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Human Rights Violations by Peacekeeping Forces in Somalia

by Richard J. Wilson* and Emily Singer Hurvitz**

INTRODUCTION

Widespread sexual violence is occurring throughout South-Central Somalia, and the perpetrators of this violence are often alleged to be government security forces and military personnel from the African Union Mission for Somalia (AMISOM).¹ Within Somalia, there is little recourse for victims of sexual violence, and human rights practitioners are looking to international options as alternative venues for seeking justice. This article uses the case of peacekeeping troops in Somalia perpetrating human rights violations to explore the liability of peacekeepers and their home states in these situations. It assumes, for purposes of analysis here, that due to their traditional immunities, the international organizations involved in providing the peacekeeping forces are not themselves accountable for human rights violations or criminal misconduct, but that issue is not explored comprehensively in this article.

SOMALIA BACKGROUND

After the fall of President Siad Barre in 1991, Somalia limped forward, a paradigmatic example of a failed state with no functioning or internationally recognized government.² The state fell into two decades of lawlessness and fighting between rival clans.³ Drought and famine affected large swaths of the population in 1992 and from 2010–2012 while an Islamist insurgency caused extensive civil strife.⁴ In 2012, a new government with international support took power, but many Somalis remained internally displaced.⁵ After two decades of armed conflict and famine, Somalia's nascent political and judicial institutions remain ineffective.⁶

Human rights monitors have reported a widespread risk of rape and sexual violence for displaced Somali women and children.⁷ The United Nations (UN) Office for the Coordination of

Humanitarian Affairs reported that sexual violence is a pervasive problem throughout Somalia and that oftentimes the attacks are carried out by armed men in uniform.⁸ The UN reported that at least 1,700 people were affected by sexual violence in Somalia in 2012.⁹

PEACEKEEPERS IN GENERAL

Peacekeeping forces are generally deployed to areas of conflict, or to post-conflict zones, with the goal of improving the peacemaking process.¹⁰ When peacekeepers can preserve a ceasefire between fighting parties, the chances of reaching a successful peace agreement may increase, and post-conflict forces provide stability for the development of stable and safe governmental operations.¹¹ The UN is a leader in peacekeeping missions, with sixteen peacekeeping operations currently deployed on four continents.¹² Despite the sound record of performance and the good intentions of peacekeeping missions, international peacekeepers have been associated with criminal misconduct, including sexual violence. Crimes against women and children have followed UN peacekeeping operations in several locations,¹³ and the UN reported

that the entrance of peacekeeping troops into a conflict situation has been associated with a rapid rise in child prostitution.¹⁴

Peacekeeping operations date back to the 1950s, but reports of abuse by such forces have occurred only recently; the first such report of sexual violence emerged in 1999, when Human Rights Watch reported on sexual exploitation in Guinean refugee camps.¹⁵ Since then, a stream of scholarship and UN activities have criticized and analyzed the issue of peacekeeper accountability through the first decade of the 2000s.¹⁶ This work culminated with the recommendations of the UN Special Committee on Peacekeeping Operations, a companion report from a group of legal experts, and a Draft Convention on Criminal Responsibility of Experts on Mission for the UN, all of which were completed between 2005 and 2006.¹⁷ Of greatest relevance to this writing is the common unchallenged conclusion of these bodies: under the standard agreement between the UN and the troop-contributing state, the behavior and punishment of military personnel are under the exclusive control of the troop-contributing state.¹⁸ Article 46 of the 1990 Model Status of Forces Agreement (SOFA) provides that all UN peacekeeping staff are

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immune from legal process in respect to acts that they perform in their official capacity, while Article 47(b) provides that if the accused is a member of the military, he or she “shall be subject to the exclusive jurisdiction of their respective participating states in respect of any criminal offences which may be committed by them in [the host country or territory].”¹⁹ While these rules are among the most clear, the applicable law governing peacekeeping operations is a web of complex and often evolving interactions between domestic and international norms, with issues of privileges and immunities, extraterritorial jurisdiction, and the interaction of international human rights law together with that of humanitarian law and international or domestic criminal responsibility.

