

TORTURE

Interview with Dr Abdel Hamid Afana*

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Do you differentiate between torture and inhumane or degrading treatment in your work with torture victims? If yes, how do you define the different notions?

When it comes to differentiating between torture and cruel, inhumane or degrading treatment, torture is, generally speaking, a more serious violation of human rights, personal integrity and dignity.

* The interview was held on 12 September 2007 by Toni Pfanner, Editor-in-Chief of the *International Review of the Red Cross*.

I personally think there are three main differences between torture and cruel, inhumane or degrading treatment and punishment. The first one, which we all know, is the severity and intensity of pain inflicted on victims. From the political and legal point of view, this is a grey zone, as there is no exact point where cruel, inhumane or degrading treatment reaches the threshold of torture. It is even more difficult to evaluate psychological suffering. In fact, recent research studies show that the long-term effects of humiliation and humiliating treatment such as threats and other psychological manipulations are similar to physical torture.

The second and third distinctions are those highlighted by Manfred Nowak, the UN Special Rapporteur on Torture. He underlined that, legally, the purpose of torture is usually to extract information or to force a confession – which is not necessarily the case in all instances of torture. Anyway, law enforcement officials must aim at a fair balance between the legitimate purpose of an interrogation and the interference with the person's rights and integrity. The other distinction is the element of powerlessness. The perpetrators assume the victim to be in a situation of powerlessness, which usually means deprivation of personal liberty and in which they are in complete control of the person. This makes the victim extremely vulnerable to any type of physical or psychological torture. As long as the person is thus under the direct control of the law enforcement officials, the use of physical or mental coercion is considered especially harmful.

It must, however, be stressed that in any case, both torture and cruel, inhumane or degrading treatment are absolutely prohibited.

In your experience, do the victims differentiate between torture and inhumane or degrading treatment? Can you give us some examples of torture methods?

They generally complain about having been tortured and tell us about their experiences without differentiating between torture and CIDT. What they have experienced largely depends on their background. In the western world, for example, most of the people we deal with are refugees. They tell us about different methods of torture, including physical torture, as well as about beatings, psychological manipulation, humiliating treatment and exposure to force and stress. Other types of people, such as prisoners, also complain that they were tortured, especially during interrogation in the detention centre. The methods they describe are very often clearly methods of torture. In my own field of experience, a very common complaint is what we call the “Palestinian hanging”, which consists of tying the arms of the prisoners behind their backs and hanging them up by their wrists. They further complain that they were deprived of sleep, blindfolded, exposed to constant loud noise and bright lights.

The methods you mentioned include both physical and psychological methods of torture.

Physical torture was traditionally used in previous centuries and decades, but is also still used today. Psychological torture is a new method that was developed more recently. Maybe, in the future, there will even be cultural torture.

Psychological torture is about reprogramming the victim to surrender to an alternative world offered by the abuser. It is an act of deep, ineradicably traumatic programming. Unfortunately, psychologists are often involved in developing and executing interrogation strategies, in preparing a psychological profile for the detainee, or participating in the interrogation of the detainee and giving feedback to the interrogators. A well-known example is the alleged use of SERE (Survival Evasion Resistance and Escape) interrogation techniques in Guantánamo, based on the advice and consultancy of psychologists. This implication of medical personnel is very worrying, as their profession seeks to protect the welfare and rights of those with whom they interact professionally.

To come back to the definition of psychological torture: psychological torture is long-lasting and very severe. It is a technique which aims at causing a regression among victims. Regression is basically a reaction to extreme anxiety and stress and leads to behavioural defects. The victim begins to lose the competence to deal with complex situations or to cope with interpersonal relationships. This has long-term negative consequences. The victims feel helpless and powerless and lose respect for themselves. In fact, psychological torture is about instilling feelings of guilt and shame in the person. All these dramatic memories can further lead to a traumatic disorder. This trauma has been discussed extensively in scholarly writings.

Could you elaborate more on this trauma and the typical symptoms you find among torture victims? According to your clinical experience, what are the long-term effects of psychological torture?

As I mentioned before, psychological torture is often more severe and long-lasting than physical torture. What is problematic is that frequently it remains undetected, as the physicians in public health care centres are often not sufficiently trained and the victim is reluctant to speak about his or her experiences.

If you look at the types of psychological symptoms after torture, there are probably two kinds. The first kind is limited to the individual person. Torture creates a feeling of shame, guilt and disgrace because of the degradation and humiliation the victims have experienced. This leads to transformations of the personality, to a loss of self-esteem and self-worth. In my experience, this is usually accompanied by symptoms of both anxiety and depression. What is also very common among survivors of torture are manifestations of self-directed aggression, and often they withdraw from society and have symptoms of post-traumatic stress disorder (PTSD). This means victims react with emotional numbness, increased arousal, insomnia, irritability and restlessness. Anxiety and depression, withdrawal, unhappiness, loneliness, lack of interest in life and avoidance of reminders of the prison experience are all symptoms of psychological trauma and manifestations of PTSD. While the consequences of physical torture such as headaches and pain are very clear and easy to track down, these effects produced by psychological torture are more long-lasting and harder to treat.

The second kind of symptom is the displacement of anger. The anger and aggression experienced by torture survivors is often displaced onto other people,

particularly the family. Usually the most vulnerable groups, namely the victims' children or their wives, are targeted. So torture does not only have an impact on the victim but also on the family, and consequently on the community as a whole. This is also why an organization that gives help to torture victims must extend its work to their families and communities.

Can these consequences of torture and the way certain methods are perceived vary, depending on the individual, or the political, religious or cultural setting? One could imagine, for example, that a detainee who believes very strongly in a cause has fewer difficulties in bearing some forms of behaviour than someone who does not have such a strong conviction.

That is absolutely true. Culture is very important when it comes to analysing the trauma itself, as well as the reaction of society to such a trauma. Firstly, it is of great importance to promote the culture of no torture and to prevent torture from becoming a widespread practice. In fact, culture and religion form a symbolic system of values, beliefs and ideas that shape and influence its members. One of the primary characteristics of culture is that it provides a context for survival. It has a regulatory function which assists in dealing with events, such as torture, as well as their causes. The way torture is perceived in a society, and the way society looks at torture victims, has a great influence on how the victims themselves cope with it. From my clinical experience with Palestinian prisoners, I know that upon release they are considered heroes and get a lot of social support from the community and from their extended family. This, of course, makes it easier for them to cope with the physical and psychological consequences of torture. Social support is thus a key issue in coping with the trauma, and it varies from one culture to another.

Can the phenomenon of torture influence the society as a whole?

A society is composed of individuals and families, including the extended family, that form small communities and finally these communities form a bigger society. Victims obviously belong to families, and if the victim has the typical psychological symptoms of torture survivors that we have already discussed, this will influence and affect his or her behaviour within the family and especially towards the children. The children of torture victims can even end up experiencing similar symptoms, such as withdrawal from society, anxiety, often accompanied by low achievements in school, which leads to drop-out and all the consequences of it. From that psychological perspective, families of torture victims are affected and will not be productive in the community, they will not effectively participate, use the community resources and contribute to the development of the community. In addition, torture spreads fear and anxiety among the community members and this has a negative impact on community development and democracy in that community.

In order to cope with these problems it is necessary to have a society that is supportive of torture victims. Here is where non-governmental organizations, the government and human rights activists must come in to create public and

community awareness about the types of social consequences torture and trauma have. I believe that most, if not all, means of assessing torture are individually based and thus probably emphasize the diagnosis of PTSD, depression, anxiety and other medical disorders, while giving less emphasis to the macro-consequences of torture that include families and communities at large. Every traumatized individual and every dysfunctional family must also be seen in their social and political context.

Do you have the feeling there are communities or cultures that have accepted torture or certain methods of torture or cruel, inhumane or degrading treatment?

I don't think torture is accepted in any culture, but the meaning of torture and the social representation of torture may vary. Unfortunately, we have little knowledge about the representations of torture in different cultures. Without going into details, the origin of the word "torture" indicates that it is meant to cause harm and to "twist" the personality of a person. In a number of cultures, like Asian cultures and mainly in Buddhist terms, torture is derived from a religious ritual which is called *karma*. In the Arab culture, torture means "*Tatheeb*". The word in Arabic sounds very harsh; literally it means "the infliction of pain" by others using various means of torture. It doesn't put victims in a position of blame, which is important for therapeutic recovery. If you say that word in Arabic, a person hearing it might tremble just from listening to it and from its sound.

What leads a person to commit torture? Is there a kind of predisposition for a person to become a torturer, or is it mainly the institutional setting, the obedience of orders, that leads a person to torture?

In my view, the fact that torture is practised regularly and systematically in different countries with different cultural and religious backgrounds and that it has been practised for centuries shows that the reasons for which people become torturers, the origins of their actions, are not culturally specific. When it comes to explaining why people torture their fellow human beings, I think one must differentiate between three types of torture.

The first one is called functional torture. It refers to torture that is practised with the aim of extracting confessions. It aims at breaking the victim's personality and resilience in order to make that person talk. In many cases, such types of torture are committed under a slogan of "protection of public security", but it is also a tool for repressing political opposition. It harms the community as such and the democratic development of a country.

The second type of torture tends instead to be a strategy of the torturers to cope with their own problems. Often torturers wish to regain control and to re-establish their power over someone else. By practising torture, torturers regain their self-confidence and self-worth. Some torturers also displace their negative emotions by inflicting pain on someone else. They may experience humiliation, rage, envy or hatred, and when they displace their negative emotions onto their victims, the victim becomes a symbol for them of everything that is negative in

their own lives. There are, of course, forms of torture that are clearly sadistic. In those cases, torture satisfies the emotional needs of the torturers themselves. Many torturers derive pleasure and satisfaction from these sadistic acts of humiliation and from torturing others. To them, inflicting pain and suffering upon others is a kind of fun. Most importantly, those types of torturers do not empathize with the painful reactions that are generated in their victims.

A third type is possibly torture as a political strategy, a way of protecting the interests of one group and of keeping control over both the people and the political resources. Here loyalty, group affiliation and belonging are so strong that they overshadow ethical, moral and legal considerations of torture.

Can torturers also become victims? Have you, for example, had cases where torturers sought psychological help? Are there typical traits that you find in every torturer?

It is possible that victims become torturers and torturers become victims. I don't think there is a typical profile of a torturer. At the end of the day, torturers are human beings and they have both good and bad instincts. These instincts, common to every human being, are influenced and controlled by many factors, such as society, the rule of law and social justice. As far as I know, torturers don't have any particular common denominators. Their actions may be a result of the combination of their personality and environment. In many cases, these people are brainwashed or have certain ideologies, and the practice of torture is mainly meant to protect the authority or the governing body. Furthermore, torturers are most probably desensitized to torture and not aware of its psychosocial consequences. They are trained to obey orders without analysing or questioning them. In most situations, they are trained to adopt a win-lose approach, not to analyse, to discuss and to raise their voice against the orders of the authority.

You mentioned that physicians and psychologists increasingly play a role in developing methods to extract information from a person. What role do you believe psychologists and physicians should play in this process?

Traditionally, physicians and other health and mental health professionals are mainly involved in rehabilitation of victims. They draw up a case history, do a physical examination, and evaluate whether there is physical evidence of torture. Of course, the professional ethical code strictly prohibits medical professionals from playing a role in torturing people. But I am not only critical of some who are being part of torture. I also find it very unfortunate that physicians and psychologists have not widened their role in society.

Often they perceive their role as being limited to the rehabilitation of victims and give less attention to the causes of torture, as they interpret these cases as political. However, it must not be forgotten that when we talk about torture, we are talking about basic human rights and there is a clear link between health and human rights. We have to return to the broad definition of mental health, or health itself, that extends beyond cultural borders and embraces environment, family, and community factors. This perspective goes beyond the purely medical

aspect. Physicians and psychologists must take a proactive role and move from being not only providers of care but also facilitators of care who enable victims to be actively involved in their community development. As the shame, humiliation and severe trauma prevent victims from seeking help and support, access to rehabilitation must be facilitated and the services provided must include not only the biomedical approach but also engagement in the fight against impunity, against the denial of torture practices, as well as in the fight against irregular renditions, even those with so-called diplomatic assurances. Thus, the role of medical professionals has to be widened beyond rehabilitation and medical professionals have to be vocal and proactive.

As you know, the ICRC and other humanitarian agencies and medical or religious personnel visit prisoners. They may possibly interrupt the interrogation process or may even involuntarily become part of it. When it comes to prisoners who have been tortured, do you think such an intervention is helpful?

One must be cautious to let the victim be in control of the interview. First, it is important to explain who you are and why you are there, in order to decrease their apprehension and possibly their fear. During the whole conversation, the detainee should only talk as much as he or she feels comfortable and should be able to stop the interview at any time he or she wishes. If the prisoner stops the interview at some point, the visitor or delegate should not feel insulted, but understand it.

It is essential that the person who pays the visit is trained and prepared to cope with cultural differences and sensitivities. Very simple things such as shaking hands can be an icebreaker for an interview, whilst the same small gesture can be completely inappropriate in certain cultural settings. So before going to a prison, one should become familiar with all these cultural gestures and the cultural background of the person one is going to visit.

Such visits may also have an investigative aspect. The ICRC, for example, reports its findings to the prison authorities in order to achieve improvements in the treatment of the detainees. In order to do that it is necessary to ask a number of questions regarding the treatment or even specific methods of treatment used. How can this be done without opening wounds or retraumatizing the prisoners?

I don't think these questions will cause damage to the prisoners as long as they are in control of the interview and the delegates explain to them why they need this information. What is important is to have privacy, to assure them that you are not being observed or overheard and that the information they give you is strictly confidential and will not be used for anything other than to improve the conditions in the prisons. All will depend on whether the interviewer makes the victim feel comfortable and reassured. Obviously, this requires certain skills, including very basic communication skills and sensitivity. In addition, the interview must be prepared carefully. Also, in order to prevent possible unhealthy

consequences that might arise after the visit itself, it is indispensable to repeat the visit.

Let us now take a closer look at your work, namely the rehabilitation of torture victims. Is it possible to successfully rehabilitate a person that has been tortured?

Yes, I believe it is possible to rehabilitate torture victims. The aim of rehabilitation interventions is to enable survivors to become productive members of their communities. As you might know, the International Rehabilitation Council for Torture Victims (IRCT) is an umbrella organization for centres throughout the world that are carrying out pioneering preventive and rehabilitation activities.. In the last couple of years, we have tried to look at rehabilitation in its wider perspective. We are convinced that both physical, psychological and community intervention are essential in order to enable victims to cope with their experiences, and that a “bio-psycho-social, legal and political” approach is thus necessary to achieve that aim. This means that rehabilitation in its wider sense includes not only the individual perspective of treatment, but also work with the community to ensure that the victims will get the support needed for themselves and their family.

Of course there are different approaches to rehabilitation, used by different therapists and in different IRCT member centres. It is hard to say which method is the best approach. Beside cognitive behavioural therapy, which has both cognitive focus (negative symptoms such as those of PTSD) and behavioural intervention sessions to treat victims of torture, the psychoeducation content here is very important. Some centres used the psychodynamic therapy as an intervention method at the individual level, where the emphasis is placed on the unconscious representation of traumatic events and their relation to life events. Other centres use cognitive processing therapy (CPT), which is based on information processing theory. Of course, we use many other intervention methods, such as eye movement and desensitization reprocessing (EMDR), while anxiety management and various forms of individual therapy have been shown to reduce PTSD symptoms and reduce social maladjustment.

Are there also collective therapies?

In the rehabilitation of torture victims there is group therapy. Being part of a group gives them the feeling that they are not alone, that there are people who have experienced the same fate and have the same difficulties in coping with the consequences. This may give their suffering and their symptoms a more global dimension and shows them that their reaction is a normal reaction to an abnormal situation: abnormal methods were used that caused abnormal suffering.

At the same time, these therapies must be accompanied by a community approach where the family and the community are involved in a therapeutic setting.

We invite both the traditional and the religious leaders to take part in psycho-education, we offer them courses and train them to help traumatized people. This training can consist of basic communication skills, of showing them

how to listen to torture victims and how to focus on their emotions. They can also learn more complex skills, such as understanding the symptoms, exploring the reasons for them, and teaching the victims to face the challenges. We furthermore train the family and show them how to behave in an emergency situation until they get the help of a professional. This holistic approach to rehabilitation is very important.

So to answer your question: yes, victims can be rehabilitated and can be treated.

What kinds of victims seek advice in your centre and where do they come from?

The IRCT is an international movement; the secretariat, which does not provide any sort of therapeutic interventions, is based in Copenhagen. We have more than 140 centres all over the world providing psychosocial and community interventions in aid of torture victims. These centres are based in diverse geographical locations and diverse cultural backgrounds, and work in difficult financial and political circumstances. In non-conflict countries, most of the victims are likely to be refugees, asylum-seekers or immigrants from conflict or post-conflict countries. In low and middle-income countries, the types of people who come to the centres have usually been tortured by the police and law enforcement agencies. Often they are political activists and political prisoners. It is worth mentioning that in total, these centres rehabilitate around 100,000 victims and their families every year.

It is obviously better to prevent than to cure. Does your centre also engage in preventative activities, in fighting impunity of those who are responsible for acts of torture?

As I mentioned before, through our member centres we promote a holistic approach to torture. As rehabilitation must be accompanied by preventative activities, the centres promote respect for the Convention against Torture (CAT) and its optional protocol. We also offer education and training courses for law enforcement personnel. Furthermore, through our advocacy we are supporting the work of governments and multilateral institutions, like the UN, the OSCE, and others, as well as campaigns against torture, particularly on the International Day against Torture. On that day, namely 26 June, every centre organizes activities in different parts of the world to sensitize people and raise awareness of the problem of torture. And of course, every centre also carries out research activities and trains health and legal professionals. The goal is, among others, to implement the Istanbul Protocol, a set of guidelines for the assessment of persons who allege torture and ill-treatment, to bring the perpetrators to justice and to secure reparations for victims.

However, I would like to stress that the human and economic resources available to meet the increased incidence and prevalence of torture are limited. Of some 20 million refugees and internally displaced people, around five million are thought to have been subjected to various forms of torture. As mentioned earlier,

the IRCT member centres manage to treat around 100,000 victims annually. Clearly, this is not enough. We therefore lobby various institutions, urging them to provide both human and financial resources to rehabilitate torture victims all over the world, and we are working hard to secure these resources. One of the main challenges today is that while the prevalence of torture is very high and unfortunately even increasing, the financial and human resources to fight it and rehabilitate its victims are not meeting the needs, for the scale of torture is overwhelming and a valid macroscopic instrument to measure its impact not only at the individual level but also at both the family and community levels is virtually non-existent.

We must understand that human beings interact with their environment, and that well-being results in a feeling of hope and altruism. We all know that an oppressive political environment is damaging to both individuals and communities. We know, too, that health professionals must have an active role in upholding basic human rights, and must join communities in their struggle to combat torture and impunity and to promote dignity and peace.

“In truth the leitmotiv”: the prohibition of torture and other forms of ill-treatment in international humanitarian law

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Abstract

The principle of humane treatment, as Jean Pictet wrote in 1958, is in truth the leitmotiv of the four Geneva Conventions of 1949. Article 3 common to these Conventions and other provisions of International Humanitarian Law embody this absolute and minimum rule by prohibiting torture, cruel or inhuman treatment and outrages upon personal dignity. These notions can be interpreted in meaningful and practical ways through the existing instruments and jurisprudence on the prohibition of ill-treatment. Their assessment must take into account the need to respect the human being in all his or her physical, mental and moral integrity, mindful of all the circumstances of the case.

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Introduction

The obligation of any party to a conflict to treat anyone in their power humanely, or with humanity, stands at the core of international humanitarian law (IHL).¹ Jean Pictet wrote in 1958 that the principle of humane treatment “is in truth the leitmotiv of the four Geneva Conventions”.² No war, no imperative reason of national security, no military necessity can justify inhumane treatment.

Article 3 common to the Geneva Conventions (Common Article 3) embodies this absolute and minimum rule of IHL. Persons in the hands of the party must “in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”, and “to this end, the following acts are and shall remain prohibited at any time and in any place whatsoever ... violence to life and person, in particular ... mutilation, cruel treatment and torture ... outrages upon personal dignity, in particular humiliating and degrading treatment”.

The notions “torture”, “cruel treatment” and “outrages upon personal dignity” are analysed in the following article. Jurisprudence, especially of the International Criminal Tribunal for the former Yugoslavia (ICTY), but also of other bodies, has given a clearer contour to these terms and has made it possible to give illustrations as to the prohibited behaviour. The analysis will begin by delineating the framework within which the notions of ill-treatment in Common Article 3 are to be understood. It then describes the notions of “cruel and inhuman treatment”, “torture” and “outrages upon personal dignity”. The last part of the article deals with some examples of treatment contrary to the prohibition of ill-treatment.

The article concentrates on Common Article 3, which contains all three forms of ill-treatment discussed here. The meaning of the notions contained in Common Article 3 is, however, the same as in other provisions which speak of torture or cruel, inhuman, degrading or humiliating treatment. So throughout the analysis, while the emphasis is put on Common Article 3, the definitions described would equally apply to other provisions of IHL, such as Articles 50, 51, 130 and 147 of the four Geneva Conventions respectively, Article 75 of Additional Protocol I Article 4 of Additional Protocol II.

Lastly, it should also be emphasized that the prohibition of ill-treatment does not mean that other treatment which does not reach the threshold of ill-treatment is necessarily lawful. Indeed, other treatment such as intimidation, insults or exposure to public curiosity,³ unpleasant or disadvantageous treatment,⁴ or coercion⁵ are equally prohibited.

1 See, e.g., Article 4 of the Hague Regulations of 1907, Article 13 of the Third Geneva Convention (GC III), Articles 4, 27 of the Fourth Geneva Convention (GC IV).

2 Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. IV, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (hereinafter *Commentary on GC IV*), ICRC, Geneva, 1958, p. 204.

3 Article 13 of GC III.

4 Article 17 of GC III.

5 Articles 17, 99 of GC III; Article 31 of GC IV.

General remarks on Common Article 3

Three strictly prohibited forms of ill-treatment

Common Article 3 prohibits three different forms of ill-treatment: torture, cruel and inhuman treatment, and outrages upon personal dignity. As we shall see, these notions are not identical. In certain respects their legal consequences vary, especially with regard to criminal law obligations such as the exercise of universal jurisdiction. However, the distinction is of no consequence in terms of the prohibition enshrined in that article. Common Article 3 absolutely prohibits all three forms of ill-treatment in all circumstances. Similarly, international human rights law absolutely prohibits all forms of ill-treatment; this prohibition also applies in situations of emergency, such as war or the threat of war.⁶ No situation exists in which torture would be prohibited but another form of ill-treatment allowed.

Sources of interpretation for Common Article 3

To interpret Common Article 3 and outline its material content, this analysis draws on a number of sources. First, the article itself and its various notions have been interpreted by the International Criminal Tribunals for the former Yugoslavia and for Rwanda, and considerable guidance can be found in their jurisprudence.

Second, the notions of ill-treatment in Common Article 3 must also draw on international human rights treaties, soft-law instruments and jurisprudence. Indeed, while there are a number of differences between international human rights law and international humanitarian law, the notions of ill-treatment are so similar in both bodies of law that the interpretation of one body of law influences the other and *vice versa*.⁷

The differences between human rights law and international humanitarian law are in particular as follows: while human rights law is applicable at all times, binding only states and many of its provisions being derogable, international humanitarian law applies only in situations of armed conflict, also binds non-state parties and is in principle not derogable.⁸ The prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment

6 International Covenant on Civil and Political Rights (ICCPR), Article 4; European Convention on Human Rights (ECHR), Article 15; American Convention on Human Rights (ACHR), Article 27; Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 2(2). Situations of emergency include situations of terrorist threat, see Inter-American Court of Human Rights (IACtHR), *Cantoral Benavides v. Peru*, Judgment of 18 August 2000, Series C, No. 69, para. 95; European Court of Human Rights (ECtHR), *Chahal v. United Kingdom*, Judgment of 15 November 1996, Report 1996-V, para. 79.

7 See, e.g., International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Furundzija*, Case No. IT-95-17/1 (Trial Chamber), 10 December 1998, para 159.

8 With the sole exception of Article 5 GC IV, which in any case preserves the obligation to treat all persons with humanity.

is not derogable in international human rights law.⁹ It must be respected and upheld even in situations of armed conflict. Thus the only difference between international human rights law and international humanitarian law is that under the latter, non-state parties to the conflict can also be held accountable for torture and other forms of ill-treatment committed in the context of the conflict, regardless of whether they act with the consent or acquiescence of the state,¹⁰ whereas to find a violation of human rights law, the act must have been committed by, or at the instigation of or with the consent or acquiescence of, a state agent.¹¹ In terms of the treatment required, however, there is no difference between the notions in both bodies of law.¹²

Necessarily general definitions

The definitions of torture and cruel, inhuman or degrading treatment and outrages upon personal dignity are necessarily general, for several reasons.

First, the definitions are meant to cover a wide range of situations so that they must remain relatively flexible to do so. Consideration must be given not to an abstract act, but to the situation of a person and all the surrounding circumstances. While it is possible to say in abstract that some acts are always prohibited (e.g. rape or mutilation), it is impossible to define in advance a list of lawful acts for all persons, regardless of such factors as the age, sex, culture and state of health of the individual and without taking into account the particular circumstances of the case. It is equally unworkable to draw up a finite list of interrogation methods that would be acceptable at all times, because such a list would necessarily have to indicate that the accumulation of several methods can amount to various forms of ill-treatment.¹³

9 ICCPR, Article 4; CAT, Article 2(1); ECHR, Article 15; ACHR, Article 27.

10 See the wording of Common Article 3, “each Party to the conflict”; ICTY, *Prosecutor v. Kunarac and Others*, Cases No. IT-96-23 and IT-96-23/1 (Trial Chamber), 22 February 2001, para. 491, confirmed by the Appeals Chamber Judgment, 12 June 2000, para. 148; ICTY, *Prosecutor v. Kvočka and Others*, Case No. IT-98-30/1-A (Appeals Chamber), 28 February 2005, para. 284. For an analysis of the development of the ICTY’s jurisprudence, see Jill Marshall, “Torture committed by non-state actors: The developing jurisprudence from the ad hoc Tribunals”, *Non-State Actors and International Law*, No. 3, Vol. 5 (2005), pp. 171–82.

11 This is without prejudice to the obligation of *non-refoulement* (prohibition of forced expulsion) when the person faces a risk of ill-treatment by a non-state party; see, e.g., the Judgment of the European Court of Human Rights in *H.L.R. v. France*, Judgment of 29 April 1997, Reports 1997-III. The human rights violation in these cases consists in the transfer of the person, not in the treatment that the person faces by the non-state party.

Further, states have positive obligations to prevent, investigate and sanction acts of non-state actors which impair the enjoyment of human rights; see General Comment No 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 10.

12 There is sometimes a misconception that applying IHL instead of human rights could lead to torture and ill-treatment, see, e.g., Robert Verkaik, “Human rights in Iraq: a case to answer”, *Independent*, 29 May 2007, available at <http://news.independent.co.uk> (last viewed 29 May 2007).

13 Besides, certain methods of interrogation would amount to coercion prohibited under IHL, see Articles 17, 99 of GC III; Article 31 of GC IV; “Coercion” covers “all cases, whether the pressure is direct or indirect, obvious or hidden (as for example a threat to subject other persons to severe measures, deprivation of ration cards or of work)”, *Commentary on GC IV*, above note 2, p. 219.

Second, people subjected to ill-treatment almost invariably suffer not just one isolated act, but experience a number of acts and conditions which, together, amount to ill-treatment.¹⁴ It is hence often impossible to infer from the jurisprudence of international bodies that specific acts constitute torture or another form of ill-treatment, for the very reason that they are not confronted with such isolated acts. This jurisprudence simply reflects the reality of ill-treatment.

Lastly, the various notions of ill-treatment also evolve with the passage of time, and acts that might not have been considered as torture or ill-treatment in the past might be considered so now.¹⁵ The 1958 Commentary on the Geneva Conventions acknowledges this by stating that “[i]t seems useless and even dangerous to attempt to make a list of all the factors which make treatment ‘humane’”,¹⁶ and

It is always dangerous to try to go into too much detail – especially in this domain. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted [in Common Article 3] is flexible, and, at the same time, precise.¹⁷

Necessarily overlapping notions

As we shall see, there is no difference in meaning between cruel and inhuman treatment. Also, the lines between degrading treatment, cruel or inhuman treatment and torture are fluid. While the wording of the Geneva Conventions as well as jurisprudence suggest that cruel and inhuman treatment is of a nature to cause more serious harm than degrading treatment, and that torture is of a nature to cause more severe harm than cruel and inhuman treatment, it is extremely difficult in practice to draw a clear line between the thresholds of suffering.

None of the above means, however, that the notions are so unclear that they are impossible to define or observe in practice. There are numerous

14 See references below at notes 130–148; Franz Viljoen and Chidi Odinkalu, *The Prohibition of Torture and Ill-treatment in the African Human Rights System*, OMCT Handbook Series no. 3, Geneva 2006, p. 38, who note that the cases submitted to the African Commission on Human and Peoples’ Rights usually involve facts that are “very crude and cumulative, and clearly reveal excessive ill-treatment or punishment, such that a careful judicial analysis is rendered redundant”.

15 See ECtHR, *Selmouni v. France*, Judgment of 28 July 1999, Reports 1999-V, para. 101: “the Court considers that certain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.” The IACtHR follows the same approach in *Cantoral Benavides v. Peru*, above note 6, para. 99.

16 *Commentary on GC IV*, above note 2, p. 204.

17 *Commentary on GC IV*, above note 2, p. 39.

indicators, lowest thresholds and cases which help to define more clearly what falls under the different definitions in international law. To demand more certainty would be to misunderstand the very nature of ill-treatment.

Common Article 3 is only a minimum standard of treatment

Lastly, before entering into the content of the notions in Common Article 3, it must be recalled that this provision only constitutes a minimum standard to be observed, and that the parties to the conflict are encouraged to set a higher standard. In particular, it does not affect the other obligations under treaty law and customary international law with regard to conditions of detention.

Cruel or inhuman treatment

The notions of “cruel” and “inhuman” treatment are synonymous. Inhuman treatment is not explicitly mentioned in Common Article 3, which only stipulates that persons taking no active part in hostilities “shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”. The notion of inhuman treatment appears in other articles of the Geneva Conventions, namely the grave breaches provisions in Articles 50, 51, 130 and 147 of the four Geneva Conventions respectively, and in Article 75 of Additional Protocol I and Article 4 of Additional Protocol II.

However, international jurisprudence and state practice show that no differentiation can be made between cruel treatment as prohibited in Common Article 3 and inhuman treatment in the grave breaches provisions. The ICTY has explicitly said that there is no difference between cruel and inhuman treatment.¹⁸ The Elements of Crimes of the Rome Statute of the International Criminal Court confirm this approach. Thus cruel and inhuman treatment is used interchangeably.

Serious physical or mental suffering or serious attack on human dignity

To qualify as cruel or inhuman treatment, an act must cause suffering of a serious nature. It must go beyond mere degradation or humiliation.

In this vein, the ICTY defines inhuman treatment as “an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity”.¹⁹ The European Court of Human Rights (ECtHR) does

18 ICTY, *Prosecutor v. Delalic and Others*, Case No. IT-96-21 (Trial Chamber), 16 November 1998, para. 552; see also *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2 (Trial Chamber), 26 February 2001, para. 265; *Prosecutor v. Blaskic*, Case No. IT-95-14 (Trial Chamber), 3 March 2000, para. 186.

19 ICTY, *Prosecutor v. Delalic and Others*, above note 18, para. 543; *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T (Trial Chamber) 31 March 2003, para. 246; *Prosecutor v. Kordic and Cerkez*, above note 18, para. 256; *Prosecutor v. Blaskic*, above note 18, paras. 154–155.

not always follow the same wording in the way that the ICTY does, but it does require “a minimum level of severity” for treatment to attain the threshold of ill-treatment.²⁰ The Inter-American Court of Human Rights (IACtHR) has followed the ICTY’s definition.²¹

Again, the notion of human dignity is central to the definition. As explained in the ICRC Commentary with regard to the grave breaches provisions of Articles 130 of the Third Geneva Convention (GC III) and 147 of the Fourth Geneva Convention (GC IV), inhuman treatment is a wider concept than just an attack on physical integrity or health. It is intimately linked with the general rule that every person must be treated with respect for human dignity. An example given in the Commentary of inhuman treatment violating human dignity is that of a prisoner of war or interned civilian completely cut off from the outside world and in particular from his or her family, or of measures which would cause great injury to his or her human dignity.²²

General and circumstantial criteria

As far as the seriousness of the physical or mental suffering is concerned, the ICTY considers that, as for the crime of torture, “whether particular conduct amounts to cruel treatment is a question of fact to be determined on a case by case basis”,²³ no durational requirement being built into the definition of the crime.²⁴ It has in particular found that conditions of detention can amount to cruel and inhuman treatment. The Geneva Conventions and Protocols contain numerous provisions on the minimal acceptable conditions of detention.²⁵

This jurisprudence echoes that of human rights bodies and texts. The ECtHR has stated in general terms that

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the European Convention on Human Rights (ECHR). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.²⁶

It has considered treatment to be “inhuman” because,

20 ECtHR, *Ireland v. United Kingdom*, Judgment of 18 January 1978, Series A, No. 25, para. 162.

21 IACtHR, *Caesar v. Trinidad and Tobago*, Judgment of 11 March 2005, Series C, No. 13, para. 68.

22 Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. III, *Geneva Convention relative to Prisoners of War*, ICRC, Geneva 1958, p. 627 (1958), and *Commentary on GC IV*, above note 2, p. 598.

23 ICTY, *Prosecutor v. Limaj and Others*, Case No. IT-03-66-T (Trial Chamber), 30 November 2005, para. 232.

24 ICTY, *Prosecutor v. Naletilic and Martinovic*, above note 19, para. 300.

25 See ICTY, *Prosecutor v. Hadzihasanovic and Kubura*, Case No. IT-01-47-T (Trial Chamber), 15 March 2006, paras. 35–36, concerning the conditions of detention in Additional Protocol II.

26 See ECtHR, *Kudla v. Poland*, Judgment of 26 October 2000, paras. 90–94 with further references.

inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. On the other hand, the Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.²⁷

The African Commission on Human and Peoples’ Rights has clearly followed the ECtHR’s approach.²⁸

The Human Rights Committee has similarly relied on “all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim”.²⁹

The Inter-American Court of Human Rights has held that

The violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation.³⁰

In sum, to assess serious suffering for the purpose of ascertaining cruel or inhuman treatment all circumstances of the case are relevant. It may be committed in one single act or can result from a combination or accumulation of several acts which, taken individually and out of context, may seem acceptable. As said above, ill-treatment frequently does not take the form of an isolated act, but is composed of several factors. It cannot be stressed enough that the cumulative effect of the conditions and treatments can be critical.³¹ They include the manner and method or the institutionalization of the treatment, environment, duration, isolation, mental health or strength, cultural beliefs and sensitivity, gender, age, social or political background, past experiences, racial discrimination³² and the repetition or cumulative effect of one or several acts. This is not to say that the notion is completely contingent on the subjective feelings of an individual. Rather, the question is whether in general one can say that for any person in a situation

27 Ibid.

28 African Commission on Human and Peoples’ Rights (ACHPR), Communication 225/98, *Huri-Laws v. Nigeria*, Fourteenth Activity Report, (2000) AHRLR 273 (ACHPR 2000), para. 41.

29 Human Rights Committee (HRC), *Vuolanne v. Finland*, 2 May 1989, CCPR/C/35/D/265/1987, para. 9.2.

30 IACtHR, *Loayza Tamayo v. Peru*, Judgment of 17 September 1997, Series C, No. 33, para. 57. See also ECtHR, *Ireland v. United Kingdom*, above note 20, para. 167.

31 ECtHR, *Dougoz v. Greece*, Judgment of 6 March 2001, Reports 2001-II, para. 46; *Iovchev. v. Bulgaria*, Judgment of 2 February 2006, para. 137; Committee against Torture, “Concluding observations, Israel”, UN Doc. A/52/44, paras. 253–260, 9 May 1998, at paras. 255–257.

32 ECtHR, *Moldovan and others v. Romania (No. 2)*, Judgment of 12 July 2005, paras.110–113; racial discrimination can in itself amount to degrading treatment, see *East African Asians v. United Kingdom*, European Commission of Human Rights Report, 14 December 1973, Decision and Reports (DR) 78, p. 62.

comparable to that of the person subjected to the specific treatment, this treatment would cause serious mental or physical suffering. It is not necessary to rely on a completely subjective sensitivity. For instance past experiences, while individual, can have an objective impact on the assessment. If someone who has previously been submitted to a certain type of treatment is threatened again with such treatment, that threat can have a stronger impact than for a person who has not had such a past experience. So while the experience is completely subjective, it is objectively possible that this factor contributes to the suffering of any person in a similar position.

Certain specific acts that have been considered cruel or inhuman include such varied situations as lack of adequate medical attention,³³ “holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time”,³⁴ placing someone in the boot of a vehicle even in the absence of any other ill-treatment,³⁵ the so-called death-row phenomenon,³⁶ certain methods of punishment, especially corporal punishment,³⁷ certain methods of execution,³⁸ certain conditions of detention,³⁹ the imposition of the death penalty after an unfair trial,⁴⁰ involuntary sterilization,⁴¹ gender-based humiliation such as shackling women detainees during childbirth,⁴² or the use of electroshock devices to restrain persons in custody.⁴³

33 IACtHR, *Tibi v. Ecuador*, Judgment of 7 September 2004, Series C No. 114, para. 157; ECtHR, *Koval v. Ukraine*, Judgment of 19 October 2006, para. 82.

34 Principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988, (Body of Principles), available at http://www.unhcr.ch/html/menu3/b/h_comp36.htm (last visited 6 October, 2007).

35 IACtHR, *Castillo-Páez v. Peru*, Judgment of 3 November 1997, Series C, No. 34, para. 66; *Villagrán Morales v. Guatemala*, Judgment of 19 November 1999, Series C, No. 63, para. 164; *Gómez-Paquiyaauri Brothers v. Peru*, Judgment of 8 July 2004, Series C, No. 110, para. 109.

36 HRC, *Errol Johnson v. Jamaica*, Communication 588/1994, 27 March 1996, UN Doc. CCPR/C/56/D/588/1994, para. 8.4; ECtHR, *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A, No. 191, paras. 105–111.

37 International humanitarian law absolutely prohibits the use of corporal punishment: Articles 87(3), 89 and 108 of GC III, Articles 32, 118 and 119 of GC IV; Article 74 of AP I; Article 4 of AP II; see also HRC, *Osbourne v. Jamaica*, Communication 759/1997, 13 April 2000, UN Doc. CCPR/C/68/D/759/1997, para. 9.1; IACtHR, *Caesar v. Trinidad and Tobago*, above note 20), paras. 67–89; ACHPR, Communication 236/2000, *Curtis Francis Doebller v. Sudan*, Sixteenth Activity Report, (2003) AHRLR 153 (ACHPR 2003), paras. 42–44.

38 Committee against Torture, “Concluding observations, United States of America”, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 31.

39 See text below corresponding to notes 130–148.

40 ECtHR, *Öcalan v. Turkey*, Judgment of 12 May 2005 (Grand Chamber), paras. 168–175; Committee against Torture, “Concluding observations, Guatemala”, UN Doc. CAT/C/GTM/CO/4, 25 July 2006, para. 22.

41 Committee against Torture, “Concluding observations, Peru”, UN Doc. CAT/C/PER/CO/4, 25 July 2006, para. 23.

42 Committee against Torture, “Concluding observations, United States of America”, above note 38, para. 33.

43 *Ibid.*, para. 35.

It is important to stress that the suffering need not necessarily be physical. Mental suffering in itself can be of such a serious nature as to fulfil the requirement of cruel and inhuman treatment.⁴⁴ For instance, threats of torture can, but must not necessarily,⁴⁵ amount to cruel and inhuman treatment.⁴⁶ Another instance is witnessing others being ill-treated,⁴⁷ raped⁴⁸ or executed.⁴⁹ Again, this understanding derives from the inseparable link between the prohibition of ill-treatment and the obligation of humane treatment. Humane treatment is not confined to preserving a person’s physical integrity.

In this respect, the elimination of the element of “serious attack on human dignity” in the Elements of Crimes of the Rome Statute is problematic. This element of the jurisprudence of the ICTY⁵⁰ was deliberately left out of the definition of inhuman treatment in the Elements of Crimes of the Rome Statute, because it was felt that attacks on human dignity would be covered by the war crime of “outrages upon personal dignity”. However, even after the coming into force of the Rome Statute, the ICTY has not abandoned the element of “serious attack on human dignity”.⁵¹

Torture

Apart from Common Article 3, the prohibition of torture is also enshrined in the grave breaches provisions of Articles 50, 51, 130 and 147 respectively of the four Geneva Conventions, Article 75 of Additional Protocol I and Article 4 of Additional Protocol II. In the 1958 Commentary on the Fourth Geneva Convention, torture was still understood as “the infliction of suffering on a person to obtain from that person, or from another person, confessions or information”.⁵² Both law and jurisprudence have evolved since that definition, and

44 IACtHR, *Loayza Tamayo v. Peru*, above note 30, para. 57; ECtHR, *Ireland v. United Kingdom*, above note 20, para. 167; Committee against Torture, “Concluding observations, United States of America”, above note 38, para. 13.

45 ECtHR, *Hüsnüye Tekin v. Turkey*, Judgment of 25 October 2005, para. 48.

46 IACtHR, *Villagrán Morales v. Guatemala*, above note 35, para. 165; *Case of the “Juvenile Reeducation Institute” v. Paraguay*, Judgment of 2 September 2004, Series C, No. 112, para. 167; Inter-American Commission on Human Rights (IACmHR), *Prada González and Bolaño Castro v. Colombia*, Case 11.710, Report No. 63/01, Annual Report OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 34.

47 IACtHR, *Caesar v. Trinidad and Tobago*, above note 21, para. 78.

48 IACmHR, *Ana, Beatriz and Celia González Pérez v. Mexico*, Case 11.565, Report No. 53/01, Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 53.

49 IACmHR, *Tomas Porfirio Rondín v. Mexico (“Aguas Blancas” Case)*, Case 11.529, Report 49/97, Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 76.

50 See note 19 above.

51 See ICTY, *Prosecutor v. Blaskić*, above note 18, paras. 154–155; *Prosecutor v. Kordić and Cerkez*, above note 18, para. 256; *Prosecutor v. Naletilić and Martinović*, above note 19, para. 246. Keeping the notion of “serious attack” in the definition of inhuman treatment would mean that it would constitute a grave breach according to Articles 50, 51, 130 and 147 respectively of the four Geneva Conventions. With regard to Common Article 3, however, the discussion has no practical consequence, since “serious attacks” would in any case be covered by the notion of “outrages upon personal dignity” and therefore be absolutely prohibited.

52 *Commentary on GC IV*, above note 2, p. 598.

treaty law and practice now give torture a broader meaning, including in particular a wider range of purposes.

Treaty definitions of torture

Torture is explicitly defined in human rights law in Article 1 of the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 2 of the Inter-American Convention to Prevent and Punish Torture, and Article 1 of the Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is further defined in Article 7(2)(e) of the Rome Statute of the International Criminal Court, complemented by its Elements of Crimes. While the Inter-American Convention has a broader definition which applies to states parties to the convention, the definition of the Convention against Torture has influenced subsequent international jurisprudence and constitutes the starting point for the interpretation of torture in international humanitarian law as well, and in particular in Common Article 3.

Article 1 of the Convention against Torture reads:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity ...

It thus contains four elements: (i) intention; (ii) the infliction of severe mental or physical pain or suffering, (iii) for a purpose such as punishment, information, confession, intimidation, coercion or any reason based on discrimination of any kind; and (iv) by or at the instigation of a person in an official capacity.

The ICTY considers this definition to reflect customary international law, as it includes the definitions contained in the Torture Declaration and the Inter-American Convention.⁵³ However, it has adapted this definition in its case law for the purpose of international criminal law relating to armed conflicts. While it

53 ICTY, *Prosecutor v. Zejnil Delalic and Others*, Case No. IT-96-21-T (Trial Chamber), 16 November 1998, para. 459.

Article 1 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment reads:

1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or

originally kept the requirement that the perpetrator must be a public official,⁵⁴ it has meanwhile abandoned this element to adapt its case law to international humanitarian law, especially as applicable in non-international armed conflict, where torture can also be committed by a non-state party.⁵⁵ Third, the Tribunal has retained the purposive element from the definition in Article 1 of the CAT and held that this element and the level of severity of the pain or suffering are the two elements that distinguish torture from inhuman treatment.⁵⁶

Specific purpose as a constitutive element of torture

A constitutive element of torture is that it is not only an intentional act, but is committed for a specific purpose or any reason based on discrimination of any kind (see Article 1 of the Torture Convention). While the choice to use the purposive element to distinguish torture from cruel, inhuman or degrading treatment entails a certain limitation of the concept,⁵⁷ it is difficult to argue, against the express definition of the CAT, transferred to international humanitarian law by the ICTY and the Elements of Crimes of the Rome Statute, that the definition of torture in international humanitarian law would not require a purposive element. The requirement of a purpose clearly reflects the position of states.

