina's Law of War Manual cites Articles 29–31 of the 1907 HR.¹⁶³

¹⁶¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 111.

¹⁶² CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 155.

¹⁶³ Argentina, *Law of War Manual* (1969), § 2.009.

187. Australia's Commanders' Guide states that:

The most notable exception to granting of PW status to enemy military personnel is to those individuals who are classified as spies . . . Such individuals are not entitled to PW status and may be tried as common criminals under the detaining power's criminal code. It is important to note, however, that if military clothing is worn during such operations, the perpetrators are lawful combatants and are entitled to PW status.¹⁶⁴

188. Belgium's Law of War Manual states that:

Spying is not contrary to the law of war and, as a result, does not constitute a war crime. Most countries provide, however, that spying is a crime [under domestic law] in order to protect their national interests and the interests of their armed forces. A person who is caught spying for the enemy is liable to punishment, but only after being tried . . . In general, civilians act as spies. This activity, by itself, does not give them the status of combatant . . . Members of the armed forces who perform spying missions in the zone of operations will be treated, if captured, either as prisoners of war or as spies, depending on whether they accomplished their mission wearing their uniform or disguised as civilians wearing civilian clothes.¹⁶⁵

189. Cameroon's Disciplinary Regulations states that:

Members of the Armed Forces in organised units, *francs-tireurs* detached from their regular units, commando detachments and isolated *saboteurs*, as well as voluntary militias, self-defence groups and organised resistance formations are lawful combatants on condition that those units, organisations or formations have a designated commander, that their members wear a distinctive sign, notably on their clothing, that they carry arms openly and that they respect the laws and customs of war. These combatants must be considered prisoners of war. Anyone who does not comply with these conditions may be considered a spy subject to the applicable criminal sanctions.¹⁶⁶

190. Cameroon's Instructors' Manual states that a combatant caught spying "loses his status as a prisoner of war".¹⁶⁷

191. Canada's LOAC Manual states that:

Members of the armed forces engaging in espionage *while not in uniform* may be treated as spies and lose their entitlement to PW status if they are captured before rejoining the armed forces to which they belong. Spies who are not in uniform are not lawful combatants. If they engage in hostilities, they may be punished for doing so but only after a fair trial affording all judicial guarantees.¹⁶⁸ [emphasis in original]

192. Croatia's LOAC Compendium states that:

The Occupying Power may impose the death penalty only on inhabitants guilty of espionage, sabotage [and] intentional offences having caused death. However, such

¹⁶⁴ Australia, *Commanders' Guide* (1994), § 707, see also §§ 511 and 913-914 and *Defence Force Manual* (1994), § 717.

¹⁶⁵ Belgium, *Law of War Manual* (1983), pp. 21-22.

¹⁶⁶ Cameroon, *Disciplinary Regulations* (1975), Article 30.

¹⁶⁷ Cameroon, *Instructors' Manual* (1992), p. 89, see also pp. 36, 60, 77 and 143.

¹⁶⁸ Canada, *LOAC Manual* (1999), p. 3-4, §§ 34 and 35, see also p. 6-3, §§ 23 and 24.

offences must have been punishable by death under the law in force in occupied territory before occupation.¹⁶⁹

193. Croatia's Commanders' Manual provides that "search for information in uniform or without disguise concealing combatant status is legitimate. Spies may be used but they do not have the right to prisoner-of-war status."¹⁷⁰

194. According to Ecuador's Naval Manual,

Spying during armed conflict is not a violation of international law. Captured spies are not, however, entitled to prisoner-of-war status. The captor nation may try and punish spies in accordance with its national law. Should a spy succeed in eluding capture and return to friendly territory, liability to punishment terminates. If subsequently captured during some other military operation, the former spy cannot be tried or punished for the earlier act of espionage.¹⁷¹

195. France's LOAC Teaching Note states that "spies... are not combatants and have no right to prisoner-of-war status".¹⁷²

196. France's LOAC Manual states that "a spy has no right to prisoner-of-war status and is subject to the national legislation of the territory where he is captured".¹⁷³