Peacekeepers operate in a complicated legal framework. Each state contributes civilian advisors, police forces, and military officials to serve as peacekeepers within a foreign jurisdiction, all under the operational command of an agreed-upon outside organization. This complexity can negatively affect both state responsibility for human rights violations and individual accountability for crimes committed by peacekeepers. For example, UN Member States contribute UN peacekeepers, but the peacekeepers work under the authority of the UN, not the home government of the participating troops.²⁰ Under the normal rules of territorial jurisdiction, the host state would be responsible

for human rights violations and the prosecution of criminal conduct. Prosecuting perpetrators of human rights violations is generally easiest in the location where the crime was committed because the evidence and witnesses are there. But this normal procedure is often difficult to carry out, for the simple reason that some states, such as Somalia, have legal institutions that are too fragile or unstable to permit local prosecutions. When the UN begins a new peacekeeping operation, it establishes either a SOFA or a status of mission agreement (SOMA) with the host country that governs the obligations of the peacekeepers to the host country and the rights, privileges, and immunities of the peacekeepers.²¹ These agreements frequently provide for extensive immunities for the peacekeepers’ conduct within the host state.²²

Typically, an agreement will indicate that peacekeepers are only subject to criminal jurisdiction in their own countries, rather than the jurisdiction of the host country or that of the operational commanders.²³ The agreement may also include provisions requiring peacekeepers to follow local laws, but it is unlikely that a host state could enforce its laws on the peacekeepers because the host state does not have criminal jurisdiction over them.²⁴ The reality is that states contributing peacekeeping troops to UN missions rarely prosecute peacekeepers for crimes they commit in the host country.²⁵ It seems ironic that those charged with keeping the peace and protecting a

Despite the sound record of performance and the good intentions of peacekeeping missions, international peacekeepers have been associated with criminal misconduct, including sexual violence.



IHH (Turkish Humanitarian Relief Foundation) relief effort in refugee camps in Somalia, August 2011.

population of civilians are often involved in victimizing this very population and increasing strife despite their opposite mission.

AMISOM PEACEKEEPERS

Following the failed efforts of Somali and regional leadership to establish an African peacekeeping force for Somalia in 2005,²⁶ the UN authorized the African Union and the Intergovernmental Authority on Development to deploy “a protection and training mission in Somalia.”²⁷ The African Union Peace and Security Council established AMISOM in January 2007 — with an initial mandate of six months — to provide support for transitional institutions, facilitate humanitarian operations, and create a stable environment for development in Somalia.²⁸ The UN Security Council officially authorized and endorsed AMISOM in February 2007,²⁹ and it has continued to reauthorize the peacekeeping mission — with the most recent authorization set to expire in October 2014. The current resolution approves troop strength in Somalia exceeding 22,000 uniformed personnel.³⁰

The Transitional Federal Government of the Somali Republic (Somalia) and the African Union signed a SOMA in March 2007.³¹ Paragraph 54 of the agreement specifies, in typical language, that all AMISOM personnel are immune from legal process for any act performed in their official capacity.³² Paragraph 55(b) explains that military members of AMISOM who commit crimes in Somalia are subject to the exclusive jurisdiction of their home state.³³ This provision suggests that Somalia could not effectively prosecute a military member of AMISOM for crimes that he or she commits within Somalia. This is the case despite the provision of the agreement requiring AMISOM personnel to respect Somalia’s laws and regulations, a conflict of laws issue adding to the complexity of many peacekeeping missions.³⁴ The agreement does outline some shared responsibility between the Somali government and AMISOM for the arrest, interrogation, and detention of AMISOM personnel for violations committed within Somalia,³⁵ but the responsibility for prosecuting AMISOM personnel lies with the home state of the AMISOM member.

LEGAL LIABILITY FOR PEACEKEEPING TROOPS

Human rights groups have alleged that AMISOM troops and local security forces alike have perpetrated acts of sexual violence.³⁶ With the SOMA provisions on immunity and home-country prosecution of perpetrators, it is unlikely that Somalia can prosecute any members of AMISOM for their commission of sexual violence against Somali citizens. Somali victims of sexual violence have additional claims for international human rights violations against Somalia or the states contributing troops

to AMISOM in the African Commission on Human and Peoples’ Rights, but only time will tell how receptive, or how effective, the African system will be for bringing justice to Somali victims.

VICTIM PROTECTION

Another important element to consider in any criminal prosecution is victim protection. Without mechanisms to ensure their safety, it is unlikely that victims will come forward to bring criminal cases. Many international bodies have taken steps to ensure victim protection and support. The International Criminal Court, for example, provides protection services through the Rome Statute, the Rules of Procedure and Evidence, and the Regulations of the Court and of the Registry.³⁷ Both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have units dedicated to supporting and protecting victims and witnesses.³⁸ The Somali government has not made protecting survivors easy; for example, in January 2013, the government arrested a woman who alleged that security forces raped her, along with the journalist who reported on the allegations.³⁹ Somalia’s traditional culture and its history of clan-based governance with influences of *Shariah*

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law coupled with a relatively weak justice sector, leads to an environment that is not hospitable to victims of sexual violence.