As far as the purposive element is concerned, the purposes mentioned in Article 1 of the Torture Convention do not constitute an exhaustive list. This is confirmed by the wording of Article 1 of the CAT, which speaks of “such purposes as”. The non-exhaustive list was taken up in the Elements of Crimes for the Rome

incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.’

Article 2 of the Inter-American Convention to Prevent and Punish Torture reads:

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

54 ICTY, *Prosecutor v. Furundžija*, above note 7, para. 162, and Appeals Chamber Judgment, 21 July 2000, para. 111.

55 ICTY, *Prosecutor v. Kunarac and Others*, above note 10, para. 491; confirmed by the Appeals Chamber Judgment, 12 June 2000, para. 148; *Prosecutor v. Kvočka and Others*, above note 10, para. 284.

56 ICTY, *Prosecutor v. Kunarac and Others*, above note 10, para. 142; *Prosecutor v. Krnojelac*, Case No. IT-97-25 (Trial Chamber), 15 March 2002, paras. 179, 180; *Prosecutor v. Brđjanin*, Case No. IT-99-36-T (Trial Chamber), 1 September 2004, para. 486. This is in conformity with international human rights law: as is clearly stated in Article 1(2) of the Torture Declaration and recognized in the title of the Convention against Torture, torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

57 See the Report of the United Nations Special Rapporteur on Torture on his visit to the Russian Federation, UN Doc. E/CN.4/1995/34/Add.1, 16 November 1994, para. 71.

Statute of the International Criminal Court.⁵⁸ The purpose cannot, however, be of any sort, but must have “something in common with the purposes expressly listed”.⁵⁹ The ICTY also considers that the prohibited purpose “need be neither the sole nor the main purpose of inflicting the severe pain or suffering”.⁶⁰

In practice, this leads to an extremely wide notion of purpose. Indeed, “intimidating or coercing him or a third person” and “reason based on discrimination of any kind” are such wide notions that most deliberate acts causing great suffering to a specific person, especially in detention, will be caused for one of these purposes or a purpose very similar to this one.

Severe physical or mental suffering

With regard to the severity of the treatment, the assessment must – as for ill-treatment – be based both on objective criteria and on criteria that pertain to the circumstances of the particular case. The threshold of pain required by the ICTY definition (“severe” rather than “serious”) is higher than that for cruel and inhuman treatment.

The Elements of Crimes of the Rome Statute for the International Criminal Court, on the other hand, require “severe physical or mental pain or suffering” for both forms of ill-treatment.⁶¹ In other words, they require a higher threshold of pain for both forms and only differentiate between the two according to the purpose of the treatment. This was indeed the compromise reached as part of a package, even though the majority of delegations felt that the threshold of “severe” would be too high and inconsistent with the Statute.⁶²

Along similar lines as the Elements of Crimes, some experts have challenged the necessity for a hierarchy of suffering between inhuman treatment and torture.⁶³ For these authors, the only distinguishing element between torture and inhuman treatment should be the purpose required for torture. An argument in favour of this doctrine is certainly that it is difficult to define the threshold of intensity between serious suffering and severe suffering. It is also somewhat absurd to think of treatment more severe than “inhuman”.⁶⁴

58 Elements of Crimes for Article 8(2)(a)(ii) and Article 8(2)(c)(i) of the Rome Statute.

59 J. Herman Burger and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff, The Hague 1988, p. 118.

60 ICTY, *Prosecutor v. Kvočka and Others*, above note 10, para. 153; *Prosecutor v. Kunarac and Others*, above note 10, para. 486, and Appeals Chamber, 12 June 2002, para. 155.

61 Emphasis added. All other elements, concerning the link to armed conflict and the *mens rea*, are not addressed here, as they are irrelevant to the interpretation of Common Article 3.

62 Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, 2003, ICRC, Cambridge, p. 63.

63 Malcolm Evans, “Getting to grips with torture”, in Association for the Prevention of Torture, *The Definition of Torture*, Geneva 2001, pp. 33–49; Nigel Rodley, “The definition(s) of torture in international law”, *Current Legal Problems*, No. 55 (2002), pp. 467–93; Manfred Nowak, “Challenges to the absolute nature of the prohibition of torture and ill-treatment”, *Netherlands Quarterly of Human Rights*, Vol. 23/4 (2005), pp. 674–88, at p. 678; Manfred Nowak, “What practices constitute torture? US and UN standards”, *Human Rights Quarterly*, No. 28 (2006), pp. 809–841, at p. 822.

The wording of the different treaties leaves the question open. Article 16 of the Convention against Torture speaks of “acts of cruel, inhuman or degrading treatment which do not *amount* to torture” (emphasis added), which could imply a higher intensity of treatment for torture than for cruel, inhuman or degrading treatment. However, it could also mean that the purpose required for torture constitutes the aggravating element and it seems that the question was left open during the drafting of the Convention.⁶⁵

Even after the adoption of the Elements of Crimes, the ICTY has continued to require an illegitimate purpose as well as a differentiated threshold of suffering to distinguish between torture and cruel and inhuman treatment. The European Court of Human Rights also requires a higher threshold of pain for torture, in which the purpose of the infliction is a relevant, sometimes a determining,⁶⁶ factor.⁶⁷ The Inter-American Commission and Court, like the ICTY, require a higher intensity of pain for torture than for cruel, inhuman or degrading treatment, as well as a purpose.⁶⁸ The Human Rights Committee, on the other hand, does not attempt to distinguish between the two.⁶⁹

The main consequence of using the sole criterion of purpose to distinguish between torture and cruel and inhuman treatment is that in situations in which inhuman treatment is inflicted for a purpose, it automatically amounts to torture. Considering the very wide definition of purpose, which includes almost any purpose (especially those of such broad intent as to intimidate or coerce),⁷⁰ this would leave only an extremely narrow margin for cruel or inhuman treatment between torture and degrading treatment.

As pointed out above, jurisprudence has hitherto not discarded the intensity of suffering as an element distinguishing torture from cruel or inhuman treatment, but it is not excluded that this may change in the future, especially if the International Criminal Court follows the clear wording of the Elements of Crimes for Article 8(2)(c)(i) of the Rome Statute. But if it does so, it should not be at the cost of raising the threshold of severity required for treatment to be deemed cruel or inhuman.

64 Evans, above note 63, pp. 33 ff., esp. p. 49.

65 Burger and Danelius, above note 59, p. 150, only refer to the purpose as a distinctive feature; see also the account in Rodley, above note 63.

66 ECtHR, *Kismir v. Turkey*, Judgment of 31 May 2005, paras. 129–132.

67 ECtHR, *Ireland v. United Kingdom*, above note 20, para. 167; *Aksoy v. Turkey*, Judgment of 18 December 1996, Reports 1996-VI, para. 64; *Salman v. Turkey* [GC], Judgment of 27 July 2000, Reports 2000-VII, para. 114; *Corsacov. v. Moldova*, Judgment of 4 April 2006, para. 63; *Menesheva v. Russia*, Judgment of 9 March 2006, para. 60. For an analysis of the jurisprudence of the ECtHR see Roland Bank, “Das Verbot von Folter, unmenschlicher oder erniedrigender Behandlung oder Strafe”, in Rainer Grote and Thilo Mahraun (eds.), *EMRK/GG, Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, 2006, pp. 479–534.

68 IACtHR, *Caesar v. Trinidad and Tobago*, above note 21, paras. 50, 68, 87.

69 HRC, General Comment 20 on Article 7, 10 March 1992, refers in para. 4 to the “nature, purpose and severity” of the treatment; Rodley, above note 63, points out that it is impossible to infer any general criteria from the Human Rights Committee’s early case law.

70 ICTY, *Prosecutor v. Kvočka and Others*, above note 10, para. 140; ICTR, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, para. 682.

Again, in order to assess the severity of the pain, all the circumstances of the case have to be considered.⁷¹ The assessment of torture is based on a number of factual elements, such as environment, duration, isolation, mental health or strength, cultural beliefs and sensitivity, gender, age, social or political background, or past experiences. It may be committed in one single act or can result from a combination or accumulation of several acts which, taken individually and out of context, may seem acceptable. Relevant factors include “the nature and context of the infliction of pain”, “the premeditation and institutionalisation of the ill-treatment”, “the manner and method used”, and “the position of inferiority of the victim”.⁷² The period of time, the repetition and various forms of mistreatment and the severity should be assessed as a whole.⁷³ “Permanent injury is not a requirement for torture; evidence of the suffering need not even be visible after the commission of the crime.”⁷⁴ As with all forms of ill-treatment, “in certain circumstances the suffering can be exacerbated by social and cultural conditions and the evaluation should take into account the specific social, cultural and religious background of the victims when assessing the severity of the alleged conduct.”⁷⁵

Some acts meet the threshold of severity per se, as they necessarily imply severe pain or suffering. This is the case, in particular, for rape.⁷⁶ Other examples of torture in jurisprudence include beating followed by detention for three days where food and water and the possibility of using a lavatory are denied,⁷⁷ electric shocks,⁷⁸ burying alive,⁷⁹ suffocation under water,⁸⁰ suspension by the wrists,⁸¹ severe beatings,⁸² especially beatings on the soles of the feet,⁸³ mock executions,⁸⁴

71 ICTY, *Prosecutor v. Brđjanin*, above note 56, para. 483.

72 ICTY, *Prosecutor v. Krnojelac*, above note 56, para. 182.

73 Ibid.

74 ICTY, *Prosecutor v. Brđjanin*, above note 56, para. 484; *Prosecutor v. Kvocka and Others*, above note 10, para. 148.

75 ICTY, *Prosecutor v. Limaj, Bala and Musliu*, above note 23, para. 237.

76 ICTY, *Prosecutor v. Brđjanin*, above note 56, para. 485; ICTR, *Prosecutor v. Jean-Paul Akayesu*, above note 70, para. 682; ECtHR, *Aydin v. Turkey*, Judgment of 25 September 1997, Reports 1997-VI, paras. 82–86; Committee against Torture, *T.A. v. Sweden*, UN Doc. CAT/C/34/D/226/2003, 27 May 2005, paras. 2.4, 7.3; IACmHR, *Raquel Martin de Mejia v. Peru*, Case 10.970, Report No. 5/96, Annual Report 1995, OEA/Ser.L/V/II.91 Doc. 7 rev. (1996), p. 185.

77 Committee against Torture, *Danilo Dimitrijevic v. Serbia and Montenegro*, UN Doc. CAT/C/35/D/172/2000, 29 November 2005, paras. 2.1, 2.2, 7.1, 7.2.

78 HRC, *Rodriguez v. Uruguay*, Communication 322/1988, 9 August 1994, CCPR/C/51/D/322/1988, paras. 2.1, 12.1; ACHPR, *Tshitenge Muteba v. Zaire*, Communication No. 124/1982, 24 July 1984, CCPR/C/OP/2 at 158 (1990), paras. 8.2, 12; ECtHR, *Çakici v. Turkey*, Judgment of 8 July 1999, Reports 1999-IV, para. 93; Committee against Torture, “Concluding observations, Switzerland”, UN Doc. CAT/C/CR/34/CHE, 21 June 2005, para. 4 (b) (i).

79 HRC, *Eduardo Bleier v. Uruguay*, Communication R.7/30, 23 May 1982, UN Doc. Supp. No. 40 (A/37/40) at 130 (1982), paras. 2.3, 12.

80 HRC, *Rodriguez v. Uruguay*, above note 78, paras. 2.1, 12.1.

81 ECtHR, *Aksoy v. Turkey*, above note 67, para. 64; HRC, *Torres Ramirez v. Uruguay*, Communication 4/1977, 23 July 1980, UN Doc. CCPR/C/OP/1 at 49 (1984), para. 2.

82 ECHR, *Selmouni v. France*, above note 15, para. 101.

83 ECtHR, *Aksoy v. Turkey*, above note 81, para. 64.

84 ECmHR, *The Greek Case*, Report of 5 November 1969, (1969) 12 Yearbook 186–510, at 501; HRC, *Tshitenge Muteba v. Zaire*, Communication No. 124/1982, 24 July 1984, CCPR/C/OP/2 at 158 (1990), paras. 8.2, 12.

threats to shoot or kill,⁸⁵ exposure of detainees under interrogation to severe cold for extended periods,⁸⁶ a combination of restraining in very painful conditions, hooding under special conditions, sounding of loud music for prolonged periods, threats, including death threats, violent shaking and using cold air to chill.⁸⁷

As with ill-treatment, there is no doubt that mental suffering on its own can be severe enough to amount to torture. Indeed, psychological methods of torture as well as the psychological effects of torture can cause suffering as severe as physical torture and its physical effects.⁸⁸ The ICTY has considered that being forced to watch serious sexual attacks inflicted on an acquaintance was torture for the forced observer.⁸⁹ It has held likewise with regard to threats of death causing severe mental suffering and falsely informing the victim that his father has been killed,⁹⁰ or obliging victims to collect the dead bodies of other members of their ethnic group.⁹¹

Outrages upon personal dignity, in particular humiliating and degrading treatment

Outrages upon personal dignity are prohibited in Common Article 3, Article 75 of Additional Protocol I and Article 4 of Additional Protocol II.

Serious humiliation, degradation or serious attack on human dignity

Outrages upon personal dignity have been defined in the Commentary on Article 75 of Additional Protocol I as “acts which, without directly causing harm to the integrity and physical and mental well-being of persons, are aimed at humiliating and ridiculing them, even forcing them to perform degrading acts”.⁹² The ICTY has found a definition closer to the wording of Common Article 3 and which distinguishes outrages upon personal dignity from cruel and inhuman treatment. It requires “that the accused intentionally committed or participated in an act or an omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity”.⁹³ Here, too, the

85 ECmHR, *The Greek Case*, above note 84, para. 501.

86 Committee against Torture, “Report of Mexico produced by the Committee under Article 20 of the Convention and reply from the Government of Mexico”, 30th Session, UN Doc. CAT/C/75 (2003), para. 165.

87 Committee against Torture, “Concluding observations, Israel”, above note 31, paras. 255–257.

88 IACtHR, *Maritza Urrutia v. Guatemala*, Judgment of 27 November 2003, Series C, No. 103, para. 93. On this subject see the article by Hernan Reyes, “The worst scars are in the mind: psychological torture” in this issue of the Review.

89 ECtHR, *Prosecutor v. Kvočka and Others*, above note 10, para. 149.

90 ICTY, *Prosecutor v. Naletilic and Martinovic*, above note 19, paras. 294–295.

91 ICTY, *Prosecutor v. Brđjanin*, above note 56, para. 511.

92 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhof, The Hague 1987, paras. 3047 ff.

93 ICTY, *Prosecutor v. Kunarac and Others*, above note 10, para. 161.

ICTY has retained an objective threshold⁹⁴ but takes into account subjective criteria, according to which “[t]he form, severity and duration of the violence, the intensity and duration of the physical or mental suffering, shall serve as a basis for assessing whether crimes were committed”.⁹⁵ In any case, while the humiliation and degradation must be “real and serious”, it need not be lasting.⁹⁶ No prohibited purpose such as those which characterize the crime of torture is required.⁹⁷

The Elements of Crimes of the Rome Statute define the material element of outrages upon personal dignity as an act in which “[t]he perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons” and “the severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity”. While this definition is of course tautological, it gives the indication that the violation does not require severe mental or physical pain but that, on the other hand, it has to be significant in order to be distinguished from a mere insult.

The European Court of Human Rights has considered that in determining whether a particular form of treatment is “degrading” it will have regard to “whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 [of the ECHR]”.⁹⁸ However, it has also held that the absence of an intention to debase or humiliate does not exclude a finding of degrading treatment.⁹⁹ The Inter-American Court of Human Rights has stated that “[t]he degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance.”¹⁰⁰

Examples of degrading treatment have been: treatment or punishment of an individual if it grossly humiliates the individual before others or drives him or her to act against his or her will or conscience;¹⁰¹ serious forms of racial discrimination;¹⁰² not allowing a prisoner to change his soiled clothes;¹⁰³ cutting off the hair and beard for punishment;¹⁰⁴ the use of human shields;¹⁰⁵ inappropriate conditions of confinement, performing subservient acts, being forced to relieve bodily functions in one’s clothing, or enduring the constant fear of being subjected to physical, mental or sexual violence¹⁰⁶.

94 Ibid., para. 162.

95 ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1 (Trial Chamber), 25 June 1999, para. 57.

96 ICTY, *Prosecutor v. Kunarac and Others*, above note 10, para. 501.

97 ICTY, *Prosecutor v. Kvočka and Others*, above note 10, para. 226.

98 ECtHR, *Raninen v. Finland*, Judgment of 16 December 1997, Reports 1997-VIII, para. 55.

99 ECtHR, *Peers v. Greece*, Judgment of 19 April 2001, Reports 2001-III, para. 74; *Kalashnikov v. Russia*, Judgment of 15 February 2002, Report 2002-VI, para. 95.

100 IACtHR, *Loayza Tamayo v. Peru*, above note 30, para. 57; IACmHR, Report No. 35/96, Case No. 10.832, *Luis Lizardo Cabrera v. Dominican Republic*, 19 February 1998, paras.77.

101 ECmHR, *Greek case*, above note 84, p. 186.

102 ECmHR, *East African Asian Cases*, above note 32, p. 76.

103 ECtHR, *Hurtado v. Switzerland*, Judgment of 28 January 1994, Series A, No. 280-A, para. 12.

104 ECtHR, *Yankov v. Bulgaria*, Judgment of 11 December 2003, ECHR 2203-XII, paras.114, 121.

105 ICTY, *The Prosecutor v. Aleksovski*, above note 95, para. 229.

106 ICTY, *The Prosecutor v. Kvočka and Others*, above note 10, para. 173.

“Humiliating” and “degrading” are synonymous

None of the tribunals have attempted to distinguish between humiliating and degrading treatment. Indeed, despite the wording of Common Article 3, which seems to distinguish between humiliating and degrading treatment (with the formulation “or”), it is hard to conceive of a logical difference between the two terms. The question whether there can conceivably be any treatment that would amount to outrages upon personal dignity but would not be humiliating or degrading (see the formulation “in particular” in Common Article 3) is of a rather academic nature, since both outrages upon personal dignity as well as humiliating and degrading treatment are prohibited by Common Article 3.

Further, the question arises whether the seriousness of the physical or mental suffering must attain a higher threshold to constitute inhuman treatment. The fact that the grave breaches provisions criminalize cruel and inhuman treatment but not outrages upon personal dignity indicates that this is the case. On the other hand, the definitions of cruel or inhuman treatment and of outrages upon personal dignity by the ICTY overlap, since it counts “serious attacks on human dignity” as belonging to both definitions. Indeed, the two notions do necessarily overlap. Depending on the particular circumstances of the case, treatment which is merely considered degrading or humiliating can easily turn into cruel and inhuman treatment if repeated over a certain period of time or committed against a person in a particularly vulnerable situation, or into torture if committed intentionally for an illegitimate purpose.

Specific situations and treatment, especially in detention

The following are but a few examples, taken mainly from jurisprudence, in which certain treatment or conditions of detention have been found to constitute torture or cruel, inhuman or degrading treatment or punishment. They do not constitute an exhaustive list, nor do they address all the elements of the particular situation. It would go beyond the scope of this analysis to consider all conditions and treatment in detention.

As said above, the wealth of jurisprudence and standards in human rights law is essential to understand treatment in detention from the perspective of the proliferation of torture and other forms of ill-treatment. Indeed, as the proliferation in human rights law also applies in armed conflict and overlaps with the proliferation under IHL, human rights jurisprudence and standards inform the legal assessment also in IHL. The reason why some examples are mentioned here is because detention – which is understood here in its broadest meaning, covering all forms of deprivation of liberty¹⁰⁷ – puts the person at particular risk of ill-treatment. This is all the more true for all forms of unlawful

¹⁰⁷ Administrative detention or internment during armed conflict, pre-trial detention, imprisonment after a criminal conviction and all forms of unlawful deprivation of liberty.

detention, such as incommunicado detention and clandestine detention or enforced disappearance.

The special vulnerability of detainees and the difficulty in proving what has happened during the time of detention have led human rights bodies to adopt rules imposing a high burden of proof upon the state authorities. For instance, the European Court of Human Rights has held that where a person is under the control of law enforcement officials, any injury that occurs to that person while under their control gives rise in principle to a strong presumption that the injury was caused by the officials.¹⁰⁸ Similarly, the Inter-American Court and Commission of Human Rights have held that if a person is illegally detained and thus under the absolute control of the authorities, then the state has to rebut the presumption that the person was ill-treated.¹⁰⁹

Incommunicado detention

Incommunicado detention is understood here as detention without contact with the world outside.¹¹⁰ This means that a person is incommunicado if he or she has no contact with family, friends, lawyer or independent doctor, even if the person has access to a court¹¹¹ and is being visited by the ICRC.

Numerous human rights bodies have found that prolonged incommunicado detention in itself amounts to ill-treatment or torture because of the mental suffering caused by the victim's uncertainty as to the length of detention, social isolation and denial of communication with family and friends.¹¹² Many have also concluded that incommunicado, clandestine or unacknowledged detention substantially increases the risk of torture or other forms of ill-treatment.¹¹³ Experience does in fact show that such forms of detention, when prolonged, almost invariably go hand in hand with ill-treatment.

108 ECtHR, *Salman v. Turkey*, above note 67; para. 100; *Günaydin v. Turkey*, Judgment of 13 October 2005, para. 29.

109 IACtHR, *Juan Humberto Sánchez v. Honduras*, Judgment of 7 June 2003, Series C, No. 99, paras. 97–100; IACmHR, *Joaquín Ortega et al. v. Guatemala*, Case 10.586, Report No. 39/00, Annual Report 1999, OEA/Ser.L/V/II.106 Doc. 6. rev. (1999), paras. 253–254.

110 Nigel Rodley, *The Treatment of Prisoners under International Law*, OUP, Oxford 2000, p. 334.

111 HRC, *Marais v. Madagascar*, 24 March 1983, UN Doc. CCPR/C/18/D/49/1979, para. 17.4.

112 See HRC, *General Comment 20 on Article 7*, 10 March 1992, UN Doc. HRI/GEN/1/Rev.7, para. 11; *El-Megreisi v. Libya*, UN Doc. CCPR/C/50/D/440/1990, 24 March 1994, para. 5.4; *Marais v. Madagascar*, 24 March 1983, UN Doc. CCPR/C/18/D/49/1979, para. 19; *Celis Laureano v. Peru*, 16 April 1996, UN Doc. CCPR/C/56/D/540/1993, para. 8.5; IACmHR, *Dayra María Levoyer Jiménez v. Ecuador*, Report No. 66/01, Case 1.992, 14 June 2001, para. 34; IACtHR, *Suárez Rosero v. Ecuador*, Judgment of 12 November 1997, Series C, No. 35, para. 91; *Velázquez Rodríguez v. Honduras*, Judgment of 29 July 1988, Series C, No. 4, para. 156; *Castillo Páez v. Peru*, above note 35, para. 192; ACHPR, Communication 250/2002, *Zegfeld and Ephrem v. Eritrea*, Seventeenth Activity Report, para. 55, available at: http://www.achpr.org/english/_info/index_activity_en.html (last visited 6 October 2007).

113 Committee against Torture, “Concluding observations, Spain”, UN Doc. CAT/C/CR/29/3, 23 December 2002, para. 10; Report of the UN Working Group on Arbitrary Detention, UN Doc. E/CN.4/2006/7, 12 December 2005, para. 57; Recommendations of the Special Rapporteur on Torture, UN Doc. E/CN.4/2003/68, 17 December 2002, para. 26 (g).

There is no entirely clear norm as to what “prolonged” means. Indeed, there are few indications in treaties as to when a person arrested or detained must be able to contact the outside world. Nonetheless, any person arrested or detained on a criminal charge has the right to be brought promptly before a judge or other officer with judicial power (ICCPR, Article 9(3)) and anyone detained has the right to challenge the lawfulness of the detention before a court for it to decide on the lawfulness thereof “without delay” (ICCPR, Article 9(4)). “Promptly” means, as a rule, no more than a few days.¹¹⁴ For this right to be exercised effectively, the person should have access to a lawyer.¹¹⁵ In any case, it should be a matter of days, not a matter of weeks. Similarly, communication with the family should be allowed without delay, which should not exceed a few days.¹¹⁶

Enforced disappearance

According to Article 1(2) of the UN Declaration on the Protection of All Persons from Enforced Disappearance, enforced disappearance constitutes torture or other cruel, inhuman or degrading treatment or punishment.¹¹⁷ This has been confirmed by numerous international bodies, either because they consider that the suffering caused by the disappearance and loss of contact with the outside world causes such serious suffering that it amounts to ill-treatment or because they have considered that enforced disappearance is inseparably linked to torture and ill-treatment.¹¹⁸

114 Human Rights Committee, General Comment 8 on Article 9, 30 June 1982, UN Doc. HRI/GEN/1/Rev.7, para. 2; HRC, *Terán Jijón v. Ecuador*, UN Doc. CCPR/C/44/D/277/1988, 8 April 1992, para. 5.3 (five days deemed excessive); see also *Kurbanov. v. Tajikistan*, UN Doc. CCPR/C/79/D/1096/2002, 12 November 2003, para. 7.2 (seven days excessive); ECtHR, *Aksoy v. Turkey*, above note 67, para. 78 (fourteen days excessive even in situation of emergency).

115 Principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles).

116 See Article 106 of GC IV (“As soon as he is interned, or at the latest not more than one week after his arrival ...”); Article 11 of GC IV; Body of Principles, Principle 15.

117 Enforced disappearance has been defined in Article 2 of the Convention for the Protection of all Persons from Enforced Disappearance (2006): “enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”; as well as in the UN Declaration on the Protection of All Persons from Enforced Disappearance (1992): “enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law”.

118 HRC, *Mojica v. Dominican Republic*, UN Doc. CCPR/C/51/D/449/1991, 10 August 1994, para. 5.7; *Celis Laureano v. Peru*, above note 112, para. 8.5; Report of the UN Working Group on Enforced and Involuntary Disappearances, UN Doc. E/CN.4/1435, 26 January 1981, para. 184; IACtHR, *Velázquez Rodríguez v. Honduras*, above note 112, para. 156; IACmHR, *Romer Morales Zagarra et al. v. Peru*, Cases 10.827 and 11.984, Report 57/99, 13 April 1999, OEA/Ser.L/V/II.95 Doc. 7 rev., p. 1013 (1998), paras.71, 72; *Ampara Tordecilla Trujillo v. Colombia*, Case 10.337, Report 7/00, OEA/Ser.L/V/II.106 Doc. 3 rev. at 423 (1999), para. 37.

Furthermore, enforced disappearance not only constitutes ill-treatment for the disappeared person or creates a situation where the person will be subjected to ill-treatment; it can also constitute cruel or inhuman treatment for the members of that person's family, owing to the mental anguish endured by close family members when a person disappears and the seriousness of its effects on their physical and mental well-being, who can therefore also be considered victims of inhuman treatment.¹¹⁹

Conditions of detention and ill-treatment

The obligation in Common Article 3 to treat persons in detention humanely is echoed in some human rights treaties, which stipulate that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."¹²⁰ It is, of course, complemented by other IHL rules on conditions of and treatment in detention as well as procedural safeguards in detention.

People deprived of their liberty are at double risk of being subjected to ill-treatment, namely though conditions of detention which debase and dehumanize them and acts by prison personnel or others which amount to torture or ill-treatment. Here, as above, "objective" conditions of detention are not the only relevant factors to determine a violation of Common Article 3. The special vulnerability of certain persons, for instance of minors, must also be taken into account.¹²¹

Detention in itself brings with it severe restrictions for the detainees and a certain level of suffering inherent in the deprivation of liberty. However, it must be carried out in a manner that respects the dignity of the detainee.¹²² In international humanitarian law, Article 5 of Additional Protocol II sets out conditions of detention and standards of treatment in detention which must be respected as a minimum at all times. For international armed conflict, there are numerous provisions on the treatment of persons deprived of liberty, which all contribute to their treatment with humanity.¹²³ In addition, numerous international treaties and soft-law instruments have been developed in order to set out the minimum

119 HRC, *Almeida de Quinteros v. Uruguay*, 15 October 1982, UN Doc. CCPR/C/OP/2, paras. 14, 16; ECtHR, *Kurt v. Turkey*, Judgment of 25 May 1998, Reports 1998-III, para. 174; *Bazorkina v. Russia*, Judgment of 27 July 2006, para. 139 (unreported); IACtHR, *Bámaca Velázquez v. Guatemala*, Judgment of 25 November 2000, Series C, No. 70, para. 129; ACHPR, Communications 222/98, 229/98, *Law Office of Ghazi Sulaiman v. Sudan*, Sixteenth Activity Report, (2003) AHRLR 134 (ACHPR 2003), para. 62. Only those family members who share a relationship of personal affection and closeness, according to ECtHR, *Çakici v. Turkey*, above note 78, para. 98; IACtHR, *Children's Rehabilitation v. Paraguay*, Judgment of 2 September 2004, Series C, No. 112, para. 191.

120 ICCPR, Article 10; ACHR, Article 5(2).

121 See Article 37 of the Convention on the Rights of the Child; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the General Assembly in resolution 45/113 of 14 December 1990; IACtHR, *Bulacio v. Argentina*, Judgment of 118 September 2003, Series C, No. 1000, para. 126.

122 ICCPR, Article 10; ACHR, Article 5(2).

123 See, e.g., Articles 13–16, 20, 22, 25–38, 49, 51–53, 69–71 of GC III, and Articles 25, 27, 31–34, 76, 83–95, 103, 106–107, 119, 124, 127 of GC IV.

standards that must be provided to all persons in detention, such as the Standard Minimum Rules for the Treatment of Prisoners (SMRTP), the Basic Principles for the Treatment of Prisoners (BPTP), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, the Code of Conduct for Law Enforcement Officials, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the European Prison Rules (EPR), and the Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). These standards are to be upheld, regardless of the reason for the imprisonment and the state’s budgetary constraints.¹²⁴ They complement and illustrate the obligation of humane treatment in international humanitarian law and human rights law insofar as their purpose is to prevent ill-treatment.

In certain cases, conditions of detention are so inimical to human dignity that they not only infringe such minimum rules but constitute degrading treatment, cruel or inhuman treatment, or even torture. Since conditions of detention are not usually imposed for a specific purpose, such as punishment or interrogation, they do not generally constitute torture, but they may do so if they cause severe suffering and are imposed on the individual for a specific purpose.¹²⁵ Even in the absence of any intention to humiliate, inadequate conditions of detention can violate the dignity of the detainee and inspire in him or her feelings of humiliation and degradation.¹²⁶

Again, it cannot be stressed enough that conditions of detention cannot be considered in isolation. The whole situation of the detainee must be taken into account, including treatment and the lawfulness of the detention.¹²⁷ Almost invariably, it is the cumulative effect of several factors that increases the detainee’s suffering to a point that reaches the threshold of ill-treatment. In the words of the European Court of Human Rights,

[T]he State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention

124 HRC, *Womah Mukong v. Cameroon*, Communication 458/1991, 10 August 1995, UN Doc., CCPR/C/51/D/458/1991, para. 9.3; IACmHR, *Joseph Thomas v. Jamaica*, Case 12.183, Report 127/01, Annual Report 2001, OEA/Ser.L/V/VV.114 Doc. 5.rev. (2001), para. 132; The IACmHR has frequently taken the Standard Minimum Rules into account: *Denton Aitken v. Jamaica*, Case 12.275, Report No. 58/02, Annual Report 2002, OEA/Ser.L/V/II.117 Doc.1 rev. 1 (2002), para. 135; *Michael Edwards et al. v. Bahamas*, Cases 12.067 et al., Report No. 48/01, Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 195.

125 See the “Report of the United Nations Special Rapporteur on Torture on his visit to the Russian Federation”, UN Doc. E/CN.4/1995/34/Add.1, 16 November 1994, para. 71; Bank, above note 67, p. 493; IACmHR, *Lizardo Cabrera v. Dominican Republic*, above note 100, para. 86.

126 ECtHR, *Alver v. Estonia*, Judgment of 8 November 2005, para. 55; *Romanov v. Russia*, Judgment of 20 October 2005, para. 81; *Mathew v. Netherlands*, Judgment of 29 September 2005, para. 216.

127 HRC, *Vuolanne v. Finland*, above note 29, para. 9.2; ECtHR, *Dougoz v. Greece*, above note 31, para. 46; *Iovchev v. Bulgaria*, above note 31, para. 137.

and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.¹²⁸

By way of illustration and without being exhaustive, the following examples are some factors that can, in themselves or in combination with other conditions, amount to being cruel, inhuman or degrading:

- lack of minimum space per person/overcrowding (the European Committee against Torture has fixed at 7 sq m the minimum surface per person in a detention cell);¹²⁹
- lack of natural light or daylight;¹³⁰
- artificial light night and day;¹³¹
- lack of fresh air or ventilation;¹³²
- insufficient possibility to leave the cells and exercise;¹³³
- inadequate food and drinking water;¹³⁴
- inadequate material conditions (such as lack of clean bedding, clothes, cleaning material);¹³⁵
- inadequate sanitary and hygiene conditions;¹³⁶
- lack or denial of medical care,¹³⁷ including psychological care;¹³⁸
- excessively hot or cold temperatures and exposure to climate;¹³⁹
- unlawfulness of the detention;¹⁴⁰
- isolation or solitary confinement (see in more detail below);¹⁴¹
- lack of contact with the outside world;¹⁴²

128 ECtHR, *Kudla v. Poland*, Judgment of 26 October 2000, Reports 2000–XI, para. 95.

129 Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 (SMRTP), Articles 9, 10; European Prison Rules, Recommendation No. R(87)3 adopted by the Committee of Ministers of the Council of Europe on 12 February 1987 (EPR) Rules 18.5, 18.6; The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Standards (CPT Standards), CPT/Inf/E (2002) 1 – Rev. 2006, p. 8, para. 43.

130 SMRTP, Article 10; EPR Rule, 18.2.a; CPT Standards, p. 15, para. 47, p. 25, para. 30.

131 SMRTP, Articles 10, 11; EPR Rule 18.2.b; CPT Standards, p. 25, para. 30.

132 SMRTP, Article 10; EPR Rule 18.2.a;

133 At least one hour a day in the open air: SMRTP, Article 21; EPR Rule 27; CPT Standards, p. 15, para. 47.

134 Article 5(1)(b) of AP II; SMRTP, Article 20; EPR Rule 20; CPT Standards, p. 10, para. 42, p. 15, para. 47.

135 SMRTP, Articles 17–19; EPR Rule 20; CPT Standards, para. 47.

136 Article 5(1)(b) of AP II; SMRTP, Articles 12–16; EPR Rule 19; CPT Standards, p. 10, paras 42, p. 15, para. 47, p. 18, para. 47.

137 Article 5(1)(a) of AP II; SMRTP, Article 22; Basic Principles for the Treatment of Prisoners, GA Res. 45/111, annex, 45 UN GAOR Supp. (No. 49A) at 200, UN Doc. A/45/49 (1990) (BPTP) Principle 9; Body of Principles, Principle 24; EPR Rules 39–48; CPT Standards, pp 29–38.

138 SMRTP, Articles 22, 82; EPR Rules 40.5, 47.

139 Article 5(1)(b) of AP II; SMRTP, Article 10.

140 ECtHR, *Fedotov v. Russia*, Judgment of 25 October 2005, paras 68–70.

141 SMRTP, Articles 29–32; BPTP Principle 7; EPR Rule 60.5.

142 Article 5(1)(c) and 5(2)(b) of AP II; SMRTP, Articles 37–38, 79–80; Body of Principles, Principles 15–19; EPR Rule 24; CPT Standards, p. 18, paras 50, 51.

- lack of any meaningful occupation or of work under lawful working conditions;¹⁴³
- lack of respect for religious or spiritual needs;¹⁴⁴
- lack of segregation and of protection of detainees from other detainees;¹⁴⁵
- prisoner-on-prisoner violence;¹⁴⁶
- period of time for which the person is detained or held in such conditions.¹⁴⁷

Strip and body searches

No international standards entirely prohibit strip and body searches,¹⁴⁸ and jurisprudence has not found that strip or body searches are necessarily incompatible with the prohibition of inhuman or degrading treatment.¹⁴⁹ But searches must be conducted with due respect for human dignity and for a legitimate purpose.¹⁵⁰ They do amount to inhuman or degrading treatment if the manner in which the search is carried out is debasing,¹⁵¹ for instance, where a male prisoner is obliged to strip in the presence of a female officer, his sexual organs touched with bare hands,¹⁵² where a search is carried out by guards who deride or abuse the prisoner,¹⁵³ where the search is not justified by the preservation of prison security or prevention of disorder or crime,¹⁵⁴ or where the search is carried out in a “normal” manner but is performed on a regular basis as a matter of practice which lacks clear justification in the particular case of the person and must be perceived by him or her as harassment.¹⁵⁵

Solitary confinement, isolation, segregation

Solitary confinement is understood here as the social isolation of detainees from the rest of the prison and also, partly, from the outside world. Solitary confinement can occur in two distinct situations. It is frequently a consequence

143 Article 5(1)(e) of AP II; SMRTP, Articles 71–78; BPTP Principle 6, 8; Body of Principles, Principle 28; EPR Rule 26.

144 Article 5(1)(d) of AP II; SMRTP, Article 41; BPTP Principle 3; EPR Rule 29.

145 Article 5(2)(a) of AP II; SMRTP, Article 8; Body of Principles, Principle 8; United Nations Rules for the Protection of Juveniles Deprived of their Liberty; EPR Rules 11.1, 12.1, 18.8.

146 General Recommendations of the Special Rapporteur on Torture, above note 113, para. 26 (j); HRC, *Griffin v. Spain*, Communication No. 493/1992, UN Doc. CCPR/C/53/D/493/1992, 4 April 1995, para. 3.1; CPT Standards, paragraph 27.

147 ECtHR, *Georgiev v. Bulgaria*, Judgment of 15 December 2006, para. 56; *Khudoyorov v. Russia*, Judgment of 8 November 2005, para. 105.

148 See, e.g., EPR Rule 54, explicitly regulating such searches.

149 ECmHR, *McFeeley et al. v. United Kingdom*, application 8317/77, 15 May 1980, 20 DR 44.

150 ECtHR, *Karakas and Yesilirmak v. Turkey*, Judgment of 28 June 2005, paras. 36–41.

151 ECtHR, *Iwanczuk v. Poland*, 15 November 2001, para. 59; Committee against Torture, “Concluding observations, Qatar”, UN Doc. CAT/C/QAT/CO/1, 25 July 2006, para. 21.

152 ECtHR, *Valasinas v. Lithuania*, Judgment of 24 July 2001, Reports 2001-VIII, para. 117.

153 ECtHR, *Iwanczuk v. Poland*, above note 151, para. 59.

154 *Ibid.*, paras. 58–59.

155 ECtHR, *Yankov v. Bulgaria*, above note 104, ECHR 2203-XII, para. 110.

of unlawful or incommunicado detention or enforced disappearance, but can also take the form of social isolation during administrative detention, pre-trial detention or imprisonment after conviction. It can be used, for instance, to prevent detainees from influencing witnesses or to preserve prison order. Solitary confinement does not necessarily imply total isolation from the outside world, and is in fact likely to be unlawful the stricter the isolation is, particularly if the detainee has no social contact either inside or outside the prison.

There is no international treaty banning solitary confinement, and international jurisprudence has not found it to be unlawful as such. Nonetheless, it may amount to cruel or inhuman treatment or torture, especially if it is prolonged.¹⁵⁶ Principle 7 of the Basic Principles for the Treatment of Prisoners indicates that solitary confinement is in principle undesirable: “Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.”

Because of its negative effect on the detainee’s physical and mental well-being, solitary confinement must remain an exceptional measure, justified for legitimate reasons such as preventing the detainee from harming others or from influencing witnesses. It should be imposed “only in exceptional cases and for a specified period of time, which shall be as short as possible”.¹⁵⁷

International standards and jurisprudence have imposed restrictions on the use of solitary confinement. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty strictly prohibit “all disciplinary measures constituting cruel, inhuman or degrading treatment ..., including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned”.¹⁵⁸ This rule is very clear in condemning close or solitary confinement as ill-treatment for juveniles.

International jurisprudence and soft-law standards also impose limits on solitary confinement, and consider it to amount to cruel or inhuman treatment if it is carried out by placing in a dark cell,¹⁵⁹ if it entails sensory isolation¹⁶⁰ or complete social isolation,¹⁶¹ if the victim suffers from a disability,¹⁶² or if it is

156 HRC, *General Comment 20 on Article 7*, 13 March 1992, UN Doc. HRI/GEN/1/Rev.7/Add.1, para. 6; General Recommendations of the Special Rapporteur on Torture, above note 113, para. 26 (m).

157 CPT Standards, p. 20, para. 56; EPR Rule 60.5.

158 UN Rules for the Protection of Juveniles Deprived of their Liberty, Rule 67.

159 SMRTP, Principles 32 (1) and 31; EPR Rule 60.3. This could be understood as excluding these types of treatment only as disciplinary punishments but not as punishments for criminal offences. However, that interpretation cannot hold sway, for it would mean that cruel, inhuman or degrading treatment is allowed as a criminal sanction, which is incompatible with its non-derogable nature.

160 Footnote to Principle 6 of the Body of Principles.

161 Committee against Torture, “Concluding observations, New Zealand”, UN Doc. CAT/C/CR/32/4, 11 June 2004, para. 5(d); “Concluding observations, United States of America”, above note 38, para. 36; “Conclusions and Recommendations on Spain”, UN Doc. CAT/C/CR/29/3, 23 December 2002, para. 11(d); ECtHR, *Ramirez Sanchez v. France*, Judgment of 27 January 2005, para. 100; *Öcalan v. Turkey*, above note 40, paras.191–196.

162 IACmHR, *Víctor Rosario Congo v. Ecuador*, Case 11.427, Report No. 63/99, Annual Report 1998, OAE/Ser.L/V/II.95 Doc. 7 rev. (1998), para. 59.

imposed for an excessive period of time.¹⁶³ If contact with other prison inmates is completely cut off, solitary confinement can nonetheless be acceptable if the person has other conditions that prevent him or her from being totally isolated, such as access to newspapers, television, radio, contact with prison staff, outdoor exercise, prison teachers and chaplains, counsel, correspondence with and visits from the family, medical staff.¹⁶⁴ In other words, the detainee must continue to have some meaningful activities and appropriate human contact.¹⁶⁵

If solitary confinement is inflicted for any of the purposes that define torture and causes severe harm to the detainee, it amounts to torture.¹⁶⁶

Use of force and restraint in detention

Detainees are especially vulnerable to abuse and unnecessary or excessive use of force. In comparison with the situation outside detention, unnecessary or excessive use of force is more likely to cause humiliation or constitute an attack on human dignity and have lasting effects on the victim’s physical and mental health.¹⁶⁷

The European Court and the Inter-American Court of Human Rights have therefore made it clear that in situations of detention the tolerance for physical force is limited, in view of the vulnerable position of the detainee. The European Court, for instance, has repeatedly held that “in respect of persons deprived of their liberty, recourse to physical force which has not been made strictly necessary by their own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3”.¹⁶⁸ Use of force in detention therefore has to be applied with the utmost restriction, and only when it is strictly necessary for the maintenance of security and order within the institution or when personal safety is threatened.¹⁶⁹ This does not mean that all excessive use of force constitutes ill-treatment. The characteristics of ill-treatment or torture must be fulfilled. Similarly, not all cases of deaths resulting from

163 HRC, *General Comment 20 on Article 7*, 13 March 1992, HRI/GEN/1/Rev.7/Add.1, para. 6. See also HRC, *Vuolanne v. Finland*, above note 29, para. 9.2; *Kennedy v. Trinidad and Tobago*, 5 May 2003, CCPR/C/77/D/908/2000, para. 6.4; *Polay Campos v. Peru*, 9 January 1998, CCPR/C/61/D/577/1994, para. 8.6; *Conteris v. Uruguay*, 17 July 1985, CCPR/C/25/D/139/1983, para. 1.6.