197. Germany's Military Manual states that:

Even if they are members of their armed forces, [spies] do not have the right to the status of prisoner of war. Persons who fall into the hands of the adversary while engaging in espionage shall be liable to punishment. Even if taken while engaging in espionage, a spy shall not be punished without prior conviction pursuant to regular judicial proceedings.¹⁷⁴

198. Hungary's Military Manual states that:

The Occupying Power may impose the death penalty only on inhabitants guilty of espionage, sabotage [and] intentional offences having caused death. However, such offences must have been punishable by death under the law in force in occupied territory before occupation.¹⁷⁵

199. Israel's Manual on the Laws of War states that:

The spy does not meet the conditions required of a legal combatant (since he is assimilated in the civilian population) and thus is not entitled to the prisoner-of-war's immunity against being tried. Therefore, a state that captures a spy is allowed to bring him to trial in accordance with its own internal laws, an offense that is generally punishable by a long prison sentence or even death... A spy who

¹⁶⁹ Croatia, *LOAC Compendium* (1991), p. 65.

¹⁷⁰ Croatia, *Commanders' Manual* (1992), § 31.

¹⁷¹ Ecuador, *Naval Manual* (1989), § 12.8.1.

¹⁷² France, *LOAC Teaching Note* (2000), p. 2.

¹⁷³ France, *LOAC Manual* (2001), p. 64, see also p. 40.

¹⁷⁴ Germany, *Military Manual* (1992), §§ 321-322.

¹⁷⁵ Hungary, *Military Manual* (1992), p. 101.

has succeeded in completing his mission and returning to his army is once again entitled to legal combatant status.¹⁷⁶

200. Italy's LOAC Elementary Rules Manual provides that "search for information in uniform or without disguise concealing combatant status is legitimate. Spies may be used but they do not have the right to prisoner-of-war treatment."¹⁷⁷

201. Kenya's LOAC Manual states that:

Those captured while engaged in espionage do not have POW status but may not be punished without trial... Members of the armed forces who were involved in spying cease to be spies as soon as they return to their own lines. If subsequently captured, they cannot be punished for their previous spying activities.¹⁷⁸

202. Madagascar's Military Manual provides that "the search for information in uniform or without disguise concealing combatant status is legitimate. Spies may be used but they do not have the right to prisoner-of-war status."¹⁷⁹

203. The Military Manual of the Netherlands states that:

A member of the armed forces who falls into the hands of the adversary while engaged in espionage has no entitlement to the status of prisoner of war; he can be treated as a spy... Military spies, who rejoin their forces after having accomplished their task and are subsequently captured, must be treated as prisoners of war and no longer be convicted for their earlier spying activities... A spy caught in the act may under no circumstances be sentenced without trial.¹⁸⁰

204. New Zealand's Military Manual states that:

Although spying is not contrary to the law of armed conflict, international law provides that spies, if captured, may be tried in accordance with the law of the captor and may be liable to the death penalty. To punish them without a proper trial is, however, a war crime. The collection of information by persons wearing uniform is a permitted means of conflict and a person so engaged is liable to be fired upon as is any other member of the enemy forces. If captured, such a person is to be treated as a prisoner of war.¹⁸¹

The manual adds that:

Persons who have evaded capture when carrying out acts of espionage and who have rejoined their own forces or own national authority cannot be charged with such acts if subsequently captured; if they are members of armed forces they must be treated as prisoners of war.¹⁸²

¹⁷⁶ Israel, *Manual on the Laws of War* (1998), p. 59.

¹⁷⁷ Italy, *LOAC Elementary Rules Manual* (1991), § 31.

¹⁷⁸ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 9.

¹⁷⁹ Madagascar, *Military Manual* (1994), Fiche No. 5-O, § 31.

¹⁸⁰ Netherlands, *Military Manual* (1993), pp. III-5 and III-6.

¹⁸¹ New Zealand, *Military Manual* (1992), § 506(2) and (3).

¹⁸² New Zealand, *Military Manual* (1992), § 506(4).