STATE RESPONSIBILITY FOR PEACEKEEPER ACTIONS

The violation of international human rights obligations can give rise to state responsibility for those violations. As noted above, the states contributing troops are most likely to have responsibility for violations committed by peacekeeping troops. There are two key issues in this analysis: whether the state in question exercises exclusive or effective control over its troops in the receiving country, and whether human rights obligations have extraterritorial application to the sending country. Recent decisions in both the European Court of Human Rights⁴⁰ and the Inter-American human rights system⁴¹ suggest that human rights obligations do apply extraterritorially when a state has effective control over its military operations in a foreign country.

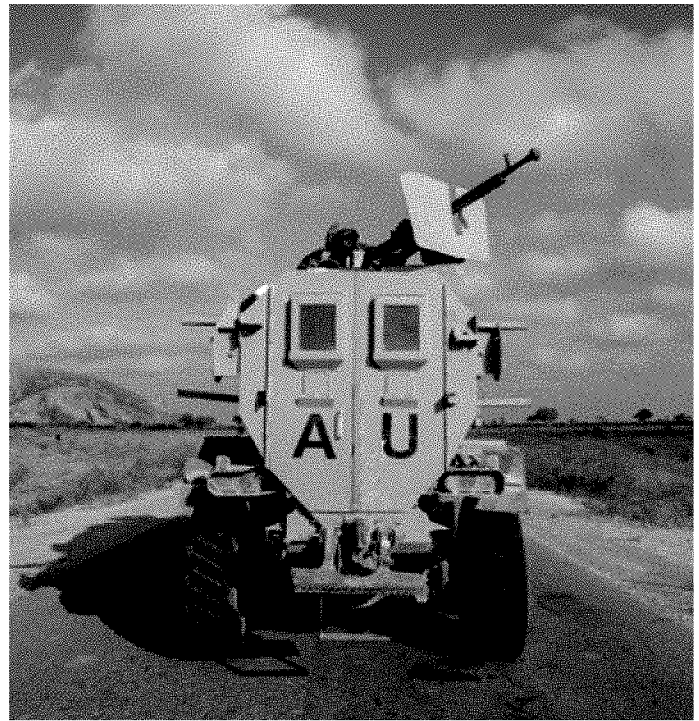
A recent decision by the Dutch Supreme Court held that the Netherlands was responsible for the deaths of three Bosnian Muslim men in the 1995 Srebrenica massacre.⁴² While working for the UN peacekeeping mission, Dutch peacekeepers forced the Bosnians to leave the safety of the UN compound during the massacre in Srebrenica, and Bosnian-Serb forces killed them.⁴³ The Dutch Supreme Court found that, under international law, when a unit from a state is serving under the auspices of an international organization, its activities are attributable to the sending state, the international organization, or both.⁴⁴ In this case, the

Court held that though both the UN and the Dutch government had some control over the troops in question, the Dutch government had “effective control” during the period that the acts in question occurred and was therefore liable for the actions committed by the peacekeepers.⁴⁵

This decision is important because it establishes that peacekeepers do not act in a legal vacuum and that immunity does not necessarily extend to all UN or peacekeeping activities, but only to those acts legitimately performed in the mission’s official capacity.⁴⁶ Though this decision does not constitute binding precedent outside of the Netherlands, it could be an indication that other courts may also hold states responsible for the actions of their peacekeeping delegations stationed abroad. Other courts may look to the Dutch Supreme Court’s decision because the Court based its holding on two sets of rules created by the International Law Commission of the UN:⁴⁷ the Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001⁴⁸ and the Draft Articles on the Responsibility of International Organizations of 2011.⁴⁹ The Dutch Supreme Court also pointed out that when the Netherlands contributed troops to the UN, the troops were still in the service of the Netherlands and the state maintained the power to decide personnel issues and to punish the troops under disciplinary or criminal law.⁵⁰ Other courts dealing with similar issues could also utilize this type of argument to find that a state had effective control over its troops serving in a peacekeeping mission.

IMMUNITY OF INTERNATIONAL ORGANIZATIONS

Another recent example of peacekeepers causing harm in a host state is that of UN peacekeepers in Haiti. In 2004, the UN Security Council established the UN Stabilization Mission in Haiti (MINUSTAH)⁵¹ following an armed conflict that ousted the country’s president.⁵² After a destructive earthquake in 2010, the UN Security Council increased the number of MINUSTAH troops in Haiti.⁵³ The UN sent peacekeeping troops from Nepal to join the MINUSTAH troops in Haiti.⁵⁴ The UN stationed the



SOMALIA, Buur-Hakba: Photograph taken and released by the African Union-United Nations Information Support team 27 February 2012. An armored personnel carrier of Ugandan forces serving with the African Union Mission in Somalia (AMISOM) advances along a road toward the central Somali town of Buur-Hakba. AU-UN IST PHOTO / STUART PRICE.