164 ECtHR, *Rohde v. Denmark*, Judgment of 21 July 2005, para. 97; *Öcalan v. Turkey*, above note 40, paras.191–196.

165 CPT, *Report on Norway*, 11 April 2006, CPT/Inf (2006) 14, paras.52, 56; *Report on Lithuania*, 23 February 2006, CPT/Inf (2006) 9, para. 107; *Report on Azerbaijan*, 7 December 2004, CPT/Inf (2004) 36, para. 133; *Report on Belgium*, 17 October 2002, CPT/Inf (2002) 25, paras.92, 95; 116; *Report on the Russian Federation*, 30 June 2003, CPT/Inf (2003) 30, para. 118.

166 IACmHR, *Lizardo Cabrera v. Dominican Republic*, above note 100, para. 86.

167 This is not to say that ill-treatment cannot be committed outside detention. For such situations, see in particular Nowak, above note 63, pp. 674, 676–678.

168 ECtHR, *Selmouni v. France*, above note 15, para. 99; *Menesheva v. Russia*, Judgment of 9 March 2006, para. 56; the Inter-American Court has used very similar language: *Loayza Tamayo v. Peru*, above note 30, para. 57. In requiring “purpose of the conduct and the powerlessness of the victim”, Nowak seems to follow this approach, but writes that “in a situation of detention or similar direct control, no proportionality test may be applied”. Nowak, above note 63, p. 678.

169 Principle 15 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; EPR Rules 64–70; CPT Standards, p. 19, para. 53.

disproportionate force necessarily amount to ill-treatment, even if they constitute violations of the right to life.¹⁷⁰

Often, unnecessary or excessive use of force stems from or can be associated with inappropriate weapons or the inappropriate use of weapons or instruments of restraint. International standards and jurisprudence consequently prohibit the use of instruments of physical restraint that may cause unnecessary pain and humiliation¹⁷¹ and especially prohibit them as punishment.¹⁷² The use of firearms should be avoided.¹⁷³ Jurisprudence has found that inappropriate use of pepper spray¹⁷⁴ or tear gas¹⁷⁵ could amount to ill-treatment, or that electro-shock devices such as tasers could be instruments of torture.¹⁷⁶

Conclusion

Despite their almost succinct terminology, the notions of torture, cruel or inhuman treatment and outrages upon personal dignity can be interpreted in meaningful and practical ways through the wealth of existing instruments and jurisprudence on the prohibition of ill-treatment. Ill-treatment can never be considered as an abstract act, committed outside a concrete context. Its assessment must take into account the need to respect the human being in all his or her physical, mental and moral integrity, mindful of all the circumstances of the case.

Common Article 3 only sets out minimum requirements for humane treatment and sets but the lowest common denominator. All obligations and prohibitions enshrined in it are absolute and must be taken with the utmost seriousness and applied in good faith.

170 IACtHR, *Durand and Ugarte v. Peru*, Judgment of 16 August 2000, Series C, No. 68, paras.78–79; *Neira Alegría v. Peru*, Judgment of 19 January 1995, Series C, No. 20, para. 86; the ACHPR has sometimes found a violation of Article 5 of the African Charter on Human and Peoples' Rights in cases where people were "shot or tortured to death": *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, Fourteenth Activity Report, (2001) AHRLR 51 (ACHPR 2001), para. 43.

171 SMRTP, Article 33; EPR Rule 69; Committee against Torture, "Concluding observations, Australia", UN Doc. A/56/44, paras. 47–53, 21 November 2000, para. 52(b); Committee against Torture, "Concluding observations, United States of America", above note 38, para. 179(e).

172 SMRTP, Article 33; Principles 15 and 16 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; EPR Rules 60.6, 68.

173 Principle 16 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; Article 42 of GC III (escaping prisoners of war).

174 Committee against Torture, "Concluding observations, Canada", UN Doc. A/56/44, paras. 54–59, 22 November 2000, para. 58 (a).

175 IACmHR, *Parque São Lucas v. Brazil*, Case 10.301, Report No. 40/03, Annual Report 2003, OEA/Ser.L/V/II.118 Doc. 5 rev. 2 (2003), para. 52.

176 Committee against Torture, "Concluding observations, Switzerland", above note 78, para. 4(b)(i).

Torture of terrorists? Use of torture in a “war against terrorism”: justifications, methods and effects: the case of France in Algeria, 1954–1962

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Abstract

During its war against the armed nationalist movement fighting for Algerian independence (1954–62), France made extensive use of torture, for which the main justification given was the terrorism employed by the National Liberation Front, even though such terrorist violence was neither the nationalists' main form of action nor the French army's true target. Research into the methods used and the aims pursued challenges that justification, shedding light on the way in which torture really operates in a war of this kind, even though the Algerian War has been presented as a model for many subsequent conflict situations.

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In August 2003 the US Directorate for Special Operations and Low-Intensity Conflict organized a screening of the film *The Battle of Algiers*¹ at the Pentagon (Defence Department). The film, which portrays the Algerian partisans' struggle during the war of independence against the French colonial power, shows in equal measure the terrorist methods adopted by the National Liberation Front (FLN) and the violence used against it by the French army and police. While it might well be thought that such a screening, designed to train and inform those in charge of

clandestine operations, was likewise supposed to remain confidential, a timely press leak brought it to public attention: the text of the invitation, which referred to similarities between the war waged by the United States in Iraq and that faced by the French in Algeria, was published in the press.² It emphasized features common to both wars to show that the Americans would not make the same mistakes as the French; in a sense, they wished to tell the world they had learned from the past – the past of others, that is.

The previous spring US President George W. Bush had vaunted the end of the main hostilities in Iraq. A few months later, however, he had to change his tune in the face of the public scandal over abusive treatment of inmates at Abu Ghraib prison in Iraq, the continuing hostilities and the high numbers of dead and wounded, including Americans.

More than three years later, he was able to say that he had read Alistair Horne’s book³ with interest; in the preface, the author highlights four similarities between the two conflicts:⁴ the emphasis placed by the weaker of the two sides on attacks against members of the enemy administration and its repressive apparatus, and, more broadly, against civilian targets; transfers of weapons thanks to porous borders; the use of electrical forms of torture, which weakened national cohesion in the country resorting to it; and the difficulty of envisaging the withdrawal of military troops.

While the two conflicts undoubtedly share many similar features – of which the following article will give an idea – there are also significant differences between them. Aside from the well-documented shifts in the international constellation, the influence of public opinion and its ability to react to information are undoubtedly the most obvious signs that times have changed since the conflicts of the 1950s and 1960s. For that matter, the two conflicts are bound to differ, for one preceded the other by nearly half a century.

The Algerian War may in fact be regarded as a prototype for conflicts in the second half of the twentieth century; it has served as a model for the fight against “subversion”, “enemy insurgents” and “terrorism”, depending on the terminology used. The US war in Iraq and the Algerian War are indeed linked in this respect. It is not the only link, however. There are numerous echoes of the

1 The film *The Battle of Algiers*, directed by the Italian Gillo Pontecorvo (1966), was made just after independence and shot in the Algiers casbah; it featured the latter’s residents, with Yacef Saadi, head of the Autonomous Zone of Algiers at the time, playing himself. It was filmed partly with a hand-held camera. The director says he shot it in “documentary style”, helping to give it the power of a virtual eyewitness account of the period.

2 “How to win a battle against terrorism and lose the war of ideas. Children shoot soldiers at point-blank range. Women plant bombs in cafes. Soon the entire Arab population builds to a mad fervor. Sound familiar? The French have a plan. It succeeds tactically, but fails strategically. To understand why, come to a rare showing of this film.” Quoted by Michael T. Kaufman, Film Studies, *New York Times*, 7 September 2003.

3 Alistair Horne, *A Savage War and Peace: Algeria 1954–1962*, Viking Press, New York, 1977, was the first to give an overall account of the war. The author is a British historian; a new 2006 edition gave him the opportunity to suggest contemporary comparisons.

4 Marc Roche, “Le président américain, l’historien britannique et la guerre d’Algérie”, *Le Monde*, 23 January 2007.

Algerian War and affinities with it for the Americans in Iraq; it has also had a bearing on many other conflicts throughout the world since the 1950s. In order to allow readers to make up their own minds about the possible implications, I shall discuss the standard arguments put forward to justify the use of torture, followed by the methods adopted and the perpetrators. I shall then question the validity of the proposed justifications in the light of the forms of violence used, affording an opportunity to reflect on the aims pursued and the formidable issue of effectiveness. In addition to the aims explicitly affirmed by those directly and indirectly involved, an analysis of the practice of violence reveals its ultimate *modus operandi*, thereby challenging an interpretation that merely skims the surface of the events in question.

From insurrection to the Algerian War

The war between the Algerian nationalists and the French authorities, which culminated in an agreement providing for a ceasefire and Algerian independence, is not always defined in the same way on both sides of the Mediterranean Sea. The French have long spoken of the “Algerian War”, but the French parliament did not officially endorse the expression until October 1999. The Algerians, for their part, hail it as a “revolution”, a “war of liberation” or “of national independence”. Everyone would agree, however, that the transition to sovereignty was formalized when Algeria acceded to independence in early July 1962. Political and community leaders are deeply divided over the causes, while historians themselves opt for a sequential chronology.⁵ Here I shall adopt the traditional timeline starting in 1954, on the grounds that the FLN, the French authorities’ main adversary, made known its emergence by a series of attacks during the night of 1 November that year.

France then had to contend with an insurrection that gradually spread throughout Algeria in the form of an armed resistance movement and attacks on Algerian and French civilians and soldiers.⁶ Refusing to acknowledge a state of war or siege, the French authorities referred to an “insurrection”, a “rebellion”, “terrorism” or acts of “outlaws”, and regarded the entire situation as an internal French affair to which they responded by means of “police operations” designed

5 A number of dates could be taken as a starting point. The colonization of Algeria dates from 1830, and France’s decision to colonize the whole country from 1834. In 1848 the north of the country was divided into French *départements*, thereby asserting administrative continuity between Algeria and France. The first great massacre of Algerians who had expressed nationalist leanings took place in May and June 1945 (following demonstrations in north-east Constantine). The first FLN attacks took place in 1954; in 1955 France decreed a state of emergency throughout Algeria; in 1956 the French National Assembly granted the government special powers in respect of the Algerian issue.

6 It must be borne in mind, however, that this distinction – adopted here for reasons of linguistic convenience – was not used at the time. Everyone was officially French, by either nationality or citizenship. Since 1947 the attainment of citizenship by “French people of North African origin” had improved considerably on paper, although there was still a great deal of discrimination in practice. On the other hand, the proponents of Algerian nationalism regarded the inhabitants of Algeria as being divided into two national groups: in their view, there were indeed Algerians and French people living in Algeria.

to “maintain law and order” in a French territory. Within a legislative, administrative and judicial framework geared to the needs of law enforcement, where the executive and the army ultimately had supreme control over operations, France took the view that it had nothing to answer for to the rest of the world. So although it had been largely instrumental in drafting the Universal Declaration of Human Rights⁷ and was a signatory to the 1950 European Convention on Human Rights, it did not agree to ratify the latter until 1974, well after the Algerian War. France had, however, ratified the Geneva Conventions in June 1951, which according to international law were thus applicable to the Algerian situation.⁸

The French did not see it like that, however, and rejected such an interpretation. Despite the efforts of the International Committee of the Red Cross (ICRC), France refused to let it conduct an investigation in Tunisia during the 1953 revolts.⁹ Nevertheless, in 1955 the ICRC did obtain the authorization of the Prime Minister, Pierre Mendès France, to carry out visits to prisoners on Algerian territory, although with very limited room for manoeuvre: there was no explicit statement that the prisoners were covered by an instrument of international law, and missions had to be confined to checking on their conditions of detention. Moreover, their status was not specified: they might be civilians or soldiers, and the grounds for their detention varied widely. In March 1958 the establishment of special military internment centres for “rebels taken captive while in possession of weapons” was, for one category of these Algerian prisoners, a form of *de facto* acknowledgement of a status comparable with that of prisoners of war.¹⁰ Yet it was only in November 1959 that General Challe, commander-in-chief of the French forces in Algeria, described detainees at the centres as being “considered equivalent to members of an enemy army”.¹¹ From then on it was a matter of following the lead of a political authority that had shown the way to self-determination for the Algerian people.

Not until 1961, however, did France acknowledge the applicability in certain cases of the Third Geneva Convention relative to prisoners of war¹² and did the army ensure that it was applied within the military internment centres.¹³ This recognition of a diplomatic negotiating partner caused a military enemy to emerge. While the Provisional Government of the Algerian Republic could be

7 This text, adopted by the UN General Assembly on 10 December 1948, owes much to French lawyer René Cassin.

8 Indeed, Article 3 common to the four Conventions clearly stipulated that there were non-international armed conflicts in which they must also be applied.

9 Art. 3(2) explicitly allows parties to a non-international conflict to refuse the ICRC's services.

10 General Salan, in charge of the French forces in Algeria in March 1958, took care to specify that those detainees “must not be regarded as prisoners of war. The Geneva Conventions do not apply to them.” Memorandum from the Sixth Bureau of the General Staff of Algiers of 19 March 1958 on the military internment centres, 1H 1100/1 (Service Historique de la Défense – SHD).

11 Quoted by Allan Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law applicable in Armed Conflicts*, Academia Scientiarum Fennica, Helsinki, 1976, p. 149.

12 In this connection, see *ibid.*, chap. 6, “Survey of recent practice”.

13 For more details, see Raphaëlle Branche, “Comment rétablir de la norme en temps d’exception. L’IGCI/CICDA pendant la guerre d’Algérie”, in Laurent Feller (ed.), *Contrôler les agents du pouvoir*, PULIM, Limoges, 2004, pp. 299–310.

pleased with its success, the pace of military operations had slowed down considerably by that time and the National Liberation Army (ALN), the military arm of the FLN, was much weaker than before.¹⁴ Few ALN soldiers were going to appreciate such a change of heart when people regarded as “suspects” or “terrorists” – who had been by far the most numerous victims of the French troops since the outbreak of hostilities – continued to be excluded from the new concessions.¹⁵

These civilians were a constant source of concern to French soldiers. Who was actually a member of the resistance? Who might be hiding a knife under his djellaba to slit the throat of a shopkeeper deemed too loyal to the French? Which child shepherd was actually a lookout for ALN fighters? Which peaceful old man was keeping them informed of French troop movements, thereby paving the way for a deadly ambush? Which woman was delivering supplies to the mountains on the pretext of gathering food? In town, who was wearing European clothing to be able to plant a bomb more discreetly in a crowded place? An enemy with a thousand faces in an unknown country was what confronted French soldiers arriving from metropolitan France with, at most, a few months’ military training.¹⁶

Urgency and intelligence gathering as justifications for torture

The operations the French carried out in Algeria induced them to commit acts of torture. Without ever being explicitly justified in writing¹⁷ – given that it was a form of violence totally prohibited under French law – torture was suggested by the highest authorities and on the whole was both tolerated and encouraged. Notwithstanding the official line about “pacification” and “maintenance of law and order”, a distinction between occasions “during combat” and “outside combat” was established in summer 1955: “There are no restrictions on the use of weapons during combat”;¹⁸ “outside combat”, the “French rules of humanity

14 Owing, *inter alia*, to the major operations carried out under the “Challe plan” in 1959 and 1960 and the construction of two electric fences on the Moroccan and Tunisian borders, which blocked arms deliveries and made it much more difficult for people to cross over to rest bases or, travelling in the other direction, to contribute fresh blood to the fight in Algeria.

15 As Jack Goody states, “terrorist” “turns out to be the label assigned to those who use illegal or illegitimate force against existing state authorities. They are essentially people that see themselves as without justice, without rights, whether political or property. That is why such an extraordinary variety of states under different regimes have so avidly taken up the American challenge to fight “terrorism” ... Any national or minority movement that seeks to act against the state’s monopoly of force can be so characterized, although most such movements do not see themselves as having any alternative.” Jack Goody, “What is a terrorist?”, *History and Anthropology*, Vol. 13 (2) (2002), p. 141.

16 Unlike the Indo-China War, where only the professional army was called upon to fight, France sent almost its entire contingent to Algeria between 1956 and 1962.

17 According to the archives kept and consulted.

18 “Au combat, aucune restriction n’est apportée à l’emploi des armes.” Memorandum from General Noiret, 9 April 1956, 1H 2898/1 (SHD). The permission in question applied to ground combat.

continue to apply”.¹⁹ Insults, theft, rape, pillage, destruction and torture were prohibited.²⁰ While straightforward in theory, however, this distinction seldom reflected the situation faced by French troops in Algeria. Their enemies were difficult to distinguish from civilians at first sight, unless they were armed men wearing identifiable uniforms – which they rarely did. Furthermore, the civilian population was thought to be informed of enemy movements and thus regarded as a key source of intelligence. In practice, civilians often came under suspicion, arousing fear and mistrust on the part of French soldiers.

Intelligence gathering

From the onset of the war, civilian and military authorities had stressed the crucial need to gather intelligence. Every soldier had to be alert and endeavour to supply information about the enemy. Having groped around in the dark trying to identify nationalist groups, the French security forces had gradually become certain of the FLN’s growing influence on the Algerian population and attempted to forestall it. Their action was then extended to dismantling the networks the organization was developing within Algerian society. The Resident Minister in Algeria, Robert Lacoste, said, for instance, “Resolute, systematic action must be taken against the rebel OPA [political and administrative organization], which forms the very basis of the enemy structure and must therefore be identified and destroyed.”²¹

A different kind of war

Soldiers adapted to what was perceived as a new type of war, a “revolutionary war”. It had to be a total war, based on new tactics and strategies.²² The emphasis was on a war waged within the civilian population, seeking to identify nationalist networks that did not hesitate to resort to indiscriminate terrorism.

The aim of revolutionary war is the same as that of conventional war: to impose one’s will on the adversary. But whereas in conventional war this aim is achieved primarily by destroying armed forces, with the population playing a merely secondary role, in revolutionary war the initial lack of forces means that winning over the population becomes an indispensable intermediate step.²³

19 “Hors du combat [ce sont les] règles françaises d’humanité [qui] demeurent.” Interministerial circular of 1 July 1955.

20 It should be noted, however, that the texts carefully avoid any reference to “human rights”.

21 “Il convient d’aborder résolument une lutte systématique contre l’OPA [organisation politico-administrative] rebelle qui est la base même de l’organisation adverse et qui doit à ce titre être détectée et détruite.” Special directive from the Resident Minister on action against the rebel OPA, 18 August 1956, 1H 3088/1 (SHD).

22 This shift in the approach taken to the war owes a great deal to General Salan (who headed the French forces in Algeria from late 1956 to late 1958) and the men in his entourage, who had come from Indo-China.

23 Antoine Argoud, *La décadence, l’imposture et la tragédie*, Fayard, Paris, 1974, p. 121.

Accordingly, the French army undertook to wage a counter-revolutionary war, justified by its adversary's methods: "The 'subversive revolutionary war' waged by international communism and its intermediaries cannot be fought with conventional methods of combat, but also calls for clandestine counter-revolutionary forms of action."²⁴ In the face of urban terrorism in Algiers, the chaplain of the paratrooper division responsible for maintaining law and order in the city commented that "it is not [the] military leaders who ... have arbitrarily imposed such methods; by behaving like bandits, the *fellagha*²⁵ are forcing [the paratroopers] to act as police officers".²⁶

A response to the terrorists

The argument that it was necessary to adopt "counter-revolutionary" means of combat was reinforced by the idea that the latter were effective. Against this background, a specific line of thinking was developed in order to justify torture. It was based largely on the idea of dealing with urban terrorism in a city riddled with nationalist networks.

The practice of torture was sometimes likened to the technical procedures performed by a surgeon, sometimes to the actions of a priest seeking to convert, sometimes to the blows struck by a caring father to punish an unruly child for its own good, and sometimes to the concern shown by teachers adopting the language of their pupils in order to make themselves understood.²⁷ It all stemmed from the implicit idea that the person being tortured had something to say (confess) and was therefore guilty. Torture was thus a kind of anticipatory punishment – in that it eliminated recourse to legal proceedings which, the military complained, were in any case too slow and too lenient. The disappearance of legal proceedings and the summary procedure offered in their place were not unproblematic. Consequently, justification was based primarily on clear-cut cases in which the person tortured was undeniably guilty – a confessed killer belonging to a "gang" or the acknowledged witness of a crime or attack, even though his role was a passive one,²⁸ in other words, a

24 "On ne peut lutter contre la 'guerre révolutionnaire et subversive', menée par le communisme international et ses intermédiaires, avec les procédés classiques du combat, mais bien également par des méthodes d'action clandestines et contre-révolutionnaires." Memorandum from General Massu, 29 March 1957, 1R 339/3* (SHD).

25 Literally "road blockers", this term was used initially in Tunisia and was subsequently applied to the Algerian context to designate the French army's adversaries throughout the war, helping – along with other terms – to deny them the status of combatants.

26 "Ce ne sont pas [les] chefs militaires qui ... ont arbitrairement imposé ces méthodes; ce sont les *fellagha* qui, se conduisant en bandits, obligent [les parachutistes] à faire ce métier de policiers." The Rev. Delarue, "Réflexions d'un prêtre sur le terrorisme urbain", text circulated as an appendix to the memorandum from General Massu of 29 March 1957, 1R 339/3* (SHD).

27 See Gabriel Périès, "Conditions d'emploi des termes *interrogatoire* et *torture* dans le discours militaire pendant la guerre d'Algérie", *Mots*, No. 51 (June 1997), pp. 41–56.

28 "Entre deux maux, choisir le moindre" (Choose the lesser of two evils). Text probably written by Rev. Delarue and Lieutenant-Colonel Trinquier (see Pierre Vidal-Naquet, *La raison d'État*, Minuit, Paris, 1962, p. 112) and sent via the chain of command to officers in the north Algerian zone in spring 1957. It was quickly brought to the notice of the press.

terrorist who knew where the next bomb was. Soldiers therefore had to act quickly: “As soon as a criminal [is] caught in the act, it [is essential] that he speak spontaneously, if possible, or be persuaded to disclose anything that would make it possible to avoid a renewed massacre of innocents.”²⁹ The use of torture was justified by an imminent threat: once again, it was a case of exceptional remedies for an exceptional situation.³⁰

Urgency

In practice, the argument that terrorists knew where the bombs were gave way to a justification based on the straightforward concept of urgency and speed. Until the nationalist organization had been eradicated, the threat was present; it weighed just as heavily as actual attacks. Although a memorandum had attempted to distinguish between “rebels” taken prisoner during engagements, who had not participated in abuses, and individuals responsible for detestable (acts) associated with banditry and terrorism,³¹ some soldiers had serious reservations. A text accompanying the aforesaid memorandum acknowledged that “local needs” had to prevail: “Some rebels caught bearing weapons during engagements may, following an investigation, be found to be guilty of previous acts of terrorism, in which case there is clearly no need to grant them special treatment.”³²

In fact, all enemies were by and large regarded as one and the same, and the argument justifying the use of torture as part of the fight against urban terrorism could be applied in every case. This did not bother the Resident Minister – far from it. Having set out a list effectively putting all “rebels” on the same footing, he plainly stated, “The rebels’ terrible threats and appalling crimes are forcing us to adopt certain behaviour”, and “in some cases strict compliance with the law may become a crime”.³³

Proportionality to the threat, and the duty of protection

The threat was terrifying, endangering law and order: “Unlike war, where the stakes are victory, [the maintenance of law and order] involves a form of violence

29 “Aussitôt qu’un criminel [est] pris sur le fait, il [faut] qu’il parle spontanément, si possible, ou qu’il soit amené à dire ce qui permettrait d’éviter quelque nouveau massacre d’innocents.” Ibid.

30 Ibid. As far back as Carolingian times, the concept of an “obvious crime” warranted bypassing the normal investigation process and having more rapid recourse to trial by ordeal, justified by the urgency of the situation.

31 Memorandum from the Sixth Bureau of the 10th Military Region (i.e. Algeria), 24 November 1957, 1H 3977/2 (SHD). The memorandum recommends treating the former as similarly as possible to the way in which prisoners of war are treated by civilized countries signatory to commitments in this area.

32 “Certains rebelles, pris les armes à la main au cours d’engagements peuvent, après enquête, être convaincus d’actes de terrorisme antérieurs, auquel cas il n’y aura évidemment pas lieu de leur donner un traitement privilégié.” Memorandum from the Fifth Bureau of the Constantine Army Corps, 10 December 1957, accompanying the memorandum from the Sixth Bureau of the 10th Military Region, 1H 3977/2 (SHD).

33 “Les menaces atroces, les crimes abominables des rebelles nous impos[ent] une conduite ... le respect strict de la légalité peut devenir en certains cas un crime.” Ibid.

directed towards the restoration of civil peace”; in this case, the means used are not proportional “to the attack, as in war, but [to] the threat”.³⁴

What kind of violence is permitted in such a context, where intelligence gathering is the main priority? In one of the few explicit texts originating from the highest levels of command, General Salan, commander-in-chief of the French forces in Algeria, advocated “the temporary surprise abduction and transportation by helicopter of a few inhabitants selected at random or identified as suspects with a view to interrogating them about the rebel organization established in the *douar* [rural administrative area]”³⁵ and “thorough interrogations, to be utilized immediately”, which should be “as vigorous as possible”.³⁶ General Salan could not go into too much detail in terms of practical advice.³⁷ One of his subordinates defined the moral framework for the actions of a good soldier: “This is an inevitable, implacable fight, morally justified by the duty to provide effective protection for those citizens who continue to place their trust in us.”³⁸ The technical aspects, for their part, remained vague. Prior to December 1959 and the Minister of the Armies’ explicit, strict ban on “coercive procedures such as water, electricity or the hoist”,³⁹ at best leaders simply asked that “methods detrimental to individual human dignity”⁴⁰ not be used. It might be specified – without further clarification – that any “procedure that would leave an irrevocable moral or physical mark on the individual in question”⁴¹ was prohibited.

34 Antoine Garapon, “Que signifie maintenir l’ordre?”, *Esprit*, No. 248 (December 1998), pp. 121–33.

35 “L’enlèvement provisoire et par surprise, par action hélicoptée, de quelques habitants pris au hasard ou repérés comme suspects en vue d’un interrogatoire sur l’organisation rebelle implantée dans le douar.” General directive No. 3, 19 January 1957 (SHD).

36 “Interrogatoires poussés à fond et immédiatement exploités”, “aussi serré[s] que possible”. Memorandum from General Salan, 11 March 1957, 1H 3087/1 (SHD).

37 Some of his subordinates complained about this. According to Algiers Army Corps officers, “the unusual nature of this modern conflict confronts each of us with tasks which, going beyond the traditional confines of conventional war, have not been codified: our consciences are then faced with a painful dilemma they may be reluctant to resolve in the absence of clear instructions”. Criticism was levelled at the “inadequacy of the Criminal Code”, and the “lack of firm, clear instructions on how to wage revolutionary war” was widely deplored. Report on morale in the Algiers Army Corps in 1957, 31 December 1957, 1H 2424 (SHD).

38 “Il s’agit bien là d’une lutte inéluctable et implacable, dont la justification morale se trouve dans le devoir de protéger efficacement les populations qui nous ont conservé leur confiance.” Operational directive issued by General Loth, 6 December 1957, 1H 4402/2* (SHD).

39 “Procédés coercitifs tels que l’eau, l’électricité ou le palan”. Directive from Pierre Guillaumat, to General Challe, Commander-in-Chief of the French troops in Algeria, 23 December 1959 (private source). The minister stated that he wished these instructions to be circulated down to the level of local commanders, with a reminder of the harsh penalties incurred in the event of a violation, and that he was determined to make his wishes known right down to the lowest ranks of the army, without the production of other texts at intermediary levels.

40 “Méthodes attentatoires à la dignité humaine de l’individu”. Directive No. 2 from General Allard to zone commanders, 23 March 1957, 1R 296* (SHD).

41 “Procédé qui marquerait irrémédiablement l’individu moralement ou physiquement”. Directive from General Allard to the Algiers Army Corps generals commanding the northern, southern, eastern and western zones, 27 March 1957, 1R 296* (SHD).

Methods used and perpetrators

Nevertheless, it is possible to ascertain the methods used and how soldiers on the ground interpreted the ambiguous orders they were given. The content of the circular from the Minister for the Armies after five years of conflict has been borne out: water (using a funnel or some kind of trough), electricity and suspension were recurrent forms of torture. Prisoners were first stripped naked and beaten.

The basic reality

While the hoist suggests special equipment, the reality was often more basic: the prisoner’s feet and hands were tied behind his or her back, a stick passed between them and the prisoner suspended like an animal. A rope might be used for the same purpose, binding the prisoner’s hands or feet. Electricity was the most common technique: it could be used in barracks or during operations, thanks to technical advances enabling the electric generator to be taken along with the troops during combat. This device, which supplied electricity for the field telephone and radio, could also be diverted from its primary function and linked up to electrodes placed on the prisoner’s body.

Such functional aspects undoubtedly played a part, but above all this form of torture held a certain attraction for rational minds attempting to convince themselves that such violence was necessary in war.⁴² It was also very different from the kind of violence used by the adversary and highlighted by propaganda, in which mutilation predominated. Furthermore, the electric generator made it possible to keep the victim’s body physically and psychologically at a distance. This interposition of an instrument was also a feature of the other methods: a rope, a hoist, a jerry can of water, a funnel. Lastly, this short list of techniques employed all over Algeria throughout the war – even after their explicit prohibition at the end of 1959 – should also include the practice of rape, often using intermediate objects.

Drawing on a fairly limited range of forms of violence, mostly in different combinations, the torture practised by the French army in Algeria appeared to obey an unspoken rule: it must not leave permanent marks on the victim’s body. Where this was not the case, the victim was frequently executed; where an execution was planned in advance, this was reflected in the type of violence used.

The “specialists”

Such acts of torture were usually performed by specific soldiers, mostly from the Second Bureau, which was responsible for intelligence. They formed a small team headed by an officer, sometimes backed up by a commando. Most of the men were conscripts. As a result of the emphasis on intelligence gathering, the Second

⁴² With the generator it was possible to graduate the level of violence and adjust it to the victim’s reaction.

Bureau was extended beyond the general staff level during the Algerian War. Intelligence officers were quickly trained and sent out even to sectors and regiments.⁴³ It would be an exaggeration to speak of training in torture, however, since interrogation techniques appear to have been learned primarily on the spot or via tips exchanged between officers.

Alongside this team, other soldiers might also have occasion to torture prisoners, particularly when it came to questioning them immediately after capture – as recommended by all the directives. In addition, the Algerian War gave rise to the development of specific units of specialists responsible for torturing the most important or reticent individuals or those most sensitive in political or other terms: the Operational Protection Detachments.⁴⁴

However it is organized, torture is a form of violence that is always collectively inflicted under the supervision of a higher-ranking officer. The presence of an officer in charge means it is sometimes described as a crime of obedience, which in no way diminishes each participant's share of responsibility.⁴⁵ De facto, torturers form a group bonded together partly by the collective practice of torture. This communion in violence deliberately inflicted on others leads to a different definition of the word "torturer". As well as the person who administers the beating or plunges the prisoner's head under water, there is a whole group in which each person has a role: the person who asks the questions, perhaps another who acts as interpreter, the person who takes notes, the person who pours more water over the victim receiving electric shocks. Members of the group test and monitor one another. This collective dimension is essential to understanding both the psychological pressure and the protection felt. There is no need for recourse to training schools or particularly harsh conditioning in order to explain why, in the all-pervading anxiety typical of this guerrilla war, men – who were not necessarily predisposed to such acts in any way – agreed to participate in torture sessions.

Both then and now, one of the main ways in which they justify their acts (having emphasized the violent nature of their adversary and presented the French army's actions as merely defensive) is to stress the aim pursued (intelligence) and the method's effectiveness. This is the full force of the argument presenting the use of torture as a key element in the race between security forces and terrorists about to set off a bomb. Let us look at what actually happened on the ground.

43 Given the considerable latitude left open to them, it would be wrong to assert that all intelligence officers used torture. On the other hand, everything suggests that it was regarded as a legitimate and often necessary practice.

44 Regarding the establishment and development of these units and the extreme difficulty the military authorities and government had in controlling them, see Raphaëlle Branche, *La torture et l'armée pendant la guerre d'Algérie, 1954–1962*, Gallimard, Paris, 2001, chs. 9, 12 and 18.

45 Likewise, the officer in charge of the group of torturers is part of a hierarchical structure and under its orders, but is not thereby relieved of personal responsibility.

Aims pursued and effects of torture

In late 1954 the Minister of the Interior – in charge of Algeria⁴⁶ – realized how hard it was for the police to fight terrorism, particularly when used by a movement of which it had no previous knowledge. “It is clearly difficult”, he said, “for police to prevent a terrorist – for such is his loathsome name – from one day setting off a bomb in an Algiers cinema that will cause many casualties.”⁴⁷ Two and a half years later, when the police⁴⁸ had been replaced by the army in operations to “maintain law and order” in Algeria and the military had just been granted full powers to break the FLN’s hold on Algiers, François Mitterrand, by then Minister of Justice, commented with some concern on the successes proudly declared by the paratroopers, “It is true that the Army has achieved significant results in terms of suppressing terrorism. However, its activities would have been just as effective – and would only have gained in authority by escaping criticism – if it had shown greater regard for the law.”⁴⁹

Results – in the short term

General Massu’s paratroopers did indeed achieve impressive results in less than three months. Deployed to prevent a general strike instigated by the FLN in late January from being a success, their task was essentially to eradicate nationalist networks in the capital of French Algeria – including the activists themselves, their leaders, the communists and Christians who supported them, their network of bomb manufacturers and the bombers themselves. Regular press conferences were held to announce their achievements, backed up by numerous enemy organization charts, photographs of seizures and discussion of the prize capture of regional leader Larbi ben M’hidi.⁵⁰

46 The minister was represented in Algeria by a governor-general. In 1956, the governor-general was replaced by a resident minister, who was a member of the government on a par with other ministers – thereby demonstrating the importance placed on Algeria at the time.

47 “Il est évident qu’il est difficile à une police d’empêcher qu’un jour un terroriste – tel est son nom abominable – puisse, dans un cinéma d’Alger, lâcher une bombe qui fera tant de victimes.” Hearing of the Minister of the Interior before the National Defence Committee of the National Assembly, 2 December 1954 (National Assembly Archives).

48 A number of whose reports, moreover, established that it used torture as a matter of course. See Pierre Vidal-Naquet, *La torture dans la République: Essai d’histoire et de politique contemporaines, 1954–1962*, Minuit, Paris, 1972.

49 “Les résultats obtenus par l’Armée, dans le domaine de la répression du terrorisme ont été, certes, très importants. Mais cette activité aurait été tout aussi efficace et n’aurait fait, en échappant à la critique, que gagner en autorité, si elle s’était montrée plus soucieuse des lois.” Letter from the Minister of Justice to Guy Mollet, copied to Robert Lacoste, 22 March 1957, cab 12/87* (Centre des Archives d’Outre-Mer – CAOM).

50 More specifically, Larbi ben M’hidi was a member of the FLN’s executive organ, the co-ordination and execution committee (CCE). He was one of those most strongly in favour of triggering the general strike; being based in Algiers, he was in charge of the action taken. His arrest prompted the CCE’s departure from Algiers and the reorganization of the FLN within the city. Officially Larbi ben M’hidi died in his cell, using his sheets to commit suicide. In fact, this lie concealed the summary execution of the main nationalist leader arrested by the army in Algeria. In particular, it shows how the military freed themselves from civilian supervision at the time.

This apparent success – since bloody attacks again shook the capital in May and June, and the FLN organization in Algiers was not dismantled until the autumn⁵¹ – was achieved by sealing off the Casbah district,⁵² introducing a strict census system coupled with encouragement for informing on others, the systematic practice of torture and round-ups of suspects, the disappearance of arrested persons outside any legal framework and an increase in summary executions.⁵³ Trumpeting the system's success was also a means of diverting attention from such methods, the scale of which was just becoming perceptible to the French public and international circles.

In any event, very few were aware of the whole truth; the number of politicians in the know was doubtless very small. Although François Mitterrand appeared to be convinced that the military would have been just as effective⁵⁴ if it had respected the law, and the head of the Algiers paratroopers echoed his sentiments 43 years later by admitting that “we could have acted differently”,⁵⁵ it is highly likely that the vast majority of those in power agreed at the time (and perhaps still do) that torture was effective.

What is the truth of the matter?

A central method in an overall plan

Some information obtained under torture may have led to arrests. Some of it may even have made it possible to thwart attacks in the process of being carried out. But this was not what mattered most to the French army – whatever it may have implied in its occasional justifications. The main purpose was to identify members

51 On the other hand the influence gained by the French army over the population was confirmed in the years that followed; possible evidence includes the Algerian crowds celebrating the putsch of 13 May 1958 by military officers claiming that they wished for a new French Algeria, opposed to the government's policy, and the cessation of attacks. Nevertheless, such triumphalism must be tempered by the scale of the spontaneous pro-independence demonstrations of December 1960, pending detailed research on this nationalist foothold and the strategy adopted.

52 The Arab quarter in the heart of Algiers in which the FLN was well established.

53 There was a hesitant return to legality from April 1957, but the bulk of the system – including the systematic practice of torture – remained in place.

54 Letter from the Minister of Justice to Guy Mollet, copied to Robert Lacoste, 22 March 1957, cab 12/87* (CAOM).

55 He said a few months later, “We should have done things differently, that's really what I think. But what, how? I don't know. We should have looked for, tried to find, alternatives. Unfortunately we didn't manage to.” In this interview he had described the situation as follows, “I also think civilians did what they could at the time and it wasn't easy for them. It was a very complex war, with political, social and economic aspects and involving policing. But I wish people would avoid accusing the French army. It was assigned the unpleasant task of restoring law and order, which it did as well as it could. As for determining the government's share of responsibility, I cannot see how that is possible. All I can say is that they came to Algiers regularly, to the 10th paratrooper division, and that they went to visit the regiments and oversee the intelligence work. They came even when I wasn't there. There was always one of them in the sector, which is understandable given that we were carrying out a very important operation in Algiers at the time. But none of them ever said anything whatsoever on the subject, not even: “Ease off a bit!” I think they were all very frightened about what was happening in Algiers, the murders, the bombs (especially Lacoste), and wanted it to stop at all costs.” Interview with General Massu, by Florence Beaugé, *Le Monde*, 22 November 2000.

of the FLN and the ALN. The idea was that since the combatants – including those described as terrorists – were moving among the population like fish in water, simply depriving them of that water would be enough to stop them. Algerian citizens were shifted to camps, creating prohibited zones where ALN combatants were hunted down without any restrictions.⁵⁶ The French army had a dual objective: first, it was pursuing enemies, “rebels”, “terrorists” and “outlaws”. Second, however, it was attempting at the same time to mimic the approach taken by the FLN: to convince the Algerian population that its future lay with France. It went all out to do so, building roads, schools and housing – for which time had not been found to build in more than 120 years of colonization – setting up a programme to modernize the economy, introducing free medical care and so on.

Torture was not separate from this overall plan; it was one of the central methods used. Far from being a form of violence chosen, in an emergency, to stop a murderer, it came to be an ordinary, everyday form of violence used indiscriminately in towns or in the mountains, well away from any “terrorist” threat. Some prisoners were tortured immediately after being arrested, but others were left to languish in captivity for a while before being subjected to torture.

While urban civilians suspected of belonging to networks planting bombs were tortured, they accounted for only a tiny minority of victims. Far more often the victims were mere civilians suspected of delivering supplies to combatants in outlying areas, giving them shelter or even just knowing or having seen them. Naturally, they might also be suspected of being members of the FLN, raising funds, organizing politically or belonging to the ALN.

Whereas intelligence was presented to French soldiers as the ultimate purpose of torture – and it is indeed a means of obtaining information – in reality this was just a fantasy.⁵⁷ The main objective of the violence was elsewhere.

Yet that emphasis on intelligence did highlight something fundamental: beyond the torture room lay a world connected to that place and the individuals in it. The torturers claimed to be deliberately inflicting suffering on others as a way of finding out about that world, which remained impenetrably obscure to them despite the lengthy colonial history during which they had lived alongside it rather than mingling with it. In reality, they were inflicting such suffering as a means of communicating with that world.

The Algerian population as the primary stake

As the war began to affect everyone, the Algerian population indeed became a key battleground and the primary stake for the two main opposing camps. Torture became a basic weapon in this essentially political war, in which it was vital to win

56 By the end of the war, nearly a quarter of the Algerian population had been forcibly displaced in this way. For the first analysis see Michel Cornaton, *Les camps de regroupement de la guerre d'Algérie*, Editions Ouvrières, Paris, 1967.

57 According to the *Trésor de la Langue Française*, a fantasy is an “imaginary construction, conscious or unconscious, allowing the subject involved in it to express and satisfy a more or less repressed idea or overcome an anxiety”.

over the population – whether by persuasion, psychological action, improvements in the Algerians' living conditions or by torture and terror. By torturing individuals, French soldiers were sending a message to the families, villages, clans and political communities to which they belonged. By humiliating individuals, assaulting them and forcing them to give in and betray, the military was affirming its present omnipotence and desire for future power. Torture is often thought to be intended to make people talk. In fact, as used for political purposes in Algeria and other comparable situations, torture was designed chiefly to make people listen. It was not based on *raison d'état*, as part of the violence that is necessary to run a state. It was the essence of power itself, which could no longer be masked by the inegalitarian trappings of the colonial system. Accordingly, it had a complex relationship with publicity, for although it could be regarded as the dark side of a colonial regime that stressed the advantages of the "civilization" it brought, this did not mean that it had to remain hidden. On the contrary, to be effective on the ultimate battleground (within the Algerian population) it had to be publicized. In the contest of distorting mirrors and the echo chamber of rumours that are always an integral part of war, public opinion thus had a complex role to play.

The role of public opinion

While currents of public opinion are feared when they are liable to hinder government action, they may also be sought by political authorities (vis-à-vis the rest of the world, but also the military authorities, for example). At the time of the Algerian War, however, conflicts still received limited media coverage. Algeria was a long way from metropolitan France, and in Algeria itself information was controlled by the army. Apart from what went on in the cities,⁵⁸ very little news reached the general public.

Informing the world

The nationalists did attempt, however, to inform the world of their plight at a very early stage. International meetings (such as the Bandung Conference) and above all the United Nations were choice fora for those wishing to gain recognition for the Algerian people's right to self-determination and trying to undermine the official French line that events in Algeria were simply an "internal French affair".⁵⁹

The vigilant French authorities, too, waged war in this diplomatic arena. They submitted their three-yearly human rights report to the UN Commission on

58 This was one of the very reasons the FLN opted for indiscriminate urban terrorism in Algiers itself. Such acts attracted far more attention there than those in the Algerian interior.

59 Matthew Connelly, *A Diplomatic Revolution: Algeria's Fight for Independence and the Origins of the Post-Cold War Era*, Oxford University Press, Oxford and New York, 2002.

Human Rights, pointing out that social order was essential for effective individual freedoms.⁶⁰ The report analysed the situation in Algeria since 1954 as follows:

The development of an attempt at political subversion characterized from the start by the massacre of civilian populations and acts of individual terrorism [has created] an emergency situation in this part of the French Republic, which is seriously endangering citizens’ lives, the protection of freedoms and property and national sovereignty itself.

While stressing that civilians retained control of Algerian politics, the report set out the various measures taken to control and improve the situation. It explicitly stated that it was prohibited to obtain confessions by force or trickery within a legal framework. Although nothing was said about extrajudicial settings, it was nevertheless specified that a “civil servant or member of the forces of law and order [who], while in office or in the exercise of his or her functions, has used violence or had it used against people without legitimate grounds” would see his sentence increased.⁶¹

In this unequal battle for international public opinion as represented by the UN, France was better armed; there, too, it had the strength of an established power. Nevertheless, the Algerian nationalists’ claims struck a chord and fairly quickly attracted support. Preceded by a number of international campaigns on behalf of torture victims, the bombing of a Tunisian village near the Algerian border finally destroyed the credibility of a version of events as an “internal French affair”. In this connection, however, the issue of torture probably played only a minor role.

The limited influence of public opinion in France

French public opinion was a different matter. In 1957 the public discovered that torture was not merely a series of blunders, but a widespread practice (although its true scale was not known at the time) and, a very serious indictment, that Europeans and women were also affected. The considerable emotion aroused went beyond activist and Christian circles; it influenced the government’s policy, forcing it to take a definite stand.⁶² However, although some groups worked to

60 Three-yearly report submitted in September 1957, archived in the René Cassin collection, 382AP/129/6 (Centre Historique des Archives Nationales).

