

# The protection of foreign workers and volunteers in situations of internal conflict, with special reference to the taking of hostages

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## I. INTRODUCTION

One has only to glance at a newspaper to realize that much of today's world is in a state of upheaval and permanent crisis. Many countries are affected by internal conflicts of one sort or another, making the social stability usually enjoyed in North America and Western Europe a rare privilege. These internal conflicts constitute fertile breeding grounds for the most arbitrary violence against defenceless victims and for increasingly frequent violations of the fundamental rights and freedoms of the individual, whether a national of the country concerned or an alien.<sup>1</sup>

Indeed, the gradual undermining of respect for the rights and freedoms of the citizens of States affected by internal conflicts has inevitably led to a simultaneous erosion of respect for the rights and freedoms of the foreign nationals living in those States. This is especially true for certain groups of foreigners (like workers and volunteers), whose life, liberty and security — the most basic concerns of the rules governing aliens (in traditional international law) and of human rights law (in modern international law) — are particularly at risk in such situations of crisis, for reasons we shall go into below.

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<sup>1</sup> See for example ICRC, *1984 Annual Report*, Geneva, 1985, pp. 89-90; *1985 Annual Report*, Geneva, 1986, pp. 85-86; *1986 Annual Report*, Geneva, 1987, pp. 86 and 88. Further examples are to be found in ICRC field activities in Africa, Latin America, Asia and the Middle East in 1988 and 1989; see *1988 Annual Report*, Geneva 1989, pp. 13 ff., 43 ff., 59 ff. and 77 ff.; *1989 Annual Report*, Geneva, 1990, pp. 13 ff., 39 ff., 57 ff., and 85 ff.

Indeed, the impressive development in human rights law and humanitarian law since the Second World War has not prevented the groups or parties involved in internal conflicts from repeatedly and persistently violating the most basic rights of both their own nationals and of aliens. Despite the apparent consensus of the international community that States have general obligations to protect individuals, whether nationals or aliens, the existence of such obligations and their presumptive acceptance as customary norms do not seem to have led to any improvement in their application and effectiveness. This would seem to be the case in all types of conflict, including internal conflicts.<sup>2</sup>

This article proposes first to situate the different types of internal conflict in the existing legal framework (II). Those descriptions will then serve as guidelines for a brief review of the type and content of existing rules designed to protect basic human rights and freedoms in peacetime or in situations of internal conflict (III), and for a series of case studies concerning one of the most blatant violations of the basic rights and freedoms of foreign workers and volunteers, namely the taking of hostages (IV). The article takes a look at the almost predictable extension of this phenomenon to the hostage crisis in Iraq (V) before going on to the conclusion proper (VI).

## II. TYPES OF INTERNAL CONFLICT

To our understanding, internal conflicts are characterized by two things: the existence of an objective situation of violence and strife; and the fact that it takes place on the territory of one State. An internal conflict may consist simply in an outbreak of random and isolated acts of violence repressed through the application of ordinary criminal law; in that case it is known as a *low-intensity internal conflict* (temporary disturbances, unrest, riots and lynchings). An internal conflict may, however, take the form of an organized, intense and prolonged struggle, usually involving the armed forces and not just the police, and a rebel movement organized along military lines with some form of bureaucratic apparatus and effective control of part of the State's territory, its purpose being to overthrow a specific

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<sup>2</sup> See for example Gasser, H.P., "Some reflections on the future of international humanitarian law", *International Review of the Red Cross (IRRC)*, No. 238, January-February 1984, at pp. 19-20, and the ICRC paper "Respect and development of international humanitarian law", in *IRRC*, No. 239, March-April 1984, at pp. 91-94.

government or political regime or to obtain the independence of part of the State. These are the constituent elements of a *non-international, high-intensity armed conflict* (the classic *civil war*).<sup>3</sup>

There also exists an *intermediate* type of conflict, usually known as banditry. It is characterized by three things: continuous armed skirmishes, a certain amount of strategy, and a collective and endemic nature giving rise to a permanent climate of insecurity. The acts of banditry (traditionally kidnapping, theft and pillage) are usually committed by armed groups with some degree of organization.<sup>4</sup> This is the kind of internal conflict we are most interested in here. In fact, our list of types of internal conflict is original only in that it goes one

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<sup>3</sup> Our definition of internal armed conflicts and the various forms they may take is based *mutatis mutandis* on the provisions of Article 1 of Additional Protocol II, in relation to Article 3 common to the Geneva Conventions, and on the work of the International Law Commission (ILC) on State responsibility, from the ILC *Yearbook*, 1975, Vol. II, pp. 98-99 (commentary on Art. 14 of Part One of the Draft Articles on State Responsibility, paras. 1-3). See also ICRC internal policy as described in "ICRC protection and assistance activities in situations not covered by international humanitarian law", in Gasser, H.-P., "A measure of humanity in internal disturbances and tension: proposal for a Code of Conduct", and in Meron, T., "Draft Model Declaration in internal strife", in the *IRRC* special issue on the subject, No. 262, January-February 1988, at pp. 12-13, 30-42 and 67, respectively. See also Mangas Martin, A., *Conflictos armados internos y derecho internacional humanitario*, Salamanca, 1990, pp. 59-62 and 68-70.

Some conflicts are difficult to categorize. This is the case in particular of very complex situations said to be internal conflicts, such as the so-called civil war in Lebanon. In fact, there was a state of civil war in Lebanon only from the spring of 1975 until the autumn of 1976, the Syrian armed intervention of June 1976 having virtually put an end to it. Since then the conflict has been in an intermediate phase with sporadic clashes and periods of more serious crisis. We believe that our definition surmounts these difficulties and can be applied to the Lebanese conflict, as is confirmed in the study by Eitel, T., "Lebanon: a legal survey", in the *German Yearbook of International Law*, Vol. 29, 1986, at pp. 14-23.

In any case, our definition does not include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination", which according to Article 1, para. 4, of Additional Protocol I, constitute international armed conflicts.

<sup>4</sup> See Huber, M., "*Réclamations britanniques dans la zone espagnole du Maroc (Accord anglo-espagnol du 29 mai 1923)*", in *Rapports*, The Hague, 1925, p. 56, para. 4, and Ralston, J.H., *Supplement to the 1926 Revised Edition of the Law and Procedure of International Tribunals*, Stanford University (California), 1936, pp. 175-1976, para. 613b. Acts of banditry may of course be simply common-law offences or occur in a situation of rebellion, and would therefore be included in low-intensity or high-intensity conflicts respectively. But we feel that the intermediate situation is that which best characterizes banditry in accordance with jurisprudence and practice, because the permanence and general insecurity which typify it and distinguish it from low-level conflicts are not usually accompanied by effective control of part of the territory and an antagonistic political claim, as a rule the aspiration to govern or secede, which are characteristic of high-level conflicts.

step further than most scholarly works and classifies banditry as a situation of *intermediate conflict*.

This is the perfect category for the new situations of constant political violence and instability<sup>5</sup> which have beset so many recently-independent and developing countries. The main causes are poverty, overpopulation and gross inequality<sup>6</sup> (Guatemala, Colombia or Peru, for example); or great cultural diversity, involving in particular race, religion and language (as in Angola, Chad or Sudan); or both concurrently but to varying degrees (the Philippines, India or Zaire).<sup>7</sup> When these factors are combined with the general functional weakness of the State power structure, the inevitable result is either increasingly arbitrary behaviour on the part of the latter or its collapse; the result of either is a state of chronic insecurity and lawlessness, which in turn inexorably affects basic human rights and freedoms. This category of conflict includes such widely divergent situations as intermittent guerrilla warfare, sometimes resembling traditional banditry, without any prospect of a political future, more acute institutional violence and police repression, terrorism, political upheaval and violent *coups d'état*, racial disturbances and killings; together they result in a generalized situation of medium intensity conflict which has been shown to

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<sup>5</sup> We have again simply gone one step further in our interpretation, since we have not changed the institutional framework of the customary norm, but have merely broadened one category to include more cases than hitherto. See Díez-Picazo, L., *Experiencias jurídicas y teoría del derecho*, Barcelona, 1982, pp. 282-283.

<sup>6</sup> This is without doubt the principal and most widespread component of intermediate-level conflict, and is fully recognized as an emergency situation brought about by a conjunction of external and internal socio-economic factors. See Marks, S.P., "Principles and norms of human rights applicable in emergency situations: underdevelopment, catastrophes and armed conflicts", in Vasak, K. (ed.), *The international dimensions of human rights*, 3 vols., Greenwood Press, Connecticut, 1982, vol. I, at pp. 176-179.