Nepalese soldiers close to a tributary of the Artibonite River, which is one of Haiti’s main sources of potable water.⁵⁵ The UN constructed poor sanitation facilities for the Nepalese soldiers and sewage eventually contaminated the tributary with cholera. Cholera is a prevalent disease in Nepal and an outbreak occurred just before the soldiers left to join MINUSTAH.⁵⁶ The Haitian Ministry of Public Health reported on the appearance of the disease just downstream from the MINUSTAH base less than a month after the troops from Nepal arrived in Haiti.⁵⁷



Stabilization Mission in Haiti (MINUSTAH), to reinforce the military component of the UN Mission in South Sudan (UNMISS). UN Photo/Isaac Billy

The UN denies responsibility for the cholera epidemic, but a recent report by the Yale Law School and the Yale School of Public Health concluded that the UN did cause the cholera epidemic in Haiti, and that the UN’s refusal to compensate the victims of the epidemic is a violation of its obligations to the Haitian government under international law.⁵⁸ Victims of the epidemic filed a class action lawsuit against the UN in U.S. federal court in 2013.⁵⁹ The UN stated that it cannot receive the complaint pursuant to Section 29 of the Convention on the Privileges and Immunities of the UN.⁶⁰ This convention is binding on the United States,⁶¹ and in addition to the Convention, the U.S. International Organizations Immunities Act provides that international organizations “shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that

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such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.”⁶² Based on these international and domestic legal instruments, the UN’s argument of immunity will probably be successful in the U.S. legal system.⁶³ The case, however, raises important questions about the extent to which traditional organizational immunities can be trumped by the more fundamental values inherent in the international human rights of victims of serious or ongoing violations.

INTERNATIONAL LEGAL RESPONSIBILITY

The Dutch Supreme Court case noted above is an important example of a state being held responsible for the actions of its troops serving in a UN peacekeeping mission abroad; however, it is unlikely that many national cases will follow the Dutch example in the near future. The immunities of international organizations and state troops are difficult to circumvent, and many states may not have the necessary legal infrastructure for extraterritorial application of their criminal laws. The UN’s denial of responsibility for the cholera outbreak in Haiti also illustrates the strength of immunities granted to international organizations. The case of sexual violence perpetrated by AMISOM peacekeeping troops in Somalia faces similar obstacles. It is unlikely that a national case against AMISOM itself or the troop-contributing states would be successful due to these immunities. Alternatively, the international arena may provide a stronger chance for success.

Prosecuting AMISOM personnel for acts of sexual violence committed against Somali citizens may be more successful in international or regional courts than in national courts because these courts set aside the issue of immunity. Sexual violence perpetrated by AMISOM troops likely constitutes a violation of international law.⁶⁴ It is widely agreed upon that those who commit acts that constitute international crimes under international law can be held criminally responsible.⁶⁵ The immunities that may complicate the prosecution of these types of cases in national courts are explicitly disregarded in the international courts so that state officials can be brought to justice.⁶⁶

HUMAN RIGHTS VIOLATIONS AS OFFICIAL ACTS

Despite the fact that the SOMA between the African Union and Somalia provides that AMISOM personnel are immune from legal process for acts performed in their official capacity,⁶⁷ there is a strong argument that sexual violence cannot be committed within an official capacity. In the case against former head of state of Chile — Augusto Pinochet Ugarte — the British courts held that crimes such as torture can never be committed as official acts.⁶⁸ Under this line of reasoning, if acts of sexual violence committed by AMISOM troops were not perpetrated in

the official capacity of the troops, then the SOMA may not apply and the troops may not be immune from legal process.

INTERNATIONAL HUMANITARIAN LAW

In a conflict-ridden area like Somalia, it is likely that international humanitarian law also applies. The sexual violence committed in Somalia gives rise to criminal responsibility for ordinary crimes, punishable according to the rules of national jurisdiction in the country where they are committed. But the nature of the armed conflict, as well as the range, gravity, and intentions of the perpetrators, may be sufficient to implicate violations of the Geneva Conventions or their Additional Protocols, particularly if violations of such norms are codified in the domestic law of the troop-contributing countries.