61 “Le développement d’une entreprise de subversion politique caractérisée dès l’origine par le massacre des populations civiles et les actes de terrorisme individuel [a créé] dans cette partie du territoire de la République française une situation de crise où la vie des citoyens, la sauvegarde des libertés et des biens, et la souveraineté nationale elle-même [sont] dangereusement menacées ... [un] fonctionnaire ou agent de la force publique [qui], dans l’exercice ou à l’occasion de l’exercice de ses fonctions a sans motif légitime usé ou fait user de violences envers les personnes [verra sa peine alourdie].” The general absence of sanctions and criminal convictions is precisely what allows the conclusion to be drawn that torture – albeit prohibited – was in fact permitted in Algeria.

62 It was also as a result of this public feeling that the military authorities responsible for law enforcement in Algiers issued texts prohibiting any technique that would leave an irrevocable psychological or physical mark on the individual in question. Explicit reference was made to the context: it must be ensured that “the Army cannot be accused of having resorted either to reprisals against innocents or to methods detrimental to individual human dignity” (“[que] l’Armée ne puisse être accusée d’avoir usé, soit de représailles sur des innocents, soit de méthodes attentatoires à la dignité humaine de l’individu”). Directive No. 2 from General Allard to zone commanders, 23 March 1957, 1R 296* (SHD).

keep the issue alive, seeking to obtain as much information as possible⁶³ and ensuring that incidents were not shelved and the public was kept informed, torture was neither a subject of ongoing indignation nor a major political consideration during the war. No member of the government resigned, nor was any military leader punished for using such methods.⁶⁴

Lessons from the Algerian War

Should this impunity continue to be the principal lesson of the Algerian War? It is a question worth asking, given the extent to which the conflict has become the basis for a theory of war exported throughout the world. Indeed, notwithstanding a colonial context that may seem to belong to the past, the Algerian War displayed elements typical of many contemporary conflicts, generally characterized by considerable inequality between the combatants. While it involved a confrontation between two cultural systems, one had hegemonic aspirations tinged with contempt for the other side and was able to harness the machinery of state. This cultural power struggle was compounded by significant legal inequalities and, in particular, a relationship to the land marked by an opposition of lawful and unlawful occupants (a dual claim invoked equally by both parties, each with its own interpretation in which the other was regarded as the unlawful occupant). Lastly, the real challenge was to turn a presence imposed by force into a presence accepted by the majority.

Against such a background, by labelling one's enemies as "rebels", "subversive" or "terrorists" they are placed beyond the pale, as "outlaws"⁶⁵ who permit a high level of violence. This kind of categorization serves to blame them, as the initial troublemakers, for any violence they may suffer. In the end, it denies their actions any legitimacy – particularly by treating them as the actions of a minority. Above all, it is a refusal to consider that they are acting for political motives and with a political plan in mind. Yet that is precisely what those who use torture as a key weapon in a war waged by a repressive system are doing: they are performing a political act. They are making a political response to a political threat. In such a context, the practice of torture is intended to secure total control over the population and subject it to a specific, non-negotiated plan for the future. However, by denying one's adversaries the status of political negotiating partners and reducing them to the rank of "terrorists", one is liable to preclude a political solution for ending the war, thereby rendering any situation secured by means of such force particularly unstable. Conversely, encouraging other forms of persuasion is a way of trying to break the

63 Pierre Vidal-Naquet and the Audin Committee played a crucial role in this respect.

64 Although a few political and military leaders expressed their disapproval of the practice and even used their power to punish some of the perpetrators, this did not lead to an acknowledgement that torture was part and parcel of the security forces' assignment.

65 "Outlaws" was the very term the French used for a long time to refer to Algerian nationalists.

deadlock. Rather than seeking to crush one’s adversaries, it is a matter of bringing them to change their position, vis-à-vis both the population they are attempting to control and the one they too would like to confine, expel or eliminate.

Black letter abuse: the US legal response to torture since 9/11

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Abstract

The use of torture by the US armed forces and the CIA was not limited to “a few bad apples” at Abu Ghraib but encompassed a broader range of practices, including rendition to third countries and secret “black sites”, that the US administration deemed permissible under US and international law. This article explores the various legal avenues pursued by the administration to justify and maintain its coercive interrogation programme, and the response by Congress and the courts. Much of the public debate concerned defining and redefining torture and cruel, inhuman and degrading treatment. While US laws defining torture have moved closer to international standards, they have also effectively shut out those seeking redress for mistreatment from bringing their cases before the courts and protect those responsible from prosecution.

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I. Introduction: revelations of torture

Allegations of torture by US personnel in the “global war on terror” only gained notoriety after photographs from Abu Ghraib prison in Iraq were broadcast on US television in April 2004. Prior to the mass dissemination of these disturbing images, reports in the media and in the publications of human rights organizations of torture and other mistreatment generated little public attention and evidently rang few alarm bells in the Pentagon (Department of Defense). Words did not

* Thanks to Nicolette Boehland of Human Rights Watch for her assistance in preparing this article.

carry the reality of the pictures. And the pictures – of US soldiers giving the “thumbs up” behind a stack of naked Iraqi men or a battered corpse, of military dogs snarling at a naked, helpless prisoner, and the iconic photo of the man in the hood on the box, arms outstretched, wires dangling in the air – could not have fully captured the reality of Abu Ghraib.

And it was not just at Abu Ghraib, as the misleading phrase “Abu Ghraib scandal” would suggest. And it was not just a few “bad apples”. US military and Central Intelligence Agency (CIA) personnel committed torture and other forms of coercive interrogation at the detention centres at Bagram air base in Afghanistan, various detention facilities and forward operating bases in Iraq, and at Guantánamo Bay in Cuba. Prisoners were subjected to long-term sleep deprivation, extremes of heat and cold, painful stress positions, beatings, forced nakedness and other degrading treatment, indefinite solitary confinement, and other abusive interrogation methods. Jose Padilla, a US citizen, was held for 43 months in severe isolation in a naval brig in Charleston, South Carolina, so that he would confess all he knew about al Qaeda.¹

And those were just the methods used at the known detention centres. Only the barest information has emerged about torture by the CIA in secret prisons – so-called “black sites” – outside the United States.² And then there is the torture inflicted on individuals unlawfully rendered by the United States to other countries, such as Syria or Egypt.

The Abu Ghraib photos were powerful enough to generate a public furore, an official reaction from the previously unforthcoming administration of President George W. Bush and a series of military investigations. New revelations in the media and from Freedom of Information Act requests kept the matter in the headlines. Internal government memorandums setting out legal justifications for torture were made public. Retired military personnel emerged publicly to decry practices unbecoming of the armed forces.

More than three years since the revelations of Abu Ghraib, the concerns of detainee mistreatment have been subsumed in larger questions about Guantánamo Bay and what should be done about the prisoners there. According to the US government, torture has been prohibited and mistreatment has stopped. The low-level personnel caught in the photos at Abu Ghraib have been tried and punished. The Department of Justice legal memos on torture have been repudiated. Persons held in secret facilities by the CIA have been sent to Guantánamo, where the International Committee of the Red Cross is able to meet with them. And the

1 According to the *Christian Science Monitor*, “Although the issue of Padilla’s treatment in the brig arose briefly in the Miami case, no judge has ruled on its legality. According to defense motions on file in the case, Padilla’s cell measured nine feet by seven feet. The windows were covered over. There was a toilet and sink. The steel bunk was missing its mattress. He had no pillow. No sheet. No clock. No calendar. No radio. No television. No telephone calls. No visitors. Even Padilla’s lawyer was prevented from seeing him for nearly two years.” Warren Richey, “US gov’t broke Padilla through intense isolation, say experts”, *Christian Science Monitor*, 14 August 2007.

2 See Human Rights Watch, “Off the record: US responsibility for enforced disappearances in the ‘war on terror’”, June 2007.

military field manual on interrogations and the interrogation rules for the CIA have been revised and deemed compliant with US legal obligations.

But that is only part of the story. The US military's record of prosecuting personnel implicated in prisoner abuse has been poor, albeit with some exceptions. Convicted were a number of low-ranking soldiers and officers, but no senior officers. And investigations into other more serious cases of detainee abuse – including the death of several detainees during interrogations in Afghanistan and Iraq – made little headway or resulted in disciplinary action or short sentences. Except for the demotion of the brigadier-general in charge of coalition detention facilities in Iraq – a reservist – no serious action has been taken against senior military personnel for their role in establishing a system of coercive interrogation of prisoners.

The United States continues to hold several hundred men at Guantánamo Bay without regard to international human rights or humanitarian law. Thousands more are held in questionable circumstances and doubtful conditions in Afghanistan and Iraq. The various military investigations into the allegations of torture did not find anything terribly wrong – at least not criminally – at the senior levels, and Congress never conducted its own investigations: not a single member of the administration lost his or her job because detainees were tortured. Even if the United States has indeed ended torture and other mistreatment at these detention centres, those held still endure the psychological abuse of indefinite, long-term isolation.

Whereas the administration sought to deflect any role in the mistreatment of detainees at Abu Ghraib, CIA coercive interrogation techniques – some of which by any standard amount to torture – against “high-value” detainees have received official praise.³ While more than a dozen of the “disappeared” – the detainees held in secret CIA prisons – have since late 2006 been transferred to Guantánamo, nearly forty or so persons whose identities human rights organizations made public, remain unaccounted for. Many likely were sent home to an unknown fate. In short, the administration decried photographed abuses at Abu Ghraib while simultaneously conducting a programme of organized coercive interrogation in offshore CIA detention facilities.

This article will examine US legal issues concerning the torture and other mistreatment of prisoners held by the United States in the “global war on terror” and from the armed conflicts in Afghanistan and Iraq. It will examine the initial response of the executive branch to allegations of mistreatment, efforts by the legislative branch to address these concerns, and the role of the courts. What occurred can be likened to a three-sided ping-pong match, where issues of prisoner mistreatment bounced between the administration, the Congress and the Supreme Court.

This legal ping-pong match is far from over, but certain trends have developed over the ensuing years since the Abu Ghraib revelations. Efforts by the

3 See The White House, “The Military Commissions Act of 2006”, fact sheet, 17 October 2006; see generally Jane Mayer, “The black sites”, *New Yorker*, 13 August 2007.

administration to make the definition of torture so narrow as to preclude even the most terrible treatment from being considered torture were unsuccessful. Congress, through legislation, has pressed for definitions of torture and other mistreatment that approach, if they do not fully meet, the standards set out in international law. At the same time, administration initiatives in Congress have increasingly made it difficult for so-called “enemy combatants” in US custody – who may have been mistreated in detention – to bring their claims for redress before the courts. In other words, in the three years since Abu Ghraib, the substantive protections against torture have been strengthened against presidential tampering, but the real means to enforce them have been substantially weakened. Until the lights are turned on with regard to the US practice of torture, we shall never be sure what has occurred in the dark.

Failure of accountability mechanisms

The US government’s response to the allegations of torture and other mistreatment at Abu Ghraib prison, Guantánamo and Afghanistan was twofold: the creation of more than a dozen primarily military inquiries to investigate the allegations and possible policy failings, and the prosecutions or disciplinary action of individuals directly involved in the abuse. Ultimately, the inquiries and prosecutions attributed the abuses to policy lapses within the military structure and to criminal conduct by enlisted personnel and low-ranking officers. Protected from official condemnation, disciplinary action and prosecution were senior military and civilian officials. One effect was to shift the legal issues surrounding mistreatment from the executive branch of government to Congress and the courts – and away from the accountability of the administration.

Official inquiries

The dozen or so inquiries established by the Pentagon to investigate various aspects of detainee abuse were of uneven quality. The first investigation, by Major General Antonio M. Taguba, began in January 2004 in response to the as-yet-unpublished photographs of abuse at Abu Ghraib and was limited to investigating allegations of abuse by the 800th Military Police Brigade, which provided security at the prison. Filed in March 2004, the Taguba report proved to be the most forthright and critical analysis of US military detainee practices. Taguba found that

Between October and December 2003, at the Abu Ghraib Confinement Facility, numerous incidents of sadistic, blatant and wanton criminal abuses were inflicted on several detainees. This systemic and illegal abuse of detainees was intentionally perpetrated by several members of the military police guard force ... The allegations of abuse were substantiated by detailed

witness statements and the discovery of extremely graphic photographic evidence.⁴

Congressional hearings following the publication of the Abu Ghraib photographs addressed the allegations in the Taguba report. However, there was no serious follow-up to the Taguba report by Congress, only additional Pentagon investigations.

The ensuing investigations appeared to be little more than self-serving exercises on behalf of the senior military leadership. In August 2004, the highest-level report, the Final Report of the Independent Panel to Review DoD Detention Operations, headed by former Defense Secretary James R. Schlesinger, found “institutional and personal responsibility at higher levels”, but absolved Defense Secretary Donald Rumsfeld of any direct responsibility.⁵ Although email messages sent to the Pentagon in January 2004 from senior officials in Iraq reported the abuses and the existence of the photographs, the Schlesinger report upheld Rumsfeld’s contention that “the reluctance to move bad news up the chain of command” was the main reason why the Defense Department failed to respond to the ill-treatment at Abu Ghraib until after the story became public in April 2004.⁶ Other Defense Department inquiries provided important and useful information about the abuse of prisoners in US detention facilities, especially when examined together. However, none reached persuasive conclusions on the role of senior military and civilian officials in the perpetration of the mistreatment.

The inquiries suffered from three crucial flaws. First, most of the reports contained extensive classified sections. While classifying certain information relating to individuals or source information will be necessary in documents of this nature, the reported length of the classified sections of many of the reports suggest that they were being used to bury information to which the public should have had access. Indeed, it would likely be necessary to reassess upward the value of some of these reports were the classified information made public. But the failure to bring all possible information to public attention meant that the government and military could avoid responding in full to all the issues raised.

Second, the large number of investigations had the effect of diluting the findings of abuses and deterring a more comprehensive and independent investigation. Whereas the 9/11 Commission authorized by Congress and completed around that time painted a broad and compelling portrait of

4 US Department of Defense, “Article 15–6 Investigation of the 800th Military Police Brigade” (Taguba report), March 2004, reprinted in Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers*, Cambridge University Press, Cambridge, 2005, p. 405.

5 US Department of Defense, “Final Report of the Independent Panel to Review DoD Detention Operations” (Schlesinger report), August 2004, reprinted in Greenberg and Dratel, above note 4, p. 908. At a media conference releasing the report, Schlesinger rejected calls for Rumsfeld’s resignation, saying that it “would be a boon to all of America’s enemies and, consequently, I think that it would be a misfortune if it were to take place”. Bradley Graham and Josh White, “Top Pentagon leaders faulted in prison abuse”, *Washington Post*, 25 August 2004.

6 Seymour Hersh, “The general’s report”, *New Yorker*, 25 June 2007, pp. 65–6.

government failings prior to the attacks of 11 September 2001, none of the individual commission reports investigating mistreatment by US personnel had or could have had the same impact.

Third, and most importantly, the commission investigations were not of sufficiently high level to permit a bottom-to-top investigation of abuse. Military personnel can only conduct investigations of soldiers of equal or lower rank. That meant that none of the investigations could genuinely examine the role that senior military and civilian officials played in the abuse. Major General Taguba acknowledged that he was only permitted to investigate the military police at Abu Ghraib, not those above him in the military chain of command. Although he learned that somebody was giving “guidance” to the military police at Abu Ghraib, he told a journalist several years later, “I was legally prevented from further investigation into higher authority. I was limited to a box”.⁷

As a result, the numerous commissions of inquiry unearthed important information about detainee abuse but fell far short of providing any kind of governmental accountability. The piecemeal approach meant that the focus remained on enlisted personnel and a handful of officers. It meant that no single report was able to “connect the dots” between abuse in one location and abuse in another. And it meant that the most senior officials, most notably Defense Secretary Rumsfeld and his top officials and officers, were not investigated, even though documents before and since point to their role in the promulgation and support of policies that resulted in the torture and other abuse of detainees in Iraq, Afghanistan and at Guantánamo.⁸

Criminal prosecutions

Two years after Abu Ghraib, Human Rights Watch and several other non-governmental human rights organizations reported that more than 600 US military and civilian personnel were implicated in prisoner abuse involving more than 460 detainees.⁹ Few of those investigated for prisoner abuse were officers, and no officers were held accountable as a matter of command responsibility.¹⁰ The groups found more than 330 cases in which US military and civilian personnel were credibly alleged to have abused, tortured or, in about 30 cases, killed prisoners. Only half of the cases appear to have been adequately investigated.

7 Ibid., p. 61.

8 See generally Human Rights Watch, “Getting away with torture? – command responsibility for the US abuse of detainees”, April 2005, available at www.hrw.org/reports/2005/us0405/ (last visited 10 August 2007).

9 See generally Human Rights Watch et al., “By the numbers: findings of the detainee abuse and accountability project”, April 2006, available at <http://hrw.org/reports/2006/ct0406/> (last visited 10 August 2007).

10 Under the doctrine of command responsibility, commanders and other superiors may be found criminally responsible for the criminal acts of their subordinates when they knew or should have known of such crimes and did not take all necessary and reasonable measures in their power to prevent the crime or to punish those responsible. See, e.g., *Yamashita v. Styer*, 317 US 1; 66 S. 340, 4 February 1946.

The investigations conducted often ended abruptly or stalled without any resolution.¹¹

In those cases where military investigators found significant evidence of abuses and identified perpetrators, military commanders frequently used weak, non-judicial disciplinary measures as punishment, instead of pursuing a criminal case through courts-martial. When courts-martial did occur, most resulted in either prison sentences of less than one year or punishments that did not involve incarceration (such as discharge or rank-reduction). Only 40 of the more than 600 US personnel implicated in these cases were sentenced to prison time. As of April 2006, only ten US personnel had been sentenced to a year or more in prison. Only three officers were convicted by a court-martial for prisoner abuse.¹² On 28 August 2007 a court-martial acquitted Lieutenant Colonel Steven L. Jordan on charges that he failed properly to supervise soldiers at Abu Ghraib responsible for detainee mistreatment. He was the only officer to stand trial for abuses at Abu Ghraib, and his acquittal meant that not a single officer was found criminally liable for what happened there.¹³

One of the cases highlighting the failure of government accountability mechanisms to address official involvement in mistreatment concerned the alleged torture of Mohammad al-Qahtani, a Saudi citizen accused of being the so-called “twentieth hijacker” on 9/11. An unredacted copy of al-Qahtani’s interrogation log, which detailed interrogations during a six-week period from November 2002 to January 2003 at Guantánamo Bay, indicates that US personnel subjected al-Qahtani to a programme of physical and mental abuse including sleep deprivation, painful stress positions, forced standing, and sexual and other humiliation. A December 2005 army investigation contains a sworn statement describing then Defense Secretary Rumsfeld as being “personally involved” in al-Qahtani’s interrogation, with Rumsfeld “talking weekly” with General Geoffrey Miller, then senior commander at Guantánamo, about al-Qahtani’s interrogation. The head of US Southern Command, General Bantz J. Craddock, rejected the report’s findings, saying that the al-Qahtani interrogation did not violate military law or policy.¹⁴ No investigations or criminal action were taken against Rumsfeld or Gen. Miller.

Congressional inaction

Until the passage of the Detainee Treatment Act (DTA) in December 2005, the US Congress took a decidedly hands-off approach to the entire issue of detainee treatment, despite constitutional authority for a congressional role. There was no congressional authorization for the administration’s establishment of military commissions to try foreign terrorism suspects, the “opting out” of the Geneva Conventions in the “war on terror” or the creation of a detention facility at

11 Human Rights Watch et al., above note 9, pp. 2–3.

12 Ibid.

13 Paul von Zielbauer, “Colonel is acquitted in Abu Ghraib abuse case”, *New York Times*, 29 August 2007.

14 See Human Rights Watch, “US: Rumsfeld potentially liable for torture”, 14 April 2006.

Guantánamo Bay. Congress let the administration draft the rules and orders on the treatment of detainees instead of putting forth its own legislation. This was the case even though the Republican-controlled Congress would undoubtedly have supported the administration by enacting legislation that would have given clear legal authority for the administration's various actions.

The administration evidently determined that it had neither the need nor the obligation for congressional involvement. The vision of a unitary executive branch, promoted by influential administration lawyers such as David Addington and John Yoo – in which the president as commander-in-chief has unconstrained wartime powers¹⁵ – required neither legislation nor congressional approval. This vision was reflected in the so-called Bybee memorandum (discussed below) and executive branch statements suggesting that the president was restrained by no laws – including prohibitions on torture – during a time of war. And Congress itself showed little or no inclination to get involved in the issue of detainee treatment, despite Article 1, Section 8, Paragraph 11 of the Constitution, which empowers Congress to “make rules concerning captures on land and water”. The Republicans seemed content to leave the matter with the administration and the minority Democrats had little ability or will to push through such politically explosive legislation.

Defining and redefining torture

The chain of events that led to the use of coercive interrogation methods, including torture at Abu Ghraib and elsewhere in Iraq, Afghanistan and Guantánamo, is still not fully understood. A series of public policy statements and internal legal memorandums, some still unpublished, demonstrate that senior officials in the administration at a minimum created the conditions under which US military and civilian personnel could commit abusive interrogations with little fear of being subjected to disciplinary action or criminal prosecution.

On the basis of the documentation currently available, it would be unsurprising if the release of further government documents relating to the “torture scandal” and personal accounts by participants revealed that government responsibility for the coercive interrogations of detainees was crucial, direct and intentional. Continuing official support for coercive methods that are claimed to fall short of torture – the continuing administration refusal to denounce mock drowning (“waterboarding”¹⁶) for instance – is strong evidence of this.

15 See generally Jane Mayer, “The hidden power”, *New Yorker*, 3 July 2006.

16 “Waterboarding” was used during the Spanish Inquisition when it was called the *tormenta de toca*. In some versions of waterboarding, prisoners are strapped to a board, their faces covered with cloth or cellophane, and water is poured over their mouths and nose so they believe they are drowning.

Torture and other mistreatment under international and US law

The prohibition against torture and other mistreatment of persons in custody is long-standing under both international and US law. The torture prohibition is *jus cogens*, meaning that it pre-empts other international law norms.¹⁷ It is enshrined in many international treaties, most notably the International Covenant on Civil and Political Rights (ICCPR)¹⁸ and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention against Torture).¹⁹

The Convention against Torture defines torture as intentional acts by public officials or their agents inflicting on a person severe pain or suffering, whether physical or mental, to gain information or a confession, as punishment, to intimidate or coerce, or for any reason based on discrimination. The Convention against Torture also prohibits cruel, inhuman or degrading treatment or punishment. Cruel and inhuman treatment includes suffering that lacks one of the elements of torture or does not reach the intensity of torture.²⁰ Degrading treatment includes acts that involve the humiliation of the victim or that are disproportionate to the circumstances of the case.²¹

The prohibition against torture during wartime is codified under international humanitarian law (the laws of war) dating back at least to the US Lieber Code in 1863²² and more recently to the Geneva Conventions of 1949,²³ as well as their additional protocols.²⁴ It is prohibited at all times and in all places, in both international and non-international armed conflicts, always without exception. Torture is a grave breach of the Geneva Conventions and thus a war crime. It is a war crime under the ad hoc International Criminal Tribunals for the

17 See Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, N.P. Engel, Kehl, 1993, pp. 157–8.

18 International Covenant on Civil and Political Rights (ICCPR), GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976, Article 7.

19 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), GA Res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), entered into force 26 June 1987, Article 1.

20 Nowak, above note 17, p. 131.

21 Ibid., p. 133.

22 General Orders No. 100, Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Article 16.

23 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (GC I), 75 UNTS 31, entered into force 21 October 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (GC II), 75 UNTS 85, entered into force October 21, 1950; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (GC III), 75 UNTS 135, entered into force 21 October 1950; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV), 75 UNTS 287, entered into force 21 October 1950.

24 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) of 8 June 1977, 1125 UNTS 3, entered into force 7 December 1978; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II) of 8 June 1977, 1125 UNTS 609, entered into force 7 December 1978.

former Yugoslavia and for Rwanda and under the Rome Statute of the International Criminal Court.

Torture and other forms of mistreatment are banned under US state and federal law. As the US government in 2006 reported to the UN Committee against Torture, the international body that monitors compliance with the Convention against Torture,

Every act of torture within the meaning of the Convention [against Torture] is illegal under existing federal and state law, and any individual who commits such an act is subject to penal sanctions as specified in criminal statutes. Such prosecutions do in fact occur in appropriate circumstances. Torture cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer.²⁵

Members of the armed forces are prohibited from engaging in coercive interrogation under various provisions of the Uniform Code of Military Justice, which applies to all US service members, whether present in the United States or abroad.²⁶

Two federal laws also prohibit torture and other forms of coercive interrogation. Prior to its revision by the Military Commissions Act of 2006, the War Crimes Act of 1996 made it a criminal offence for US military personnel and US nationals to commit grave breaches of the 1949 Geneva Conventions as well as violations of Article 3 common to the Geneva Conventions (Common Article 3), which prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; ... outrages upon personal dignity, in particular humiliating and degrading treatment”.²⁷

The US anti-torture statute, enacted in 1994, permits the prosecution of a US national or anyone present in the United States who, while outside the United States, commits or attempts to commit torture. Torture is defined as an “act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control”.²⁸

25 US Department of State, “List of issues to be considered during the examination of the second periodic report of the United States of America: Response of the United States of America”, 2006, available at www.state.gov/documents/organization/68662.pdf (last visited 10 August 2007), p. 25.

26 See Department of Defense, Uniform Code of Military Justice, Title 10, Subtitle A, Part II, Chapter 47 of the United States Code, Articles 77–134.

27 18 USC §2441 (2000). Amendments to the War Crimes Act are discussed below.

28 18 USC §2340A (1998). A person found guilty under the anti-torture statute can be incarcerated for up to 20 years or receive the death penalty if the torture results in the victim’s death. Additionally, military contractors working for the Department of Defense might also be prosecuted under the Military Extraterritorial Jurisdiction Act of 2000 (Public Law 106–778), known as MEJA. MEJA permits the prosecution in federal court of US civilians who, while employed by or accompanying US forces abroad, commit any federal criminal offence punishable by imprisonment for more than one year. MEJA was amended in 2005 to define the phrase “employed by the Armed Forces outside the United States” to include civilian employees, contractors or employees of contractors, not only of the Defense Department, but also of “any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas”.

Torture redefined after 9/11

Following the 11 September 2001 attacks on the World Trade Center and the Pentagon, and the ensuing armed conflict in Afghanistan, the administration sought to loosen the definition of torture and other mistreatment under US law. After a public disagreement between the State and Justice Departments on the applicability of the Geneva Conventions to the Afghan conflict, President George W. Bush on 7 February 2002 issued a directive entitled “Humane Treatment of al Qaeda and Taliban Detainees”.

While accepting that the Geneva Conventions were applicable to the hostilities in Afghanistan, the directive concluded that captured Taliban members were not entitled to prisoner-of-war status because they were “unlawful combatants”, and captured al Qaeda members – because al Qaeda is “not a High Contracting Party to Geneva” – were not entitled anywhere in the world to treatment under the Geneva Conventions. Crucially, the directive stated that “the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, *in a manner consistent with the principles of Geneva*”.²⁹

This was the first public articulation of a policy in which those held by the United States in the “global war on terror” would not formally be entitled to legal protections – but only protected as a matter of policy. And the directive purposely excluded mention of the CIA.³⁰ The administration was opening the door to redefining the reach of US and international law to permit abusive practices.

As a result of this apparent relaxation of existing rules on interrogation and increasing demands for “actionable intelligence”, the CIA asked the Department of Justice for guidance on permissible interrogation methods. According to John Yoo, then Deputy Assistant Attorney General,

The CIA wanted – needed – a definitive answer to the question: how far can we go? They had specifically requested a legal opinion. They had captured senior al-Qaeda operatives who were not responding to being asked questions politely. CIA officers needed to know what, legally, they were entitled to do to them to get them to talk. They knew these guys had information on what al-Qaeda was planning. If the CIA could get that information, they could save lives. But they also wanted to be sure they would not end up going to prison for doing so.³¹

29 The White House, “Humane treatment of al Qaeda and Taliban detainees”, 7 February 2002, reprinted in Greenberg and Dratel, above note 4, p. 134 (emphasis added).

30 In written answers to the Senate Judiciary Committee, White House Counsel Alberto Gonzales confirmed that the policy was designed “to provide guidance” to the US armed services. When questioned whether the directive applied to CIA and other non-military personnel, Gonzales said that it did not. See US Senate, Committee on the Judiciary, “Confirmation hearing on the nomination of Alberto R. Gonzales to be Attorney General of the United States”, 6 January 2005, serial no. J-109-1, p. 331.

31 Alasdair Palmer, “‘Professor Torture’ stands by his famous memo”, *The Spectator*, 17 March 2007.

The Justice Department's Office of Legal Counsel drafted a response to the CIA request, which had been routed through then White House counsel Alberto Gonzales. It was reportedly drafted by Yoo and signed by Assistant Attorney General Jay Bybee, who soon thereafter was appointed to a federal judgeship. Completed in August 2002, the "Bybee memo" interpreted the statutory term of art "torture" as defined in the anti-torture statute.³² In 2007, Yoo described the memo as examining "what methods of inflicting pain and suffering constitute torture, and whether the U.S. president can order torture if he thinks it necessary".³³ More than that, the memo – commonly referred to as the "torture memo" when it became public – was a broad justification for methods of interrogation that were patently unlawful under US and international law.

The Bybee memo states that within the meaning of the Convention against Torture as ratified by Congress, "acts must be of an extreme nature to rise to the level of torture". The mere infliction of pain or suffering "is insufficient to amount to torture". Rather, the "[p]ain or suffering must be severe". That is, to amount to torture, "an act must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure or even death".³⁴ In short, the memo defined torture so narrowly as to exclude many practices commonly recognized as torture.³⁵

At the time, the administration was seeking authority for a wider range of interrogation methods for the military than had been permitted under existing doctrine. The standard US military doctrine on interrogation methods was the Army Field Manual on Intelligence Interrogation, FM 34–52, last revised in 1987.³⁶ While some of the approved interrogation methods in the field manual, such as "fear up" and "false flag", lend themselves to abusive treatment,³⁷ in general both the prescribed practices and overall tone of the field manual were consistent with the requirements of the Geneva Conventions. As FM 34–52 states in Chapter 1,

32 Office of Legal Counsel, Department of Justice, Memorandum for Alberto R. Gonzales Counsel to the President, "Standards of conduct for interrogation under 18 USC secs. 2340–2340A" (Bybee memo), 1 August 2002, reprinted in Greenberg and Dratel, above note 4, p. 172.

33 Palmer, above note 31.

34 Bybee memo, above note 32, pp. 172, 176.

35 Beyond the definitions of torture, the memo sought to set out legal grounds that would serve to protect any official who might ever be charged with committing unlawful acts. It indicated that the president as military commander-in-chief could authorize torture and suggested that interrogators have such authorization. It also set out legal defences, notably the "necessity" defence, as a justification for an official charged – no doubt by a later administration – for breaking the law. *Ibid.*, pp. 207–13. Although the Bush administration later declared the Bybee memo to be inoperative, the superseding Office of Legal Counsel opinion of 30 December 2004 noted that "[w]hile we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum". Office of Legal Counsel, Department of Justice, "Legal standards applicable under 18 USC sections 2340–2340A", 30 December 2004, available at www.usdoj.gov/olc/18usc23402340a2.htm (visited 10 August 2007).

36 US Department of the Army, *Field Manual 34–52: Intelligence Interrogation*, September 1992.

37 Professor Martin Lederman suggests that US military interrogators could have come to believe that the abusive interrogation methods used in Iraq were actually in compliance with FM 34–52 and thus in compliance with the Geneva Conventions on which the field manual was based. See <http://balkin.blogspot.com/2005/08/mowhoush-murder-geneva-scorpions-and.html>.

The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government. Experience indicates that the use of force is not necessary to gain the cooperation of sources for interrogation. Therefore, the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear.³⁸

The perceived intelligence demands at Guantánamo, and later in Iraq, led the administration to seek to substantially rewrite the provisions of FM 34–52 on coercive interrogation. In November 2002, Defense Department General Counsel William Haynes, after discussions with Deputy Secretary of Defense Paul Wolfowitz, Chairman of the Joint Chiefs of Staff General Richard Myers, and Undersecretary of Defense Douglas Feith, notified Defense Secretary Rumsfeld that it was lawful to subject detainees at Guantánamo to two categories of interrogation methods, including the use of stress positions for up to four hours,³⁹ isolation for up to 30 days, forced nakedness and using fear of dogs to induce stress. Even more serious “category III” methods, such as exposure to cold and heat and waterboarding were proposed without specific approval. In December 2002, Secretary Rumsfeld approved all of these interrogation methods for use at Guantánamo.⁴⁰ A month later, after protests from the military Judge Advocates General, the use of the category III methods was withdrawn.⁴¹

Additional legal concerns about what constituted torture and other mistreatment raised by the military led to the creation of the Defense Department Working Group under Navy General Counsel Alberto Mora. While the Working Group’s final, classified report on 3 April 2003 noted that the Uniform Code of Military Justice prohibited assault, cruelty and maltreatment of detainees, it recommended that Secretary Rumsfeld approve various seemingly unlawful methods, such as the use of guard dogs and forced nudity.⁴² It was later uncovered that the military officials participating in the Working Group, including Mora,

38 *Field Manual 34–52*, above note 36, pp. 1–8.

39 The listing of this method prompted Secretary Rumsfeld’s handwritten comment: “I stand for 8–10 hours a day. Why is standing limited to 4 hours?”, US Department of Defense, “Memorandum from the Secretary of Defense: counter-resistance techniques”, 27 November 2002, reprinted in Greenberg and Dratel, above note 4, p. 236.

40 US Department of Defense, “Memorandum for Commander, Joint Task Force 179: legal brief on proposed counter-resistance strategies”, 11 October 2002, reprinted in Greenberg and Dratel, above note 4, p. 229.

41 “Counter-resistance techniques”, above note 39, p. 236.

42 The Working Group final report stated that “legal doctrines could render specific conduct, otherwise criminal, *not* unlawful”. It cites its earlier discussion of commander-in-chief authority: “In order to respect the President’s inherent constitutional authority to manage a military campaign, 18 USC 2340A (the prohibition against torture) as well as any other potentially applicable statute must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority. Congress lacks authority under Article I [of the Constitution] to set the terms and conditions under which the President may exercise his authority as Commander-in-Chief to control the conduct of operations during a war.” According to Prof. Martin Lederman, this analysis came directly from a 14 March 2003 memo written by John Yoo for Defense Department General Counsel Haynes, and was presented to the

never signed off on the Working Group's final report. This version of the report was used to brief Major General Geoffrey Miller prior to his being transferred from Guantánamo to Iraq. And it is these abusive methods that appeared again and again in the Abu Ghraib photographs.⁴³

Torture, renditions and extraterritoriality

As a fundamental element of its efforts to narrow the definition of torture and maintain that its methods were legal, the administration has made use of international borders – transferring detainees to states that routinely use torture, or simply applying coercive interrogation methods outside the United States. It sought to do so through its interpretation of its international legal obligations: it tried to evade the Convention against Torture prohibition not to return individuals to places where they were likely to be tortured by receiving so-called diplomatic assurances from receiving states. And it rejected any extraterritorial application of the International Covenant on Civil and Political Rights, effectively permitting abroad that which would have been unlawful if committed in the United States.

Unlawful renditions

One method by which the administration made use of torture and other ill-treatment to obtain information from detainees in the “war on terror” was to render (or transfer) them to other states, including the person's home country, for interrogation. Unlike extradition, which is normally a treaty-based process that may entail provisions to ensure the protection of the rights of the person being transferred for criminal prosecution, rendition is typically “off the books”. The term “extraordinary rendition” had been used in the context of the *Álvarez Machain* case from the 1990s with respect to the controversial practice of abducting persons abroad to prosecute them at home – so-called renditions to justice.⁴⁴ Post-9/11, the term came to be applied to cases of renditions *from* justice,

Working Group as “controlling authority” because it came from the Justice Department's Office of Legal Counsel, presumably the “Bybee memo”. See Martin Lederman, “Silver linings (or, the strange but true fate of the *second* (or was it the third?) OLC torture memo)”, Balkinization Blog, 21 September 2005, available at <http://64.233.169.104/search?q=cache:Dt5WwNn1JuEJ:balkin.blogspot.com/2005/09/silver-linings-or-strange-but-true.html+Lederman+%22controlling+authority%22+March+13&hl=en&ct=clnk&cd=1&gl=us> (last visited 10 August 2007). In other words, the Justice Department was compelling the military to adopt abusive interrogation methods that were later used in Iraq.

43 See Jane Mayer, “The memo”, *New Yorker*, 27 February 2006.

44 In 1990, agents hired by the US Drug Enforcement Administration (DEA) abducted from Mexico Dr. Humberto Álvarez Machain because of his alleged role in the 1985 kidnapping, torture and murder of DEA agent Enrique Camarena Salazar, and brought him to the United States for trial. *United States v. Alvarez-Machain*, 504 US 655 (1992). See Alan J. Kreczko, Deputy Legal Adviser, US Department of State, “The Alvarez-Machain decision: US jurisdiction over foreign criminal Humberto Alvarez Machain, statement before the subcommittee on civil and constitutional rights of the House Judiciary Committee (24 July 1992)”, in 3 *US Dep't St. Dispatch* 616, 3 August 1992 (“These procedures require that decisions as to extraordinary renditions from foreign territories be subject to full inter-agency coordination and that they be considered at the highest levels of the government”).

where persons would be sent without legal safeguards to another country that had no intention of fairly prosecuting them.

The very nature of these US renditions is such that their number is not – and probably cannot be – known. Several cases of alleged rendition to torture have been widely reported, most notably those of Maher Arar, a Syrian-Canadian national who was picked up by US authorities while in transit in 2002 and sent to Syria, where he was brutally treated for nearly a year, and Khaled el-Masri, a German citizen of Lebanese descent, who alleged being picked up in Macedonia in 2003 and sent to a CIA detention facility in Afghanistan, where he was mistreated. Efforts by these individuals to seek redress for their alleged mistreatment via the courts are discussed below.

Article 3 of the Convention against Torture provides that no state “shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.⁴⁵ Article 3 adds that for the purpose of making this determination, “the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”.⁴⁶

Despite cases of evident abuse, the administration continues to assert that it may lawfully send terrorism suspects to states that regularly engage in torture so long as it has obtained “diplomatic assurances” – promises from the receiving state that it will treat the detainee humanely. These promises cannot be enforced and neither state has an incentive in uncovering abuse, so there is little likelihood that diplomatic assurances provide protection to the individual so transferred.⁴⁷

Extraterritorial application of human rights law

The administration long asserted that international human rights treaties, notably the ICCPR and the Convention against Torture, do not prohibit US officials abroad from using coercive interrogation techniques short of torture against non-US citizens.

During the confirmation process for attorney general in January 2005, Alberto Gonzales responded to queries by Senate committee members on the treatment of foreign detainees abroad by claiming that US officials were not bound by the prohibition against cruel, inhuman or degrading treatment.⁴⁸ While asserting in written responses that torture by all US officials was unlawful, Gonzales indicated that no law would prohibit the CIA from engaging in cruel,

45 Convention against Torture, Article 3(1).

46 Ibid., Article 3(2).

47 See, e.g., Human Rights Watch, “Still at risk: diplomatic assurances no safeguard against torture”, April 2005.

48 See “Senate Judiciary Committee Confirmation Hearing” on the nomination of Alberto R. Gonzales to be attorney general, 6 January 2005, available at www.nytimes.com/2005/01/06/politics/06TEXT-GONZALES.html?ei=5070&en=31a4f50c78ff7e20&ex=1186977600&adxnnl=1&adxnnlx=1186844794-hxi4ru4f/rDg6r7qSpVagA&pagewanted=all&position= (last visited 10 August 2007).

inhuman or degrading treatment when interrogating non-citizens outside the United States. Gonzales argued that when the US Senate gave its advice and consent to ratify the Convention against Torture in 1994, it made a reservation by which the United States defined the prohibited “cruel, inhuman or degrading treatment” as meaning the ill-treatment prohibited by the Fifth, Eighth or Fourteenth Amendments to the US Constitution.⁴⁹

The administration was claiming that because the Constitution does not apply to non-US citizens outside the United States,⁵⁰ neither does the Convention against Torture’s prohibition against ill-treatment. Under this interpretation, US officials interrogating or detaining non-US nationals abroad would be free to engage in cruel and inhuman treatment short of torture without violating the Convention against Torture.

Abraham Sofaer, legal advisor at the State Department during the Reagan administration, disagreed publicly with Gonzales’s analysis of the reservation’s meaning. In a letter to the Judiciary Committee, Sofaer stated,

[T]he purpose of the reservation [to the Convention] was to prevent any tribunal or state from claiming that the US would have to follow a different and broader meaning of the language of Article 16 than the meaning of those same words in the Eighth Amendment. The words of the reservation support this understanding, in that they related to the meaning of the terms involved, *not to their geographic application*.⁵¹

The administration reiterated its position in the 5 May 2006 statement to the Committee Against Torture by State Department legal advisor John Bellinger III. Bellinger said that the Convention against Torture did not apply to detainees in the “war on terror” held abroad because “[i]t is the view of the United States that these detention operations [in Afghanistan, Guantánamo and Iraq] are governed by the law of armed conflict, which is the *lex specialis* applicable to those operations.”⁵²

Such an interpretation undermines the very aim of the Convention against Torture, which calls on governments to eliminate torture and ill-treatment to the fullest extent of their authority.⁵³ It would also give the green light to the

49 United States of America Reservation I (1) to the Convention against Torture, available at www.ohchr.org/english/countries/ratification/9.htm#reservations (last visited 10 August 2007).

50 See *Reid v. Covert*, 354 US 1 (1957) (US constitutional rights apply abroad only to US citizens).

51 Letter from Abraham Sofaer, Hoover Institution, to Senator Patrick Leahy, Judiciary Committee, 21 January 2005 (emphasis added). Sofaer’s letter emphasizes the words of the reservation: “the United States considers itself bound by the obligation under article 16 ... *only insofar as the term* cruel, inhuman or degrading treatment or punishment *means* the cruel, unusual and inhumane treatment under the Eighth Amendment” (emphasis in original).

52 Department of State, US Meeting with UN Committee Against Torture, Opening Remarks of John B. Bellinger, III, Geneva, 5 May 2006, available at www.us-mission.ch/Press2006/0505BellingerOpenCAT.html (last visited 10 August 2007).

53 As the UN Human Rights Committee states in its General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 10: States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. ... This

CIA to commit abuses in its secret detention facilities abroad. Thus while claiming it was rejecting torture, the administration was effectively seeking a loophole in international law that would allow US intelligence operatives abroad leeway to conduct abusive interrogations.

Congress responds

Throughout this period – and indeed to the present – the administration has maintained that it has not authorized the use of torture and has acted consistently with international law. For instance, in a June 2003 response to a letter from Senator Patrick Leahy about allegations of mistreatment by US forces in Afghanistan, Defense Department General Counsel Haynes wrote that “*It is the policy of the United States to comply with all its legal obligations in its treatment of detainees*” (emphasis added). He added that it is US policy to treat all detainees and conduct all interrogations, “wherever they may occur”, in a manner consistent with US obligations under the Convention against Torture. But with respect to allegations of specific practices, he said that “[i]t would not be appropriate to catalogue the interrogation techniques used by US personnel ... thus we cannot comment on specific cases or practices”.⁵⁴ As such statements indicate, the administration did not accept that international legal provisions were binding on the United States, but rather the United States would treat detainees humanely only as a matter of policy – policies which of course were subject to change.

In an apparent refutation of the Bybee memo, the Justice Department in December 2004 declared torture to be “abhorrent”. Yet, as the *New York Times* reported in October 2007, incoming Attorney General Alberto Gonzales in February 2005 approved a secret Justice Department legal opinion on “combined effects” providing the CIA with “explicit authorization to barrage terror suspects with a combination of painful physical and psychological tactics, including head-slapping, simulated drowning and frigid temperatures”.⁵⁵

The administration strongly objected to the inclusion of the “McCain amendment” to the proposed Detainee Treatment Act (DTA), which included language specifically to prohibit US military personnel abroad from using coercive methods that fell short of torture. In July 2005 Vice President Cheney met with senior Republican leaders to oppose such language, and the White House issued a statement to Congress that President Bush’s advisers would urge him to veto the pending \$442 billion defence bill “if legislation is presented that would restrict the

principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

54 Letter of Department of Defense General Counsel William J. Haynes II to Senator Patrick Leahy, June 25, 2003, *reprinted in* Congressional Record: February 10, 2004 (Senate), pp. S781–S785.