<sup>7</sup> Our interpretation of this category is based on: Marks, *op. cit.*; Eide, A., "Internal disturbances and tensions", in *International dimensions of humanitarian law*, Unesco (Paris), Henry Dunant Institute (Geneva), Martinus Nijhoff Publishers (Dordrecht), 1988, Ch. XV, at pp. 242-243 and 246-248; Meron, T., *Human rights in internal strife: their international protection*, Grotius Publications Ltd., Cambridge, 1987, pp. 71-86; the interesting United Nations document E/CN.4/1108/Rev.1, E/CN.4/1131/Rev.1 (Study prepared by M. Ganji, New York, 1975, pp. 107-108, paras. 221-230, and 111-112, paras. 233-237); and R. Falk's analysis of prospects for human rights development in *Human rights and State Sovereignty*, New York, 1981, pp. 66-71, 76-77, 87-89, 98-99 and 165-166. For a specific example, that of Peru, see Rubio Correa, M., "Militares y Sendero Luminoso frente al sistema democrático peruano", in *Revista de Estudios Políticos*, Madrid, No. 53, 1986, at pp. 162-163 and 169 *in fine* - 174.

be very prejudicial to individual rights and freedoms, whether of nationals or of aliens.<sup>8</sup>

Indeed, States affected by this type of internal conflict inevitably find themselves in an emergency situation, understood to be the result of a temporary or permanent combination of circumstances which leave State institutions in a precarious situation and which justify *de jure* or explain *de facto* the suspension of certain human rights. As for low-level conflicts, although public order is of course threatened by any incidents of tension or unrest, their unorganized and sporadic nature does not usually result in the breakdown of social stability. They are usually quelled without there being reason to justify *a priori* any suspension of human rights, it being sufficient simply to apply internal criminal law.

Medium-intensity conflicts have inevitable repercussions on the rights and freedoms of foreigners. One of the common aims of most of the acts which characterize such conflicts (at least those committed by individuals or groups of individuals) is to raise questions about the internal political structure of the State concerned — among the international community as well. To achieve this end, those concerned seek to obstruct not only the political structures and the administrative services which are the normal channels for political and trade relations between States (for example by attacking internationally protected persons) but also the economic aid and technical assistance offered the State in the framework of the cooperative relations promoted by international development law (by attacks against foreign workers and volunteers). The obvious result is that the established international order is disrupted on its two main levels: the level of inter-State relations and the institutional level, in which international organizations play a role.

What repercussions have such acts against aliens had on the international responsibility of the State? In low-level conflicts the State has rarely been held responsible for injury to foreigners; State liability is incurred only when one of its agents has manifestly and inexcusably acted negligently *ex ante* or *ex post facto*, i.e., in the case of the connivance, complicity or obvious participation of its agents in acts harmful to foreigners.<sup>9</sup> In high-intensity conflicts (internal armed

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<sup>8</sup> See Meron, *op. cit.*, pp. 95-102. Colombia is a good example; see Valencia Villa, H., "The law of armed conflict and its application in Colombia", in *IRRC*, No. 274, January-February 1990, at pp. 9-14.

<sup>9</sup> Garcia Amador, F.V., *The Changing Law of International Claims*, 2 vols., Oceana, Dobbs Ferry, New York, 1984, Vol. I, pp. 206-208. This Cuban scholar

conflicts or civil wars), the State is presumed from the outset not to be responsible, although exceptions are made (*juris tantum*) when the claimant State can prove that the injury is the result of deliberate or inexcusable negligence *ex ante* or *ex post facto* by the authorities of the State against which the complaint has been made, or in the case of unjustified discrimination against the foreigner, especially as concerns financial compensation.<sup>10</sup> Finally, practice has shown that in intermediate conflicts responsibility is generally attributed according to the rules governing high-intensity conflicts, even though the situations are not materially comparable.

In avoiding attribution of responsibility to the State for acts committed in situations of internal conflict, the law of international responsibility simply falls in line with international humanitarian law (IHL) by protecting the primary subject of international relations and in preserving the prevailing legal order, which as we know is conditioned by the eminently inter-State structure of the international community.<sup>11</sup>

The Diplomatic Conference which drafted the final text of Article 3 common to the 1949 Conventions was already anxious<sup>12</sup> not to approve restrictive provisions which might weaken the State. The final decision was to apply certain basic principles — a minimum humanitarian standard — to non-international armed conflicts. Article 3 thus refers primarily, but not exclusively, to high-intensity internal conflicts (civil wars). It should be added that the phenomenon of endemic banditry was not considered as belonging to that category. The same attitude towards banditry prevailed when the 1977 Protocols were drafted.<sup>13</sup>

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expressly states that practice suggests “that negligence in the protection of aliens during internal disturbances (riots, mob violence and the like) be dealt with separately from negligence during civil war (rebellion or insurgency)” (p. 206).

<sup>10</sup> *Ibid.*, pp. 208-211, and Al-Ganzory, A.A., “International Claims and Insurgence”, in *Revue égyptienne de droit international*, Vol. 33, 1977, at pp. 78-81. See Arts. 14 and 15 of Part One of the ILC’s Draft Articles on State Responsibility.

<sup>11</sup> Cassese, A., “La guerre civile et le droit international”, in *Revue générale de droit international public (RGDIP)*, Vol. 90, 1986, at pp. 577-578.

<sup>12</sup> See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II, Section B, pp. 120 (Seventh report drawn up by the Special Committee of the Joint Committee) and 128 (Report of the Joint Committee to the Plenary Assembly). See also Cassese, *op. cit.* p. 564.

<sup>13</sup> See for example the statement made in plenary by Mr. Abdine (Syria), in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, Federal Political Dept., Bern, 1978, Vol. VII, p. 67, para. 47.

What is more, during the debate on Article 1 of Protocol II by Commission I of the Diplomatic Conference on the Reaffirmation and the Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH, Geneva 1974-1977), and in the light of the development of human rights, whose analogical relevance for the protection of the individual in any peacetime or conflict situation was emphasized by a number of speakers, an attempt was made gradually to increase the scope of Article 3 of the 1949 Geneva Conventions by rephrasing its rather vague field of material application on the one hand (the requirement of a high-intensity conflict, in particular the control by the rebels of part of the territory, was introduced as a condition for application of the Protocol), and by extending the rights protected on the other.

However, in spite of the efforts of many of the participating delegations and of the ICRC, whose draft Protocol attempted to clarify the scope of Article 3 and the material protection it affords, in the end the plenary session adopted, by 58 votes for and five against with 29 abstentions — far short of the desired consensus — a very restrictive version of the scope of material application of Protocol II, without achieving a marked improvement in the degree of protection.

So, under pressure from a good many recently-independent States, the CDDH included, in Article 1, para. 1, of Protocol II, a set of very strict objective conditions for the application of the Protocol in cases of internal conflict, such as the presence of dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of the State's territory so as to enable them to carry out sustained and concerted military operations and to implement the Protocol. The CDDH expressly excluded from the Protocol's field of application any low-intensity internal conflict such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts (paragraph 2 of the same article).

A large number of delegations felt that these conditions were excessive and weakened the Protocol in that they limited its scope to conventional civil wars, which have become increasingly rare, while failing to provide for detailed regulation of the more common modern phenomenon of guerrilla warfare. Their objections were ultimately overridden by the obligatory link between Article 1, para. 1, of Protocol II and Article 3 common to the 1949 Geneva Conventions, whose independent merit was safeguarded in respect of the application of Protocol II. This is important in that Protocol II covers only one of the kinds of conflict — the most intense — governed by Article 3,

which requires the existence of an armed conflict, but does not stipulate that the conflict must necessarily be between the government and rebel forces, nor that the latter must control part of the territory.<sup>14</sup> There is therefore no doubt about the rules governing intermediate internal conflicts. Only the rules governing low-level internal conflicts remain open to interpretation.