In the case of Somalia, the conflict is largely internal.⁶⁹ Assuming an internal armed conflict for our purposes, it may be argued that both Common Article 3 of the Geneva Conventions⁷⁰ and the explicit provisions of Article 4 of Additional Protocol II of the Conventions apply.⁷¹ Common Article 3, for its part, prohibits “violence to life and person,” “cruel treatment,” or other “outrages upon personal dignity.”⁷² Article 4 of Additional Protocol II protects civilians in an internal armed conflict from “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”⁷³ Uganda, Burundi, Djibouti, Sierra Leone, Kenya, and Ethiopia are the countries contributing troops to AMISOM’s military component⁷⁴ and they are all parties to Additional Protocol II, though Somalia is not a party.⁷⁵ These avenues for criminal responsibility, as well as those arising under international criminal law, should be fully explored in determining the scope of responsibility for peacekeeping forces implicated in serious sexual violence.

CONCLUSION

Somalia, though emerging from its reputation as a failed state, must now assure that its own citizens’ most basic human rights are protected. Situations in which there are few strictures on misconduct, immense discretion in operational scope, and the cloak of international immunities should never serve as a shield against either violations of fundamental human rights or grave violations of the laws of war. International partners in post-conflict institution building can play an important supportive role, but should never be a part of the problem. As the forgoing analysis demonstrates, there are myriad problems with legal responsibility in this context for individuals, states, or international institutions involved in criminal activity. Creative advocacy may provide innovative solutions while assuring that victims of sexual violence are protected from retaliation if they come forward to seek justice.

ENDNOTES

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⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Ivan Watson & Joe Vaccarello, *U.N. Sued for 'Bringing Cholera to Haiti,' Causing Outbreak That Killed Thousands*, CNN, Oct. 10, 2013, available at <http://edition.cnn.com/2013/10/09/world/americas/haiti-un-cholera-lawsuit/>.

⁶⁰ Statement of the Special Representative of the Secretary-General of the United Nations in Haiti a. i. Nigel Fisher, on the Compensation Case Filed Against the United Nations on Behalf of Victims of the Cholera Outbreak in Haiti, MINUSTAH, available at <http://www.minustah.org/statement-of-the-special-representative-of-the-secretary-general-of-the-united-nations-in-haiti-a-i-nigel-fisher-on-the-compensation-case-filed-against-the-united-nations-on-behalf-of-victims-of-th/>; Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, available at <https://www.un.org/en/ethics/pdf/convention.pdf>.

⁶¹ The United States acceded to the Convention on the Privileges and Immunities of the UN in 1970. STATUS OF CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS (Feb. 13, 1946), available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&lang=en.

⁶² 22 U.S.C. § 288(a) (2012).

⁶³ Armin Rosen, *How the U.N. Caused Haiti's Cholera Crisis — and Won't Be Held Responsible*, THE ATLANTIC, Feb. 26, 2013, <http://www.theatlantic.com/international/archive/2013/02/how-the-un-caused-haitis-cholera-crisis-and-wont-be-held-responsible/273526/>.

⁶⁴ Both the ICTY and the ICTR have convicted individuals for rape as a form of torture and as a crime against humanity. CRIMES OF SEXUAL VIOLENCE, ICTY WEBSITE, [HTTP://WWW.ICTY.ORG/SID/10312](http://www.icty.org/sid/10312) (last visited Apr. 22, 2014).

⁶⁵ Joanne Foakes, *Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts*, CHATHAM HOUSE BRIEFING PAPER 2 (2011), available at http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111_foakes.pdf.

⁶⁶ *Id.*

⁶⁷ Status of Mission Agreement, The Transitional Federal Government of the Somali Republic-African Union, ¶ 54, Mar. 6, 2007, available at <http://storage.globalcitizen.net/data/topic/knowledge/uploads/20100505103429290.pdf>.

⁶⁸ R v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet (No. 3) [2000] 1 A.C. 147 (H.L.) (appeal taken from the Divisional Court of the Queen's Bench Division).

⁶⁹ Although, there may be a question of whether the notorious actions of Somali pirates would extend the country's domestic conflict into the international arena.

⁷⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 3].

⁷¹ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-international Armed Conflicts art. 4, June 8, 1977, 1125 U.N.T.S. 609.

⁷² Common Article 3, 1(a), 1(c).

⁷³ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-international Armed Conflicts art. 4(2)(e), June 8, 1977, 1125 U.N.T.S. 609.

⁷⁴ AMISOM MILITARY COMPONENT, <http://amisom-au.org/mission-profile/military-component/> (last visited Apr. 22, 2014).

⁷⁵ STATES PARTIES TO THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS, INTERNATIONAL COMMITTEE OF THE RED CROSS, http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treaty-Selected=475 (last visited Apr. 22, 2014).