55 See Scott Shane, David Johnston and James Risen, “Secret US endorsement of severe interrogations,” *New York Times*, 4 October 2007. The administration did not deny the existence of the legal opinion, but to date it has not been made public.

President's authority to protect Americans effectively from terrorist attack and bring terrorists to justice"⁵⁶ – a clear reference to the McCain amendment.

McCain and congressional supporters persisted, and on 5 October 2005, his amendment to the bill passed the Senate by a veto-proof 90 to 9 vote. As enacted and signed into law in December 2005, the DTA prohibits the use of cruel, inhuman or degrading treatment by any US official or employee operating anywhere in the world and prohibits US military interrogators from using interrogation techniques not listed in the Army Field Manual on Intelligence Interrogation.

One substantive provision of the DTA is problematic. It requires that detainee status tribunals set up at Guantánamo Bay assess whether any detainee statements were obtained through coercion and then assess the "probative value of the statement".⁵⁷ The implication is that statements obtained through torture or cruel, inhuman or degrading treatment could be entered as evidence if they have sufficient probative value. There are also no prohibitions on the use of statements by other witnesses in detainee review proceedings obtained through torture or other coercion. A misuse of such evidence seems to have occurred, according to Defense Department documents, when Guantánamo detainee Mohammed al-Qahtani accused 30 other prisoners there of being Osama bin Laden's bodyguards – after Qahtani reportedly endured weeks of sleep deprivation, isolation and sexual humiliation.⁵⁸

Even after the DTA was enacted, the administration sought to weaken its substantive provisions. President Bush's "signing statement", issued when the DTA was signed into law, stated that the president's powers as military commander-in-chief superseded any restrictions on the use of torture and cruel, inhuman and degrading treatment imposed by the McCain amendment.⁵⁹ This view was reflected in administration pronouncements on "waterboarding", an

56 See Josh White and R. Jeffrey Smith, "White House aims to block legislation on detainees", *Washington Post*, 23 July 2005.

57 Detainee Treatment Act, Federal Judiciary Emergency Special Sessions Act of 2005, Pub.L.No. 109–163, §100(3)(b.Stat.1993,119 (2005).

58 Adam Zagorin, "One life inside Gitmo", *Time Magazine*, 13 March 2006. Nor have the federal courts always provided better protection against the use of evidence allegedly obtained through abusive treatment by third parties. During the trial in 2005 of Ahmed Omar Abu Ali, a US citizen, on charges of providing material support for the al Qaeda terrorist network, the government relied extensively on a confession made by Ali while he was detained in Saudi Arabia. He asserted that he gave a confession only after authorities in Saudi Arabia tortured, whipped and eventually coerced him into confessing. The federal court convicted Ali on terrorism conspiracy charges and subsequently sentenced him to 30 years in prison. The federal court rejected the request of Ali's defence counsel to present evidence of scars on his back from Saudi Arabia as evidence of his being tortured. The court also denied the defence request to admit information concerning Saudi Arabia's poor human rights record on torture, ignoring US Department of State country reports of widespread abuse of prisoners by Saudi authorities. The court instead accepted official Saudi statements denying that torture occurred in Saudi Arabia. See Jerry Markon, "Judge allows statement by al Qaeda suspect", *Washington Post*, 24 October 2005; Amnesty International, "The trial of Ahmed Abu Ali - findings of Amnesty International's trial observation", 14 December 2005.

59 George W. Bush, President's Statement on Signing of HR 2863 (30 December 2005), available at www.whitehouse.gov/news/releases/2005/12/20051230-8.html (last visited 10 August 2007).

interrogation method that is invariably torture. Prior to the passage of the DTA, the administration refused to declare waterboarding to be unlawful.⁶⁰ Nearly a year after the law was enacted, State Department legal adviser Bellinger in October 2006 declined to answer specific questions on waterboarding, saying the matter was up to Congress.⁶¹ And Vice President Cheney agreed with a radio interviewer that subjecting prisoners to “a dunk in water” was not torture; if it could save lives, he said, “It’s a no-brainer for me”. The vice president said that such methods had been a “very important tool” in the interrogation of alleged high-level al Qaeda detainees, such as Khalid Sheikh Mohammed, and that they did not, in his view, constitute torture.⁶² And in October 2007 it came to light that after the enactment of the DTA, the Justice Department had approved a secret legal memorandum, which remains classified, that none of the CIA interrogation methods were cruel, inhuman or degrading.⁶³

Blocking redress for torture

While Congress slowly, if not wholly successfully, placed limits on the administration’s interrogation practices, it simultaneously took measures that undermined detainees’ rights to be protected from mistreatment. This became evident in the congressional response to the three Supreme Court decisions to date concerning the detainees at Guantánamo – *Hamdi v. Rumsfeld*⁶⁴ and *Rasul v. Bush*⁶⁵ in 2004, and *Hamdan v. Rumsfeld* in 2006.⁶⁶

These cases addressed the issue of whether those incarcerated had the legal right to challenge their detention in US federal courts and the jurisdiction of the courts to hear their claims. So while not directly concerned with torture and other abuse, the cases had important implications for detainee treatment. Prohibitions on mistreatment mean little if there is no effective remedy, with the courts being an independent and impartial source of such a remedy.

A judicial hearing has also been important in other cases relating to the “global war on terror”. Those subjected to rendition and torture have sought out the courts for a remedy – or at least an official apology. And while some detainees have achieved courtroom victories, in none of the cases has the complainant obtained genuine relief. So while the definition of torture and other mistreatment

60 CIA Director Porter Goss while appearing on ABC News on 29 November 2005 refused to condemn waterboarding as an impermissible interrogation method.

61 Demetri Sevastopulo, “Cheney endorses simulated drowning”, *Financial Times*, 26 October 2006.

62 The White House, “Interview of the Vice President by Scott Hennen, WDAY at Radio Day at the White House”, October 24, 2006, available at www.whitehouse.gov/news/releases/2006/10/20061024-7.html (last visited 10 August 2007).

63 See Shane, Johnston and Risen, above note 55.

64 *Hamdi v. Rumsfeld*, 542 US 507 (2004). In September 2004, the US government released Hamdi to Saudi Arabia on the condition that he give up his US citizenship.

65 *Rasul v. Bush*, 542 US 466 (2004). The claimant in the case, Shafiq Rasul, a British national, was repatriated to the United Kingdom and released three months before the decision was handed down.

66 *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

under US law has gone beyond the “equivalent to organ failure” standard endorsed in the August 2002 “torture memo” to approach international standards, it is largely because of congressional action. However, congressional action has largely been the reason why judicial remedies available to those who have claimed abuse have appreciably narrowed in the same time span.

The intervention of the Supreme Court

The two Supreme Court cases decided on 29 June 2004 were a defeat for the administration’s claim that detainees at Guantánamo Bay were outside the purview of the federal courts. Creating a “legal black hole”, in the words of Lord Steyn,⁶⁷ was the rationale for establishing a detention centre at Guantánamo in the first place. It seemed to allow US officials to employ interrogation methods that would otherwise be unlawful within the United States, while those detained could not challenge their detention or treatment before US courts. Although the cases did not address the first half of that equation, *Rasul* and *Hamdi* taken together rejected the second half.

In *Rasul*, the court by a six to three margin held that the federal courts had the authority to decide whether foreign nationals held at Guantánamo Bay were lawfully imprisoned, reversing a lower court decision. While long established case law supports the proposition that US citizens are protected under the Constitution whether they are inside the United States or abroad, non-nationals have constitutional protections only within the United States.⁶⁸ Thus the question for the *Rasul* court was whether Guantánamo was inside or outside the United States. The court held for *Rasul* and the other petitioners, finding that the Guantánamo detainees were being imprisoned “within ‘the territorial jurisdiction’ of the United States” in a place “over which the United States exercises exclusive jurisdiction and control”.⁶⁹ Non-nationals at Guantánamo, said the court, “no less than American citizens”, had the right to challenge the lawfulness of their detention through the writ of habeas corpus, and the courts had jurisdiction to review.⁷⁰ While this was a favourable ruling for the Guantánamo detainees, it seemed unlikely to apply to detainees held by the United States in other locations, such as in Afghanistan or Iraq.

67 Johan Steyn, “Guantanamo Bay: the legal black hole”, Twenty-Seventh F. A. Mann Lecture, British Institute of International and Comparative Law, 25 November 2003.

68 See *Reid v. Covert*, 354 US 1 (1957).

69 *Rasul*, above note 65, at 476, 480.

70 *Ibid.*, 481. The court found that the petitioners were entitled to the writ of habeas corpus under the federal habeas corpus statute, but indicated that application of the writ to the detainees was “consistent with the historical reach of the writ of habeas corpus” at common law. The Court noted that the writ of habeas corpus existed prior to the federal statute and that at common law the writ extended to persons detained not only “within sovereign territory of the realm”, but persons in “all other dominions under the sovereign’s control”. *Ibid.*, at 481–2. This issue would be returned to in the case of *Boumediene v. Bush* and *Al Odah v. Bush*, which considered whether Guantánamo detainees did in fact have a habeas corpus right that existed outside the federal habeas corpus statute, since under the Military Commissions Act they were no longer covered by the federal habeas corpus statute.

In *Hamdi*, the court reversed the dismissal of a habeas corpus petition brought on behalf of Yaser Esam Hamdi, a US citizen detained indefinitely as an “illegal enemy combatant”. The court recognized the government’s authority to detain enemy combatants but said that the executive branch does not have the power to detain indefinitely a US citizen without basic due process rights, such as notice of the charges and an opportunity to contest them.

The *Rasul* and *Hamdi* decisions established that neither the location of the detention facility (at least at Guantánamo and perhaps in other foreign locations) nor the legal status of the detainees (as enemy combatants) precluded their right to judicial review of their cases. The cases were a defeat for the administration and threatened to burst the law-free zone created at Guantánamo. The administration’s ability to hold detainees at will was being challenged along with its ability to conduct coercive interrogations.

The aspect of the *Hamdi* decision that had the greatest immediate impact was the plurality’s holding that a detained US citizen had the right “to challenge meaningfully the Government’s case and to be heard by an impartial adjudicator”.⁷¹ The reference to an “impartial adjudicator” left open the possibility that the military could create a tribunal that would serve this function, and still avoid bringing the matter before the courts.

The administration reacted quickly. Nine days after the announcement of the *Hamdi* and *Rasul* decisions, Deputy Secretary of Defense Paul Wolfowitz announced – as a matter of internal department “management” – the creation at Guantánamo of Combatant Status Review Tribunals (CSRTs). According to the Pentagon, the purpose of this entirely new process was not to make *de novo* determinations of the legal status of the detainees to determine whether they were properly detained. Rather, the CSRT process would allow for a review of determinations that had already been made “through multiple levels of review by officers of the Department of Defense” that those held were “enemy combatants”.⁷²

Under the CSRT regulations applied since 2004, Guantánamo detainees are not allowed counsel. They are not allowed to see or have the opportunity to rebut any accusations against them that the government considers classified. They are given no meaningful opportunity to present exculpatory evidence or present witnesses on their behalf. Basically, the process imposes upon Guantánamo detainees the burden of proving themselves innocent of being “enemy combatants” without allowing them access to the information on which the government was basing its decision to hold them.

Unsurprisingly, in over 90 per cent of the CSRT rulings, in several hundred cases, the tribunals confirmed the original decision that a detainee was an “enemy combatant”. In 2007, in an affidavit appended to a legal challenge to the CSRTs, Lt. Col. Stephen Abraham, an Army reservist and lawyer who spent six

71 *Hamdi*, above note 64, p. 535.

72 See US Department of Defense, “Factsheet on Combatant Status Review Tribunals”, July 2006, available at www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf (last visited 10 August 2007).

months in 2004–5 as a panelist on the CSRTs at Guantánamo, sharply criticized the CSRTs, claiming that determinations of enemy combatant status were based on outdated, generic intelligence that was rarely case-specific.⁷³

Denying the right to a remedy

A fundamental precept of international human rights law is the right to an effective remedy for the violation of one's rights. Article 2 of the ICCPR provides that each state party to the convention shall "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy" for abuses by persons acting in an official capacity and that anyone claiming such a remedy shall have this right determined by competent governmental authorities, and that such remedies when granted shall be enforced.⁷⁴

The difficulties of redress for those alleging torture while in US custody have been evident in cases brought by individuals who claim that they were unlawfully rendered by the US government to other countries and mistreated in detention.

Maher Arar, a Canadian citizen of Syrian ancestry, was detained incommunicado by US immigration authorities for two weeks in September 2002, during which time he was unable to challenge either his detention or imminent transfer to a country where he was likely to be tortured. Relying on diplomatic assurances from Syria that he would not be tortured, the United States flew Arar to Jordan, where he was driven across the border to Syria. He was detained in Syria for ten months, during which time he alleges that Syrian authorities tortured him repeatedly, often with cables and electrical cords.⁷⁵

Arar brought a lawsuit in US federal court against US officials involved in his rendition and detention for compensation for the physical and psychological harm suffered in Syria. The US government claimed a national security privilege and sought to dismiss the case. The district court agreed, concluding that it could not second-guess the government's claims that the need for secrecy was

73 *Al Odah v. US*, Supreme Court, Reply to Opposition to Petition for Rehearing, available at www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf (last visited 10 August 2007).

74 The UN Human Rights Committee in its General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), at para. 10, states with respect to states' jurisdiction for human rights violations, "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Reparations Principles"), adopted 16 December 2005, GA Res. 60/147, UN Doc. A/RES/60/147 (2005), principle 11.

75 United States Senate, "Hearing of the Personnel Subcommittee of the Senate Armed Services Committee, military justice and detention policy in the global war on terrorism", 109th Cong., 1st sess., 14 July 2005.

paramount and that discovery could have a negative impact on US foreign relations and national security.

In a ruling on 16 February 2006 that makes the very mistreatment of the individual the grounds for denying judicial relief, a US district court judge dismissed Arar's lawsuit because the government raised "compelling" foreign policy and national security issues that were a matter for the executive and legislative branches, not the courts. The judge also stressed that "the need for secrecy can hardly be doubted". According to the court ruling, "One need not have much imagination to contemplate the negative effect on our relations with Canada if discovery were to proceed in this case and were it to turn out that certain high Canadian officials had, despite public denials, acquiesced in Arar's removal to Syria". The concern, then, was not Arar's treatment, but the embarrassment that would be felt by Canadian officials were it to become known in a US courtroom that they had secretly participated in Arar's unlawful rendition to Syria. As a *New York Times* columnist wrote at the time, the ruling "basically gave the green light to government barbarism".⁷⁶

In *Arar v. Ashcroft*, the administration had initially invoked the "state secrets" doctrine, which permits the government the privilege, not reviewable by the courts, of shielding state secrets from trial. The government argued that because every fact in the case is a US state secret, Arar could not prove his case and it should be dismissed. But the federal court judge did not accept the state secret doctrine as presented and instead took it a step further. He said that merely invoking the doctrine could prove embarrassing to the government because "it could be construed as the equivalent of a public admission that the alleged conduct had occurred in the manner claimed".⁷⁷ Thus the government does not even have to claim that torture is a "state secret" to prevent allegations of it from being heard in court. Arar has appealed.

In a second highly publicized case, Khaled el-Masri, a German citizen of Lebanese descent, claimed that he was seized in Macedonia in December 2003 and eventually transferred to a CIA-run detention facility in Afghanistan where he was beaten and held incommunicado for several months. It is believed that el-Masri was mistaken for Khaled al-Masri, a suspected al Qaeda member alleged to have been involved in the planning of the 9/11 attacks on the United States. In May 2004, el-Masri was flown to Albania and left on an empty road; he eventually found his way back to Germany. He said that one of the detaining officials conceded that his arrest and detention had been in error. El-Masri filed a lawsuit in US federal court against US officials and other individuals and companies allegedly involved in his detention and rendition. He alleged violations of his due process rights and the international prohibitions against arbitrary detention and cruel, inhuman and degrading treatment. The US government invoked the state

⁷⁶ Bob Herbert, "The torturers win", *New York Times*, 20 February 2006.

⁷⁷ *Arar v. Ashcroft*, 16 February 2006; see David Luban, "An Embarrassment of Riches", Balkinization Blog, 4 March 2006, available at <http://balkin.blogspot.com/2006/03/embarrassment-of-riches.html> (last visited 10 August 2007).

secrets doctrine. The court agreed with the US government's argument and on 18 May 2006 dismissed the case.⁷⁸ In October 2007, the Supreme Court without comment rejected el-Masri's appeal against the appellate court decision.⁷⁹

Hamdan and the Military Commissions Act

The Abu Ghraib scandal and its revelations and several years of litigation by Guantánamo detainees culminated in a historic Supreme Court decision and new legislation from Congress. Instead of largely resolving the issues of coercive interrogation and redress for abuse, they ensured that the United States would not put the issue behind it in the near future.

Redefining mistreatment

The Military Commissions Act (MCA), enacted by Congress on 28 September 2006 and signed into law by President Bush on 17 October 2006, was not just about re-establishing the military tribunals at Guantánamo Bay that were struck down by the Supreme Court in *Hamdan v. Rumsfeld*. In *Hamdan*, the Supreme Court held that the Guantánamo military commissions were unlawfully established under US law and also violated the fair trial provision of Common Article 3 to the 1949 Geneva Conventions. It said that the lower court had erred in finding the conflict with al Qaeda to be international in scope instead of a non-international armed conflict. During non-international armed conflicts, states (and non-state actors) are bound to abide by Common Article 3.⁸⁰

The *Hamdan* case has important implications for the use of coercive interrogation methods against suspected al Qaeda members. In addition to requiring that sentences only be carried out by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples",⁸¹ Common Article 3 also sets out minimum standards for the humane treatment of all persons no longer actively participating in hostilities.⁸² On 7 July 2006 the Pentagon quickly issued a memo implementing the court's decision with respect to the applicability of Common Article 3 to the US armed forces.⁸³

In the meantime the administration made no clear enunciation of the requirements of humane treatment as required by Common Article 3. This was

78 *El-Masri v. George Tenet*, 2006 WL 1391390 at 7 (E.D.Va., 2006); Reuters, "Judge dismisses Masri torture case", 18 May 2006.

79 Linda Greenhouse, "Supreme Court refuses to hear torture appeal," *New York Times*, 9 October 2007.

80 *Hamdan*, above note 66.

81 Article 3 (1)(d) common to the Geneva Conventions of 1949.

82 *Ibid.*, Article 3(1)(a) and (c).

83 See US Department of Defense, "Application of Common Article 3 of the Geneva Conventions to the treatment of detainees in the Department of Defense", 7 July 2006, accessed at <http://balkin.blogspot.com/CA3.DOD.memo.pdf> (last visited 10 August 2007).

crucial to the US interrogation regime because it opened up the liability of US officials involved in interrogation to prosecution under the War Crimes Act. The War Crimes Act makes grave breaches of the 1949 Geneva Conventions felonies under federal law when committed against or by US citizens. The intention of the act was to allow for the prosecution in US courts of persons responsible for war crimes against US military personnel. In 1997 the law was amended to include violations of Common Article 3 of the Geneva Conventions, thus expanding coverage to abuses committed in non-international armed conflicts as well as international armed conflicts. Legislative proponents of the amendment specifically had in mind members of armed groups in internal conflicts in Somalia, Bosnia or El Salvador who might mistreat US soldiers in their custody.⁸⁴

The US government's inclusion of Common Article 3 in the list of prosecutable offences under the War Crimes Act along with grave breaches of the four Geneva Conventions⁸⁵ goes beyond what the Geneva Conventions themselves require. The "Penal Sanctions" provisions of the Geneva Conventions only mandate that high contracting parties undertake to enact legislation necessary to provide effective penal sanctions for persons committing or ordering "any of the grave breaches" of the Conventions.⁸⁶ Because it was assumed that violations committed during non-international armed conflicts would be prosecuted by the state in which they occurred, Common Article 3 was not included among the "grave breaches" of the 1949 Geneva Conventions.⁸⁷

The *Hamdan* decision no doubt raised concerns within the administration that the Common Article 3 component of the War Crimes Act could be used to prosecute officials who used cruel or inhuman interrogation methods – or that it could at least hamper ongoing and future interrogations of al Qaeda suspects. So while *Hamdan* created the need for congressionally mandated military commissions to replace the unlawful commissions set up by executive order, it also encouraged the administration to seek to amend the War Crimes Act. As a result, the Military Commissions Act not only provided a legal basis for military commissions, but addressed substantive US law defining torture and other ill-treatment of "enemy combatants" as found in the War Crimes Act.⁸⁸

While the MCA prohibits the introduction of evidence at military commissions that the accused cannot see to rebut, the act relaxes the rule on

84 See R. Jeffrey Smith, "Detainee abuse charges feared", *Washington Post*, 28 July 2006.

85 18 USC §2441(c) (2006). "(c) Definition.--As used in this section the term "war crime" means any conduct ... (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict."

86 See GC I, Article 49; GC II, Article 50; GC III, Article 129; and GC IV, Article 146.

87 The ad hoc tribunals for the former Yugoslavia and Rwanda determined that serious violations of Common Article 3 committed during non-international armed conflicts could be prosecuted as war crimes. The Rome Statute of the International Criminal Court specifically added criminal offences found in Common Article 3 to its list of war crimes. Rome Statute of the International Criminal Court, 2187 UNTS 90, entered into force 1 July 1, 2002, Article 8(c).

88 Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (17 October 2006) (codified at 10 USC §§948a-950w and other sections of titles 10, 18, 28, and 42).

hearsay – permitting evidence deemed “reliable” and sufficiently “probative”⁸⁹ – which opens the door for the use of evidence obtained through the mistreatment of detainees. International human rights law does not prohibit the use of hearsay evidence – indeed, continental legal systems rely on judges rather than on hearsay rules to disallow evidence that is of doubtful probative value. But the military commissions under the MCA lack the broader array of protections found in continental law courts – particularly fully independent and professional judges. Under the MCA, the burden is on the accused to prove that the evidence is unreliable; given the very limited opportunity to obtain evidence through discovery, this will be a particularly difficult hurdle to overcome. Individuals could be convicted on the basis of summaries of second and third-hand testimonies of persons who were mistreated in detention, without the accused having any meaningful chance to confront their accusers or meaningfully challenge their statements.

The MCA also contains limited discovery compared with what is available to defendants in federal court or before US courts-martial. Specifically, the rules allow the prosecution to withhold classified sources and methods of interrogation from both the accused and the legal counsel of the accused.⁹⁰ This could render meaningless the prohibition on torture, since the defence will have a very difficult time showing that evidence used before the commission was obtained through coercive interrogation methods.

The MCA neither authorizes torture nor eliminates Common Article 3 from the War Crimes Act. However, it does narrow the scope of unlawful treatment considered to be a criminal offence. The MCA lists nine offences that it defines as “grave breaches” of Common Article 3 that can be prosecuted as war crimes. Torture and inhuman treatment are listed as “grave breaches”, but degrading and humiliating treatment are not. The MCA defines “serious physical pain or suffering” as occurring only if there is “extreme” pain or other extreme injuries: substantial risk of death, burn or serious physical disfigurement, or significant impairment of a body part, organ or mental faculty.⁹¹ In other words, the threshold for “serious” pain has effectively been raised to an “extreme” pain threshold.

Crucially with respect to possible future prosecutions of US personnel for engaging in abusive interrogations, the MCA sets out two distinct definitions of cruel and inhuman treatment. One definition applies to mistreatment that occurred prior to the enactment of the MCA and a second, more stringent definition, applies to conduct since then. Any non-fleeting mental pain or suffering is defined as cruel and inhuman treatment if committed after the passage

⁸⁹ Ibid., 10 USC §949a(b)(2).

⁹⁰ Ibid., 10 USC §949d(f)(2)(B). The act states, “The military judge, upon motion of trial counsel, shall permit trial counsel to introduce otherwise admissible evidence before the military commission, while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that (i) the sources, methods, or activities by which the United States acquired the evidence are classified, and (ii) the evidence is reliable.”

⁹¹ Ibid. 10 USC §950v(b)(12).

of the MCA. Prior to the MCA's passage, the pain inflicted had to be "prolonged" to qualify as cruel and inhuman treatment.⁹²

This latter definition of "cruel and inhuman treatment" effectively accepts the administration's contention that "enhanced interrogation techniques" used by the CIA against suspected Al Qaeda members, such as exposure to heat and cold, stress positions, and even waterboarding, were never prohibited. That is, they were not cruel and inhuman because they did not cause "prolonged suffering". Two of the primary sponsors of the MCA, Senators John McCain and John Warner, argued that the MCA was intended to ensure that these and similar practices were prohibited by law. The result is that officials previously authorized to use or who had carried out abusive interrogation methods that caused relatively brief but severe mental anguish – such as waterboarding and extended sleep deprivation – would effectively be immune from prosecution.

The MCA provides the president with the authority to interpret the "meaning and application" of the Geneva Conventions. This could be considered merely a restatement of the president's existing powers under the constitution – necessary for instance to interpret treaties – with no more weight than other executive branch regulations, which are subject to judicial review. But administration lawyers, while concluding that the law did not require that an executive order on CIA interrogation practices be drafted, were under pressure from the CIA, as well as Congress, to do so. As CIA Director Michael V. Hayden wrote in a note to CIA employees, "At the end of the day, the director — any director — of CIA must be confident that what he has asked an agency officer to do under this program is lawful. That's the story here".⁹³

It was not until 20 July 2007 that President Bush issued an executive order construing the meaning of Common Article 3 with respect to the CIA's detention and interrogation programme.⁹⁴ While reiterating the ban on torture and cruel and inhuman treatment as provided under US law, the executive order essentially permits the CIA to restart its interrogation of persons held in secret, incommunicado detention. Specific directives on permissible interrogation methods remain classified. Thus the determination of whether certain techniques such as waterboarding are allowed cannot be determined from the executive order, and so long as there is no independent oversight of persons held at so-called "black sites", there can be no real way to judge how the CIA is defining torture and mistreatment.

92 The MCA provisions on offences state in 10 USC §950v (b)(12), "The term serious mental pain or suffering has the meaning given the term severe mental pain or suffering in [the War Crimes Act] except that—

(I) the term serious shall replace the term severe where it appears; and

(II) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term serious and non-transitory mental harm (which need not be prolonged) shall replace the term prolonged mental harm where it appears."

93 See Mark Mazzetti, "C.I.A. awaits rules on terrorism interrogations", *New York Times*, 25 March 2007.

94 Executive Order: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, 20 July 2007.

Perhaps the answer can be found in the statement President Bush made when he signed the MCA into law in October 2006. Calling the CIA detention programme “one of the most successful intelligence efforts in American history”, he said that the new authority provided to the CIA to detain intelligence suspects would “ensure that we can continue using this vital tool to protect the American people for years to come”.⁹⁵

Court stripping under the MCA

Legal victories for detainees in the Supreme Court on judicial oversight, along with pressure from the US Congress to bring legal definitions of torture and other coercive treatment in line with the requirements of the Geneva Conventions and human rights treaties, threatened to shut down administration interrogation practices and subject those involved to legal scrutiny. The administration fought back by obtaining legal provisions in legislation that made it hard, if not impossible, for detainees to bring their case before a court. Should the administration succeed, this would effectively reverse the major Supreme Court decisions on Guantánamo and judicial review and keep actual interrogation practices out of public scrutiny – regardless of how legislation defined torture and other mistreatment.

The genuine substantive gains of the Detainee Treatment Act were undermined by the inclusion of important procedural restrictions on the rights of Guantánamo detainees. For instance, the DTA includes no mechanism for detainees who are mistreated in detention to bring civil actions seeking redress for violations of the DTA. This left enforcement of the act with the administration, which never indicated what measures if any the Department of Defense and the CIA would take to ensure compliance with the McCain amendment.

The “Graham-Levin amendment” to the DTA precluded Guantánamo detainees from bringing any future challenge to their ongoing detention or conditions of confinement before the courts. The administration took the position that the Graham-Levin amendment precluded *all* Guantánamo detainees from challenging in federal court the use of torture and cruel, inhuman or degrading treatment. The June 2006 *Hamdan* decision declaring the military commissions at Guantánamo illegal found that the “court-stripping” provisions of the DTA only applied retroactively – that is, it did not prevent those who had already filed suits from having their habeas petitions heard.

The Military Commissions Act addressed the illegal military commissions but also the habeas corpus stripping provisions, and effectively reversed the administration’s Supreme Court defeat in *Hamdan*.⁹⁶ The bill was rushed through Congress – doubtless to take advantage of the Republican majority in the House

⁹⁵ The White House, “President Bush signs Military Commissions Act of 2006”, 17 October 2006.

⁹⁶ MCA, above note 88.

and Senate before the November 2006 elections, which brought about Democratic majorities in both houses.⁹⁷

As discussed above, the MCA strengthens some elements of the 2005 Detainee Treatment Act and somewhat weakens the War Crimes Act with respect to US officials implicated in the mistreatment of detainees. Most importantly, however, the act sharply reduces the legal avenues open to “enemy combatants” to challenge their mistreatment in detention.

The MCA includes a paragraph stripping the federal courts of jurisdiction in cases of “application[s] for a writ of habeas corpus” and other actions that relate “to any aspect of the detention, transfer, treatment, trial, or conditions of confinement” of aliens determined by the US government. This provision basically undoes the *Hamdan* decision by making its habeas-stripping provisions retroactive and applicable to non-citizens held by the United States anywhere in the world. The constitutional issues addressed by the provision will not only have important implications for the rights of Guantánamo detainees, but have profound consequences for the right to habeas corpus under US law.

The court-stripping provisions of the MCA were challenged in *Boumedienne v. Bush*, brought by Guantánamo detainees petitioning for habeas corpus against their continuing detention. In April 2007 the Supreme Court rejected a late term request for review. On 29 June, in apparent response to US intelligence officer Lt. Col. Abraham’s affidavit criticizing the CSRTs in which he had participated, the Supreme Court took the highly unusual step of reversing its earlier ruling and decided to hear arguments in the *Boumedienne* appeal during the 2007–8 term.⁹⁸ The question in this case will be whether the status determination process used by the CSRTs at Guantánamo is sufficient to meet the common law requirements of habeas corpus under the US Constitution.

The MCA not only seeks to strip the courts of their ability to review habeas corpus petitions, but *all* legal actions seeking relief, including redress for mistreatment.⁹⁹ As a result, violations of the prohibition on torture will be difficult for Guantánamo detainees to litigate, and thus ultimately difficult to prevent, when those responsible for mistreatment cannot be taken to court by their victims. This provision also sends a message to those contemplating the use of coercive interrogation methods banned by the legislation that they are unlikely to face prosecution should they violate the laws.

97 President Bush stated publicly, “I urge the Senate to act quickly to get a bill to my desk before Congress adjourns.” White House, “President Bush appreciates House passage of Military Commissions Act of 2006”, 27 September 2006.

98 The court gave no reason for its reversal. The last time the Supreme Court granted such a request after an initial denial was in 1968. See James Vicini, “Court to hear Guantanamo prisoners appeals”, Reuters, 30 June 2007.

99 The MCA states, “[N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant, or is awaiting such determination”, above note 88, §950j(b).

Further provisions of the MCA preclude any individual from invoking the Geneva Conventions as a source of rights in a legal action against any US official.¹⁰⁰ This will also make it very difficult for those mistreated in detention to challenge presidential interpretations of the Geneva Conventions. Had this provision been in effect previously, it would have prevented Salim Ahmed Hamdan from making his claim that he was being denied a fair trial under Common Article 3. But it will also affect future detainees who believe that they were protected by Geneva Convention prohibitions on torture and other ill-treatment, and who seek to have those claims adjudicated in US courts.¹⁰¹

Conclusion

Since 9/11, the use of torture and other coercive interrogation methods by the US government has played out at two levels. The first is the actual terrible practice – the stress positions, the exposure to freezing temperatures, the sleep deprivation, the mock drowning. Few have been prosecuted for their actions, none at the highest levels. Since Abu Ghraib much information has come out about these unlawful practices and, just as certainly, much remains unknown. Some or all have been discontinued in Afghanistan, Iraq and Guantánamo and at CIA “black sites” – or they have not. The lack of accountability makes it hard to know.

The second level is how these interrogation techniques – what is torture, what is not – have played out through the law. An issue that the Bush administration sought to keep wholly within its own purview has reached the courts and the Congress. At times the question is the definition of mistreatment; at other times it has been about the right of those mistreated to be heard. Congress and the courts have established prohibitions on torture and other mistreatment that approach international standards. But the administration, with the help of Congress, has successfully to date ensured that those who might suffer mistreatment will not be able to bring their claims before a court of law.

This three-way ping-pong match between the branches of the US government shows no signs of ending. Remedies for those abused in Guantánamo or Afghanistan or rendered to torture abroad seem no closer. As long as the debate about torture continues in the federal courtrooms and halls of Congress and from the president’s desk, one cannot be confident that the practice of torture by the US government does not continue as well. Torture should not be debated.

¹⁰⁰ MCA, above note 88, §5.

¹⁰¹ The question of whether the Geneva Conventions are self-executing has never been fully answered by US courts. See, for example, *United States v. Noriega*, case No. 88-79-CR, US District Court for the Southern District of Florida, 8 December 1992 (“this Court believes Geneva III is self-executing and provides General Noriega with a right of action in a US court for violation of its provisions”).

The worst scars are in the mind: psychological torture

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Abstract

Torture during interrogation often includes methods that do not physically assault the body or cause actual physical pain – and yet entail severe psychological pain and suffering and profoundly disrupt the senses and personality. Solitary confinement and prolonged sleep deprivation are just two examples of these psychological torture methods. Even psychological methods which do not amount to ill-treatment when considered in isolation, amount to inhuman or degrading treatment or torture, when applied in conjunction with other techniques, cumulatively and/or over a long time. Often they are part and parcel of the whole torture process and constitute a “background environment” of harassment and duress. The “cumulation over time” factor must thus be considered as part of a system of psychological torture.

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Interrogators often – sadly – take pride in the fact that they do not resort to “crude physical methods” in their work, but rely only on psychological “methods”,¹ which they do not consider as torture. This calls for a discussion on what exactly is meant by the term “psychological torture”. The following pages will examine what constitutes torture per se and, in particular, whether psychological methods used during interrogation can produce effects, mental or physical, that amount to torture.

Torture may occur during detention, with the aim of punishing or degrading and humiliating a person.² This article will, however, focus only on torture applied during interrogations with the aim of extracting information.

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During interrogations, psychological methods are used specifically with the aim of “softening up” and thus breaking detainees’ resistance so as to make them “talk”. Their use often results from a state policy authorizing them either directly or indirectly, in the latter case by “condoning” them.

From the outset, it should be stressed that interrogations as such, so long as the methods used respect the rule of law, are legitimate. These methods have been described elsewhere,³ and include different forms of interrogation techniques and the use of psychological ploys. The challenge is thus to determine which methods are legitimate and which are illegal, causing pain and suffering that fall into the category of “cruel and inhuman or degrading treatment” or torture. Some of the methods used are physical methods, acting on the body and generally producing pain; others are psychological, that is, non-physical, and act on the mind. Some methods are recognized forms of torture; others – which also may produce pain and suffering, but to a lesser degree – may not “qualify” as torture according to the definition. Yet other “non-physical” methods may appear to be “minor” or even innocuous when taken separately one by one. This paper will attempt to explore the use of non-physical methods, and will consider whether and when their use can amount to torture according to the established definition. It will in particular look into whether the use of such “minor” and apparently innocuous methods, when applied repeatedly, either singly or in combination and over a period of time, can also amount to cruel, inhuman and degrading treatment, or even torture.

On the legal definition of torture

Defining exactly what torture means seems to be as complex as defining what shocks the conscience in the case of pornography. A US Supreme Court Justice once said with regard to the definition of pornography,

I shall not today attempt further to define the kinds of material I understand to be embraced [by the term pornography] ... but I know it when I see it!⁴

There is nevertheless a universally accepted definition of torture today, namely the one contained in the 1984 UN Convention against Torture (CAT),

- 1 This acknowledgment was made to the author on several occasions by detaining authorities, in different contexts, during ICRC visits to prisoners during the last two decades.
- 2 In the case of Raquel Marti de Mejia (*Raquel Martin de Mejia v. Perú*, Caso 10.970 Informe No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 168, 1996), the Inter-American Court of Human Rights stressed that the “purpose” element can include punishment or humiliating and intimidating the person. It is not restricted to extracting information from a detainee.
- 3 Legitimate “psychological methods of interrogation” go beyond the scope of this paper, but the most well-known ones can be listed here: “fear up”; “pride and ego”; “futility”; “we know all”; “good cop/bad cop”; silent questioning and others. See *Field Manual* (FM) 34–52, Intelligence Interrogation, US Department of the Army, Washington DC, 28 September, 1992, Chapter 3, “Approach phase and questioning phase”, 3–10 and 3–20. Available at www.fas.org/irp/doddir/army/fm34-52.pdf (last visited 9 October 2007). See also Raúl Tomás Escobar, *El interrogatorio en la investigación criminal*, Editorial Universidad, Buenos Aires, 1989, pp. 312–30.
- 4 Justice Potter Stewart trying to explain “hard-core” pornography, or what is obscene. *Jacobellis v. Ohio*, 378 US, 184 (1964), Appeal from the Supreme Court of Ohio (in footnote 11), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=378&invol=184> (last visited 8 October 2007).

which defines as torture any act that consists of the intentional infliction of “severe pain or suffering, whether physical or mental”, involving a public official and carried out for a specific purpose.⁵ The Inter-American Convention to Prevent and Punish Torture has a broader definition of torture,⁶ which does not have to include the infliction of severe pain and suffering. In international humanitarian law (IHL), torture does not have to be inflicted by or with the acquiescence of a public official, but can be perpetrated by any individual.

Despite these various interpretations, when it comes to defining “torture” the main elements remain those laid down in the CAT. An important characteristic of this Convention is that it introduces a significant difference between the term “torture” and “other acts of cruel, inhuman or degrading treatment or punishment” (CIDT): it bans torture completely and absolutely (Art. 2),⁷ while imposing on states “only” the obligation to “undertake to prevent” cruel, inhuman or degrading treatment (Art. 16). States have used this to argue that while torture is forbidden, cruel, inhuman or degrading treatment may be justified under exceptional circumstances. If such treatment is to be allowed in certain circumstances, but not torture, the differentiation between these two notions becomes important.

Other legal instruments, however, do not differentiate between the two terms. The International Covenant on Civil and Political Rights (ICCPR), for example, prohibits in absolute terms both torture and inhuman or degrading treatment.⁸ The same is true of the European Convention on Human Rights (ECHR).⁹ International humanitarian law equally forbids torture (whether physical or mental) and cruel, humiliating or degrading treatment, as well as any form of physical or moral coercion.¹⁰

In the practical application of the provisions, the European Court of Human Rights has distinguished between torture and “cruel, inhuman or

5 Article 1 of the CAT defines torture thus: “1. For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

6 The Inter-American Convention to Prevent and Punish Torture defines torture in Article 2 as “any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.”

7 Article 2 (2) of the CAT states that “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

8 ICCPR, Articles 4 and 7.

9 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3: “No one shall be subjected to torture or inhuman or degrading treatment or punishment.”

10 See Article 3 common to all four Geneva Conventions of 1949, and Article 17 of the Third Geneva Convention of 1949 relative to the treatment of prisoners of war.

degrading treatment” by attaching a “special stigma” and “particular intensity and cruelty” to torture.¹¹ In the early case of *Ireland v. UK*, methods such as hooding, sleep deprivation, wall-standing and constant noise were considered *not* to amount to torture.¹² Conversely, in the discussion whether similar methods used by the Israeli General Security Service for interrogating suspected Palestinian terrorists in the late 1980s and 1990s amounted to torture, the UN Committee against Torture and the Special Rapporteur on Torture found that these methods *did* constitute torture.¹³

In more general terms, it is possible to differentiate between the two notions by referring to the UN Declaration of 1975, which defines torture as an “aggravated form of cruel, inhuman or degrading treatment”.¹⁴ Torture thus implies the infliction of more severe suffering or pain – arguably a very subjective concept.

The definition of torture, as opposed to cruel, inhuman or degrading treatment, is thus not very clear and a constant issue of debate. An interpretation in good faith of the relevant human rights instruments, however, makes the differentiation between these notions legally irrelevant, as the intention was to prohibit *both* torture *and* inhuman or degrading treatment, and not to allow states to circumvent the absolute prohibition of torture by classifying methods as cruel, inhuman or degrading, rather than as “torture”.

Defining psychological torture

The term “psychological torture” can relate to two different aspects of the same entity. On the one hand, it can designate *methods* – that is in this case the use of “non-physical” methods. While “physical methods” of torture can be more or less self-evident, such as thumbscrews, flogging, application of electric current to the body and other similar techniques, “non-physical” means a method that does not hurt, maim or even touch the body, but touches the mind instead. Just as readily recognizable as methods of torture in this category are prolonged sleep deprivation, total sensory deprivation or having to witness the torture of family members, to cite only three examples. On the other hand, the term “psychological torture” can also be taken to designate the psychological *effects* (as opposed to

11 *Ireland v. United Kingdom*, App. No. 5310/71, ECtHR, Strasbourg, 18 January 1978, para. 167.

12 *Ibid.*, para. 168. However, the Commission on Human Rights, through which cases had to pass before submission to the Court, had found that the acts did constitute torture, a position which many would support today.

13 Israeli Information Centre for Human Rights in the Occupied Territories (B’Tselem), “Legislation allowing the use of physical force and mental coercion in interrogations by the General Security Service”, Position Paper, January 2000, available at www.btselem.org/Download/200001_Torture_Position_Paper_Eng.doc (last visited 15 October 2007).

14 This UN Declaration does not clearly define such treatment, except for this comparison to torture. See UN Declaration on the Protection of all Persons from being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly Resolution 3452, available at www.unhchr.ch/html/menu3/b/h_comp38.htm (last visited 7 October 2007).

physical ones) of torture in general – torture “in general” meaning the use of either physical or psychological methods, or both. There is sometimes a tendency to merge these two separate concepts into one, which leads to confusion, between methods (or “input”, as it were) and effects (or “output”). This confusion has led some authorities to deny the very existence of “psychological torture” as a separate entity.

It has been stated that it can be difficult to define torture in general. It is even harder to define “psychological torture”. As has been seen, the definition of torture is firmly based on “severe pain and suffering”. The fact that this notion is qualified as being both “physical and mental” is a recognition that both aspects go together. Physical torture produces both physical and mental suffering; the same applies to psychological torture. It therefore becomes difficult to isolate psychological torture per se as a separate entity and define its different features.

A report by Physicians for Human Rights (PHR) in 2005 broke new ground by providing a definition of the term “psychological torture”, based on the interpretation formulated in the United States Code (USC) – the codification of the general and permanent laws of the United States – of the prohibition of torture.¹⁵ The Code’s interpretation refers to

“severe mental pain or suffering” caused by the threat of, or actual, administration of “procedures calculated to disrupt profoundly the senses or personality”.¹⁶

Here the effects that will qualify as torture are clearly defined. If the methods used during interrogations – in this case, what PHR calls “psychologically coercive tactics” – produce the said effects, then those psychological methods do indeed qualify as constituting “psychological torture”. They are used to break down any will prisoners may have to resist interrogators’ demands, and are discussed in detail further on.

Similar to the definition of torture in the CAT, this definition requires a measurement of the gravity of suffering, as the methods must be calculated to disrupt “profoundly” the senses or the personality, and the effects they produce must be “severe” mental pain or suffering. The difficulties linked to measuring mental pain and suffering now need to be considered.

15 Federal Criminal Anti-Torture Statute, 18 USC, Section 2340: “(1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control; (2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;” available at http://caselaw.lp.findlaw.com/cascode/uscodes/18/parts/i/chapters/113c/sections/section_2340.html (last visited 15 October 2007).

16 *Break Them Down*, Report by Physicians for Human Rights (hereinafter PHR Report), Washington, D.C., 2005.

Measuring mental pain and suffering

The threshold that must be reached for acts to amount to torture is, as mentioned above, the causing of severe pain and suffering. The Convention against Torture explicitly prohibits the infliction of severe physical or mental (or psychological) suffering. *Physical* forms of pain and suffering are more readily understood than *psychological* forms, although physical suffering may also be hard to quantify and measure objectively – defining severe pain and suffering involves an assessment of gravity that is difficult to make, as these notions are highly subjective and may depend on a variety of factors, such as the age, gender, health, education, cultural background or religious conviction of the victim.¹⁷ How should the distinction be drawn between different levels of pain: mild, moderate, substantial, severe, intense, extreme, unbearable, intolerable, excruciating, agonizing ...? – And the list could go on ...