The International Court of Justice itself recently recalled that the minimum humanitarian rules set down in common Article 3 were general customary norms whose application was mandatory in non-international as well as in international armed conflicts, thus establishing the obligation for the United States to respect and ensure respect, in all circumstances, for the rules of behaviour prescribed in that article in its conflict with Nicaragua.<sup>15</sup>

On the other hand, an equally large number of delegations considered the text of Article 1 as the minimum condition for accepting Protocol II in its entirety. This did not mean that they had no doubts about the article, in view of both the manifest weakness of their countries' civilian and military administration and the prevalence of rebellions and internal conflicts in their history to date. They would have preferred that the conditions set forth in Article 1, para. 1, apply only to the State affected by the conflict, to avoid any possible interference in its internal affairs and any weakening of its legal position, as the

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<sup>14</sup> See *inter alia* the statements made in plenary by Mr. Mbaya (Cameroon), *ibid.* Vol. VII, p. 70, para. 66; Mr. Eide (Norway), p. 71, para. 68; Mr. Di Bernardo (Italy), p. 223, paras. 143-146; Mr. Bindschedler (Switzerland), pp. 299-300, paras. 103-106. Also see the written explanations of votes by the Federal Republic of Germany (pp. 79-80), Belgium (p. 76) and Italy (pp. 100-101). As concerns ICRC policy, see Swinarski, Ch., *Introducción al derecho internacional humanitario*, San José de Costa Rica/Geneva, 1984, pp. 60-67, and Bornet, J.-M., "Modalidades de acción del CICR en las situaciones de disturbios interiores y de tensiones internas y sus actividades en América Latina", in *Coloquio sobre la protección jurídica internacional de la persona humana en las situaciones de excepción*, (Mexico. 16-21 March 1987), organized by the ICRC and the International Institute of Humanitarian Law, s. l. ed., s.a. at pp. 82-85. See also Veuthey, M., "Implementation and enforcement of humanitarian law and human rights in non-international armed conflicts: the role of the International Committee of the Red Cross", in *American University Law Review*, Vol. 33, 1983, at pp. 87-89; Abi-Saab, G., "Non-international armed conflicts", in *International dimensions of humanitarian law*, *op. cit.*, ch. XIV, at pp. 224, 228-229 and 237-238; and Meron, *op. cit.*, pp. 106-117.

<sup>15</sup> ICJ, *Reports of Judgments, Advisory Opinions and Orders 1986*, pp. 113-115, paras. 217-220, although the Court does not state on what kind of normative interaction it bases the customary nature attributed to the article, i.e., it does not justify its conclusions. See Meron, T., "The Geneva Conventions as customary law", in the *American Journal of International Law*, Vol. 81, 1987, at pp. 356-358 ff.

automatic application of Protocol II would transform situations of internal strife into matters subject to international law.<sup>16</sup>

It is therefore logical that the law of international responsibility, given its secondary normative nature, should respect the material postulates of IHL and have as its main objective the protection not only of the sovereignty and security of the State affected by an internal conflict, but also of the stability of its external relations. This is why we have distinguished between low-level, intermediate and high-intensity internal conflicts (civil wars); as we have seen, neither low-level nor intermediate conflicts are in principle covered by IHL, with the exception of the application to intermediate conflicts of common Article 3; they can therefore receive our full attention as situations which cannot be equated with internal armed conflicts or civil wars.

This also explains the current convergence of human rights law and IHL, since the qualification of a situation as a low-level or intermediate conflict can never be considered to preclude protection of the basic rights of the individual, whether a national or an alien; indeed, both sets of rules regulate the grey zone of internal violence and hostility which lies between total peace and a classic internal armed conflict (civil war).

Moreover, in the case of a low-level or intermediate conflict, both internal and international rules allow the suspension of certain human rights. These "escape clauses", as they are known, are to be found, for example, in the Covenant on Political and Civil Rights (Article 4), the European Convention on Human Rights (Article 15), and the American Convention on Human Rights (Article 27). But these conventions expressly bar any derogation from a nucleus of rules which includes the right to life, the prohibition of torture and hostage-taking, and the prohibition of arbitrary or retroactive penalties, to name but a few.<sup>17</sup> In any event,

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<sup>16</sup> See *inter alia* the statements in plenary of Mr. Charry Samper (Colombia), in *Official Records, op. cit.*, Vol. VII, pp. 66 and 69, paras. 39 and 56; Mr. Clark (Nigeria), p. 70, para. 60; Mrs. Sudirdjo (Indonesia), pp. 72-73, paras. 70-71. Also the written explanations of votes submitted by Brazil (p. 78), Canada (pp. 78-79), Colombia (p. 80), India (pp. 82-83), Kenya (p. 83) and the Philippines (p. 85). See Bretton, P., "Les Protocoles de 1977 additionnels aux Conventions de Genève de 1949 sur la protection des victimes des conflits armés internationaux et non internationaux dix ans après leur adoption", in *Annuaire français de droit international*, Vol. XXXIII, 1987, at pp. 547-548.

<sup>17</sup> Marks, *op. cit.*, pp. 192-193. Eide, *op. cit.*, pp. 243-245. Zayas, A. de, Moller, J. T., Opsahl, T., "Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee", in

“... the different situations of violence considered here give rise to the application of norms pertaining either to international human rights law (IHRL) or to the international law of armed conflicts (ILAC), or to both at the same time. The level of protection afforded by IHRL is highest in time of peace and diminishes as a situation approaches war, as when, for instance, attacks on life due to lawful acts of war are permitted. Conversely, the level of protection afforded by ILAC is relatively limited in peacetime (obligation to disseminate the Conventions, to modify legislation, etc.), but is very developed when there is a situation of international war”.<sup>18</sup>

Let us now take a closer look at the basic rights and freedoms composing the minimum standard of treatment to which nationals and aliens are entitled under international law in peacetime and in the event of internal conflict.

### III. THE MINIMUM STANDARD OF TREATMENT

The list of existing customary and treaty rules protecting the basic rights and freedoms of the individual is impressive. Suffice it to mention, for peacetime situations, Articles 3 to 10 of the Universal Declaration of Human Rights (10 December 1948), the Preamble and Articles 5 to 8 of the Declaration on the human rights of individuals who are not nationals of the country in which they live, adopted by consensus in United Nations General Assembly Resolution 40/144 (13 December 1985),<sup>19</sup> and Article 4 of the International Covenant on Civil and Political Rights (16 December 1966), in effect since 23 March 1976; and, for situations of internal conflict, Article 3 common to the 1949 Geneva Conventions, which since their entry into force on 21 October 1950 have become almost universally accepted, and Additional Protocol II of 1977, in effect since 7 December 1978. Other treaties covering specific rights and freedoms include the Inter-

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*GYIL*, Vol. 28, 1985, at pp. 61-63. Gros Espiel, H. and Zovatto, D., “La regulación jurídica internacional de los estados de emergencia en América Latina”, in *Coloquio sobre la protección jurídica internacional de la persona humana en las situaciones de excepción*, *op. cit.*, at pp. 38-42.

<sup>18</sup> Marks, *op. cit.*, pp. 200-204 (p. 200 cited), and Eide, *op. cit.*, pp. 245-250.

<sup>19</sup> For the origins of this resolution, see United Nations document E/CN.4/Sub.2/392/Rev. 1 (Study prepared by Baroness Elles), New York, 1980, in particular pp. 36-37 (paras. 249-254) and 57-58 (Annex I).

national Convention against the Taking of Hostages (adopted by consensus in General Assembly Resolution 34/146, 17 December 1979, in effect since 3 June 1983), in particular Articles 1, 12 and 13, and the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by consensus in Resolution 39/46, 10 December 1984, in effect since 26 June 1987), in particular Article 1, para. 1, and Article 16, para. 1, defining types of conflicts, and Article 2, para. 2, on the application of the Convention in situations of internal conflict.

These rules are proof that much progress has been made in the general protection of the minimum basic rights of the person, independently of his national origin, because they prohibit, specifically and simultaneously, in peacetime or in an internal conflict of any sort, certain acts against the individual, in particular any attempt on his life or attack on his liberty, personal safety, or physical and moral integrity. They also guarantee the right to proper trial. As we mentioned earlier, in an internal conflict derogations may be permitted from such basic rules as those which protect the individual's right to freedom and security and to a fair administration of justice, but no derogation is permitted from the minimum humanitarian treatment provided for in common Article 3, irrespective of whether or not the conflict is taking place in the legal context of a state of emergency or martial law.<sup>20</sup>

The minimum guarantees specified in IHL are simply the counterpart, adapted to the circumstances, of the "hard core" of basic individual rights and freedoms.<sup>21</sup> Moreover, the appreciable substantive development of treaty law in the field of human rights and IHL has led most scholars to approve both their relative convergence and their material similarity (in respect, at least, of a nucleus of basic rules

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<sup>20</sup> See Lillich, R.B., "The Paris minimum standards of human rights norms in a state of emergency", in *AJIL*, Vol. 79, 1985, at pp. 1076-1079, a note reflecting the consensus reached by the International Law Association at its 61st Conference, held in Paris in 1984; Abellan Honrubia, V., "La protección internacional de los derechos humanos: métodos internacionales y garantías internas", in *Pensamiento jurídico y sociedad internacional. Estudios en honor del Profesor D. Antonio Truyol Serra*, 2 vols., Madrid, 1986, Vol. I, at pp. 52-55; and Chowdhury, S.R., *Rule of Law in a State of Emergency*, Pinter Publishers, London, 1989, pp. 143-219. These papers all deal with the application of human rights law in situations of internal conflict as defined above, irrespective of whether those situations are formally designated as states of emergency or martial law.