205. Nigeria's Military Manual states that "spies...are however not to be considered as prisoner of war".¹⁸³

206. Nigeria's Manual on the Laws of War states that:

For the purpose of waging war it is necessary to obtain information about the enemy. To get such information, it is lawful to employ spies and use soldiers and civilians of the enemy for committing acts of treason. But although this practice by the states is considered legitimate, lawful punishment under the municipal law may be imposed upon individuals engaged in espionage or treason when they are caught by the enemy... Soldiers wearing their uniform when penetrating the enemy zone of operations are not spies and if captured, should be treated as prisoners of war. When a spy is apprehended, he should not be punished without a fair regular trial. A spy who succeeds to rejoin his armed forces and is subsequently captured by the enemy is not liable to be punished for his previous acts of espionage. Such immunity is not accorded to a civilian spy captured by the enemy after reaching his own territory.¹⁸⁴

207. South Africa's LOAC Manual states that espionage "is not a violation of the law of war but there is no protection under the Geneva Conventions in respect of acts of espionage".¹⁸⁵

208. Spain's LOAC Manual states that spies are not entitled to POW status.¹⁸⁶

209. According to Sweden's IHL Manual, "spies... are not entitled to combatant or prisoner-of-war status".¹⁸⁷

210. Switzerland's Basic Military Manual states that:

International law applicable in armed conflict does not prohibit the use of spies and secret agents, who can even be soldiers or civilians of enemy nationality. Nevertheless, upon their capture or arrest, these persons are liable to be sentenced severely, according to the domestic law of the State concerned... A spy who is caught in the act may not be sentenced without previous judgement.¹⁸⁸

211. The UK Military Manual states that "regular members of the armed forces who are caught as spies are not entitled to be treated as prisoners of war. But they would appear to be entitled, as a minimum, to the limited privileges conferred upon civilian spies or saboteurs by [Article 5 GC IV]".¹⁸⁹

212. The UK LOAC Manual provides that:

Those captured while engaged in espionage do not have PW status but may not be punished without trial. If members of the armed forces gather intelligence in occupied territory they may not be treated as spies provided that they are in uniform. Even if not in uniform, members of the armed forces who were involved in spying

¹⁸³ Nigeria, *Military Manual* (1994), p. 8, § 9(c)(2).

¹⁸⁴ Nigeria, *Manual on the Laws of War* (undated), § 31.

¹⁸⁵ South Africa, *LOAC Manual* (1996), § 34(d).

¹⁸⁶ Spain, *LOAC Manual* (1996), Vol. I, § 1.4.

¹⁸⁷ Sweden, *IHL Manual* (1991), Section 3.2.1.4, p. 36.

¹⁸⁸ Switzerland, *Basic Military Manual* (1987), Articles 41(2) and 43.

¹⁸⁹ UK, *Military Manual* (1958), § 96.

cease to be spies as soon as they return to their own lines. If subsequently captured they cannot be punished for their previous spying activities.¹⁹⁰

213. The US Naval Handbook states that:

Spying during armed conflict is not a violation of international law. Captured spies are not, however, entitled to prisoner-of-war status. The captor nation may try and punish spies in accordance with its national law. Should a spy succeed in eluding capture and return to friendly territory, liability to punishment terminates. If subsequently captured during some other military operation, the former spy cannot be tried or punished for the earlier act of espionage.¹⁹¹

214. The YPA Military Manual of the SFRY (FRY) states that spies caught in the act cannot be punished without previous trial, but spies who rejoin their army and are subsequently caught must be treated as POWs and incur no responsibility for their previous acts of espionage.¹⁹²

National Legislation

215. Chile's Code of Military Justice states that spies can be sentenced to life imprisonment or death.¹⁹³

216. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 45(3) AP I, is a punishable offence.¹⁹⁴

217. Referring to Malaysia's Armed Forces Act, the Report on the Practice of Malaysia states that the use of spies is unlawful in Malaysia. The report adds that there is no statutory definition of "spy", but it nevertheless considers that it is an offence for any person subject to service law in Malaysia to assist the enemy, communicate with it or share intelligence with it and that the Official Secrets Act and Armed Forces Act provide a penalty for spying.¹⁹⁵

218. Mexico's Code of Military Justice as amended provides that spies will be punished by death. Once spies have returned to their own troops and are then arrested, they cannot be punished as spies, but have to be treated as POWs.¹⁹⁶

219. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁹⁷

¹⁹⁰ UK, *LOAC Manual* (1981), Section 3, pp. 9–10, § 6.