An objective assessment of psychological suffering is especially difficult. Sir Nigel Rodley, former UN Special Rapporteur on Torture and one of the leading experts on the subject, has stated,

[T]he notion of “intensity of suffering” is not susceptible of precise gradation, and in the case of mainly mental as opposed to physical suffering, there may be an aura of uncertainty as to how ... [to assess] the matter in any individual case.¹⁸

This aura of uncertainty is problematic, as it has been used to exclude certain treatment from being qualified as torture. As far as physical pain and suffering are concerned, it is perhaps useful to recall that the debate has at times gone well off track. In Jay Bybee’s famous (some would say “infamous”) memorandum (Bybee memo) of 2002, which sought to qualify the definition of torture for purposes internal to the US government, the severity of pain or suffering necessary for any method of interrogation to “qualify” as a form of torture had to be of a “high level of intensity”.¹⁹

With regard to physical suffering, the author of the memorandum defined “severe” as having to

17 See Cordula Droegge, “In truth the leitmotiv: the prohibition of torture and other forms of ill-treatment in international humanitarian law”, in this issue, pp. 515–541.

18 Report of the Human Rights Committee, GAOR, 37th Session, Supplement No. 40 (1982), Annex V, General Comment, 7(16), para 2.

19 Memorandum from Jay. S. Bybee, Assistant Attorney General for the Office of Legal Council at the US Department of Justice, to Alberto Gonzales, Counsel to the President (1 August 2002), in Karen Greenberg and Joshua Dratel (eds.), *The Torture Papers*, Cambridge University Press, Cambridge, 2005, pp. 172–218. It should be noted that debates internal to the US government that began with the issuing of “Internal Memos” by the Office of Legal Council (OLC) have come to light, mainly in the aftermath of well-publicized scandals, such as the graphic ill-treatment of detainees at Abu Ghraib. Such openness in discussing the inner reasonings behind the development and wielding of certain methods of interrogation in the interest of national security is certainly not present in most countries. Many other governments would undoubtedly have a great deal to “contribute” to these arguments, either in the light of what they have done or condoned in the past, or what they may be doing at the present time, but do not “share” their lines of reasoning thus openly.

rise to a ... level that would ordinarily be associated with a sufficiently serious condition or injury such as death, organ failure or serious impairment of bodily functions.²⁰

The reasoning that pain, in order to qualify as “severe”, has to produce permanent damage and impairment may be valid for insurance compensation.²¹ But it is most certainly flawed for any definition of torture, for which there is no requirement that the pain and suffering be long-lasting, let alone permanent. The use of domestic legislation for assessing insurance claims has no bearing whatsoever on the interpretation of international law prohibiting torture. Suffering from illness and suffering from torture are two completely different things. Besides being flawed, the threshold proposed for physical pain is also extremely high and does not take into account mental suffering.

With reference to psychological torture, another most extraordinary condition was proposed in the same Bybee memo,²² suggesting that in order to constitute “severe mental pain or suffering” there had to be “prolonged mental harm”, “of substantial duration”, “lasting months or even years”. This meant that any objective qualification of psychological suffering had to be proven to be long-lasting. The ICRC visits prisoners around the world, and encounters many who are still under interrogation in situations where torture is being used. According to the above interpretation, any meaningful assessment of “prolonged” damage would thus have to be done months or years after the fact, which would defeat the very purpose of qualifying a situation of ongoing torture as such.

Post-traumatic stress disorder (PTSD)²³ found in prisoners subjected to coercive interrogations would certainly qualify as “significant” psychological harm of “significant” duration. This diagnosis, however, can only be made if the symptoms have been present for more than one month and requires suitable conditions and sufficient time for interviewing the person. These optimum conditions are very difficult to secure whilst prisoners are still in custody, all the more so if they are still under interrogation and are thus being subjected to ongoing stress! Acts deliberately causing PTSD thus might qualify under the Bybee memo as torture, but that qualification would require waiting for a proper assessment several months or years down the line to determine what was happening to prisoners not yet released at the time such acts were perpetrated. This not only constitutes an unnecessary barrier to the classification of certain

20 Ibid., p. 176.

21 Ibid., p. 176. The memorandum specifically mentions that “the phrase severe pain applies in statutes defining an emergency medical condition for the purpose of providing health benefits”.

22 Ibid., pp. 195 ff.

23 The discussion of whether torture produces PTSD is a complex one and goes well beyond the scope of this paper. PTSD as originally defined was meant to apply to extreme situations, in fact “near-death” situations, which resulted in serious psychological trauma to the victims. This would for example be the case of someone who survived an air crash, or who narrowly survived dying in a fire. The common denominator differentiating these “near-death” situations from torture is that torture is “man-made” and intentional. The PTSD-like effects after torture are consequently different. The debate among specialists today has, however, largely blurred this distinction.

psychological effects as amounting to torture, but defeats the very goal of any psychological evaluation for the purpose of rehabilitation.

In the following description of what has been called “input” (psychological methods of torture) and “output” (psychological effects of those methods), the issue of “psychological torture” will first be considered from the “input” point of view.

Psychological methods used during interrogations

Psychological methods used during interrogation are those that cause disruptions of the senses or personality, without causing physical pain or leaving any visible physical sequelae. These non-physical methods are many and their use is widespread. They include:

- sleep deprivation;
- solitary confinement;
- fear and humiliation;
- severe sexual and cultural humiliations;²⁴
- the use of threats and phobias to induce fear of death or injury;
- use of other “techniques” such as forced nudity, exposure to cold temperatures, light deprivation, etc.

The US Department of State, in its *Country Reports on Human Rights Practices 2004*,²⁵ quotes a report by the US Committee for Human Rights listing various psychological methods which it describes as torture:

[M]ethods of torture included ... prolonged periods of exposure; humiliations such as public nakedness; confinement to small “punishment cells,” in which prisoners were unable to stand upright or lie down, where they could be held for several weeks; being forced to kneel or sit immobilized for long periods.²⁶

Although many examples mentioned here will be from the context of US detention in the so-called “global war on terror”, there are many other contexts in which “aggressive psychological techniques” amounting to torture are likewise used or have been used. Harsh techniques employed by the East German secret police or “Stasi”, for example, have been documented since the fall of the German Democratic Republic. The use of various forms of humiliation, degrading treatment, threats, hunger and cold, isolation and other psychological methods

24 In the PHR Report, above note 16, which deals with US detention, the effects of these sexual and cultural humiliations are considered in relation to detainees of the Muslim faith.

25 *Report for North Korea, Country Reports on Human Rights Practices 2004*, released by the Bureau of Democracy, Human Rights, and Labor, 28 February 2005, available at www.state.gov/g/drl/rls/hrrpt/2004/41646.htm (last visited 15 October 2007).

26 The first two methods cited here, forced nudity and solitary confinement in a small cell, are typical non-physical methods. The latter two, forced positioning and immobilization, are on the borderline between physical and psychological. Their psychological effects are certainly deeper than the physical ones.

during interrogations was found to cause “persisting and paranoid anxieties, re-
arousable by specific situations; persecution dreams, mood disturbances, suicidal
tendencies, and shattering of confidence”.²⁷

As pointed out above, consideration must be given not only to what is
done to a person, but to the overall situation and circumstances and the individual
susceptibilities and vulnerabilities. The ethnic and religious contexts certainly have
to be taken into account. Any of these factors will of necessity be subjective and
case-related. The discussion of torture cannot merely be narrowed down to “acts
causing pain and suffering” in an abstract sense.

Apart from the psychological methods which cause disruption of the
senses and personality, there are other methods used during interrogations which
in themselves are not deemed to be a form of psychological torture. They could be
termed “minor” or “innocuous” methods; they can, however, become coercive if
used over prolonged lengths of time. These ancillary methods can also produce a
situation of duress that can in fact amount to a form of cruel, inhuman and
degrading treatment, and in some cases even torture. They are considered later on
in this paper.

Psychological effects of torture

Torture in general, meaning the use of psychological and/or physical methods of
torture, has been shown to have “destructive health consequences on detainees”.²⁸
The use of these methods in many ways makes detainees feel responsible for what
is happening to them, inducing feelings of fear, shame, guilt and grief, as well as
intense humiliation.²⁹ On a more clinical scale, victims of psychological torture
present symptoms associated with anxiety disorders. These symptoms are
described further on and undoubtedly cause disruption of the senses and
personality as stated by Physicians for Human Rights. The many negative effects
on health of psychological torture have been documented widely by others as
well.³⁰

It has thus been proven that psychological methods can be extremely
coercive, constitute torture and be unlawful. The first UN Special Rapporteur,

27 See Uwe Peters, “Über das Stasi-Verfolgten-Syndrom” (The Stasi persecution syndrome), *Fortschr Neurol Psychiatr*, Vol. 59, No. 7, July 1991, pp. 251–65. See also Christian Pross, *Social Isolation of Survivors of Persecution in a Post-totalitarian Society*, Behandlungszentrum für Folteropfer, BZFO/Arch, Berlin, 1995, p. 346.

28 “Health consequences of psychological torture”, PHR Report, above note 16, pp. 48–51.

29 These same symptoms and effects have been encountered by ICRC staff in their visits to prisoners in many countries. The ICRC documents torture in order to make official representations to the states responsible, in order to try to put a stop to such practices.

30 See Pétur Hauksón, *Psychological Evidence of Torture*, CPT, Council of Europe, 2003, p. 91; see also Metin Başoğlu, *Torture and its Consequences*, Cambridge University Press, Cambridge, 1992, and *Psychological Evidence of Torture: A Practical Guide to the Istanbul Protocol for Psychologists*, Human Rights Foundation of Turkey (HRFT), 2004.

Professor Peter Kooijmans, accordingly made a statement in which he merged the methods and effects of torture:

This distinction [between physical and psychological torture] seems to have more relevance for the means by which torture is practised than for its character. Almost invariably the effect of torture, by whatever means it may have been practised, is physical and psychological ... A common effect is the disintegration of the personality.³¹

The Istanbul Protocol

Both the physical and psychological effects of torture are comprehensively discussed, analysed and fully documented in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, a landmark publication otherwise known as the Istanbul Protocol.³²

Compiled over several years by a wide selection of experts from many countries, the Istanbul Protocol considers virtually all aspects of torture and its consequences and establishes a procedure for governments or independent bodies to conduct a standardized investigation of the use of torture. It also broke new ground by covering issues that had never been fully acknowledged before.

The Istanbul Protocol states categorically that torture, to be qualified as such, need not leave any visible scars or marks. In a nutshell, it states that torture without any visible physical evidence is nonetheless torture and therefore can still have severe consequences. In other words, torture is not a “WYSIWYG” issue.³³ The “size of the scars” has no relation to the extent of the trauma: the fact that no scars are left therefore does not mean the person was not tortured. For many decades, numerous courtrooms tended to dismiss allegations of torture on the grounds that the plaintiffs had “nothing to show” on their “allegedly tortured” bodies. The Istanbul Protocol officially establishes³⁴ that absence of evidence is not evidence of absence,³⁵ thus affirming that *torture is torture*, even if it leaves no

31 Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. UNGAOR, 59th Session, Agenda Item 107(a) 2004, UN Doc. A/59/324, para. 45.

32 Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Professional Training Series No 8/ Rev.1, Office of the United Nations High Commissioner for Human Rights, Geneva, 2004, available at www.ohchr.org/english/about/publications/docs/8rev1.pdf (last visited 15 October 2007).

33 Abbreviation borrowed from computer engineers: WYSIWYG = “what you see is what you get”, in this case meaning that a victim of torture may well have no scars or traces at all on the body, but this in no way diminishes credibility, which must be established separately. See Michael Peel and Vincent Iacopino (eds.), *The Medical Documentation of Torture*, Greenwich Medical Media, London, 2002, ch. 5.

34 Istanbul Protocol, above note 32, ch. V, p. 160: “To the extent that physical evidence of torture exists, it provides important confirmatory evidence that a person was tortured. However, the absence of such physical evidence should not be construed to suggest that torture did not occur, since such acts of violence against persons frequently leave no marks or permanent scars.”

35 Paraphrasing Carl Sagan in a different context; see *The Demon-Haunted World: Science as a Candle in the Dark*, New York, 1996.

physical traces at all. By extension, psychological methods of torture, which are not expected to leave any “physical marks”, also constitute a form of torture. This had of course already been common knowledge for many years in centres for the rehabilitation of torture survivors, where torture was found to have produced serious trauma and health problems without leaving any physical evidence.³⁶ The late Professor Sten Jacobsson, a Swedish expert on torture, always stressed that “the worst scars are in the mind”.³⁷

The Istanbul Protocol also says that a victim’s testimony on the torture experience may be patchy or “muddled”. It may be imprecise in time, location, or in its details – or all of the above – and this can be quite normal after torture. Unconsciously or even deliberately “forgetting” about torture is often part of a person’s coping mechanisms. This, too, has been known for several decades among people working to help torture victims and applies to both physical and psychological forms of torture.³⁸

The Istanbul Protocol rightly considers torture as a holistic process that can involve both physical and psychological methods, producing both physical and psychological effects. This reality was first stated and documented by medical researchers in Toronto (Federico Allodi et al.) and Copenhagen (Inge Genefke et al.), in the first rehabilitation centres that began to work systematically and scientifically with survivors of torture some thirty years ago.

There is, however, a gap in this holistic approach. It lies in the fact that in considering the effects of torture, the Istanbul Protocol took an evidence-based approach and furthermore describes the effects of torture in general. It does not separate the effects caused by “purely physical methods” from those caused by methods that are “purely non-physical”. This could seem to be a non-issue, since in most torture situations both types of methods are combined for interrogations. Is it not artificial to want to separate the effects of the physical from the effects of the psychological, having clearly stated that torture is a holistic phenomenon and that both methods produce both types of effects? How can separating them help to clarify the entity of “psychological torture”?

The reason for considering the effects of “psychological methods” separately is to see whether these methods alone – that is, without any physical assault – produce “pain and suffering” that reach the threshold of cruel, inhuman or degrading treatment or torture.

In the last two decades the use of torture has followed two different paths. In some states torture continues, even today, to be physical and very brutal.

36 Hauksson, above note 30, p. 91.

37 Personal communication to the author from Prof. Sten Jakobsson, Karolinska Institutet, University of Stockholm, at the IVth International Symposium on Torture and the Medical Profession, Budapest, October 1991.

38 Physical torture has psychological effects as well as physical effects, and psychological torture likewise produces both psychological and physical effects. See Anne Goldfeld, Richard Mollica et al., “The physical and psychological sequelae of torture”, *Journal of the American Medical Association*, 1988, pp. 2725–9; see also Metin Başoğlu, Murat Paker et al., “Psychological effects of torture: a comparison of tortured with nontortured political activists in Turkey”, *American Journal of Psychiatry*, No. 151 (January 1994), pp. 76–81.

Leaving physical evidence on the bodies of the tortured has not troubled those oppressive states where impunity is widespread and the perpetrators have no reason to fear prosecution, let alone condemnation, for following what is de facto (although usually unwritten ...) state policy. But this situation is not the subject of the present analysis.

Other states, while also choosing narrowly to interpret torture as implying only physical acts, have increasingly changed their practices owing to growing accountability or perhaps to moral or other pressures and are thus resorting more and more to coercive psychological methods in their interrogations.

The point here is that states that use torture seek to narrow the definition thereof, taking into consideration only its physical “severe pain and suffering” aspects. As the person is not assaulted, the reasoning goes, the “severity of pain and suffering” criterion (here meaning physical only) is not met. This line of argumentation is effectively used to manipulate wider public opinion, which has largely come to consider torture to be mainly a “physical phenomenon”, thus accepting the (flawed) reasoning that without physical assault there is no torture.

The psychological effects of torture – that is, of all methods combined, both physical and psychological, described in detail in the Istanbul Protocol and many other medical publications – are well known.³⁹ Those most frequently encountered are

- re-experiencing the trauma (flashbacks, nightmares, stress reactions, mistrust – even of family members – bordering on paranoia);
- avoidance of anything recalling the torture experience (also called emotional numbing);
- hyper-arousal (irritability, sleep difficulties, hyper-vigilance, constant anxiety, difficulties in concentrating);
- depressive symptoms, and what is known as depersonalization (acknowledged atypical behaviour, feeling detached from one’s body).⁴⁰

It is thus virtually impossible to determine from the Istanbul Protocol alone what types of non-physical methods of ill-treatment⁴¹ produce what symptoms and effects, and thus by extension determine what non-physical

39 Compare Federico Allodi, Glenn Randall et al., “Physical and psychiatric effects of torture”, in Eric Stover and Elena Nightingale (eds.), *The Breaking of Bodies and Minds: Torture, Psychiatric Abuse, and the Health Professions*, Freeman & Co., New York, 1985, pp. 58–79.

40 Istanbul Protocol, above note 32, Başoğlu et al., above note 38, pp. 72–82; see also Hauksson, above note 30. Other psychological effects of torture can also be much more focused and relate directly to what has been done. To give but one example from a situation in an Asian country, detainees were found to have been brutally tortured by very physical means, by the crushing of their limbs and applications of electricity all over the body. It was found that the most traumatic consequence of such torture was in fact psychological: the fear, for the young men concerned, all in their early manhood, of having been rendered impotent by repeated violence – beatings and electricity – on their genitals. This fear was instilled in them on purpose by the torturers, who knew its cultural significance, and was described by the victims as “the worst part” of what they had suffered. Even reassurance by doctors about their “genital integrity” did not dispel it. From ICRC field experience in Asia, 1996–2006.

41 The term “ill-treatment” is used here so as not to get into the debate of whether one is talking about torture, cruel, inhuman or degrading treatment, or something lesser that constitutes wrongdoing.

methods could, by applying the criterion of “severe pain and suffering”, be considered as a form of torture – in this case (purely) “psychological torture”.

Psychological torture: specific examples

Now that the definitions and references have been established, specific consideration will be given to several methods of psychological torture and their effects, in fact combining the “input” and “output” approaches mentioned above. First, however, one undoubtedly very “physical” method of torture will be discussed as a typical example of a method with both physical and psychological effects, the latter – the psychological effects – being much longer lasting than the physical.

Submarino

The physical example that will make the case for “physical methods with psychological consequences” is a method known as “*submarino*”,⁴² a term coined from its extensive use in Latin America in the 1970s and 1980s. It is used during interrogations and has been widely documented in all centres for the rehabilitation of torture victims, as well as by the ICRC in its work. It consists of dunking a victim’s head into a vat filled with water, to which urine, excrement or other contaminants may have been added to increase the torment.⁴³ This leads to a “near-drowning” experience in which victims are suffocated by having to hold their breath under water or inhaling the water, and which has been described as one of the most traumatic a human being can endure.⁴⁴ This method is well known; it has been described in many texts⁴⁵ and often portrayed in the cinema.⁴⁶ The physical consequences of *submarino* are usually short-lived, consisting mainly of uncontrollable coughing from the inhaled “water”,⁴⁷ but it can also cause acute brain damage due to deprivation of oxygen, as well as death from asphyxiation. The acute suffering produced during the immediate infliction of *submarino* is superseded by the often unbearable fear of repeating the experience. In the aftermath, it may lead to horrific memories that persist in the form of recurrent

42 In all publications by specialists on the subject of torture, “*submarino*” is the term recognized, just as “*telefono*” has become the “official” term for boxing of the ears during torture.

43 In some countries, chilli powder is added to the water to add to the torment.

44 The National Commission on Political Imprisonment and Torture Report, Chile, June 2005 (also called Valech Report), gives an overview of *submarino* torture in chapter 5. It is available at www.gobiernodechile.cl/comision_valech/index.asp (last visited 15 October 2007).

45 See Boston Centre for Refugee Health and Human Rights, available at www.bcrhhr.org/pro/course/physical/signs.html (last visited 15 October 2007).

46 Since *submarino* was a favourite method of the Gestapo, there is an eloquent scene of it in the 1974 film *Lacombe Lucien*, directed by Louis Malle, and recently in the biographical film about Jean Moulin, Pierre Aknine’s *Une affaire française*, 2003. Another recent very convincing example of its use was seen in Paul Verhoeven’s 2006 film *Black Book*, which clearly depicts the anguish and despair caused by the “near-drowning” experience of *submarino*.

47 A resulting chest infection is possible, but rare.

“drowning nightmares”. It has been condemned as torture for several decades, and as such is prohibited under international law and domestic US law.⁴⁸ The method typically leaves no outward effects and is often monitored by medical staff ensuring that the victim does not actually drown. One variation of *submarino* is called “*chiffon*”,⁴⁹ which induces the same near-drowning experience through a cloth or similar material being applied to the face and covering both nostrils and mouth, which is then slowly and steadily soaked with water. This variation has been used in many countries and continents.

Clearly *submarino* and its variants are an example of a physical method that produces immediate physical and mental suffering and major subsequent psychological distress. Just the mention of a repetition of *submarino* has been known to cause profound anguish and make detainees agree to make any confession asked of them.⁵⁰

“Waterboarding” is the name given to a technique quite similar – in fact identical – to *submarino* or *chiffon*. It has been described as an “enhanced interrogation technique” in which “simulated drowning” is produced by “strapping down a prisoner and pouring water over a cloth that covers mouth and nose”.⁵¹ The Council of Europe⁵² has specifically examined and condemned the use of this method, stating that

[T]o immerse persons under water so as to make them believe they might drown is not a professional interrogation technique, it is an act of torture.⁵³

The “near-drowning experience” has been described in some detail so as to convey clearly the psychological anguish and fear it produces while being a clearly physical method of torture.

Psychological methods used during interrogation will now be considered, together with their effects on the victims.

Phobias used during interrogation

The use of phobias is a good example of a psychological method often applied in interrogations. Phobias can be cultural, affecting a whole population,⁵⁴ or

48 See statement by Kenneth Roth, executive director of Human Rights Watch, 12 November 2005, available at <http://hrw.org/english/docs/2005/11/21/usdom12069.htm> (last visited 15 October 2007).

49 The term, from the French word for “rag”, comes from the use of the method by the French in Northern Africa.

50 Specific testimonies to the author during visits to political detainees in South America in the 1980s and 1990s.

51 See a complete overview of the waterboarding technique in *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality*, PHR and Human Rights First, August 2007, p. 17, available at <http://physiciansforhumanrights.org/library/report-2007-08-02.html> (last visited 15 October 2007).

52 Through the Committee for the Prevention of Torture and Cruel, Inhuman Degrading Treatment or Punishment (CPT), the operational mechanism of the Council of Europe for monitoring the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

53 *15th General Report on the CPT's Activities*, CPT, Strasbourg, 22 September 2005 (CPT/Inf (2005) 17).

54 Such as the quasi-phobia in many Arab populations with regard to dogs. See Rafael Patay, *The Arab Mind*, Hatherleigh Press, New York, originally published in 1976, re-edited 2002.

individual. Individual refinement of their use has perhaps best been described by Orwell in his classic novel *1984*, when the main protagonist, Winston, is tortured in “Room 101”.⁵⁵ Whether personal or “collective”, the use of phobias maximizes psychological suffering, tailoring the inducement of fear and dread to the individual. The use of dogs to induce fear among detainees at Abu Ghraib prison was tailored to the well-known Muslim dread of canines; it also exploited the fact that the dog is considered to be an unclean animal.⁵⁶ In other cultures, the fear and revulsion of pigs, for example, have been used to torment victims.

Breaking sexual taboos

Sexual taboos have always been used by interrogators, either knowingly or not. The methods used to break such taboos can be psychological as well as physical and can, depending on a variety of factors, amount to cruel, inhuman or degrading treatment or torture. In most cases, they involve crude male-on-female abuse ranging from lewd remarks and innuendos, having to undress and stay naked in front of males, crass groping or pawing, and ultimately sexual rough treatment and (but not always) rape.⁵⁷ Rape, meaning sexual aggression with penetration, has now been officially defined as being a form of torture.⁵⁸ It should be recognized, however, that the other forms of sexual abuse mentioned above, apart from rape, can also have devastating effects, precisely because of the psychological trauma they cause.

Sexual taboos have recently been highlighted in the context of Islamic countries because of the Abu Ghraib and other related incidents.⁵⁹ Such taboos exist, however, in all cultures and are merely more or less accentuated. Any sexual connotation given to coercion in custody can be extremely frightening and have shattering effects on the mind, and torturers know this.⁶⁰

There is arguably a gender difference regarding the use of sexual methods that needs to be explained. Women in custody can be more traumatized than males by any sexual innuendo made by their captors or interrogators. Aware as they often are that sexual abuse occurs during detention and interrogation, such innuendo (during arrest for example) may make women in custody wonder “how far things may go”. They may become increasingly frightened to the point of becoming traumatized, fearing that “the worst” may happen, even though

55 George Orwell, *1984* (1949).

56 Sexual and religious phobias in the Muslim world are best described in Patai, above note 54.

57 Male-on-male abuse is more often simply a targeting of the male genitalia for torment by electricity or beatings. Sodomy does occur, but proportionately less often than rape of female detainees.

58 See Christine Strumpfen-Darrie, *Rape: A Survey of Current International Jurisprudence*, available at www.wcl.american.edu/hrbrief/v7i3/rape.htm (last visited 15 October 2007).

59 Religious taboos have also been discussed in the Muslim context. They are used to humiliate, enrage or otherwise torment victims during interrogations. Interrogators introduce, as part and parcel of the whole system, desecration of anything considered holy by detainees in their custody.

60 Compare this with the trivialization of “Abu Ghraib” that has been touted by some. See Mortimer Zuckerman, “A bit of perspective, please!”, *US News and World Report*, 16 May 2004, available at www.usnews.com/usnews/opinion/articles/040524/24edit.htm (last visited 15 October 2007).

“nothing” may have actually been done to them. For this reason the traumatic effect of any sexual abuse, including “mere sexual innuendo”, should never be underestimated, even if actual rape is not the issue.

Any sexual abuse is traumatic, but for cultural reasons and all the additional concerns about pregnancy and fertility, it tends to be more traumatic in women than in men.⁶¹ This is certainly not to say that sexual abuse is “less harmful” to males. In many societies, however, the mere hint that a woman may have undergone sexual violence in detention can result in ostracization by her family and exclusion from her society, and may in some cases even lead to her “honour killing”.

In societies where sexual taboos render the whole issue of sexuality infinitely more complex, the trauma will obviously be multiplied accordingly. The differences between “guilt” societies and “shame” societies have been described elsewhere and go beyond the scope of this paper.⁶² In many rehabilitation centres for torture survivors it has been documented that women from Asian societies, for example, who have suffered even extreme sexual ill-treatment, sometimes including multiple rapes, are most often highly reluctant to seek help. To them the shame of what happened is so great that they do not want anybody to know about it. They fear that if they go to the rehabilitation centre, “everyone may think they have been abused”.⁶³

Sexual abuse of men obviously exists as well, as shown by the recent widely publicized photos of Abu Ghraib prison which illustrate how sexual taboos can be “exploited” by interrogators, apparently with the aim of making the detainees more “co-operative” during questioning. Here again the cultural dimension aggravates the serious psychological effect of what occurred,⁶⁴ as sexual taboos are inculcated in Muslim society from early childhood.⁶⁵

Solitary confinement

A method used in many countries around the world during interrogations of prisoners is solitary confinement⁶⁶ – that is, confinement alone in a cell for days on

61 Statement based on 25 years of ICRC experience visiting prisoners, both male and female, in situations of coercion and stress.

62 See Grethe Skylv, “The nature of human experience: some interfaces between anthropology and psychiatry”, Lecture at the Royal Society of Medicine, London, 1992 (copy on file with the author). See also Başoğlu et al., above note 38, p. 92.

63 In one Asian country, a group of women detainees who had been raped when arrested by the military did not say a word about it for several months, even to female ICRC delegates interviewing them in custody. It was only when a physician (who happened to be male) came to see them that they, under the cloak of medical confidentiality, timidly spoke about it – wanting to ask the doctor questions about their future fertility (author’s personal experience).

64 See the “pyramids of naked men”, “enforced simulated masturbation” and other sexually oriented ill-treatment as widely publicized in the photos from Abu Ghraib. See also PHR Report, above note 16, pp. 55–9.

65 The author was personally confronted with the psychological trauma experienced by Muslim detainees whose sexual taboos and fears were exploited during interrogations (ICRC visits in 2002–4).

66 Solitary confinement is also used as a punishment, which is outside the scope of the present analysis.

end, with minimal environmental stimulation and practically no opportunities for any social interaction. Being confined for prolonged periods of time alone in a cell has been said to be the most difficult torment of all to withstand – a comment made, moreover, by hardened prisoners used to rigorous conditions and abuse. The effects of solitary confinement have been widely documented. According to Grassian, in severe cases

[T]he mental disturbances among prisoners so detained ... [include] ... an agitated confusional state, characteristics of a florid delirium, [with] severe paranoid and hallucinatory features and also by intense agitation and random, impulsive, often self-directed violence.”⁶⁷

According to Craig Haney, writing on solitary confinement,

There are few if any forms of imprisonment that appear to produce so much psychological trauma and in which so many symptoms of psycho-pathology are manifested ... [prisoners are held] in virtual isolation, and [subjected] to almost complete idleness ... no group or social activity of any kind is permitted ... the harmful psychological consequences of solitary confinement ... are extremely well documented ... [These include] sleep disturbances, anxiety, panic, rage, loss of control, paranoia, hallucinations, self-mutilations ... cognitive dysfunction, ... depression [and] emotional breakdown.⁶⁸

More recently, the European Committee for the Prevention of Torture (CPT) has stated that solitary confinement “can have very harmful consequences for the person concerned ... [It] can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms of solitary confinement should be as short as possible.”⁶⁹ In Uruguay, in the 1970s and 1980s, leaders of the MLN-Tupamaro movement were imprisoned in harsh conditions of solitary confinement for several years without being allowed to communicate with anyone. Meals were delivered through a hatch by guards who were strictly forbidden to say even a word to them. Several of these prisoners confided that for them solitary confinement had been the worst form of torture. “Electricity [torture]”, said one, “is mere child’s play in comparison to prolonged solitude.”⁷⁰

The Tupamaros were held in dirty, stinking, bug-infested cells. Confinement alone in the sanitized cells of a modern maximum security prison can be much worse.⁷¹ Such conditions result not only in solitude but also in

67 Stuart Grassian, “Psychiatric effects of solitary confinement”, *Journal of Law and Policy*, Vol. 22, 2006, pp. 327–80.

68 Craig Haney, “Mental health issues in long-term solitary and “supermax” confinement”, *Crime and Delinquency*, Vol. 49, No. 1, Jan. 2003, pp. 124–56. Professor Haney is a recognized expert on the effects of solitary confinement.

69 “CPT standards: “Substantive” sections of the CPT’s General Reports”, CPT/Inf/E (2002), Rev. 2006, available at www.cpt.coe.int/EN/documents/eng-standards.doc (last visited 15 October 2007).

70 These personal experiences have been published in Mauricio Rosencoff and Eleuterio Fernandez-Huidobro, *Memorias del Calabozo*, Banda Oriental, Montevideo, 1987 and 2005, as well as interviews with leaders of the MLN between 1983 and 1985.

71 Paradoxically, being kept in a “bug-infested” cell was actually a boon for at least one of the Tupamaro leaders. The cockroaches, he said, at least gave him some sense of “company”.

sensory deprivation (no noise, no voices, utter silence) and sensory hyper-stimulation (e.g. steps in the corridor are amplified many times over).⁷² Modern cells of that kind are indeed much more “solitary” than old, dilapidated ones and consequently may be more traumatic.

It should be noted that the UN Standard Minimum Rules for the Treatment of Prisoners⁷³ as well as the European Prison Rules,⁷⁴ while not taking the bold move of completely outlawing the use of solitary confinement, do stipulate a daily medical check-up for all inmates in solitary confinement. This would hardly be necessary unless solitary confinement was considered as being potentially harmful.

Confinement alone in a cell needs to be considered in the light both of its duration and of the surrounding circumstances. The European Committee for the Prevention of Torture has determined that any use of solitary confinement should be for as short a period as possible. In its visits to Scandinavian countries, it clearly stated that prolonged total isolation “could lead to an individual’s psychological destruction”.⁷⁵ It has described the effects of prolonged solitary confinement (lasting between seven and 24 months) and noted the following symptoms: anxiety, nervousness, stress, disturbed sleep, difficulties in concentration and elocution, as well as suicidal tendencies, depression and paranoid symptoms. Thus solitary confinement, as stated by the CPT, is at least a form of inhuman and degrading treatment if applied for several weeks.

Furthermore, a detainee under interrogation to whom a combination of different methods is being applied, who is being interrogated intensively (even if no physical violence is involved) and who is suddenly thrust back into a cell alone, even if only for a couple of days, may well develop the adverse effects mentioned above after just a day or two of renewed isolation. All these factors have to be considered when determining whether a method or group of methods “qualifies” as a form of torture, in addition to the general criteria laid down in the Convention against Torture or other conventions.

72 Sensory deprivation is inflicted, for example, by using cells with quasi-total sound-proofing so as to muffle any sound. Conversely, sensory enhancement, or hyper-stimulation – often used in combination with sensory deprivation – is exaggerated amplification of *any* noise, such as the sound of boots in the corridor or the systematic banging of doors or of batons on cell bars, so as to harass the detainee.

73 Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council in its Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Available at www.unhcr.ch/html/menu3/b/h_comp34.htm (last visited 15 October 2007).

74 European Prison Rules, Council of Europe, Recommendation No. R(87)3, adopted by the Committee of Ministers of the Council of Europe on 12 February 1987, Strasbourg, revised in 2006, available at www.uncjin.org/Laws/prisrul.htm (last visited 17 October 2007).

75 CPT Report to the Danish government on the visit to Denmark carried out by the CPT, December 1990, available at CPT website: www.cpt.coe.int/documents/dnk/1991-12-inf-eng.pdf (last visited 15 October 2007).

Sleep deprivation

Sleep deprivation has been used as a method of interrogation in many contexts and for many centuries. The Romans used it to extract information from their enemies, calling it *tormentum vigilae* (waking torture) or *tormentum insomniae*, and it is still very much in use today.⁷⁶ Detainees are usually kept awake for several days; when they are finally allowed to fall asleep, they are suddenly awakened and then interrogated, harshly or otherwise. They may be deprived of sleep in many ways, for instance by guards banging their batons all night long on cell bars.⁷⁷ Sometimes detainees are made to adopt what is called “forced positioning”. This may be just standing against the wall, or crouching down or in any posture that quickly becomes uncomfortable and precludes any meaningful sleep. Or interrogators may wake detainees up every time they close their eyes. Sleep deprivation is often used in conjunction with other psychological methods, including hooding, being stripped naked and the use of various restraints. The old proven method of repeatedly playing a scratched record and blaring out an endlessly repetitive tune for hours or days on end is still used as an effective way of depriving prisoners of sleep.⁷⁸

Prolonged sleep deprivation has been described by people subjected to it as being horrendous. Menachem Begin, a former Israeli Prime Minister (1977–83), described his experience of it as a prisoner of the KGB in the Soviet Union:

In the head of the interrogated prisoner a haze begins to form. His spirit is wearied to death, his legs are unsteady, and he has one sole desire, to sleep, to sleep just a little, not to get up, to lie, to rest, to forget ... Anyone who has experienced this desire knows that not even hunger or thirst are comparable with it ... I came across prisoners who signed what they were ordered to sign, only to get what the interrogator had promised them. He did not promise them liberty ... [only] uninterrupted sleep! ... And, having signed, there was nothing in the world that could move them to risk again such nights and such days.⁷⁹

More generally, even short-lived sleep deprivation causes hallucinations, paranoia and disorientation and can have deleterious psychological effects on an individual. The use of sleep deprivation is a favoured “method of interrogation”,⁸⁰ as it leaves no physical mark on the victim. Interrogators will claim outright that they have not (physically) abused detainees in their custody.

76 See the discussion on sleep deprivation in the CIA’s manual on “Counterintelligence interrogation” (Kubark Manual), available at www.kimsoft.com/2000/kubark.htm (last visited 17 October 2007).

77 In a Latin American prison guards were instructed to do this all night long in the prison for political prisoners – while at the same time there were signs clearly visible everywhere specifically (and cynically) forbidding any such practice. The signs were obviously for the benefit of visitors, such as the ICRC.

78 Testimony to the ICRC from a Central Asian country in 2001.

79 Quoted in PHR Report, above note 16, p. 70.

80 See Michael Rosen, *Is Sleep Deprivation Torture?*, 28 March 2005, available at www.geocities.com/three_strikes_legal/torture_sleep_deprivation.html (last visited 15 October 2007).

The question of whether sleep deprivation can be a form of torture has been reviewed and commented on in detail in a very recent study on torture that leaves “no marks” by Physicians for Human Rights and Human Rights First (HRF):

Sleep deprivation is a well established form of abuse, used in breaking down interrogation subjects ... The psychological impact of sleep deprivation supports the conclusion that it would constitute torture or cruel or inhuman treatment for the purposes of criminal investigation. Sleep deprivation is known to cause mental harm ... [and] also is calculated to disrupt the senses or personality.⁸¹

A psychotherapist from the London Medical Foundation for Victims of Torture (MFVT) further describes the effects of sleep deprivation thus:

After two nights without sleep, the hallucinations start, and after three nights, people are having dreams while fairly awake, which is a form of psychosis. By the week's end, people lose their orientation in place and time – the people you're speaking to become people from your past; a window might become a view of the sea seen in your younger days. To deprive someone of sleep is to tamper with their equilibrium and their sanity.⁸²

The severity of suffering from sleep deprivation alone has been found to constitute torture in, for example, the jurisprudence of the Committee against Torture.⁸³ As the technique of sleep deprivation, renamed “sleep management”, has recently been openly discussed in connection with US detention, it may be useful to recall that there are relevant references in US jurisprudence, as federal courts have recurrently found incidences of sleep deprivation to violate both the 8th and 14th Amendments to the US Constitution.⁸⁴ Sleep deprivation has been considered torture in the United States since *Ashcraft v. Tennessee* in 1944.⁸⁵ Although Ashcraft was only subjected to 36 hours of sleep deprivation, the court ruled it to be both physical and mental torture. In a ruling not only categorizing sleep deprivation as torture but further emphasizing the unreliability of any information obtained in such a way, US Justice Hugo Black stated that “deprivation of sleep is the most effective torture, and certain to produce any confession desired”.⁸⁶

81 *Leave No Marks*, above note 51, pp. 22–4.

82 John Schlapobersky, quoted in Megan Lane and Brian Wheeler, “The real victims of sleep deprivation”, BBC News Online Magazine, Thursday, 8 January 2004, available at <http://news.bbc.co.uk/1/hi/magazine/3376951.stm> (last visited 15 October, 2007).

83 See Droege, above note 17; see also “Consideration of reports submitted by States Parties under Article 19 of the Convention, Concluding observations, Israel”, Committee against Torture, doc. A/57/44, 25 September 2002, para. 6(a)(ii).

84 *Leave No Marks*, op. cit. note 51, p. 24.

85 *Ashcraft vs Tennessee*, 322 US 143, 154 (1944), available at <http://supreme.justia.com/us/322/143/case.html> (last visited 15 October 2007).

86 *Ibid.*, note 6 of Judgment.

The new US *Army Field Manual* of 2006 permits a certain amount of sleep deprivation during interrogations, stipulating that detainees should get at least four continuous hours of sleep every 24 hours.⁸⁷ Thus, technically, a detainee could be allowed four hours of sleep on Day 1, and then be interrogated for 20 consecutive hours, followed by another 20 consecutive hours on Day 2, and then four hours of sleep. This would respect the letter of the rule, but still be extremely stressful.

Both methods described above – solitary confinement and sleep deprivation – are psychological, not physical, methods.⁸⁸ The former UN Special Rapporteur on Torture, Sir Nigel Rodley, defined sleep deprivation as a form of torture in several of his reports.⁸⁹ This has been confirmed by subsequent Rapporteurs on Torture, most recently by Manfred Nowak.

Recently, sleep deprivation has been the subject of considerable discussion, being promoted as an “aggressive interrogation method” that might be permissible against terrorist suspects and yet “not be viewed as torture”.⁹⁰ The question whether sleep deprivation constitutes a form of torture has been debated in public and even discussed by the highest authorities. In Australia, for example, the Prime Minister himself has (to a certain extent) taken a position: “It depends upon the severity of it, the regularity of it, the circumstances in which it is conducted. So that’s what makes yes and no answers to things like that so very difficult.”⁹¹

Cumulative methods, applied over a prolonged period of time

In examining the use of purely psychological methods during interrogation, other factors have also to be taken into account.

Some psychological methods used by interrogators are recognized as methods of torture, but they are generally used on a one-off basis rather than systematically. A typical example is the “sham execution”, a method known to be extremely traumatic in which prisoners are led out to what they believe is their

87 US Department of the Army, Field Manual 2-22-3, Human Intelligence Collector Operations, at M-30, available at www.enlisted.info/field-manuals/fm-2-22.3-human-intelligence-collector-operations.shtml (last visited 15 October 2007).

88 In stark contrast to solitary confinement and sleep deprivation, in the case of *submarino* clearly any amount of time having one’s head forced underwater can and does constitute a form of torture. A near-drowning experience, no matter how short, provokes extreme anguish and terror.

89 Report of the Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment, Visit by the Special Rapporteur to Pakistan, UN Commission on Human Rights, UN Doc. E/CN.4/1997/7/Add.2 (1996), available at www1.umn.edu/humanrts/commission/thematic53/97TORPAK.htm (last visited 18 October 2007). See also Manfred Nowak, “What practices constitute torture? US and UN standards”, *Human Rights Quarterly*, Vol. 28, 2006, available at http://muse.jhu.edu/journals/human_rights_quarterly/v028/28.4nowak.pdf (last visited 18 October 2007).

90 Statement by Australian Attorney General Philip Ruddock, quoted in “Sleep deprivation “sometimes” torture”, 5 October 2006, available at www.news.com.au/story/0,23599,20528646-1702,00.html (last visited 15 October 2007).

91 Ibid., quoting statement by Australian Prime Minister John Howard on ABC Radio.

summary execution.⁹² Forcing prisoners to watch sexual acts committed on an acquaintance is another method also used by torturers.⁹³ These methods will not be further discussed here, as they tend to be single events rather than repeated over time.

The psychological methods described above, such as sleep deprivation and solitary confinement, are usually not used alone but are applied alternately or cumulatively with others. They are often combined with other “non-physical” methods, which may seem insignificant considered individually but whose constant repetition and cumulation over time create a background environment that is precisely intended to accentuate the other – should they be called “major”? – methods. These “minor” methods are many, and the following list of examples is anything but exhaustive:

- constant taunting;
- verbal abuse;
- intimidations;
- insulting the honour of a family member;
- spitting in someone’s lunch container;⁹⁴
- petty humiliations (always linked to cultural values);
- petty and less petty harassments;
- repeated exasperation provoked on purpose;
- enforced artificial light 24 hours a day;
- lack of privacy exploited purposely to mock sensitivities;
- verbal threats of further torment – whether realistic or not;
- repeated annoyances petty in themselves, but magnified out of proportion by the context;
- and many more...

The point is not to consider whether such additional petty methods are anything more than “ill-treatment”, but to acknowledge that all these methods, used together, form a system deliberately designed to wear and break down, and ultimately also to disrupt the senses and personality. The effect *over a prolonged period of time* of this “grouping of methods” has to be considered as part and parcel of the effects of psychological torture.⁹⁵

Here the cumulative effect over time of psychological methods, and particularly of these so-called “minor” ones, needs to be re-emphasized. Some psychological methods are already defined as torture, as they produce “mental suffering” serious enough to qualify as torture without cumulation, for example sleep deprivation and solitary confinement as mentioned above. The use of forced nudity is also a case in point; depending on the circumstances, the cultural

92 Başoğlu et al., above note 38, pp. 204–5.

93 See Droege, above note 17.

94 This could allegedly be considered “physical”, but it is undoubtedly the psychological aspect that is traumatic, and not the few drops of saliva.

95 Quite obviously, these “minor” methods can also be used as “background” in a system that uses brutal physical torture – but that is not the subject under discussion here.

background, and the actual way in which it is enforced, stripping a prisoner naked can be considered at least as inhuman and degrading treatment. The UN Rapporteur on Torture, in a report to the UN Commission on Human Rights, has stated that

[S]tripping detainees naked, particularly in the presence of women, and taking into account cultural sensitivities, can in individual cases cause extreme psychological pressure and can amount to degrading treatment, or even torture.⁹⁶

When considering the cumulative, or “combined”, effects of methods which do not qualify per se as either CIDT or torture, the “time factor” needs to be determined. The common denominator, however, will be that each method, applied in isolation, is not considered by perpetrators as being a form of ill-treatment, let alone a form of torture.

The discussion then boils down to whether such cumulative situations over a prolonged period of time can be deemed to produce a “sufficient” degree of suffering or disruption of personality to qualify as cruel, inhuman and degrading treatment, or even torture.