<sup>21</sup> There is no shortage of books on the relationship between humanitarian law and human rights. See ICRC, Henry Dunant Institute, *Bibliography of international humanitarian law applicable in armed conflicts*, 2nd ed., Geneva, 1987, *passim*, in particular p. 29 ff.

contained, as concerns IHL, in common Article 3, supplemented by Protocol II in the event of civil war), and the relationship of complementarity or even interdependence between their fields and conditions of application in situations of internal conflict, notwithstanding the fact that they obviously concern different people in different situations.<sup>22</sup>

Specific differences there may be, but there can be no denying that IHL and human rights law have come to overlap *ratione materiae*. This process has in turn had an inevitable and obvious, and above all a declarative,<sup>23</sup> effect on the relationship between the traditional customary rules governing aliens and the contemporary development — eminently treaty-based — of human rights law and IHL. Indeed, there is at present a consensus on the substantive content of a minimum standard of protection for the individual, whether national or alien, both in peacetime and in the event of any type of internal conflict, based on the rights and freedoms cited above (i.e., the right to life, liberty and security, to physical and moral integrity and to a fair administration of justice), respect for which would seem well-established in custom and in international treaties.<sup>24</sup> This list of minimum rights and freedoms applies to all individuals *erga omnes*;<sup>25</sup> it is for

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<sup>22</sup> See in particular Calogeropoulos-Stratis, A.S., *Droit humanitaire et droits de l'homme. La protection de la personne en période de conflit armé*, Graduate Institute of International Studies, Geneva, 1980, pp. 47-52, 94-97, 165-168 and 223-228, and El Kouhene, M., *Les garanties fondamentales de la personne en droit humanitaire et droits de l'homme*, Nijhoff, Dordrecht, 1986, pp. 8-12, 97-98 and 161.

<sup>23</sup> See in this respect the body of rights said to make up the minimum standard, on the basis of international and arbitral jurisprudence, by Schwarzenberger, G., *The law of armed conflict — International law as applied by international courts and tribunals*, 4 vols., Stevens and Sons, London, 1957-1986, Vol. I (3rd ed.), pp. 200-207.

<sup>24</sup> See Nascimbene, B., *Il trattamento dello straniero nel diritto internazionale ed europeo*, Milan, 1984, pp. 11-16, 20-21, 95-99, 146-149, 176-184, 203-204 and 215-220 (p. 20 cited), and Zayas, Moller, Opsahl, *op. cit.*, pp. 31-42 and 44-51, which discusses the “jurisprudential” development by the Commission on Human Rights of the International Covenant on Political and Civil Rights, Article 6 (the right to life), Article 7 (the right not to be subjected to torture or cruel, inhuman or degrading punishment), Article 9 (the right to liberty and security of person), Article 10 (the right to humane treatment and respect for human dignity during imprisonment) and Article 14 (the right to justice); the Commission has had no opportunity to do the same for Article 8 (the prohibition of slavery and servitude). In our opinion these articles constitute a relatively well-defined legal basis for the recently-developed standard.

<sup>25</sup> See Meron, T., *Human Rights Law-Making in the United Nations. A Critique of Instruments and Process*, Clarendon Press, Oxford, 1986, pp. 183-189. By the same author, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, Oxford, 1989, pp. 188-201. Article 5 (approved at first reading) of Part Two of the ILC's Draft Articles on State Responsibility, in the ILC *Yearbook*, 1985, Vol. II (Part Two), pp. 26 *in fine* - 29, Article 5 and points 20-22 of the Commentary.

the most part non-derogable even in situations of internal conflict, and transcends any cultural particularism.

Evidence that the rules of IHL governing international conflicts intersect with the law governing aliens is to be found as early as 1949: Article 38 of the Fourth Geneva Convention states that “with the exception of special measures authorized by the present Convention, in particular by Articles 27 [measures of control and security in regard to protected persons that may be necessary as a result of war] and 41 [assigned residence or internment of such persons where State security makes it absolutely necessary: see also Article 42] thereof, *the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace*”.

Furthermore, the International Court of Justice itself removed all remaining reasonable doubt that there was a connection between the two sets of rules in its judgment of 24 May 1980 in the case of the diplomatic and consular personnel of the United States of America in Tehran,<sup>26</sup> recognizing that Iran was obviously not complying with the United Nations Charter and the principles set forth in the Universal Declaration of Human Rights, and thereby tacitly suggesting that Iran’s treatment of the American hostages was a violation of the rules of general international law. The American government had said as much in its brief, arguing that Iran had not complied with certain customary rules on the treatment of foreigners and had violated certain human rights contained, *inter alia*, in the International Covenant on Political and Civil Rights, to which the United States was not even a party.<sup>27</sup>

Although the interaction between the customary rules governing aliens, treaty human rights law and IHL has resulted in the formal drawing up of a minimum standard of protection to which any individual, whether a national or an alien, is entitled, actual application of that standard has encountered serious difficulties. In fact, the States have hardly ever defended, as though their own nationals were concerned, the rights and freedoms of aliens who have suffered from violations of the minimum standard on the part of another State, including the State of which they are nationals. And when some degree of protection has been afforded to non-nationals, it has not had the full legal and reparatory nature of diplomatic protection exercised in behalf of nationals (which in principle includes both the restoration

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<sup>26</sup> See ICJ, *Reports 1980*, p. 42.

<sup>27</sup> ICJ, *Memorial, United States Diplomatic and Consular Staff in Tehran*, pp. 179-183, in particular pp. 181-183.

of legality and compensation for injury suffered); it has rather taken the form of humanitarian protection (i.e., it has been political and very lax in nature, restorative but never compensatory, and therefore very different in its methods and objectives from diplomatic protection).<sup>28</sup>

In other words, although the universally accepted minimum rules on treatment do give a degree of uniformity to substantive law and circumvent the principle of non-interference in the internal affairs of States in order to protect the basic rights and freedoms of foreign individuals,<sup>29</sup> the international legal system does not yet have the necessary institutional framework to enforce full compliance with those rules. The States' defence of the basic rights and freedoms of non-nationals is thus limited to humanitarian protection.

If this is the case for non-nationals, what about the diplomatic protection which should guarantee respect for the basic rights and freedoms of nationals abroad? The growing importance attached to respect for human rights has blurred the traditional distinction between foreigners and nationals on which the rules governing aliens are based. That distinction has no meaning in the field of human rights, where protection has tended to become increasingly indiscriminate, taking no account of the individual's nationality. This has had serious consequences for foreigners in States affected by an internal conflict, since it puts them on the same legal footing in practical terms as nationals of the State in question. Is it still possible to distinguish legally between the national and foreign victims of the mass forced disappearances which have occurred in many States caught up in internal conflicts? Could a State which is responsible for such forced disappearances make reparations to foreign victims and not its own citizens?

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<sup>28</sup> The term "humanitarian protection" has a completely different meaning in this article from its meaning in IHL. It is used to mean a form of minor protection of a political nature, as distinct from diplomatic protection; this is also the meaning given it and similar expressions (for example, "humanitarian considerations") by United Nations bodies concerned with the defence and promotion of human rights.

<sup>29</sup> See Zourek, J., "Le respect des droits de l'homme et des libertés fondamentales constitue-t-il une affaire interne de l'Etat?", in *Estudios de Derecho Internacional. Homenaje al Profesor Miaja de la Muela*, 2 vols., Madrid, 1979, Vol. I, at pp. 616 ff. and 624. See also the "Final report" by Mr. G. Sperduti on "Protection of human rights and the principle of non-intervention in the domestic concerns of States", and Articles 2 and 3 of the Institute of International Law Resolution of 13 September 1989 on the same subject, in *IIL Yearbook*, Vol. 63, Part I (Santiago de Compostela Session, 1989), pp. 376-402; and *Revista española de derecho internacional*, Vol. XLI, 1989, p. 698.