¹⁹¹ US, *Naval Handbook* (1995), § 12.8.1.

¹⁹² SFRY (FRY), *YPA Military Manual* (1988), §§ 111–112.

¹⁹³ Chile, *Code of Military Justice* (1925), Articles 252–253.

¹⁹⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁹⁵ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.1, referring to *Armed Forces Act* (1972), Section 41 and *Official Secrets Act* (1972), Sections 2–3.

¹⁹⁶ Mexico, *Code of Military Justice as amended* (1933), Articles 206–207.

¹⁹⁷ Norway, *Military Penal Code as amended* (1902), § 108(b).

220. A publication on Philippine military law states that:

Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of the Armed Forces of the Philippines or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.¹⁹⁸

221. Spain's Military Criminal Code provides that non-combatants involved in military espionage are subject to punishment and do not benefit from POW status.¹⁹⁹

National Case-law

222. No practice was found.

Other National Practice

223. The Report on the Practice of Botswana maintains that spies are not protected.²⁰⁰

224. The Report on the Practice of Jordan notes that while there is no definition of the concept of spies in domestic law nor any provision concerning their status, interviews with military officers confirmed that spies are put on trial in Jordan.²⁰¹

225. According to the legal adviser of the South Korean Ministry of Foreign Affairs, a captured spy who is a member of enemy armed forces cannot be deemed a POW and may be punished under national law.²⁰²

226. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda affirms that spies are not considered as civilians. The report therefore concludes that spies are liable to attack.²⁰³

227. According to the Report on the Practice of Zimbabwe, "spies and mercenaries are likely to be regarded as combatants in Zimbabwe for purposes of being military targets. They are, however, unlikely to be afforded POW status and related protection if captured."²⁰⁴

III. Practice of International Organisations and Conferences

228. No practice was found.

¹⁹⁸ Claro C. Gloria, *Philippine Military Law*, Capitol Publishing House, Quezon City, 1956, p. 263.

¹⁹⁹ Spain, *Military Criminal Code* (1985), Articles 52 and 57.

²⁰⁰ Report on the Practice of Botswana, 1998, Chapter 1.1.

²⁰¹ Report on the Practice of Jordan, 1997, Interviews with military officers, Answers to additional questions on Chapter 1.1.

²⁰² South Korea, Opinion of a legal adviser of the Ministry of Foreign Affairs concerning the North Korean Submarine Infiltration Case, September 1996, Report on the Practice of South Korea, 1997, Chapter 1.1.

²⁰³ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 1.1.

²⁰⁴ Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

IV. Practice of International Judicial and Quasi-judicial Bodies

229. In its admissibility decision in *Treholt v. Norway* in 1991, the ECiHR held that the special character of espionage meant that there was a need for additional security measures and surveillance in relation to persons suspected of spying. The Commission stated that while these increased security measures were permitted, they might not extend to interference with the fundamental rights of a detainee.²⁰⁵

V. Practice of the International Red Cross and Red Crescent Movement

230. No practice was found.

VI. Other Practice

231. No practice was found.

C. Mercenaries

Definition of mercenaries

I. Treaties and Other Instruments

Treaties

232. Mercenaries are defined by Article 47(2) AP I as any person who:

- a) is specially recruited locally or abroad in order to fight in an armed conflict;
- b) does, in fact, take a direct part in the hostilities;
- c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- d) is neither a national of a party to the conflict nor a resident of territory controlled by a Party to the conflict;
- e) is not a member of the armed forces of a Party to the conflict; and
- f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Article 47 AP I was adopted by consensus.²⁰⁶

233. In an interpretative declaration made upon accession to AP I, Algeria reserved judgement on the definition of mercenarism as set out in Article 47(2) AP I, which it deemed "restrictive".²⁰⁷

²⁰⁵ ECiHR, *Treholt v. Norway*, Admissibility Decision, 9 July 1991, pp. 192 and 194.

²⁰⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 156.

²⁰⁷ Algeria, Interpretative declarations made upon accession to AP I, 16 August 1989, § 3.