There is a well-known precedent for such an “accumulation of methods” which has already been mentioned and can be recalled here. The use of the so-called “Five Methods” in Northern Ireland was hotly debated in the 1970s and came up before both the European Commission and the European Court of Human Rights for judgment. These methods were:

- wall-standing (“spreading” against the wall, standing on toes only);
- hooding (black bag over the head, except during interrogations);
- constant, loud, hissing “white noise”;⁹⁷
- sleep deprivation;
- food and drink deprivation (bread and water diet only).

Initially, the European Commission of Human Rights determined that the cumulated five methods, which were applied for hours at a stretch and for many days, amounted to a form of torture. They were found to cause both physical and mental suffering. Paradoxically, the European Court of Human Rights later disputed this designation, and stated that the five techniques did not “rise to the level of torture”. However, the Court did rule that the five methods, used together, constituted “inhuman and degrading treatment”.⁹⁸ After the first ruling the UK government suspended their use, both individually and collectively. It was the accumulation of the five that was ruled upon by both the Commission and the Court,⁹⁹ both entities admitting that the cumulative effect had to be taken into account and not only each component separately.

96 “Situation of the detainees at Guantánamo Bay”, Report to the UN Economic and Social Council, 62nd Session, E/CN.4/2006/120, 15 February 2006, p. 25, available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_02_06_un_guantanamo.pdf (last visited 15 October 2007).

97 White noise is similar to the sound of static between two radio stations.

98 *Ireland v. United Kingdom*, above note 11.

99 In fact, the UK government responded to the first ruling by the Commission by putting a stop to use of the methods, both individually and cumulatively. Today the Court would probably not have “watered down” the Commission’s ruling from torture to cruel, inhuman and degrading treatment.

Unpredictability and uncontrollability

Finally, two additional factors need to be considered here, as they are of direct relevance to the discussion on methods of interrogation and torture and certainly have a bearing on the use of cumulative methods. They are the roles of uncontrollable and unpredictable stress in torture.

It has been found that these factors, which have been studied extensively,¹⁰⁰ always come into play in any situation involving stress. In the case of detainees held in custody and interrogated by “aggressive measures”, they will obviously influence the overall situation.

According to Başoğlu, unpredictable stimuli are much more stressful than predictable ones. Similarly, a situation one can control or has merely the illusion of being able to control is less stressful than a situation that seems beyond control. Exerting some control, even minimal, over stressful events seems to be a crucial element in the way in which torture, for example, is experienced by the individual. Hooding is a case in point of a method used in conjunction with many others, and often cumulatively. Its use is usually justified by custodial authorities as being necessary for security. While visual identification of interrogation staff may indeed be an issue, the use of the hood plays a much more important role in interrogations. A hooded detainee being beaten never knows whether, when and how he or she is going to be hit – or when a cigarette burn will be inflicted ... The physical trauma (blow, burn, etc.) is greatly increased by the psychological unpredictability. Events become unpredictable and therefore less controllable, and this intensifies the pain and emotional stress.

Thus “the most deleterious consequences stem from uncontrollable aversive events that are also unpredictable”.¹⁰¹

Both factors can make themselves felt in all the aforesaid situations. Conversely, in the case of solitary confinement, for example, the fact that a detainee alone in a cell manages to communicate with another detainee (e.g. by tapping on the wall) is important as a means of finding out what may happen, and when. He has at least the illusion of retaining some “control” and being able perhaps to “predict” what is to come. Total lack of any communication, as in a modern high-security cell, will eliminate any such controllability.

If the interrogators intentionally alternate different methods and disrupt any semblance of “schedules” or “patterns”, the situation becomes unpredictable. Interrogation sessions can occur at totally unpredictable times; detainees can suddenly be switched from one cell to another at a moment’s notice; or certain forms of behaviour may be rewarded and others penalized without any discernable logic, and the rules then reversed without warning. Interrogators are known successively to alternate at random the different methods described, thus making unpredictability part and parcel of the whole system. They also make sure that the detainees concerned know that they are unable to control any aspect of their

100 Başoğlu et al., above note 38, ch. 9, pp. 182–225.

101 Ibid., p. 199.

lives.¹⁰² Thus the use of cumulative methods over time is aggravated both by the unpredictability of the situation and by the total lack of any real control. The cumulation of the various psychological methods described above induces an utter sense of helplessness over prolonged periods of time, disrupting the senses of the individual and ultimately also his or her personality.

* * *

To sum up, it has hopefully been made clear that some methods used during interrogation do not physically assault the body and do not cause actual physical pain – and yet they do entail severe psychological pain and suffering and profoundly disrupt the senses and personality. It must be borne in mind that the severity of suffering is subjective and that the actual effects on detainees will vary greatly according to the various factors mentioned. As stated by the UN Rapporteur on Torture, Manfred Nowak,

Even the use of force that causes non-severe pain or suffering can be considered degrading treatment, if it is applied in a humiliating manner. A typical example is the forced removal of clothes for the purpose of humiliation.¹⁰³

Psychological torture is a very real thing. It should not be minimized under the pretext that pain and suffering must be physical in order to be real. Indeed, some psychological methods on their own constitute torture, such as solitary confinement and sleep deprivation.

It has been argued that the concept of the use of non-physical methods also applies to use of the many other methods which undoubtedly do not constitute torture on their own if merely considered in isolation. These so-called “minor” methods are, however, part and parcel of the torture process and constitute a “background environment” of harassment and duress for detainees under interrogation who are subjected to them for prolonged periods. Their combined use and cumulative effects over time must therefore be considered as part of a *system* of psychological torture.

What is arguably merely “malevolent” and possibly humiliating if inflicted for 24 hours has to be considered very differently if applied for 24 days – let alone 24 months. The cumulative effects will also vary greatly according to the general context and the age, gender and state of health of the detainees under interrogation.¹⁰⁴

Social and political background, cultural and religious beliefs and local sensitivities¹⁰⁵ clearly play a role in determining the effects on the persons

102 Conversely, in some cases perpetrators may let the detainee *think* he or she has some control, the better to manipulate the interrogation. This in itself is not illegal if the rest of the interrogation respects the rules of law, both national and international.

103 Nowak, above note 89, p. 838.

104 For an individual with pre-existing personality disorders, even a short period of solitary confinement may become acutely psychotic. See Grassian, above note 67.

105 Being searched naked, in the open and in front of many guards has been described as extremely traumatic in Muslim societies. For women prisoners this would also be the case.

concerned.¹⁰⁶ In order to minimize the effect of the overall situation it is often argued that detainees receive food, shelter and medical care – disregarding the general psychological conditions of detention and the use of “cumulative methods over time” accompanying interrogations. Yet human dignity is not confined to mere physical integrity.¹⁰⁷ The International Criminal Tribunal for the former Yugoslavia (ICTY) has furthermore determined that

[Torture] may be committed in one single act or can result from a combination or accumulation of several acts, which, taken individually and out of context, may seem harmless ... The period of time, the repetition and various forms of mistreatment and severity should be assessed as a whole.¹⁰⁸

The cumulative (or “combined”) use of these methods on detainees is not merely theoretical: the legality of such “combined effects” has just recently come under renewed public scrutiny and is still the subject of heated legal discussions.¹⁰⁹ Finally, the stress and hence suffering produced by the situations described above will most certainly be compounded by any ongoing uncertainty as to legal status.¹¹⁰

Governments that use coercion – which is *a fortiori* cruel, inhuman or degrading treatment or torture – are obviously reluctant to admit it, hence the recent juridical and mental contortions in an attempt to raise the threshold of the “pain and suffering” required to qualify an act as a form of “torture”. Apart from the stigma attached to any country “caught” using torture, there is the issue of eventual sanctions for torturers and redress and restitution for victims.

Finally, it may seem that to qualify these “combined” or “cumulative” situations as “torture” may trivialize the term itself when compared with brutal physical forms of torture. It can, however, surely be argued that *not* to consider the protracted suffering of detainees in such situations is, on the contrary, to trivialize the long suffering that has been or is continuing to be inflicted upon them.

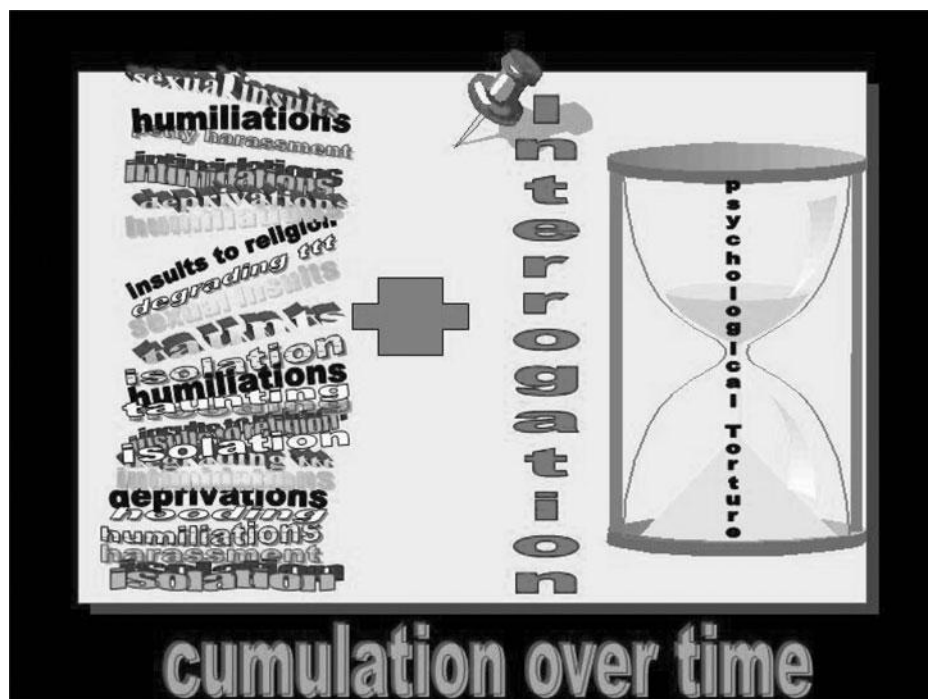
106 One memorable example of what can be extremely traumatic for a particular individual was the case of an Afghan elder, well over 80 years old, who was devastated by the fact that Russian soldiers had imposed the ultimate humiliation on him by plucking out the hairs of his beard, one by one, in front of the village women. Author’s experience, Afghanistan, 1987.

107 See Droege, above note 17.

108 Ibid., quoting the ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25 (Trial Chamber) 15 March 2002, para 182.

109 Scott Shane, David Johnston and James Risen, “Secret US endorsement of severe interrogations”, *New York Times*, 4 October 2007, available at www.nytimes.com/2007/10/04/washington/04interrogate.html (last visited 15 October 2007).

110 An aspect which has not been considered here, but is taken up by Droege, above note 17.



Civilization and torture: beyond the medical and psychiatric approach

Marcelo N. Viñar

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Abstract

The author argues that torture affects not only its victims, and also that torture is not a disease of the victim but an endemic illness of civilization which has the effect of shattering the social network that makes us human. In order to rebuild healthy social relationships, it is vital to detect and accept the existence of this invisible pathology. We must listen to the intense groan of torture victims and understand them if we are to dare to look at the oppressive order which destroys them.

.....

What do we mean when we speak of torture in this media-saturated, globalized world of the third millennium? We should certainly include under this term domestic violence, prostitution and child pornography, as well as adult and child labour in insalubrious conditions, and slavery. Ideally, we should begin by condemning current market and production systems as the worst and most widespread cause of torture, since, being primarily concerned with profitability and financial efficiency, they ignore the human cost for a very sizeable percentage of our fellow human beings, who are becoming less our “equals” with every passing day. Inequality in access to material goods and cultural opportunities is leading inexorably to a calamitous division of mankind into the “included”, who enjoy the fruits of scientific and technological advances and the progress of civilization, and the “excluded”, who by remaining on the margins of this

affluence become the pariahs whom Z. Bauman calls “wasted lives”.¹ Exclusion may be defined not only as a situation of want, but also as loss of the right to have rights.² It leaves the excluded without prospects for the future, with no sense of belonging to a greater humanity, cut off from the active pleasures of the world and isolated from the human condition.

However, the excessively long and complex list of human woes forces us to confine the term “torture” to its most commonly accepted meaning – that is, torture for political purposes as a means of eliminating the adversary, or at least breaking his will. It is the vilest face displayed by an unscrupulous government or group in order to underpin and consolidate its power and to provide a pseudo-legitimate basis for clinging to that power and to a given set of sociopolitical, ethnic or religious beliefs, by suppressing the alternative of being different.

A perusal of Elaine Scarry’s book *The Body in Pain*,³ the works of my compatriots Daniel Gil and Carlos Liscano⁴ and my own writings⁵ might provide a partial insight into the chilling subject of torture. In literature, George Orwell’s magnificent description in 1984, Dalton Trumbo’s *Night of the Aurochs*⁶ and Truman Capote’s description of a torturer’s mind are also extremely important,⁷ as are the books describing life in concentration camps by Primo Levi,⁸ Robert Antelme,⁹ Sarah Kofman,¹⁰ Jean Améry,¹¹ Elie Wiesel¹² and the recent Nobel prize-winner Imre Kertész.¹³ Torture is also the central theme of Botero’s pictures showing the hell of Abu Ghraib.

Breaking bodies and minds

Although the horrors of torture are a story as old as human history, they may not be written off as mere ancient savagery. Rather, they must be seen as something that has constantly accompanied the unfolding tale of our species. The wars and genocides of the twentieth century, the Nazi concentration camps, South African

1 Zygmunt Bauman, *Le coût humain de la mondialisation*, Hachette, 1999.

2 Hannah Arendt, *The Human Condition*, University of Chicago Press, London, Chicago, 1958.

3 Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World*, Oxford University Press, 1985.

4 See in particular Carlos Liscano, *El furgon de los locos*, 2002, translated by Elizabeth Hampsten (*Truck of Fools*, 2006), a narrative about his years in detention and the horror of torture.

5 See the publications listed in www.unisi.it/ammin/newsletter/comunicati/century/bvinar.htm (last visited 2 October 2007).

6 Dalton Trumbo, *Night of the Aurochs*, Viking Press, New York, 1979.

7 See the film *Capote* (2005) with Philip Seymour Hoffman.

8 Primo Levi, *If This Is a Man* (1947; US title: *Survival in Auschwitz*).

9 Robert Antelme, *L’Espèce humaine*, Gallimard, Paris, 1947.

10 Sarah Kofman, *Paroles suffoquées* (1987).

11 Jean Améry, *Jenseits von Schuld und Sühne*, Munich 1966 (literally “Beyond guilt and atonement”). It was later translated into English by Sidney and Stella P. Rosenfeld as *At the Mind’s Limits: Contemplations by a Survivor on Auschwitz and Its Realities*, Indiana University Press, Bloomington, 1980.

12 Elie Wiesel, *Night*, Hill & Wang, New York, 1958, 2006.

13 Imre Kertész, *Sorstalanság* (1975) (trans. Christopher C. Wilson and Katharina M. Wilson and published in English as *Fateless*, 1992).

apartheid, Pol Pot and Guantánamo Bay all remind us that torture stubbornly recurs. Moreover, its development and refinement go hand in hand with other advances in knowledge.

Experts have devised means and procedures of torture which did not exist in the past. The humiliation and physical ill-treatment which has always been employed have been joined by even crueller and more effective techniques. The traditional expedients of making the victim stand on one leg for a long time, waterboarding and other types of near-suffocation, electric shocks and sensory deprivation have all been surpassed by cleverer strategies designed not to kill or destroy victims, or to prolong their agony, but to ensure their survival in order to turn them into willing collaborators.

If physical and mental torment is not enough, one can systematically deprive the victim of sleep, food and light while issuing cunning threats, then alternate all this with techniques of persuasion and the promise of rewards. After varying lengths of time – depending on the victim's endurance – there arises a psychotic state in which victim no longer recognizes himself, and perceives himself as worthless.

The goal

The frightening lesson is that the definition of modern torture cannot be restricted to physical torment and temporary humiliation. The definition lies not in the technical aspects of the process but rather in the goal: demolition by means of a variety of sophisticated methods selected for the individual concerned. In other words, reducing a human being to a state in which he has no control over his thoughts, depriving him of everything that defines him as an individual and, through intense pain and shame, gradually making him a puppet of his master.

I stress that when speaking of systematic and sophisticated torture, we must not confine ourselves to listing the means of inflicting physical suffering (extreme pain, hunger, thirst) and psychological torment (isolation, sensory deprivation, sleeplessness) which, when methodically applied for a sufficient length of time, can turn a person into a shadow of his former self. What must be emphasized is the extent to which the suffering of even a few dozen victims can instil terror and panic in the entire target community.

Quite apart from the findings of psychiatric experts and specialists, we have all known since we were small, with our childhood fears, our dreamlike or hallucinatory pre-knowledge of death, pain and suffering, that no direct experience is required to know what agony is. This latent knowledge can quickly be transformed into panic. The torture victim, that is, the resulting shadow of his former self, is cut adrift and deprived of everything that identifies and shapes him as a human being. This demolition, this hallucinatory stage of psychosis artificially induced by torment and sensory deprivation (subtly alternated for a prolonged period) reduces the victim to a pitiful state close to the agony where, as Hannah Arendt said, the person himself does not know if he is alive or dead. The various

after-effects experienced by survivors all their lives are similar to an infectious disease which is contagious and transmissible by word and through feelings.

But let us go back to the sources, that is to say the many thousands of victims' accounts – the groans, the screams, the weeping, these expressions of unparalleled suffering and shame. I believe that there is no need to list the methods of torture which turn a human being into a shadow of his former self. Let us leave this list for textbooks on the perpetrators. During the Salazar dictatorship, a Bolivian colleague, a Dr Domich, found an office set up by torture experts in Lisbon who rented out their expertise as one would any other sophisticated technology. It would seem that the Algerian war of independence in the mid-twentieth century left a handful of torture experts who apparently exchanged know-how and experience with the same conviction and experience as participants in congresses covering other fields of knowledge. Similarly, an anti-subversion unit of the United States military produced textbooks on torture in order to improve its efficiency in waging war. The 1963 Kubark manual is an example of this. We must therefore conclude that today there is not just one tendency in humanity – that exemplified in the identity of a doctor: the humanist desire to struggle against pain and death – but also the opposite endeavour: to produce pain and death at any price.

Organization

It is necessary to identify some of the characteristics of systematic, sophisticated torture as a specific aetiological agent of psychological damage. Its techniques and procedures have been refined ever since the Middle Ages, especially in the twentieth century, and have progressed as much as other technologies. The experiments carried out by the Gestapo and the British secret services, the Algerian war, the US School of the Americas in Panama and now Abu Ghraib – all have produced methods and experts of fearsome technical effectiveness. That is why it is necessary to dismiss the idea of primitive barbarity and savagery and to recognize that torture units are not just playful creations and figures of fiction designed for childish entertainment – they are sophisticated organizations occupying a privileged place among the institutions of the modern world.

We cannot imagine the world without schools, hospitals, churches or sports stadiums, yet this array of ordinary institutions also encompasses the secret police and the concomitant reality and fiction of extreme horror. This submission to an absolute power – where Winnicott's "primitive agony", or nameless dread, seems to exist not just as a vestige of the beginnings of life but as a disturbingly close presence – is part of our image of the world. On the pretext that military intelligence requires information about the enemy, highly perfected means of torture are capable of reducing human beings to the subhuman state of mere suffering flesh. The sentient body has become anonymous and that other human faculty, the very sense of one's own humanity, has disappeared. The individual has

been dispossessed of his sentient body and of the speech that invests it – “the body in pain”, to use the title of Elaine Scarry’s book.¹⁴

The perpetrators

In the 1990s, the American historian Christopher Browning published his research, based on personal testimony, into the murderous activities of Reserve Police Battalion 101 during the Third Reich.¹⁵ Thirty years after the events he had conducted extensive interviews with 125 of the 250 survivors of a battalion of 500 men whose job it was, for one whole year, to exterminate tens of thousand of Jews in Poland – not using industrial techniques such as gas chambers, but singly by hand, shooting them one by one in the face or the back of the head, men, women and children, after they had been dragged from their homes and made to dig their own graves. A relentless detailed investigation (the descriptions are bloodcurdling) leads the author to the frightening conclusion implicit in the title of his book, *Ordinary Men*.

How was it that these ordinary men who, before and after the mass killing, led normal lives as clerks or shopkeepers, who had not been chosen because they were ardent supporters of the Nazi regime and who had not been subjected to particular indoctrination – in other words who were a sociological sample of working-class men (from a neighbourhood in Hamburg) – turned into ferocious perpetrators of such crimes? The concluding chapter, after discussing in detail possible causal factors such as propaganda, indoctrination, particular socio-pathological traits, submissiveness and fear of authority, emphasizes his conclusion following hundreds of hours of interviews: the dominant reason why ordinary people commit monstrous crimes is the wish to be like the others, to resemble the group to which they belong, and the inability to say “no” for fear of being alone. Some were able to perform their macabre duty day after day with triumphant arrogance; others had to get drunk to be able to stand it; a few managed to relieve their conscience by allowing someone to escape. The main thing was not to appear scared or to be at odds with the peer group. What would have been extremely difficult was to refuse to comply with the local legal authority’s order to kill several thousand Jews a day. Putting up with the madness and the vile nature of the crime, on the other hand, was what it took to be part of the crowd, rather than paying the price of standing out as an individual: “the ability to be alone”, in the words of Winnicott. On the other hand, Leopoldo Bleger says that the wish to be like the others is part of a needed but, at the same time, pernicious identification process. It forges one of the links between the individual and the group and it cannot be declared definitely good or bad, but simply human, and so an open door to the demons of consent.

14 Scarry, above note 3.

15 Christopher Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*, New York, Harper Collins, 1992.

Browning's findings agree qualitatively and quantitatively with those of Stanley Milgram's experiments concerning submission to authority.¹⁶ Only 20 per cent of the individuals studied were able to withstand the suggestive persuasion of the local majority in situations of extreme tension – that is, only a fifth could resist the hypnotic power of what the group imposed in the way of correct behaviour, or was discerning enough to disagree and adopt a different line of conduct. The remaining four fifths sank into the torpor of voluntary servitude, yielded to the demons of consent, and bowed to the dominant majorities.

The ability to say “no” to group pressure or group complicity is what seems amazing and noteworthy, as when Hannah Arendt introduces us implacably to the thesis of the banality of evil, in which she contends that the monster basically does not possess a malign, perverse personality, but rather is, above all, a manipulated bureaucrat who is charmed secondarily by the enjoyment of the advantages he derives from his position as boss in a skilfully set-up trans-subjective system.¹⁷

I can rightly be reproached for taking Nazi murderers as prototypes of the human race. I agree that there is something objectionable about this approach, but in my defence I plead that Freud taught us how extreme pathologies can highlight something that in ordinary circumstances is insubstantial and therefore hard to visualize. It is therefore necessary to examine this extreme form of vileness if we wish to understand and change the persistence and recurrence of this facet of collective human behaviour, namely the tendency to allow others to think for them and to be afraid to think for themselves. Perhaps the sad reality of people overwhelmed by tyranny and totalitarianism is the key to other similar patterns of behaviour on which it would be useful to shed light.

It is hard to acknowledge through introspection, given our pride in being rational beings, the extent to which fear and prejudice trap us in the hypnotic notion that other human beings are inferior and can safely be eliminated. At the beginning of his career, Freud abandoned hypnosis and suggestion because, he said, being a poor hypnotist he was unable to achieve his therapeutic aims. An ethical imperative and his own rationalist conviction subsequently led him to compare hypnosis with cosmetic treatment and his method – psychoanalysis – with surgery. Nevertheless, at the end of the First World War he concluded, in *Group Psychology and the Analysis of the Ego*,¹⁸ that the rationality of the lone individual melts and succumbs to mass hypnosis. History offers us the examples of Galileo Galilei and Giordano Bruno, and any number of anonymous cases, where the truth of the system kills the nascent truth which threatens to shake the temple, where the fear of authority and voluntary servitude direct thought, conduct and destiny and the most important faculty of the human species – that is, the ability to innovate and create – is abandoned.

16 Stanley Milgram, *Obedience to Authority: An Experimental View*, Harper Collins, 2004 (1974).

17 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Viking Press, New York, 1963.

18 Sigmund Freud, *Group Psychology and the Analysis of the Ego* (*Massenpsychologie und Ich-Analyse*, 1921), trans. James Strachey, International Psycho-Analytical Press, London, 1922.

Illness and torture

Many years ago Maurice Merleau-Ponty pointed out that medicine and torture had a topographical affinity in that both were lodged in and colonized the intimate space of the sentient human body – one to save it, the other to destroy it.¹⁹

It is somewhat amazing to think of bracketing together such conflicting notions as medicine and torture. But they both have the power to pinpoint, focus on and render communicative this intimate space where latent ancestral fears, such as the dread of infinite pain, have always lurked. What frightens us is not so much dying, but something even worse: endless suffering. This is a motif for fables, literary phobias, children's tales and some religious myths from all ages in every part of the world. It is a universal fear which stays with us throughout our lives.

Illness and torture make real and palpable a potential of which we have always been aware, which was there prowling around us, besieging us in silence, signalling one of the basic elements of the human condition: the sentient body and its expression in speech. Dread of the destruction of the message is tantamount to the destruction of the psyche (Gantheret),²⁰ and the hangman's victory means a return to unbearable memories. For this reason we find raw testimony obscene and psychologically indigestible; it prompts only consternation and alienation, and in these extreme situations there is no room for thought which requires a familiar representation of emotion. When you are terrified you cannot think, you can only survive or succumb. The process we normally call "thought" does not occur during trauma – regardless of whether that trauma lasts a minute or several years – but afterwards, in the subsequent phases we call the development of marks and after-effects

But anxiety about the closeness of the Fates is not the same, although in both cases a dreadful threat pulverizes the comforting feeling of being alive. The sudden onset of an illness unleashes a battle with the unknown forces of destiny. It conjures up the vision of malicious gods bent on upsetting reason as the normal link between causes and effects. But the people around us who support us and buoy us up not only become more visible, but usually become kinder and more caring, which can make us even more human.

The opposite is true of institutionalized torture, which shatters the social network which makes us human. Its source is clear and identifiable: it is our fellow human beings who turn us into small, frightened, cornered animals and it is their triumphant and arrogant will that mires us in interminable suffering. One can even imagine the torturer thinking "You must die or suffer never-ending torment because you are of a different race, religion or political conviction. You and yours, everything you were, or believed, will be turned to dust."

19 Maurice Merleau-Ponty, *Humanism and Terror: An Essay on the Communist Problem* (*Humanisme et Terreur: Essai sur le Problème Communiste*, 1947), trans. and with notes by John O'Neil, Boston, Beacon Press, 1969.

20 François Gantheret, *Les corps perdus*, Collection blanche, Gallimard, Paris, 2004.

Faced with the rise of barbarity and the media's use of horror as entertainment, privacy must be restored as a central feature of our lives. It is this secret obscure area, the nucleus of our innermost selves, which is besieged and invaded by torture to a point bordering on madness: "I won't be the same ... I'll be different ... another person ... Will I recognize myself?" This spectre of a metamorphosis of the psyche, of its decomposition and ruin, is unbearable. In Orwell's *1984*, the protagonist's submission to Big Brother typifies the effect of political terror. This definition of the effect of torture seems to me to be closer to the truth and more telling than a technical definition (based on methods for inflicting physical and mental torment). From this point of view, I wish to discuss the usually misguided methods of victimology and medicalization which, with a happy altruism, segregate torture victims and separate them from their status as citizens and equals, and from their alter ego.

Torture is not a disease of the victim, it is an endemic illness of civilization, which is growing and expanding just any other technology that can be perfected and automated. Just like an industry. Modern torture, as Michel De Certeau said,²¹ is not a primitive form of barbarism but an instrument of power in modern society, a wretched necessity for the maintenance of that power. "I am not a sick man, but an expression of my times", said David Rousset on being freed from a Nazi concentration camp.²² There is a chasm of clinical asepticism between his heartfelt declaration and a list of the symptoms of post-traumatic stress syndrome.

Dealing with torture therefore means talking not just about victims, their stigmata and the after-effects, but also using their stories, their humanity, to denounce a system dependent for its survival on destroying people's minds and bodies. If we are to have any hope of staunching the wounds of torture victims and restoring them to the status of our equals, it can only be by listening to them and achieving some glimmer of understanding of what they have experienced. Then we have to dare to look more closely at the oppressive order that has destroyed them.

Torture and society as a whole

I take at face value Freud's words shortly before his death, on the eve of the Second World War, that civilization seemed to have sealed a pact with barbarism²³ – a verdict that proved premonitory. The twentieth century, which saw a huge expansion in scientific and technological knowledge, as well as rapid and intense changes in social organization and the degree of our control over nature, at the same time turned out to be the most barbarous century. Violence joined disease and natural disasters as the principal cause of premature death. The causes of

21 Michel De Certeau, *L'Écriture de l'histoire*, Gallimard, Paris, 1975.

22 David Rousset, *Les Jours de notre mort*, Hachette, Paris 1947.

23 Sigmund Freud, *Civilization and Its Discontents*, W. W. Norton, reissue edn, 1989 (first published in German in 1930 as *Das Unbehagen in der Kultur* (Unease in culture)).

mortality have a new supreme champion, namely violent death brought about by calculated human intent to wreak destruction.

This touches on civilization and culture and thus concerns statesmen and citizens alike. It is a universal subject and it would be wrong, from the modest standpoint of psychiatrists or psychoanalysts, to claim that we are especially well placed to explain the causes, effects and consequences of this evil and to work out therapies to remedy it. The consequence of such technocratic vanity and childlike overconfidence in science would be to have experts to decide on everything, thus exempting ordinary citizens from the need to think about society's problems, enabling them to wash their hands of politics. But all members of society must take part. It is dangerous to promote a division of society into the injured and the unharmed and to confine therapy to medical or psychiatric treatment in specialized institutions.

Communities that have suffered extreme political violence require a lengthy period to repair social bonds. A signal experience has been an upsurge in serious pathologies and after-effects among the children and grandchildren of those who were persecuted and annihilated in the Second World War. There is sufficient clinical evidence in Europe of this phenomenon.

Our professional and civic responsibility is thus not only to care for the victims but also to fight against silence and foster memory, which exorcizes the innermost ghosts of terror and prevents the interiorization of fear. This responsibility is collective. The victims and their descendents cannot be asked to cope with the after-effects of such horror all by themselves.

If the law is much too serious a matter to be left exclusively in the hands of lawyers, war and its effects also exceed our professional abilities and we must avoid being falsely appointed as experts to remedy ills which today – and probably for several generations to come – will impact on the social life and health of those who have suffered extreme political violence. And this impact is one of the most salient aspects of the atrocities of our world.

“Extreme political violence” seems to denote a homogenous landscape of cruelty and pain induced by a wide range of agencies capable of causing psychological damage. However, I believe that subtle symptomology can and must be used to catalogue the effects inherent in (and specific to) extreme political violence. They may be summarized as a collapse of the psyche which produces rejection of and revulsion at “membership of the human race”.²⁴ We are the only species blind enough to plan its own destruction.

The effect – intended or collateral – of the systematic torture of a given population group is collective panic giving rise to paralysis and the individual's desire to keep his head down. When faced with omnipresent political absolutism it is impossible to remain neutral or indifferent. There are only three options: humiliating submission, heroic and sacrificial defiance, and tacit or open support for and complicity with the shameful regime. There is no possible escape route and

24 Anteleme, above note 9.

all alternatives have powerful, long-lasting psychological effects. This is why I contend that not only the individual victims suffer but the whole of society. Nowadays, in Latin America, Germany, Spain or Israel, to mention only the cases of which I have direct knowledge, three generations after the actual events the remaining conflicts and after-effects in human and institutional relations are still being grappled with because the after-effects of political violence are still being felt in the families concerned. They are part of these families' history.

In Latin America, I can say from direct experience (and that of many of my colleagues), the climate and air you breathe during state terrorism is contaminated by people's horror of what is happening in the dungeons. A few real victims, a handful of human beings who have been broken by torture, are able to infect and contaminate many strata within the affected society. The infection seeps into public and political dealings and even contaminates areas of coexistence which are normally far removed from the world of politics: one's family, one's circle of friends, schools and universities – everything is affected. The danger of denunciation and the resulting doubts about doing, or not doing, something all create an atmosphere of fear and suspicion that corrodes the bonds of society. The fact that institutionalized torture and arbitrary imprisonment are an omnipresent option in a society unable to support and uphold democratic institutions generates a latent or virtual state of highly pathogenic mistrust, even if there is no visible or immediate evidence of its effects.

I have had hundreds of hours of conversations with persons who have lived under totalitarian regimes, not only potential victims but also people who got through the years of terror completely unscathed, only to realize many years later, when the threat had lessened or disappeared, how much that unacknowledged violence had affected them. Daily life under a totalitarian regime is diseased in a thousand ways, and like parasites these pathologies contaminate many facets of social life which are apparently far removed from the orbit of politics.

A totalitarian state is always unhealthily suspicious, constantly conjuring up images of the enemy where the boundaries between truth and imagination, between reality and fiction, are difficult or impossible to draw. I am suggesting that because of the psychology of rumour and propaganda, which are so important in today's world as shapers of opinion and ingredients in the building of an identity, the existence of terror in society (whether in the form of torture, arbitrary imprisonment, kidnapping or disappearances) has harmful effects which are not limited to the potential or actual victims. Rather it functions much like a fragmentation bomb, damaging or at least threatening everything in the surrounding area.

Civilization and barbarity

Just think of the changes that constitute the development of every human being. We are born more defenceless, immature and fragile than almost any other species. Freud calls this quasi-foetal extra-uterine condition of human beings in their first

year of life desertion or original helplessness. We are incapable of moving from one place to another, controlling our motor systems or speaking. More or less all a newborn baby can do is smell, hear and suck. For a long time the baby lives in a state of extreme dependence on the care provided by its parents or parental substitutes.

This immaturity, which is the first state experienced by every human being who has ever come into the world, leaves a substantial and lasting imprint on the way our minds function. For no other species are fellow creatures so crucial and so decisively important for the psychological existence of the individual, for the profile of their condition as a subject, or for the cohesion of their mental life. A human being inherits not only what is passed on by the genome and biology, but also a language and a culture with its stories, myths and legends. It is only through life in society that mankind has arrived at the place it occupies on the zoological scale. This marks us for better (because the division of labour and education has enabled humanity to build culture and achieve advances of civilization which no single human being could have managed on their own) and for worse (because we have also created war and barbarity and we are the only species capable of planning the destruction of our fellow beings).

Human society is sometimes rather flippantly compared to a beehive or an ants' nest on the grounds that these species also live in social groups. This is far from accurate. The fixed roles and behavioural patterns of bees and ants have been immutable over the generations, in contrast to the transformations and influences that humans bring about in others.

People do not just gather in society, they *must* form a social group in order to live. But war turns civilization into savagery. This makes political violence a very special kind of harm or aetiological agent, when man turns into a man-hunting wolf, when fellow man becomes the prey. For this reason, the psychological trauma of war is far greater than that produced by accidents or natural disasters, which prompt solidarity and strengthen social bonds. War corrodes and severs these bonds and infects, with something approaching gangrene, identification with all that is human. The mirrored reflection of the face of a friendly fellow creature, which is so essential for life, provokes crime, sociopathies and other serious disorders.

When lethally traumatic action stems from a methodical, rational and intentional plan devised by human beings for the destruction of other human beings who have become enemies, this imprints itself on the psyche of the defeated, the victims and those responsible for causing their suffering. It produces a stigma of humiliation and vengeance that engulfs not only those directly affected and everyone around them, but impacts on the whole of society for a period lasting several generations. Since Jacques Lacan and his school – and above all since Jean Laplanche's development of the subject²⁵ – this has been known in psychoanalysis as giving priority to the other in order to shore up the condition of

25 Jean Laplanche and Jean Bertrand Pontalis, *Vocabulaire de la psychanalyse*, PUF-Quadrige, Paris, 2004 (1967).

being a subject. Three generations are needed to configure a human being as far as his or her inherited feelings and resentments are concerned.

Mixing the included and the excluded

As Michel Foucault wisely observed, the reaction of conformist society to the pain and scars of victims is to banish them to its fringes in order not to have to see them and to suffer with them.²⁶ This is what is done with the mad and the marginal. I believe that it is crucial to the ethics of mental health workers to combat this approach and to put a stop to the complicity with a social system that allows and even encourages this split between conformist society, which claims to be unaffected, and the affected.

The considerable two-way movement between sectors that want nothing to do with each other – the affected and those who believe themselves to be unharmed – must be a priority objective of our work as a profession. Society's silence is always the precondition sought to enable authoritarian regimes of dubious legitimacy to attack dissidents and to assign to us psychiatrists the task of tertiary prevention, that of looking after hopeless cases. But it is also to prevent us from carrying out primary prevention, since the more abuse and arrogance are denounced, the more effective the treatment against this chronic disease will be, a disease that requires society's silence in order to pursue its deadly course. The psychiatrist, who plays a leading role in the mental health field, is ideally placed to demonstrate how and to what extent the vile manifestations of political violence (abuse and arbitrary application of the law, systematic torture, kidnappings and disappearances) profoundly damage the social fabric, and that their after-effects persist for generations.

The European experience of two world wars, from the fateful trenches of Verdun to the concentration camps where millions of Jews, Roma, political opponents and mentally ill people were exterminated, has shown how the after-effects among the victims and their descendents profoundly mark, for several generations, both them and the society to which they belong. The Balkan war is another indisputable example. The mental health worker's voice is crucial in the post-conflict period of reconciliation. To look no further than the twentieth century (although we realize that, in doing so, we are disregarding the still extant traces of the cruel evangelization and conquest of the Americas), the torment, torture, arbitrary imprisonment, persecution and uprooting not only of adversaries and enemies, but also of a civilian population drawn willy-nilly into a war (be it international or civil), has wreaked psychological havoc. During the world wars, the wars in Algeria and Indochina, apartheid, the political degeneracy of the communist regimes of eastern Europe, the Stalinist period, the rule of Pol Pot and the more recent wars in the Balkans and the Middle East, the official

26 Michel Foucault, *Maladie mentale et psychologie*, Presses Universitaires de France, coll. Quadrige, Paris, 1954.

reason for this tormenting of an acknowledged or secret enemy was to obtain information. It was said to be an indispensable means of espionage and source of military intelligence. Colombia and Guatemala are prime examples of the wretched fate of those afflicted by the military dictatorships of Latin America. This evil has taken on such endemic proportions that all plans for countering it and all efforts to aid the victims seem pale and inadequate.

The human ability to respond

In social psychology and psychoanalysis, people's ability to respond to the same harmful effects and traumas in a huge variety of ways is well known. Much has been written about and much thought has been given to heroism and cowardice in such circumstances. Stories of heroes and traitors, of honourable men and members of the secret police or informers infiltrate the social fabric of a police or totalitarian state in which victims and perpetrators coexist. And rumours do the rounds, some whispered, others shouted aloud.

Similarly, daily threats in a state where terror reigns are a noxious and terribly effective pathogen whose strength and size has perhaps been partially recognized but insufficiently publicized. I consider it to be the overriding duty of the humanitarian community as a whole to bring the effects of this poison to the attention of a very wide range of public bodies. No less an institution than the US Congress, with all its prestige and power, has just taken a step in the opposite direction by passing a law allowing torture to be used in the war on terrorism and insecurity. I am afraid that what is happening in Guantánamo Bay and in prisons in Iraq will spread and deeply corrode the libertarian foundations of US society. Publicly to legitimize the right to torture – even if the aim is to sanction officially the act for reasons of internal security – will have harmful repercussions sooner or later.²⁷

In times and places where desolation and terror reign, our work is to little avail and amounts to no more than a Band-Aid on a deep wound. But once the evil has taken root, it has long-lasting effects; and the post-conflict reconciliation period requires our skills for decades and generations. Assuaging psychological and/or somatic symptoms and encouraging a cathartic reaction to the horror experienced are not the only remedies. Resilience and adaptability doubtless also

27 In one of his books (*One of These Days*) Gabriel García Márquez tells the story of a political leader who develops a massive dental infection during a war. The only dentist within a radius of 200 km is the leader of the opposition. The toothache sufferer carries out a raid and, with ten machine guns trained on him, the dentist treats and alleviates the suffering of his rival and enemy who, full of paradoxical gratitude towards a political enemy, exclaims, "Well, here we all know that you are the head of the opposition and nothing has happened to you for five years." While he washes the instruments, the dentist mutters, "Nothing has happened to me! You don't know what it is like to get up and go to bed every day for five years thinking that this day is your last. You wouldn't then say, "Nothing has ever happened to me.""

exist in a society driven by extreme political violence, and they enable life and joy to continue.

What I am proposing is not lineal determinism in which things are either completely good or completely bad, but a paradoxical and contradictory reasoning that allows room for inconsistencies. Like humidity in concrete, despite the capacity to adapt and resist adversity, terror corrodes the quality of social bonds.

The urge to live is always powerful, and Adorno's statement that "it is impossible to write poetry after Auschwitz" cannot be taken literally but must rather be seen as a tragic reminder of the coexistence of lethal factors that poison healthy social relationships.

One debatable issue is the mental health criteria we use in public health and psychiatry. An ethical definition of mental health is crucial for psychoanalysis and psychiatry. Health is not only the absence of visible symptoms. It also means being in complete possession of one's creative faculties. This last criterion enables us to fine-tune the stimulus of adaptability during a period of terror and to avoid being accomplice to maniacal mechanisms of negation and denial – seeking oblivion, satire aimed at wiping the slate clean, looking to the past – which are practised in the name of a spurious reconciliation but actually disrupt the process of grieving, so essential for the relatives and friends of victims and for society as a whole.

I contend that talking is important for the healing process, and warn against treating the subject in purely medical or psychiatric terms, a strategy which (in my view) is wrong, judging by the approach of international specialists. I have no doubt that it is important to treat severe headaches, sexual impotence or any other organic pathology deriving from the aggression suffered. But this treatment should not serve as a fig leaf preventing us from dealing with psychological conflicts which are the strongest and most usual after-effect and on which our professional attention should focus.

Medicalization is not a conceptual or abstract issue, but a conspicuous emerging tendency in clinics. It leads to a disconnect in the doctor–patient relationship and misunderstandings which can sometimes have sad consequences, although these are easy to correct.

Hans Mayer, a German Jew who turned his name into Jean Améry, gave up his mother tongue and wrote a book, *Beyond Guilt and Atonement*²⁸ (which simply must be read). It reflects the view that victims feel that they have a message to convey and a report to deliver – that they are the products of their time.

On the other hand, like many professionals, we psychiatrists have the habit or almost the reflex of translating people's dramatic poignant language into a technical jargon more precise and understandable for us. Terms such as war neurosis (post-traumatic stress syndrome) give us the audacity of Puss in Boots or of Columbus and the conquistadors who baptized these lands while they were in the process of appropriating them.

28 Améry, above note 11.

This game, or misunderstanding, can invade the doctor–patient relationship. Telling a survivor, one or more of whose relatives have been murdered that – the crime itself apart – the perpetrators were full of humiliation and shame towards the victim, or thinking of the patient who reacts to his grief with melancholy or hysteria as being on an emotional rollercoaster – these are things from which no therapist is safe. The groan is so intense and so genuine that it is necessary to consider its impact not only on the victim, but also on the witness, in this case the therapist. That is why there is so much talk of burn-out among the medical staff working in this type of situation. What is needed is not only the ability to cope with the intense emotions of the other person, the patient, but a careful and painstaking exercise in handling one's own emotions.

Being the child, grandchild or indeed any member of the family of victims of extreme political violence leaves marks and after-effects which, I repeat, last a long time even when they are not the symptoms of a serious pathology. I believe that detecting and accepting the existence of these invisible pathologies is vital if we are to recover the collective memory of a community or whole society and that this restoration and reinstatement of grief and memories is indispensable to building healthy social links now and in the near future.

Physicians and torture: lessons from the Nazi doctors

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Abstract

How is it possible? What are the personal, professional and political contexts that allow physicians to use their skills to torture and kill rather than heal? What are the psychological characteristics and the social, cultural and political factors that predispose physicians to participate in human rights abuses? What can be done to recognize at-risk situations and attempt to provide corrective or preventive strategies? This article examines case studies from Nazi Germany in an attempt to answer these questions. Subjects discussed include the psychology of the individual perpetrator, dehumanization, numbing, splitting, omnipotence, medicalization, group dynamics, obedience to authority, diffusion of responsibility, theories of aggression, training, cultural and social contexts, accountability and prevention.