In view of these questions, it is opportune to examine the situation of foreigners, especially foreign workers and volunteers, in States in which there are ongoing internal conflicts, so as to explain the apparent paradox that in such situations the minimum standard of protection for both nationals and foreigners is not actually applied, whether in terms of humanitarian protection for non-nationals or of the usual diplomatic protection for nationals abroad. To do this we shall consider current practice by analyzing some hostage situations in Africa and in Lebanon, although we shall also refer in passing to the killing of foreign workers and volunteers.

#### IV. THE TAKING OF FOREIGN WORKERS AND VOLUNTEERS AS HOSTAGES IN INTERNAL CONFLICTS

The abduction of foreign workers and volunteers, resulting more often than not in their murder or accidental death, is a new method of fighting the established authorities used by armed groups and various guerrilla movements, usually for propaganda purposes and to exert political pressure in the hope of gaining recognition or support for their ideas, in an attempt to sabotage the country's economy or even, exceptionally, to obtain economic or military aid from a foreign government affected by their activities.<sup>30</sup> It is a tactic employed mainly, and not coincidentally, in Africa, the Middle East and Latin America, and primarily in situations of intermediate internal conflict. Here we have confined our analysis to Africa and Lebanon.

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<sup>30</sup> A definition of the crime of hostage-taking, in no case applicable to acts committed by States, is proposed in Articles 1, 12 and 13 of the International Convention against the Taking of Hostages, approved by consensus in United Nations General Assembly resolution 34/146 of 17 December 1979, and in force since 3 June 1983; see Salinas Burgos, H., "The taking of hostages and international humanitarian law", in *IRRC*, No. 270, May-June 1989, at pp. 198-199 and 297-210. The constituent elements of hostage-taking are the seizure or detention of a person against his will, knowingly and without authority to do so, for one of a number of possible reasons (to kill him, for profit, to obtain information, to intimidate or compel that person or a third party, including a State, to act in a specific way) which may or may not be an express condition for the release of the hostage. The scope of the Convention means perforce that there is an international factor, so that, among other options, the act involves nationals of more than one State or is carried out in more than one State; this would appear to correspond to a terrorist or guerrilla phenomenon (in time of peace or internal conflict). For a general analysis, see Veuthey, M., *Guérilla et droit humanitaire*, ICRC, Geneva, 1983, pp. 115-127.

In fact, the abduction and killing of foreign workers and volunteers are above all evidence of the blurring of the traditional distinction drawn in IHL between the civilian population and combatants. Although guerrilla groups tend, for political reasons, to maintain that distinction and what it implies (the protection of innocent civilians and their property from the effects of the hostilities), the protection of certain categories of persons (for instance, diplomats, prominent political and economic figures, businessmen, workers and volunteers, many of whom are foreigners) has been systematically put in doubt, it being felt, for reasons of ideology and military strategy, that they are not *a priori* neutral in the conflict because they are presumed to help maintain the political and economic infrastructure of the establishment.

## 1. Hostage-taking in Africa

Until quite recently, the taking of foreign workers and volunteers as hostages was relatively rare, but in the eighties it became an almost daily and sometimes a mass phenomenon in some situations of internal conflict. (It would now seem to be on the wane, probably because of the end of the Cold War and the dizzying pace of political change in Europe.) The first cases occurred in Angola, during the internal conflict which followed the so-called civil war of 1975-1976. This conflict between the victorious MPLA government and Jonas Savimbi's UNITA forces persisted until a peace agreement was signed in Lisbon on 31 May 1991. UNITA was backed by the Republic of South Africa and other Western powers and operated in large areas of the country, in particular in the south-east, where it had its principal bases.

UNITA's military strategy was one of economic sabotage. It kept up a constant campaign of attacks on roads, bridges, railways, supply convoys and industrial and mining centres, disrupting communications and transport and making normal economic development of the country impossible. To give but one example, Zambia was unable to use Angolan ports to export goods and was therefore obliged to go through South Africa, because UNITA had blown up the railway, in particular the Benguela line.

Another aspect of this strategy was a parallel campaign to abduct foreign workers (manual labourers and technicians), volunteers and missionaries with the aim of cutting off external aid for the Luanda government, rendering any economic cooperation unviable and prompting foreigners to leave, as well as obtaining highly coveted

international political publicity. Always using similar methods, UNITA kidnapped hundreds of workers, volunteers and missionaries of many nationalities (mainly from Western and socialist States, but also from developing countries, including the Philippines), whom it usually released a few weeks, several months or even years later and repatriated via South Africa or Zaire through the intermediary of the ICRC. Nationals of the former socialist States were held for much longer than others, and the conditions for their release negotiated with the States concerned. UNITA always justified its strategy of taking hostages, and the inevitable deaths of foreigners resulting therefrom or from attacks, by referring to the known risk involved in staying in the country or being under the protection of a military convoy or garrison which came under guerrilla attack. UNITA's leaders and its representatives in Europe have often repeated that their objective was to bring to a halt all foreign cooperation with the Luanda government.

In one incident, at least seven Spanish nuns were kidnapped by UNITA. Two of them were released after the Spanish Head of State intervened and after they had signed a document promising not to return to Angola until the conflict was over. Asked about the matter, the Spanish government declared that the "nuns suffered no ill-treatment apart from the arduous walk to Jamba, and were released after three or four months in captivity and a media campaign". It stated that its own role was to "assist, protect and possibly transport the hostages to Spain as they were released".<sup>31</sup>

In fact, UNITA abducted over 50 missionaries during the guerrilla war; a further 20 met violent deaths, usually in clashes between government troops and the guerrillas. It is a well-known fact that under general international law missionaries enjoy no privileges or immunity, so when they are on foreign soil they are subject to the same rules governing aliens as any other individuals with this status, the only exception being the widely recognized right to practise and teach their religion.<sup>32</sup> They are therefore entitled to benefit from the diplomatic protection of their own State, and are exposed to the same

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<sup>31</sup> See *Actividades, textos y documentos de la política exterior española* (Ministry of Foreign Affairs, Madrid), No. 43, 1984, p. 815, and No. 46, 1985, pp. 127-129 (pp. 129 and 815 cited). See also "Documentación sobre política exterior" in *Revista de Estudios Internacionales*, Madrid, Vol. 5, 1985, pp. 1032 and 1034. In fact, Spanish diplomatic action seems to have been aimed simply at obtaining information on the condition of the hostages and assurances as to their prompt release.

<sup>32</sup> "Practice of the UK", in *International Comparative Law Quarterly*, Vol. 6, 1957, pp. 138-141. See Zimmerman, T., "Missionaries", in R. Berhardt (ed.), *Encyclopedia of Public International Law*, Vol. 8, 1985, pp. 395-396.

objective risk in living and working in a country prey to internal strife, notwithstanding their spiritual motivation for taking that risk.

As has become customary in incidents of hostage-taking, neither Angola nor South Africa was requested to provide any form of compensation, nor did this strategy seem to result in any political backlash for UNITA in the way of reduction or withdrawal of political or material aid by the Western powers. The latter notoriously played both sides, by cooperating economically with the Luanda government (the proven case for the United States, the United Kingdom, Portugal, Spain and the Republic of South Africa, although the latter has no nationals in Angola), while resigning themselves to seeing their nationals subjected to repeated violations of the minimum standard of treatment at the hands of a pro-Western guerrilla movement, probably in exchange for the latter's undermining of the MPLA government, both politically and economically.

The phenomenon of hostage-taking has of course spread to other African States. In Mozambique, Renamo, a guerrilla movement which was also armed and trained by the Republic of South Africa, at least until the Nkomati Agreement was signed in 1984 by Pretoria and Maputo,<sup>33</sup> has used the same strategy against the FRELIMO government. It has been notably successful in preventing Zimbabwean exports from reaching Mozambican ports, forcing Zimbabwe to use the South African port of Port Elizabeth, and in seriously hindering and temporarily paralysing the production and transport of electrical energy from the huge Cabora Bassa dam in the north. Renamo has kidnapped missionaries, workers and volunteers of many nationalities (Brazilian, British, Chilean, Italian, Portuguese, Soviet and Spanish) for the same ends as UNITA. In this conflict, however, the FRELIMO government response has occasionally been more effective, in some cases resulting in the release of the hostages. Nevertheless, in January 1985 Maputo was forced to state that as "it could no longer guarantee the safety of foreigners in the country, all foreign aid workers were advised to

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<sup>33</sup> Article Three, para. 2, of the Agreement on Non-Agression and Good Neighbourliness between Mozambique and South Africa, signed on 16 March 1984, requires the parties to forbid, prevent and control the organization, recruitment, transfer and assistance of irregular forces or armed groups, including mercenaries, in both territories; see *International Legal Materials*, Vol. XXIII, 1984, 283-284, and "Chronique", in *RGDIP*, Vol. 88, 1984, pp. 892-893. See also Caddux, C., "L'accord de Nkomati et les nouvelles perspectives de relations entre la Republique d'Afrique du Sud et ses voisins d'Afrique australe", in *AFDI*, Vol. XXX, 1984, at pp. 73 and 78-80. South Africa has had problems in applying the agreement, as there is proof that the South African armed forces have continued to back RENAMO: "Chronique", in *RGDIP*, Vol. 90, pp. 179-180, and *Keesing's*, 1986, pp. 34085-34086.

return to five regional centres and to cease working in remote areas".<sup>34</sup>

Hostages have rarely been taken in other African States. In Ethiopia, the two Eritrean guerrilla groups (apart from other movements in other regions) which fought the Addis Ababa government to achieve independence for the northernmost part of the country, and which finally brought about the downfall of the Marxist military regime of President Mengistu Haile Mariam in May 1991, also embarked on a campaign of kidnapping foreigners in the summer of 1975, a time when the conflict was escalating on both sides. Since that date, a number of teachers, workers, volunteers and journalists, most of them of American, British, French or Italian nationality, have been abducted and released after periods ranging from one or several weeks to over six months. In some cases involving British and US nationals, the guerrillas attempted to impose conditions for release or demanded a ransom, apparently without success. We also know that the British government negotiated with the guerrillas through the Sudanese government for the release of four of its nationals.

Although hostage-taking in the Horn of Africa was much less frequent in the eighties, the last incident we know of is quite recent. On 24 January 1987, 10 French citizens belonging to *Médecins sans Frontières* were abducted from a camp for Ethiopian refugees in northern Somalia, where they had been providing medical aid, by the Somali National Movement, an Ethiopian-backed guerrilla force opposed to the authorities in Mogadishu. After having destroyed the equipment and furnishings in the organization's premises, the SNM reportedly took the hostages into Ethiopia, where it released them and handed them over to the authorities two weeks later, by a curious coincidence at the same time as two Italian technicians abducted in Ethiopia in December 1986 were released.

In June 1983 the Sudanese government announced that southern Sudan would once again be divided into three separate administrative regions (there had previously been fighting over the same issue between 1955 and 1972). The result was renewed fighting, with rebel attacks against foreign installations and companies operating in the south, leaving at least half a dozen dead and as many wounded among the foreign technicians and workers, for the most part American. The rebels, black Christians and animists who demand greater autonomy for the region *vis-à-vis* the Moslem north, have also kidnapped many Western workers, missionaries and journalists of different nationalities.

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<sup>34</sup> *Keesing's*, 1986, pp. 34084-34085 (p. 34084 cited).

Some were freed by the army, but most were gradually released by the rebels themselves, sometimes after a year in captivity.

The declared strategic objective of these abductions was to paralyse the local activities of the companies concerned, which were working on industrial projects as basic to the country's development as prospecting for oil and constructing a pipeline. After making repeated threats and attacks in 1984 and 1985, the rebels achieved their aim and the majority of the Western technicians and employees of United Nations specialized agencies left the south in 1985, because of the intense fighting between the guerrillas and the Sudanese army and the rebels' warnings that foreigners were putting their lives at risk if they stayed on.

## **2. Hostage-taking in Lebanon**

In Lebanon, a country ravaged since 1975 by what is erroneously called a civil war (see note 3), the last ten years saw frequent attacks against foreign individuals and interests in the framework of an especially aggressive campaign against the agents and premises of other States: diplomatic and consular agents have been kidnapped and killed, and diplomatic missions and residences bombed or shelled. Countries as diverse as Austria, France, Iraq, Jordan, Libya, Saudi Arabia, the Soviet Union, the United Kingdom and the United States have been the target of such attacks. Western workers, volunteers, journalists and clergymen have also been abducted. Most were American, British, French or German; some were killed by their kidnapers and others died while in captivity. Other foreigners more difficult to put in a legal category have met with violent deaths. At the end of 1990, following a number of releases, about a dozen Westerners were still being held hostage or were unaccounted for in Lebanon, most of them American. They were being treated as simple hostages whose lives and liberty were being bartered to put pressure on their own or friendly governments in order to obtain money, arms, the release of prisoners of war or terrorists who were detained or had been sentenced, or to force a change in foreign policy. The hostages' release — when it occurred — usually came after at least one year, and some hostages had been held for four years already. It would seem that they were all in the hands of radical, fundamentalist groups against which neither the Lebanese government nor the more powerful factions (Shi'ite Amal or the Druse of the Progressive Socialist Party), whose leaders have held ministerial posts, have adopted any type of preventive or repressive measure.

Moreover, the political consensus of the international community on this matter, as expressed in the clear and unanimous condemnation of hostage-taking by the UN Security Council in Resolution 638 of 31 July 1989 (which takes into account especially, although without expressly mentioning it, the case of Lebanon), came far too late.

A further paradox is that the French government negotiated the conditions for the release of French hostages in Lebanon openly and directly with the kidnapers, and through the intermediary of Iran and Syria, without consulting the Lebanese government or even the militias mentioned above. This reveals the extent to which organized authority in Lebanon has crumbled. Nevertheless, even the governments most affected, both by attacks against their premises and interests and by the abduction and murder of their agents or nationals (the case of France, the United Kingdom and the United States) have not lodged complaints and have maintained diplomatic relations with the Lebanese government, which has sunk into a state of permanent military, economic and political impotence, evidenced by its inability even to collect customs duties because most of the country's ports are controlled by the militias of the different parties to the conflict.

Following the abduction and murder of Westerners in Moslem West Beirut in April 1986 as a result of the Libyan-American crisis, the Western governments issued further warnings and gave strict orders to their diplomats and nationals. Since summer 1985, the Spanish embassy and chancellery have been in the eastern, Christian sector of Beirut, and Spanish diplomats admit that they have standing orders not to cross the Green Line separating the two sectors, even to help compatriots in distress on the other side. The American embassy, which reopened in the Christian sector after it had been destroyed in April 1983, first evacuated a group of Americans still resident in the Moslem part of the city, then notified the few Americans who wished to remain there that they did so at their own risk.

The warnings were redoubled after the wave of kidnappings of Western nationals in early 1987. At the end of January, the American Administration requested all American citizens still living in Beirut to leave the capital immediately, warning them that if they stayed it would be "under their responsibility and at their own risk", since "there is a limit to what the United States can do to protect its citizens in this chaotic city, which is at the mercy of bands of armed criminals". Congress harshly criticized the obstinacy and imprudence of

Americans refusing to leave Beirut.<sup>35</sup> The Spanish Ministry of Foreign Affairs, for its part, issued a communiqué on 30 January advising its nationals not to travel to Lebanon in the prevailing circumstances, and informed the Director of the Office of Diplomatic Information that people who travelled to Lebanon did so at their own risk, because “no one could guarantee the safety of anyone with a European appearance”.<sup>36</sup>

It is highly appropriate here to refer to what we consider to be an extreme example, i.e., the attitude adopted by the ICRC in respect of injury and loss suffered by its delegates in the conduct of their activities. In situations of non-international armed conflict, the ICRC has a treaty right of initiative under common Article 3. In any other situation, including internal disturbances and tension (low-level or intermediate conflicts), the ICRC can always offer its services, which may or may not be accepted, by virtue of its traditional right of humanitarian initiative set forth in Article 5 of the Statutes of the International Red Cross and Red Crescent Movement. It comes as no surprise, in the deteriorating legal climate of many States at present, that ICRC delegates and other staff on humanitarian missions throughout the world are increasingly at risk.

Take, for example, the 10-month ordeal (from October 1989 to August 1990) of two ICRC orthopaedic technicians, both Swiss nationals, taken hostage by unidentified armed men belonging to one of the radical Islamic groups operating in Lebanon. The technicians were released thanks, as always, to the good offices of certain governments with interests in and influence on Lebanese affairs. This was one of the most serious violations of IHL suffered by the ICRC in Lebanon, and was the second time ICRC delegates had been taken hostage there because of their nationality (Swiss); the kidnapers demanded the release of a Moslem tried and sentenced in Switzerland to life imprisonment for a terrorist act committed in an aircraft.<sup>37</sup>

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<sup>35</sup> *El País*, 27 January 1987, pp. 1-2 (both pages cited).

<sup>36</sup> See *Actividades, textos y documentos de política exterior española*, No. 60, 1987, p. 79. See also *El País*, 31 January 1987, p. 15 (cited), and compare with 7 February 1987, p. 3.

<sup>37</sup> *IRRC*, No. 273, November-December 1989, pp. 575-576 and 579; No. 274, January-February 1990, pp. 45-46 and 54-55; No. 275, March-April 1990, pp. 135-136 and 154-155; No. 276, May-June 1990, p. 269; No. 277, July-August 1990, p. 355; and No. 278, September-October 1990, pp. 435-436 and 446-447. See also *ICRC Bulletin*, from No. 166 (November 1989) to No. 176 (September 1990). The first time an ICRC delegate was taken hostage in Lebanon because of his Swiss nationality was in November 1988. The delegate, Peter Winkler, was released in December of the same year: see *ICRC Bulletin*, No. 156, January 1989, p. 1.

This is why the ICRC recently pointed out, albeit unofficially, that “from the beginning an ICRC delegate must be aware that he is exposed to certain risks that his mere presence in such situations [of conflict] brings with it”, for the nature of the ICRC’s work necessarily puts the delegate in danger, kidnapping or capture as a hostage constituting a comparatively minor risk in this context.<sup>38</sup>

Finally, although the ICRC recommends that the risks must always be calculated and taken “especially in function of the needs to supply aid to the victims”,<sup>39</sup> this does not mean that in the event of an incident affecting, slightly or seriously, the physical integrity and security or the liberty of its delegates, no matter how deliberate and prudent their behaviour, the institution will do any more than suspend its activities until it has once again been given due guarantees that its work can be conducted safely. The question of responsibility or compensation is therefore never raised, although this could be done, for example, through diplomatic representations by the victim’s country of origin. Indeed, any assessment of such incidents would have to take into account that the ICRC’s “humanitarian activists” had previous knowledge of the risks involved and accepted them. This has been confirmed by recent ICRC practice.<sup>40</sup> In other words, the ICRC would seem to accept for itself and for its delegates abroad the objective and very serious risks that tend to go hand-in-hand with its humanitarian activities, tacitly and generally renouncing, for the sake of the development and impartiality of its activities, the means of defence provided for by the international legal system against presumed illegal acts committed against its delegates and property.

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<sup>38</sup> *ICRC Bulletin*, No. 116, September 1985, p. 4 (cited).

<sup>39</sup> *ICRC Bulletin*, No. 116, September 1985, p. 4.

<sup>40</sup> See for example *IRRC*, No. 204, May-June 1978, pp. 165-167, 172-174 and 178-180; or *ICRC Bulletin*, No. 169, February 1990, p. 1. One precedent does exist, however, to our knowledge: the ICRC filed a claim against the United Nations in the matter of G. Olivet, who disappeared in 1961 near Elisabethville (Katanga) with two nurses on board a Red Cross ambulance; the bullet-riddled ambulance and their bodies were found nearby days later. The commission of inquiry appointed by the parties established that the deaths had occurred in the zone controlled by United Nations forces and that the bullets came from weapons used by those forces. The United Nations compensated the ICRC with a sum of money to be distributed to the families of the victims; see Barberis, J.A., “El Comité Internacional de la Cruz Roja como sujeto del derecho de gentes”, in *Studies and essays on international humanitarian law and Red Cross principles, in honour of Jean Pictet*, Martinus Nijhoff Publishers, The Hague, ICRC, Geneva, 1984, at p. 640. The damages were, however, *ex gratia*; see Pérez González, M., “Les organisations internationales et le droit de responsabilité”, in *RGDIP*, Vol. 92, 1988, at pp. 82-83.

## V. THE PHENOMENON SPREADS: FOREIGN HOSTAGES IN IRAQ

At the end of the 80s, it seemed that the phenomenon of hostage-taking was on the wane throughout the world, as the number of internal conflicts decreased or they became less intense. There was a resurgence, however, in 1990. When Iraq invaded and annexed Kuwait in August 1990, the Iraqi authorities forbade all foreigners to leave the country, a decree applying especially to citizens of Western States as an admitted measure of retaliation against the economic embargo and blockade imposed by the United Nations Security Council; a further and no less important aim was to prevent or at least delay Western armed action against Iraq. As a result, several thousand Westerners and others, most of them workers and volunteers living in Iraq and Kuwait, were held in Iraq waiting either for the Iraqi authorities to deign to let them leave the country, which they usually did after a visit and request by some non-governmental dignitary or delegation from the country concerned (about 1,300 Westerners had received permission to leave the country in this way by November 1990), or for the settlement of the international crisis brought about by the grave act of aggression and consequent violation of international law committed by Iraq when it occupied and annexed a neighbouring sovereign State which is a fully-fledged member of the United Nations. Although all remaining hostages were suddenly "freed" in mid-December 1990, it is nevertheless worth wondering what rules are applicable in this case and what international responsibility the Iraqi government might have incurred during the time in which the foreigners were held.

Iraq is not a party to the 1977 Additional Protocols, but it is a party, as is Kuwait, to the four 1949 Geneva Conventions. Even if Iraq were not party to the Conventions, their provisions would be applicable because of the universal consensus reached by the international community as to their mandatory nature, by virtue of the number of States which are party to them. It is true that there was not, during the time the foreigners were held, an international armed conflict between Iraq and the States which in August 1990 started to apply the economic sanctions decided on against Iraq in various Security Council Resolutions, in particular Resolutions 661 and 665 (1990), adopted legitimately within the framework laid down in Chapter VII of the United Nations Charter; the fact that Security Council Resolution 678 (1990) authorized the use of force against Iraq if it did not withdraw from Kuwait before 15 January 1991 did not change the situation. On the other hand, there was obviously an international

armed conflict between Iraq and Kuwait as of 2 August 1990; the provisions of the Fourth Geneva Convention (relative to the protection of civilian persons in time of war) were therefore applicable from that date on, and were equally binding on both parties.

Article 4 of the Fourth Convention protects, *inter alia*, all persons who, in the event of conflict or occupation, find themselves in the hands of a party to the conflict or occupying power of which they are not nationals. Paragraph 2 of Article 4, it is true, excludes from the field of application of the Fourth Convention nationals of neutral States while the State of which they are nationals has normal diplomatic relations with the State in whose hands they are. This exception did not apply in the case at hand, however, because as far as we know no State declared or formally claimed that it had neutral status in the conflict between Iraq and Kuwait. What is more, the obligations imposed by the United Nations Charter on member States and, more particularly, the encouraging application to this crisis of the mechanisms for collective security provided for in Chapter VII of the Charter, render the role which could have been played by neutrality in this case superfluous in the extreme.

On the other hand, although Article 35, para. 1, of the Fourth Convention provides that a party to the conflict may prevent foreigners from leaving its territory at the outset of or during a conflict if their departure is contrary to national interests, paragraph 2 of the same Article provides that a person refused permission to leave shall be entitled to have such refusal reconsidered as soon as possible by an appropriate court or administrative board. Article 34 unequivocally prohibits the taking of hostages (an act which Article 147 defines as a "grave breach"), and Article 28 the use of the presence of protected persons "to render certain points or areas immune from military operations". Article 38 specifies in passing that persons not repatriated shall continue to be governed by the provisions concerning aliens in peacetime, with the exception of such measures of control and security concerning them as may be necessary as a result of the war (Art. 27 *in fine*). Assigned residence or internment are mentioned as the most severe measures that may be taken, but only "if the security of the Detaining Power makes it absolutely necessary" (Arts. 41 and 42), and with the same guarantees as those described in Article 35, para. 2 (see Art. 43, para. 1). Finally, a foreigner in occupied territory may claim the right to leave the territory under the conditions set forth in Article 35, i.e., as if he were a foreigner on the territory of a party to the conflict.

The Iraqi government failed to respect the letter and the spirit of the Fourth Convention because it did not establish — as far as can be determined — any procedure allowing for rapid revision of its refusal of permission to leave Iraqi territory, with the exception of the exit visas granted at the discretion of its leader as part of the propaganda war unleashed by the military occupation of Kuwait. Nor were the Iraqi authorities reluctant to admit from the beginning that they had posted groups of foreigners (all of them apparently Westerners) in military bases and industrial centres scattered throughout Iraqi territory for the stated purpose of preventing those installations from becoming military targets in the event of hostilities against Iraq. As if that were not enough, the deplorably propagandistic nature of the bargaining over the sporadic “releases” of groups of hostages starting in August would seem to refute any arguments claiming that the hostages had to be held for technical reasons and to maintain services essential to the Iraqi economy and administration until such time as Iraq had found a satisfactory solution for their replacement.

Finally, if the Iraqi government considered that there was no international armed conflict, interpreting the annexation of Kuwait as *sui generis*, but that Iraq was in a state of internal emergency owing to the economic sanctions imposed by the Security Council and the risk of an imminent international war, a state of emergency which — still according to the Iraqi government — would also have allowed it to adopt the measures we have already discussed in respect of foreigners, it is obvious that the applicable measure would have been the minimum standard of protection for the individual accepted by custom under Article 3 common to the Geneva Conventions. That standard guarantees freedom and safety for the individual, whether a national or a foreigner, and prohibits *erga omnes* and without exception the taking of hostages.

In conclusion, the Iraqi government turned thousands of foreigners into hostages and held them illegally on its territory from August to December 1990, unquestionably violating Articles 27, 28, 34 and 35 of the Fourth Geneva Convention, and committing several grave breaches under Article 147, which lists the acts regarded as grave breaches when committed against the persons and objects protected by the Convention.<sup>41</sup> Therefore, the position of the Iraqi government is legally untenable. The political reasoning behind it, however, stems from the acquiescent reactions of the States, analyzed above, in the

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<sup>41</sup> See Salinas Burgos, *op. cit.*, pp. 219-220.

face of similar occurrences in situations of internal conflict when they have affected only individuals, and not their own agents and bodies.

The conflict is now over, but it is not possible to tell whether the international community in general and Kuwait in particular will hold Iraq responsible for damages in connection with the foreign hostages, in accordance with the provisions of Articles 146 to 149 of the Fourth Geneva Convention relating to grave breaches of its provisions.<sup>42</sup> The Security Council has, it is true, denounced and expressly condemned those violations, in particular in its Resolutions 670 (1990) and 674 (1990), which make direct reference, moreover, to the Fourth Geneva Convention, among other treaties. However, Security Council Resolution 687 (1991) and later resolutions are very general in that they deal with the responsibility incurred by Iraq as a result of the invasion, the annexation of Kuwait and subsequent events, and have so far mentioned only missing Kuwaitis and nationals of third States and property which they have not recovered.

## VI. CONCLUSIONS

In the light of the cases discussed above, it cannot be said that the minimum international standard of treatment, i.e., the point of convergence of human rights law and the rules governing aliens, and ultimately the international law of State responsibility, is effective, at least in the event of an internal conflict. The States whose nationals have been taken hostage or died violently in situations of internal conflict in other countries have not exercised humanitarian protection (not at all similar to the strict, formal and retributive nature of diplomatic protection) *vis-à-vis* the State or the guerrilla or rebel movement which is presumably in charge once it gains power. They have thus accepted *de facto* the treatment meted out to their nationals by the parties to the conflict. This failure to implement the rules providing for a minimum standard of protection of the individual, whether a national or an alien, can also be seen by the extent or nature of the reparations asked for, which have lost their full character of restitution,<sup>43</sup> becoming mere

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<sup>42</sup> Article 148 of the Fourth Convention reads as follows: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article" (which lists grave breaches of the Convention). All the obligations in Article 147, such as the prohibition on taking hostages, therefore have an *erga omnes* or non-derogable nature.

<sup>43</sup> As formulated by the ICJ in its judgment in the Chorzów Factory case (claim

requests for a stop to the illegal situation (restitution *lato sensu*) rather than demands for compensation for the injury caused (damages and satisfaction). Why have reactions been so restrained?

First of all, the formal legal structure of today's international order, which is very attached to the eminently relational and conservative principles of sovereign equality and non-intervention, together with the undoubtedly institutional and innovative doctrine of peaceful and equitable cooperation, has certainly contributed in both senses to a radicalization of the traditional restrictions on the human rights of the foreign worker or volunteer. Those rights have been sacrificed for the sake of the *ad intra* security of the States and the *ad extra* stability of the relations of cooperation between them, whether relational or institutional, especially when armed conflict in one of them renders its security and stability particularly vulnerable.

Secondly, the specific protection that the traditional order afforded foreigners within the international community has become less effective as the substantive rules governing aliens have been incorporated into the framework of human rights law, which makes no distinction of nationality. This framework does admittedly lack a sufficiently well-developed institutional structure for the application of such advanced rules, rendered pointless by the lack of parallel progress in sectors such as international order and jurisdiction. Moreover, experience has shown that injury to the foreign worker or volunteer is above all the work of groups of individuals organized in armed bands, guerrilla groups or rebel factions, which gives an added collective dimension to the problem of protecting those foreigners. What happens to foreigners is therefore materially the same as what happens to nationals. The foreigners may even be more seriously affected, since the parties to the conflict do not usually grant them any form of "privileged" treatment, not even *de facto*, and may even discriminate against them (as has been the case in some conflicts where the hostages were only or mainly foreigners). Many internal conflicts may well stem from grave violations of a people's right to self-determination. They then become much more than internal conflicts and result in an outright rejection of any special or "privileged" legal status which might be assigned, not *de jure* (which is not possible) but *de facto*, to the foreigner.

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for compensation, Fund) of 13 September 1928: "... la réparation doit, autant que possible, effacer les conséquences de l'acte illicite et rétablir l'état qui aurait vraisemblablement existé si ledit acte n'avait pas été commis" (*Cour permanente de justice internationale*, Série A, No. 17, pp. 29 and 47).

We have also observed that foreign workers and volunteers, as a high-risk group in the event of internal conflict, are closely associated with the institutional structure of present-day international development law which, as we know, is based on the principle of cooperation. It is this structure which suffers most in an internal conflict; it is shunned because of doubts concerning the activities of a group that forms the advance guard of these relations of cooperation, and that publicizes and promotes them. The reasons for contesting the human rights of this group of foreigners may lie in the fact that the institutional structure they represent also serves to lend legitimacy to the governments of many developing States, providing them in different fora with the political support, economic aid and technical assistance without which they could not formally survive as independent entities or consolidate their political regimes. The struggle to control or challenge this network of cooperation is a vital matter for the groups or factions in conflict, and the group of foreigners in question inevitably bears the brunt.

In short, all this leads us to conclude that the foreigner who has suffered injury (especially if he has been taken hostage) and *who has knowingly and freely accepted the foreseeable risk arising from his mere presence* in a State affected by a low-level or medium-level internal conflict (excluding the hypothesis of civil war) *does not normally benefit from the diplomatic protection* of his own State, but only from *humanitarian protection* of a political and very poorly defined nature which is restitutive but never compensatory.<sup>44</sup> These internal conflicts therefore provide the States in which they take place and which may be liable to claims on behalf of foreigners with a rich supply of legal arguments in their defence. This has been the case for many newly independent developing States, where the rule of law and respect for human rights are usually notoriously poor.

Another matter entirely is the total lack of legal justification for the conduct of the Iraqi government (holding thousands of foreigners on its territory by force), which is a grave breach of IHL but finds a political explanation in the dangerous complacency with which most governments have treated hostage-taking when it has affected their nationals (in particular workers and volunteers), rather than their institutions and agents. The phenomenon has taken on such proportions that governments should be much more severe in their legal condemnation and material repression of this practice if they wish to keep it

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<sup>44</sup> Jiménez Piernas, C., *La conducta arriesgada y la responsabilidad internacional del Estado*, University of Alicante Publications Service, Alicante, 1988, pp. 303-312.

from becoming an accepted requirement for diplomatic protection or a circumstance that modifies international responsibility, in that it changes the nature of the objective risk accepted by foreign individuals working in States affected by internal conflict (not civil war). This would also check, with all the attendant consequences, the alarming expansion of the phenomenon through the direct participation of State bodies or agents in the crime of hostage-taking in the event of an international armed conflict, as was the case in Iraq. For this reason, the Iraqi government should be required to pay exemplary damages.

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*La revisión del estatuto territorial del Estado por el nuevo Derecho del Mar*, University of Alicante Publications Service, 1990.