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Torture is a particularly horrible crime, and any participation of physicians in torture has always been difficult to comprehend. As General Telford Taylor

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explained to the American judges at the trial of the Nazi doctors in Nuremberg, Germany (called the “Doctors’ Trial”), “To kill, to maim, and to torture is criminal under all modern systems of law ... yet these [physician] defendants, all of whom were fully able to comprehend the nature of their acts ... are responsible for wholesale murder and unspeakably cruel tortures.”¹ Taylor told the judges that it was the obligation of the United States “to all peoples of the world to show why and how these things happened”, with the goal of establishing the factual record and trying to prevent a repetition in the future. The Nazi doctors defended themselves primarily by arguing that they were engaged in necessary wartime medical research and were following the orders of their superiors.² These defences were rejected because they were at odds with the Nuremberg Principles, articulated at the conclusion of the multinational war crimes trial in 1946, that there are crimes against humanity (such as torture) for which individuals can be held to be criminally responsible for having committed them, and that obeying orders is no defence.³

Almost sixty years later the question of torture during wartime, and the role of physicians in torture, is again a source of consternation and controversy. Steven Miles, for example, relying primarily on US Department of Defence documents, has noted that at the prisons of Abu Ghraib, Iraq, and the US Naval base at Guantánamo Bay, Cuba, “at the operational level, medical personnel evaluated detainees for interrogation, and monitored coercive interrogation, allowed interrogators to use medical records to develop interrogation approaches, falsified medical records and death certificates, and failed to provide basic health care”.⁴ The International Committee of the Red Cross, on the basis of an inspection of the Guantánamo Bay prison in June 2004, commented that physical and mental coercion of prisoners there is “tantamount to torture”, and specifically labelled the active role of physicians in interrogations as “a flagrant violation of medical ethics”.⁵

Bloche and Marks, on the basis of their interviews with physicians involved in interrogations at Guantánamo Bay and in Iraq, reported the belief of some of the physicians “that physicians serving in these roles do not act as physicians and are therefore not bound by patient-oriented ethics”.⁶ Psychiatrist Robert Jay Lifton suggested that the reports of US physicians’ involvement in torture in Iraq, Afghanistan and Guantánamo echo those of the Nazi doctors who were “the most extreme example of doctors becoming socialized to atrocity”.⁷ Nonetheless, the muting of the criticism of such torture prompted

1 *United States v. Karl Brandt et al.*, 9 December 1946 (Telford Taylor, opening statement of the prosecution).

2 George J. Annas and Michael A. Grodin (eds.), *The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation*, Oxford University Press, New York, 1992.

3 Ibid.

4 Steven H. Miles, “Abu Ghraib: its legacy for military medicine”, *Lancet*, Vol. 364 (2004), pp. 725–9.

5 Neil A. Lewis, “Red Cross finds detainee abuse in Guantánamo”, *New York Times*, 30 November 2004, p. 1.

6 M. Gregg Bloche and Jonathon H. Marks, “When doctors go to war”, *New England Journal of Medicine*, Vol. 352 (2005), pp. 3–6.

7 Robert J. Lifton, “Doctors and torture”, *New England Journal of Medicine*, Vol. 351 (2004), pp. 415–16.

Elie Wiesel to ask why the “shameful torture to which Muslim prisoners were subjected by American soldiers [has not] been condemned by legal professionals and military doctors alike”.⁸ The challenges of the war on terror present an opportunity for medical and legal professional organizations to work together transnationally to uphold medical ethics and international humanitarian law, respectively, rather than to search for ways to avoid legal or ethical dictates.

Thirty years ago, Sagan and Jonsen observed that because the medical skills used for healing can be maliciously perverted “with devastating effects on the spirit and the body”, it is “incumbent upon the medical profession and upon all of its practitioners to protest in effective ways against torture as an instrument of political control”.⁹ Such protests can help in the war against terrorism. Neither the use of torture nor violations of human rights, as another professor of law, the Jesuit Robert Drinan, has observed, will “induce other nations to follow the less traveled road that leads to democracy and equality”, but the “mobilization of shame” and the “moral power” of example can do so.¹⁰ In this article, we use insights gained from the actions of the Nazi doctors to help us understand the continuing role of physicians in torture.

Racial hygiene, murder and genocide

At Nuremberg, Telford Taylor understood the need to recognize and actively denounce the evils of the Holocaust, and implored the international community to take a stand against evil. In the foreword to *The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation*, Professor Elie Wiesel asked, “How was it that physicians could have been involved in such atrocities?”¹¹ One might well ask how any human beings could have been involved. But what Wiesel and Taylor recognized was that physicians have a special moral standing in their communities and in society at large: by nature of their advanced education and their oath to serve and protect humanity, physicians have voluntarily undertaken a special responsibility. What were the personal, professional and political contexts that allowed physicians to use their skills to torture and kill rather than to help and heal? Some insight into the events of the Holocaust – and the use of torture today – can be provided by historical accounts of the role of medicine and physicians in relation to racial hygiene theories, the medicalization of social ills and the meshing of medicine with national socialist ideology.

8 Elie Wiesel, “Without conscience”, *New England Journal of Medicine*, Vol. 352 (2005), pp. 1511–13.

9 Leonard A. Sagan and Albert Jonsen, “Medical ethics and torture”, *New England Journal of Medicine*, Vol. 295 (1976), p. 1427.

10 Robert F. Drinan, *The Mobilization of Shame*, Yale University Press, New Haven, Conn., 2001, p. 94.

11 Elie Wiesel, foreword to Annas and Grodin, above note 2, pp. vii–ix.

The idea of racial hygiene emerged at the turn of the twentieth century, and the racial policies of the Third Reich were in many ways adapted from eugenics practices developed in the United States in the early twentieth century.¹² Before the National Socialist Party came to power in Germany, there were already several institutes on racial hygiene at various German universities. The theories at these institutes grew out of the “science of eugenics” employed in the United States to justify government support for the twenty-three separate state laws which allowed for the involuntary sterilization of individuals.¹³ In the US Supreme Court decision *Buck v. Bell*, referring to the fact that the state can draft people into military service, the Court concluded,

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.¹⁴

Ultimately, the Nazis would carry this ideology beyond sterilization. They not only eliminated “undesirables” from their society, but also developed multiple programmes for the creation of a “master race”, including the *Lebensborn* programme, which encouraged members of the SS to have children with women who had Aryan traits.¹⁵ All the while they highlighted the “therapeutic” facet of their programmes, claiming that destroying the unworthy was “purely a healing treatment”.¹⁶

Eugenics was only one of many facets of the biological front the National Socialists put on their policies. Nazi leaders considered their political philosophy to be “applied biology”, and adopted many public health policies in addition to those guided by social Darwinism, including anti-tobacco initiatives.¹⁷ They gave a medical connotation to their political movement, and often referred to Hitler as the “great doctor of the German people”.¹⁸ Perhaps attracted by the medical

12 Stefan Kühl, *The Nazi Connection: Eugenics, American Racism, and German National Socialism*, Oxford University Press, Oxford, 1994.

13 Andre N. Sofair and Lauris C. Kaldjian, “Eugenic sterilization and a qualified Nazi analogy: the United States and Germany 1930–1945”, *Annals of Internal Medicine*, Vol. 132 (2000), pp. 312–19.

14 *Buck v. Bell*, 274 US 200 (1927).

15 Mark Landler, “Results of secret Nazi breeding program: Ordinary folks”, *New York Times*, 7 November 2006.

16 Robert Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide*, Basic Books, New York, 1986.

17 Robert N. Proctor, “The anti-tobacco campaign of the Nazis: a little known aspect of public health in Germany, 1933–45”, *British Medical Journal*, Vol. 313 (1996), pp. 1450–3.

18 Wolfgang Weyers, *Death of Medicine in Nazi Germany: Dermatology and Dermatopathology under the Swastika*, Ardor Scribendi, Ltd., Philadelphia, 1998.

metaphors, doctors flocked to the cause of National Socialism. Sixty-five per cent of all German doctors became Nazi Party members.¹⁹ By 1937, the representation of doctors in the SS – the most vicious arm of the Nazi Party – was seven times higher than that of the average for the employed male population and by 1942, 50 per cent of all German doctors had joined the Nazi Party.²⁰ Joining a political party is one thing, using its ideology to justify the torture and extermination of an entire people is quite another. To see why some physicians and scientists take that extreme step, we must examine the perpetrators within a framework of individual and group psychology, as well as in the larger social context.

Psychology of the individual perpetrator

First, it is impossible to explain the acts of torturers and murderers without understanding something of the psychology of human behaviour, including the concepts of self-deception, the unconscious, drive, defence, aggression, narcissism, a permissive superego, and social service for an ideal. These psychological ideas are rooted in philosophical theories about human nature. Before examining an individual psyche, it is important to consider the view one has of humanity. There is a fundamental tension between classic and romantic visions of human reality, which is highly relevant to an examination of perpetrators of torture. In the “classic” view, we all intrinsically have the capacity to do evil and are very precariously constrained by order and tradition; in other words, we all have the potential to be torturers. In the “romantic” view, men and women are intrinsically good but are spoiled by circumstance and culture – this vision of human reality is full of possibilities currently constrained by society. Under this dual framework, individuals are either perpetrators of evil prevented from acting by socialization and social constraints, or moral beings turned into torturers by evil social contexts. But the truth of human psychology is probably not so extreme.

Dehumanization

There are several psychological mechanisms by which individuals can overcome the social conditioning that prevents them from becoming perpetrators of atrocities. Dehumanization is a key psychoanalytic defence mechanism which allows individuals to avoid fully processing troubling events. Dehumanization of the self and of others draws on other defence mechanisms, including unconscious

19 James Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing*, Oxford University Press, New York, 2002.

20 Robert N. Proctor, “Nazi doctors, racial medicine, and human experimentation”, in Annas and Grodin, above note 2, pp. 17–31.

denial, repression, depersonalization, isolation of affect and compartmentalization (the elimination of meaning by disconnecting related mental elements and walling them off from each other).²¹ Ultimately, dehumanization allows the perpetrator to go beyond hatred and anger, and commit atrocious acts as if they were part of every day life.

There are two types of dehumanization processes. First, there is self-directed dehumanization, a diminution of an individual's own sense of humanness and self-image, which is often seen in cases of complex post-traumatic stress disorder (CPTSD); for torture survivors or other persons exposed to extended trauma this process is a form of self-protection.²² The second type is object-directed dehumanization, where others are perceived to lack human attributes. The two processes are mutually reinforcing, as reducing the self adds to reducing the object, and reducing the object adds to reducing the self. Perpetrators accomplish the dehumanizing process by making the other (the object) dirty, filthy and physically less than human. One could argue that there is an increased ability to dehumanize others today as a side effect of the advent of technology, as modern warfare, automation, urbanization, specialization, bureaucratization and the mass media all contribute to the isolation of individuals. Anonymity and impersonality cause a fragmented sense of one's role in society, contributing to dehumanization. Sometimes dehumanization can be adaptive; for example, in a crisis, dehumanization of the injured or sick allows for an efficient rescue. Certain occupations classically teach and perhaps require selective dehumanization, including law enforcement and the military and medical professions. This enables professionals to detach from full emotional responsiveness in the moment, but it also can be very dangerous.

Splitting

Dehumanization by itself cannot completely explain the healing–killing paradox. Splitting as a model of personality enables people to deal with trauma.²³ This is a form of self-deception in which the unconscious mind can wall off the conflict to eliminate incompatibilities with self-image, separating thought and even actual events from feeling. For a perpetrator, splitting can be used to rationalize and justify his actions, and through reaction formation he can convince himself that he is doing good, or even that he is a hero. Robert Lifton's interviews of Nazi physicians and their surviving families revealed how far splitting or “doubling” (as Lifton terms it) went for those individuals. The Nazi physicians split the self: they saw themselves as healers with special powers, practically omnipotent, and killing

21 Viola Bernard, Perry Ottenberg and Fritz Redl, “Dehumanization: a composite psychological defense in relation to modern war”, in Milton Schwebel (ed.), *Behavioral Science and Human Survival*, Behavioral Science Press, Palo Alto, Cal., 1965.

22 Stanley W. Jackson, “Aspects of culture in psychoanalytic theory and practice”, *Journal of the American Psychoanalytic Association*, Vol. 16 (1968), pp. 651–70.

23 Lifton, above note 16.

24 Ibid.

became a part of healing – in their minds, one had to kill the enemy to heal one's people, one's military unit and one's self.²⁴ Under this mental paradigm, there is no paradox in using Red Cross trucks to carry victims to a death camp or in wearing white coats while systematically killing children for experimentation: medicine becomes the equivalent of war, and physicians medicalize and humanize killing even while they dehumanize the victim.

Numbing

Splitting is combined with numbing to distance the perpetrator more effectively from the victim. Psychic numbing diminishes the capacity to feel. Blocking feelings leads to extreme repression, including denial to the point of disavowal of what one perceives and de-realization to the point that the victims never existed in the perpetrators' consciousness. One Polish survivor who worked in the medical block of a concentration camp partly defended Polish doctors who mistreated Jewish inmates by noting that "people grow indifferent to certain things. Like the doctor who cuts up a dead body [to do a post-mortem examination] develops a certain resistance".²⁵ However, this numbing process was not completely successful, as many physicians selecting at the "ramps" still needed to self-medicate with heavy drinking.²⁶

Omnipotence

Concentration camp officials' omnipotent control over life and death was balanced by the Nazis' vision of themselves as one important part of a larger omnipotent social machine.²⁷ The medical profession is susceptible to feelings of omnipotence, and Holocaust survivor Bruno Bettelheim suggests that "it is this pride in professional skill and knowledge, irrespective of moral implications", that makes physicians vulnerable to becoming perpetrators.²⁸ Ultimately, however, doctors are impotent to control death and disease, and this is part of the death anxiety that many physicians have. For those doctors who took an active part in Nazi abuses, omnipotence merged with sadism – they took pleasure in domination and control – but they still needed to eradicate their own vulnerability and susceptibility to pain and death; there is a powerlessness associated with omnipotence. They merged their anxiety over powerlessness into their pride at being part of their country's war machine. The Nazi Party was able to manipulate particular psychological vulnerabilities of individuals as it pressed them into serving the wishes of the group. In the mental struggle to maintain their

25 Ibid.

26 Waller, above note 19.

27 Lifton, above note 16.

28 Bruno Bettelheim, foreword to Miklos Nyiszli, *Auschwitz: A Doctor's Eyewitness Account*, Arcade Publishing, New York, 1993, pp. v–xviii.

professional identity, the Nazi physicians saw Hitler as the “father physician”, and became unified as a group beneath him.

Medicalization

The Nazi doctors put an abstract, purely medical, technical, and professional construction on their activities; for example, telling themselves that the doctor’s task is to alleviate suffering, they would use medical and technical skills to diminish the pain of the victims while setting up mass murder. They became absorbed in the technical aspects of medical work, examining inmates as a criterion for sending them to the gas chambers.²⁹ They became robotic in what they did and the process of murdering became a performance; in their medical uniforms, acting as the Nazi male ideal, they used their professional power to ward off their death anxiety, killing to hold back death. Medical professionals have a special capacity to split: while an individual is part of the healing profession then everything he does must be healing. Through these justifications and within the larger social context of “political medicine”, the Nazi doctors were able mentally to connect healing with their murderous actions.

Psychology of groups of perpetrators

In identifying themselves as part of a larger machine working to “heal” society, Nazi physicians diffused responsibility, transferring it to the group rather than taking individual responsibility for their actions. They achieved group unity through the creation of special group language – euphemisms for the evil acts they carried out. They saw themselves as part of a “special” group, as elite and important. There was a certain sense of belonging and being part of a movement. This group unity was facilitated by specialized training, ritualization of their actions and, as discussed above, the self-directed dehumanization and splitting that allowed them to subsume individual identity while acting in a professional capacity.

Two key psychology experiments in the United States after the Second World War examined obedience to authority and diffusion of responsibility in groups, and further demonstrated the ease with which previously well-adjusted individuals can engage in evil activities.

Obedience to authority

Beginning in 1961, Stanley Milgram performed a set of experiments at Yale University in which subjects were asked to “deliver electro-shocks” to another

²⁹ Lifton, above note 16.

³⁰ Stanley Milgram, “Behavioral study of obedience”, *Journal of Abnormal and Social Psychology*, Vol. 67 (1963), pp. 371–8.

person. Sixty-five per cent of the subjects used what they believed were dangerously high levels of shocks when the experimenter told them to do so.³⁰ In a later experiment, one-third of subjects continued the shocks when they were close enough to touch the person being shocked.³¹ The key to these experiments is that someone else – an authority figure – accepted responsibility for the final outcome. Milgram postulated three categories of reasons for obeying or disobeying authority: first, a personal history of a family or school background that encourages obedience or defiance, that is, learned object relations; second, a feeling of comfort derived from obeying authority, which is known as “binding”; and third, the sense of discomfort people get when they disobey authority.³² All the test subjects believed that the experimenter was responsible for any consequences, and presumed the legitimacy of the experiment.

When considering the effect that group dynamics can have on individuals, it is important to note what draws certain persons towards certain groups. Authority-oriented persons have a preference for hierarchy and clearly demarcated power relationships – they enjoy obeying and giving orders.³³ Such persons value obedience highly, and if self-guidance is impossible will seek external guidance, joining groups such as the military to provide an opportunity for external orders and to fill inner emptiness. Interviews with the widows of SS officers reveal that several such men reported a “need to belong”.³⁴ Authority-seeking persons also avoid confrontation with authority figures (such as strict and abusive parents), instead seeking to attain closeness with them in order to feel secure. These individuals may be even more likely to respond to authority than the average people who acted as subjects in Milgram’s experiments.

Diffusion of responsibility

Ten years after Milgram’s landmark work, Philip Zimbardo simulated prison life among college students in the famous Prison Experiment at Stanford University, randomly assigning housemates to be either a guard or a prisoner. Within six days, the subjects had changed from university students who were friends and roommates to abusive controlling guards and servile prisoners.³⁵ Prisoners became passive, dependent and helpless. Guards expressed feelings of power and group belonging. They placed all the responsibility for their actions on the researchers and the group as a whole, rather than accepting blame for individual actions. The experiment became violent, and had to be ended early. Zimbardo, who had acted both as prison superintendent and as principal investigator,

31 Waller, above note 19.

32 Stanley Milgram, *Obedience to Authority: An Experimental View*, Harper Collins, New York, 1973.

33 Waller, above note 19.

34 Tom Segev, *Soldiers of Evil: The Commandants of Nazi Concentration Camps*, McGraw-Hill, New York, 1988.

35 Craig Haney, W. Curtis Banks and Philip G. Zimbardo, “Interpersonal dynamics in a simulated prison”, *International Journal of Criminology and Penology*, Vol. 1 (1973), pp. 69–97.

concluded that the experiment demonstrated the ways in which situational factors can cause inhumane behaviour, in this way corresponding with the Milgram experiments.

The manner in which the subjects of these experiments placed all responsibility on the shoulders of the principal investigators and/or the group parallels the manner in which the perpetrators of the Holocaust denied the possibility of being blamed when they had merely been following orders. Hitler often stated of his military conquests that he took the responsibility upon himself, and in doing so, provided the basis for his subordinates to exempt themselves psychologically from moral standards or judgement.³⁶ This diffusion of responsibility can occur in *any* situation of mass violence, whether hierarchically structured or not.

Theories of aggression

Some theories of aggression focus on individuals as perpetrators, and particularly on the idea that the desire to inflict violence on others is a condition and/or expression of primary sexual drive.³⁷ This idea focuses on sadists for whom inflicting violence is sexually exciting and whose aggression is in the service of Eros. Sadism is in all people, but in some it splits off from regulating factors and becomes a dominant urge – in these people there is a competitive wish for dominance over others. The satisfaction that comes from winning or from dominating another person becomes an uncontrollable urge in sadists. Similarly, sociopaths lack control over their urge to hurt others. As a result, sadists and sociopaths do not function effectively in the systematic infliction of violence through torture or genocide; they tend towards killing or hurting individuals. Sadism, as such, is not a sufficient explanation for the behaviour of perpetrators of torture and mass violence.

Group behaviour tends to rely on diminishing the conscious individual personality, focusing thoughts and feelings in a common direction and giving emotion and the unconscious dominance over reason and judgement. As a result, ordinary persons whose urges are more easily subsumed than those of sadists or sociopaths are more effective killers, especially in a hierarchically structured setting such as the military. Interviews with a particular group of perpetrators, the Nazi Party's elite *Schutzstaffel* or SS, showed that they were not psychopaths but ordinary men.³⁸ As Hannah Arendt suggested in her work on the Eichmann trial, the evil perpetrated by Eichmann and the SS was not a function of deeply rooted malevolence, but merely a lack of imaginative capacity and a result of not thinking

36 Fritz Redl, "The superego in uniform", in Nevitt Sanford and Craig Comstock (eds.), *Sanctions for Evil*, Jossey-Bass Inc, San Francisco, 1971.

37 Debra Kaminer and Dan J. Stein, "Sadistic Personality Disorder in perpetrators of human rights abuses: a South African case study", *Journal of Personality Disorders*, Vol. 15 (6) (2001), pp. 475–86.

38 Lifton, above note 16, p. 14.

39 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin Books, New York, 1963.

out the impact of their actions.³⁹ Her idea of the “banality of evil”, though much criticized as downplaying the significance of traumatic acts of violence, captures the ease with which some evil acts are perpetrated. For example, it was not difficult to get doctors to kill 100,000 German mental patients. Given the sheer number of people required as active participants or at least complicit in that “euthanasia” programme, it is highly unlikely that all the doctors involved were deviants. Instead, the fragmentation and division of labour allowed each individual to excuse their participation by saying that they “only” did their particular assigned tasks.

The uniqueness of the group

Why do people participate in torture? Theories of obedience and diffusion of responsibility explain how individuals may be drawn into groups that perpetrate evil such as torture, but it is harder to understand how these groups initiate torture in the first place. One might assume that the purpose of torturers is to elicit information or an admission of guilt, to intimidate, to justify repression or revenge, real or perceived, to establish superiority or to elevate themselves, but that does not address the psychology of the group which creates and facilitates situations of torture. Groups such as the Nazis used oaths of loyalty to bind each individual, and used rituals to create a mystical atmosphere which drew members further in and separates them from the outside. When a group has a shared mystique and common values, the members develop camaraderie, a devotion to the organizational ideology and cause, and a sense that they are part of the elite. They take pride in performing difficult and important acts, and become completely subordinated to the organization. After a certain level of indoctrination, it becomes difficult to deviate from or defy the group. This binding prevents individual members from resisting participation in torture.

Usefulness of training

Beyond the binding to a group, individuals often receive special training to mould them into torturers (see Table 1). The indoctrination and training of a torturer often includes abuse; in the Nazi regime, for instance, members of the SS were carefully selected, beginning with individuals who were comfortable obeying authority, often because of a personal history (family or school background) that encouraged obedience. Starting with that foundation, groups are able to shape torturers through a series of steps. First, members are screened for intellect, physical ability and a powerful positive identification with the political regime.⁴⁰ This not only helps groups find individuals with the abilities they want, but also fosters an idea among members that inclusion is special and the group is elite, differentiating its members from others. New members are bound to the group

40 Mika Haritos-Fatouros, “The official torturer”, in Ronald D. Crelinsten and Alex P. Schmid (eds.), *The Politics of Pain: Torturers and Their Masters*, Westview Press, Boulder, Colo., 1994.

Table 1. *The formation of a torturer*

Select for personal history of obeying authority
Screen for intellect, physical strength and positive identification with politics
Bind with initiation rites, isolation, new rules, new values
Use elitist language
Dehumanize and blame
Harass, intimidate, desensitize, promote instinctive responses
Reward obedience
Employ social modelling of group violence
Make violence a regular, routine occurrence
Practise controlled violence

through basic training, a set of initiation rites which often include isolation from people outside the group, and the imposition of new rules and values. From this beginning, members develop an elitist attitude and an in-group language. They learn to dehumanize themselves as well as outsiders – to subsume their individual identities within that of the group. Leaders harass and intimidate recruits, preventing logical thinking and instilling instinctive responses.⁴¹ Rewards are given for obedience, and socialization of the group includes witnessing group violence, often in the form of the intimidation of recalcitrant members.⁴² As a result, members become desensitized to violence; both seeing and perpetrating violence become routine. All this training adds up to complete control of the group over its members.

Physician vulnerability

With this understanding of group psychology it is easy to see how members of the military are susceptible to becoming perpetrators. It may be less obvious why medical doctors are vulnerable (see Table 2). One must remind oneself that physicians are experts at compartmentalization, who deal with life and death every

Table 2. *Why physicians are vulnerable to becoming perpetrators*

Compartmentalization
Tendencies towards sadism, voyeurism
Healing through hurting, repressing awareness of violence
Use of science to objectify violence
Use of metaphors and euphemisms
Tendency to justify and rationalize
Impersonal medical detachment
Narcissistic sense of superiority

41 Lifton, above note 16.

42 Janice T. Gibson and Mika Haritos-Fatouros, "The Education of a Torturer," *Psychology Today*, November 1986, pp. 50–8.

day and whose profession carries a sense of power. The motivation for choosing a career as a physician is often a fantasy of power, either sadistic or voyeuristic, as medicine gives licence to look, touch and control. Doctors treat patients as impersonal medical cases so that they can more easily process what they have to do – taking a scientific approach to remain detached in their work, they heal by attacking and killing disease with surgery or therapy or whatever tools they have available. Medical students also go through an initiation ordeal. In the anatomy class they handle a dehumanized cadaver or watch operations without knowing the patients, and are made to feel shame for any lapses in which they show too much “weakness” or inability to dehumanize patients.⁴³ Medicine as a profession contains the rudiments of evil, and some of the most humane of medical acts are only small steps away from real evil. For example, although surgery to amputate a gangrenous limb is a healing act, it involves the cutting and maiming of the human body, which in non-medical circumstances would be a harmful, criminal act.

During the Holocaust, Joseph Mengele was *the* paradigmatic Nazi doctor. In the concentration camps he often assumed a dual role with his child victims, acting like a parent by playing games and giving them sweets, before brutally killing them in his experiments on twins. He exhibited signs of obsessive-compulsive disorder, fixating on cleanliness and perfection in his experiments even when the patients he treated would shortly be consigned to their death.⁴⁴ In his twenty-one months at Auschwitz, Mengele performed elaborate research on twin children, probing, infecting, cutting and exposing them to painful procedures without any anaesthetic and ultimately murdering them. One of his assistants, Miklos Nyiszli, described the experiments:

In the workroom next to the dissecting room fourteen Gypsy twins were waiting and crying bitterly. Dr. Mengele didn't say a single word to us and prepared a 10 cc and 5 cc syringe. From a box he took Evipal and from another box he took chloroform, which was in 20 cc glass containers, and put these on the operating table. After the first twin was brought in ... a fourteen year old girl ... Dr. Mengele ordered me to undress the girl and put her head on the dissecting table. Then he injected the Evipal into her right arm intravenously. After the child had fallen asleep, he felt for the left ventricle of the heart and injected 10 cc of chloroform. After one little twitch the child was dead, whereupon Dr. Mengele had her taken into the corpse chamber. In this manner all fourteen twins were killed during the night.⁴⁵

One of the victims of Mengele's twin experiments offered a more personal account:

43 Heidi Lempp and Clive Seale, “The hidden curriculum in undergraduate medical education: qualitative study of medical students' perceptions of teaching”, *British Medical Journal*, Vol. 329 (2004), pp. 770–3.

44 Olga Lengyel, *Five Chimneys*, Ziff Davis, Chicago, 1947.

45 Miklos Nyiszli, *Auschwitz: A Doctor's Eyewitness Account*, trans. Richard Seaver, Arcade Publishing, New York, 1993 (1960).

It wasn't because his face was terrifying. His face could look very pleasant. But the atmosphere in the barracks before he came and the preparation by the supervisors was creating that atmosphere of terror and horror that Mengele was coming. So everybody had to stand still. He would, for example, notice on one of the bunk beds that a twin was dead. He would yell and scream, "What happened? How is it possible that this twin died?" But of course, I understand it today. An experiment had been spoiled.⁴⁶

Mengele, although perhaps the most notorious, was not the only Nazi physician who could dissociate the deaths he caused and the deaths that merely occurred "by accident" in the camps. SS doctors would kill and then have a meal, flog and then dress for dinner, torture and then listen to the opera, and return to the camps. They used euphemisms to disavow the violence and dissociate their feelings; what they did was "medical camp duty"; they "evacuated", "transferred" and "resettled" Europe's Jewish population.⁴⁷ With this special language, killing was no longer killing; it was a routine bureaucratic action.

Some types of doctor may be more or less predisposed to dehumanize patients, viewing them purely as medical cases – surgeons, for example, whose main interaction with their patients is violent and occurs while the patient is unconscious. But performing a healing function, psychic numbing, diffusion of responsibility, de-realization, and compartmentalization, which occur within many different sectors of the medical profession, all lead to decreased feeling. Thus doctors anywhere, regardless of their speciality, have the potential to become perpetrators, and in Nazi Germany and other countries, many do.

The cultural and social contexts conducive to perpetrators

The Nazi Party ideology was portrayed in a medicalized way which attracted doctors. Writing in *Mein Kampf* on the German State, Hitler said, "anyone who wants to cure this era, which is inwardly sick and rotten, must first of all summon up the courage to make clear the cause of this disease".⁴⁸ In this "scientific" metaphor, the ultimate victims of the Nazi government were a threat – they posed a danger of contagion which could "infect" the German body politic, and without "purification" would pollute race and class. In this imagery, doctors were placed in the role of shaman, treating not individuals but rather the group, becoming "physicians to the volk [people]".⁴⁹ The white-coated doctor became the black-robed priest, a professional capable of leading the biological soldiers on a mission of medical purification, eradicating the impaired and incurable.

46 Eva M. Kor and Mary Wright, *Echoes from Auschwitz: Dr. Mengele's Twins – The Story of Eva and Miriam Mozes*, CANDLES Press, Terra Haute, Ind., 1995.

47 Waller, above note 19.

48 Adolf Hitler, *Mein Kampf*, Houghton Mifflin: Boston, 1943 (1925–6), p. 435.

49 Weyers, above note 18.

50 Hans-Georg Güse and Norbert Schmacke, "Psychiatry and the origins of Nazism," *International Journal of Health Services*, Vol. 10 (2) (1980), pp. 177–96.

Their mission began with the elimination of disabled persons. Psychiatrists and psychoanalysts played a major role in the killing of as many as 100,000 mentally and physically disabled persons between 1939 and 1941 in a project named Action T4, short for Tiergartenstrasse 4, which was the address of the Foundation for Welfare and Institutional Care.⁵⁰ Nazi politicians and doctors used the term “euthanasia” to describe the killings.⁵¹ However, these killings were not euthanasia in the usual definition of a “mercy killing”, to relieve extreme suffering of a patient. The individuals murdered were usually not suffering and certainly did not ask to be killed. They were killed merely to relieve the state of the burden of their care. Advertisements across Germany proclaimed the cost to the taxpayer of supporting disabled persons to be immense. This programme was carried out in wartime, when the public could more easily accept murderous action for the benefit of the state, but it was foreshadowed by the sterilization programme begun in 1933.

In July 1933 the Nazi government passed the Law for the Prevention of Hereditarily Diseased Offspring, requiring that physicians report every case of hereditary disease they came across, except in women over the age of 45.⁵² Genetic Health Courts were created to decide who ought to be sterilized, and by the end of the Nazi regime had ordered the forced sterilization of over 400,000 people.⁵³ The sterilization programme targeted mental disorders such as schizophrenia, manic depressive disorder and alcoholism, along with inheritable physical diseases.

This medicalized and political “solution” to mental disorders and disability may have played a role in drawing psychiatrists and psychoanalysts into the regime. The Third Reich is often portrayed as decrying psychoanalysis; the Nazi Party ceremoniously burned the works of Freud along with those of Marx and other “Jewish” thinkers who were seen as threatening the National Socialist state.⁵⁴ Despite this, some analysts remained in Germany to become a part of the Göring Institute. Those who stayed changed their ideas to mesh with the ideology of the ruling party, ultimately playing a large role in getting rid of “untreatable patients”. Science was bent to the service of the Nazi Party, and the new guiding spirit of Nazified psychoanalysis was employed to develop mental health treatments that aligned with the Third Reich’s racist ideology.⁵⁵

Many different social contexts combine to create a situation in which any person may become a torturer. Under the Nazi regime, the integration of medical–scientific and political ideologies, as well as economic pressures and social concerns about “race”, made it easier for certain individuals to dehumanize their

51 Michael Burleigh, *Ethics and Extermination: Reflections on Nazi Genocide*, Cambridge University Press, Cambridge, 1997.

52 Proctor, above note 20.

53 Johannes Meyer-Lindenberg, “The Holocaust and German psychiatry,” *British Journal of Psychiatry*, Vol. 159 (1991), pp. 7–12.

54 Rose Spiegel, Gerard Chrzanowski and Arthur H. Feiner, “On Psychoanalysis in the Third Reich,” *Contemporary Psychoanalysis*, Vol. 11 (4) (1975), pp. 477–510.

55 Geoffrey Cocks, *Psychotherapy in the Third Reich: The Göring Institute*, 2nd edn, Transaction Publishers, New Brunswick, Conn., 1997.

fellow citizens. The fervent nationalism and overwhelming support for the Third Reich made it difficult for people to lodge rational protests against the extermination of other human beings. In any situation in which human beings are divided into groups – the genetically pure versus the weak, the citizens versus the foreigners, the wealthy versus the poor – the oppression of and discrimination against the non-favoured group are facilitated.

Medicine betrayed: an international problem

The atrocities perpetrated by the Nazis more than half a century ago may be the most prominent human rights abuses in the global consciousness; nonetheless torture and other inhumane acts are still widely carried out today. Torture is practised in over 150 countries, and has even been seen as a necessary evil in the global “war on terror”.⁵⁶ In many countries there is documented evidence of physician involvement, and torture can be particularly destructive when healers are involved. One victim of torture in Argentina, Jacobo Timmerman, reported his experience with physician-perpetrators:

[H]e took my arm and very smoothly said “you know Jacobo that we doctors have many secrets ... you see here ... this blue is one of your arteries and I can inject here. You know that we have some substances that make you talk but always so painful because it affects your brain ... so why can’t you just talk and we can be friends.” His presence was a symbol that a scientific instrument is with you when you are torturers.⁵⁷

All forms of torture undermine the victim’s sense of security and self-worth, but physician involvement shatters the victim’s trust more completely. Physicians may be involved before, during or after torture, and may perform many separate roles: supervising, observing, assisting, falsifying medical records and sometimes treating a patient so that the torture can continue.

Those who attempt to point out the many factors contributing to this abuse are sometimes criticized as excusing the perpetrators. But the situationist perspective does not absolve perpetrators from responsibility; rather, it holds more people accountable for acts, including both participants and complicit facilitators. An awareness that there are many different causes for these atrocious situations merely helps to make people recognize attitudes and contexts that may be contributing to dehumanizing and torture-facilitating situations, and can help to prevent such abuses from being repeated. Suggesting that those who torture are just a few deviants would allow us to shut our eyes to the fact that such things can, and will, happen again unless we act to stop them.

56 Amnesty International, *Annual Report 2006: The State of the World’s Human Rights*, available at <http://web.amnesty.org/report2006/index-eng>; and Physicians for Human Rights, *Break Them Down: Systematic Use of Psychological Torture by U.S. Forces*, Physicians for Human Rights, Cambridge, Mass., 2005.

57 Jacobo Timmerman, *Prisoner without a Name, Cell without a Number*, Penguin Books, Harmondsworth, 1982.

Table 3. *Elements in the formation of perpetrators***Individual psychology***Predispositional trait*

Obedience to authority

Developed traits

Dehumanization

Splitting

Numbing

Omnipotence

Group psychology

Diffusion of responsibility

Theories of aggression

Usefulness of training

Uniqueness of group

Social context

Three elements are necessary to make a torturer (see table above). First, the torturer must possess certain dispositional personality traits; second, situational factors must be conducive to the perpetration of torture; and third, military training and group identifications may promote perpetration. Torturers come from the ranks of ordinary men and women. Although perpetrators have often had a strict upbringing and are deferential to authority, there is no one single personal factor which will cause a person to become a perpetrator of torture. The decision to obey authority figures is enhanced by binding factors – taking oaths, swearing allegiance, developing group adherence and the creation of special language and rituals. When individuals are slowly pushed over the line of decency and where violence comes to be seen as a normal occurrence, anyone can become a torturer.

This is not to say that torturing is ever an easy undertaking or that becoming a perpetrator has no consequences. Torturers show evidence of strain on the job and often use alcohol to cope in addition to psychological coping mechanisms which include moral disengagement through mental restructuring and justifications, dehumanizing and blaming the victims, using euphemistic language and splitting. All these mechanisms are assisted by specialized military training, which involves screening recruits for intellect and then playing on their political beliefs and encouraging obedience. This training allows diffusion of responsibility to the group and reinforces the individual rationalizations that are used by each soldier to cope with his or her acts.

The prevalence of torture around the world has raised awareness of the need for prevention efforts, although more research is needed on how to prevent torture. There are several important levels of prevention (see Table 4). Primary prevention includes educating physicians, the military and the public about human rights, ethics and the potential for violence, so that they will recognize and resist it. Secondary prevention involves the establishment of enforceable and enforced legal codes of human rights and minimum rules for the humane

Table 4. *The prevention of torture*

Primary:	educate physicians, military and public to recognize potential for violence and familiarize them with human rights.
Secondary:	stop physicians from becoming involved, monitor high-risk situations, protect whistle-blowers, recognize that persons with mixed/dual loyalty are at high risk.
Tertiary:	hold perpetrators accountable and have mechanisms in place to punish them.

treatment of prisoners. By monitoring high-risk situations, identifying doctors or soldiers who could be involved and protecting whistle-blowers, secondary prevention can work to minimize the spread of torture. Finally, tertiary prevention consists of taking action against perpetrators, holding them accountable and having established legal mechanisms available for doing so, in order to deter further acts of torture.

A number of actions short of criminal prosecution can be taken against lawyers and physicians complicit in torture. In 1993, together with our colleague Leonard Glantz, we proposed the establishment of an International Medical Tribunal that could hear cases and publicly condemn the actions of individual physicians who violate international standards of medical ethics.⁵⁸ Even though such a tribunal would not be able to punish with criminal sanctions, its decisions could result in the professional isolation of such physicians and be a powerful deterrent to grossly unethical conduct.⁵⁹ Unlike a criminal tribunal, in which charges would have to be proved beyond reasonable doubt and additional defences, including good-faith interpretation of medical ethics, would be available, these due process elements would not be present before the proposed professional tribunal. This is not only because criminal penalties could not be imposed, but primarily because the goal is deterrence and the protection of the public, not punishment. In this arena, proof of complicity by a preponderance of the evidence would be sufficient, and no defence of good faith would be available – because the believers in torture threaten to harm the public (and the precepts of medical ethics) as much as ignorant or incompetent lawyers and physicians do. One measure of this harm is the decline in our country's reputation in the world. Another is our military's ethical standards: a 2006 survey of battlefield ethics conducted among US military personnel in Iraq, for example, found that only 47 per cent of US army soldiers and only 38 per cent of Marines agreed that non-combatants should be treated with dignity and respect; and more than one-third

58 Michael A. Grodin, George J. Annas and Leonard H. Glantz, "Medicine and human rights: a proposal for international action", *Hastings Center Report*, Vol. 23 (8) (1993), p. 11. See also George J. Annas and Michael A. Grodin (Jonathon M. Mann et al., eds.), "Medicine and human rights: reflections on the fiftieth anniversary of the Doctors' Trial", in *Health and Human Rights*, Vol. 301 (1999); Luis Justo, "Doctors, interrogation, and torture", *British Medical Journal*, Vol. 322 (2006), pp. 1462, 1464.

59 Critics have argued that our proposal is unnecessary and perhaps counterproductive in the presence of the new International Criminal Court. See, e.g., Benjamin Mason Meier, "International criminal prosecution of physicians: a critique of Professors Annas and Grodin's proposed international medical tribunal", *American Journal of Law & Medicine*, Vol. 30 (2004), pp. 419, 421.

of both soldiers and Marines believed that torture should be allowed to save the life of a fellow soldier (more than 40 per cent) or to obtain other important information about insurgents (slightly less than 40 per cent).⁶⁰

In the absence of such an international forum, the other primary avenue available is the licensing board responsible for granting the medical or legal licence. In the case of physicians, an action seeking the revocation of a physician's licence could be brought before the medical board. Licence revocation is an action taken not to punish a physician, but to protect the public. It is not a criminal proceeding, and thus the due process rules of a criminal proceeding do not apply. However, on the few occasions when an attempt has hitherto been made to that effect, it has not been successful, mainly because the board has seen the action as primarily political rather than ethical.⁶¹ The California medical licensing board has, for instance, refused to hear the case brought against one of the military physicians responsible for treatment of prisoners at Guantánamo because it believes the case should be heard, if at all, by the military itself.⁶² We think that the California licensing board is simply wrong about this. Physicians cannot practise in the military unless they are licensed by the state licensing board. Retention of that licence requires conformity with the precepts of medical ethics; when these are violated, even – or perhaps especially – in compliance with the wishes of the state, revocation or suspension of the medical licence is completely appropriate.⁶³

We are all the potential victims of physicians who have become human rights outlaws. But the individuals who have suffered torture or cruel and inhuman treatment facilitated by them or actually ordered or conducted by them deserve more than simply having those outlaws brought to justice. They deserve not only a public acknowledgment of the unlawful and unethical abuse inflicted on them, but also just compensation for their injuries.⁶⁴

Preventing torture and cruel and inhuman treatment is everyone's business, but three professions seem especially well-suited to prevent torture: physicians, lawyers and military officers. Each one of them also has special obligations. Physicians have special obligations because of their universally

60 Mental Health Advisory Team IV, Office of the Surgeon, Multinational Force-Iraq Office of the Surgeon General, US Army Medical Command, Operation Iraqi Freedom 05–07, Final Report 35 (2006), available at http://www.armymedicine.army.mil/news/mhat/mhat_iv/MHAT_IV_Report_17NOV06.pdf.

61 See, e.g., *Thorburn v. Department of Corrections*, 78 Cal. Rptr. 2d 584, 590–1 (Cal. Ct. App. 1998). See generally Joan M. LeGraw and Michael A. Grodin, "Health professionals and lethal injection execution in the United States", *Human Rights Quarterly*, Vol. 24 (2002), p. 382 (asserting that physicians' participation in lethal injections violates medical ethics).

62 The complaint against John S. Edmondson was filed with the California Medical Board on 6 July 2005, and alleged a variety of medical ethics violations in the treatment of prisoners. See Janice Hopkins Tanne, "Lawyers will appeal ruling that cleared Guantánamo doctor of ethics violations", available at <http://www.bmj.com/cgi/content/full/331/7510.180-b> (last visited 23 July 2005).

63 This is of course true of lawyers as well, and complaints of complicity or aiding and abetting in the commission of war crimes serve equally as justification for revoking attorneys' licences. See George J. Annas, "Human rights outlaws: Nuremberg, Geneva, and the global war on terror", *Boston University Law Review*, Vol. 87 (2007), pp. 427–66.

64 So far, efforts to obtain compensation have been unsuccessful. See, e.g., *In re Iraq & Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85 (DDC 2007).

recognized and respected role as healers. Lawyers have special obligations to respect and uphold the law, including international humanitarian law. And military officers have special obligations to follow the international laws of war, including the Geneva Conventions. Any violation of international human rights law, and especially a serious violation of the Geneva Conventions or aiding and abetting such violation, should be sufficient grounds for a licensing authority to question the person's fitness to be a physician or lawyer, and those found to be human rights outlaws should lose the privilege of practising their professions. The re-emergence of physician complicity in torture presents an opportunity for the medical and legal professional organizations to work together transnationally to uphold both medical ethics and human rights.⁶⁵

65 Two non-governmental organizations dedicated to doing this are Physicians for Human Rights and Global Lawyers and Physicians. See, e.g., Physicians for Human Rights, *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality*, Physicians for Human Rights, Cambridge, Mass., 2007.

Selected article on international humanitarian law

Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict

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Abstract

A special challenge posed by the international humanitarian law (IHL) principle of equality of belligerents in the context of non-international armed conflict is the capacity of armed opposition groups to pass sentences on individuals for acts related to the hostilities. Today this situation is conflated by the concurrent application of international human rights and criminal law. The fair trial provisions of IHL can incorporate their human rights equivalents either qua human rights law or by analogy, recognizing that human rights law does not account for the anomalous relationship between a state and non-state party. It is argued that the preferred solution is the latter. This would put greater focus on the actual fairness of insurgent courts rather than on their legal basis. Moreover, it would be consistent with the equality of belligerents principle, a vital condition to encourage IHL compliance by armed opposition groups.

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* This contribution is an abridged version of the author's thesis, University Centre for International Humanitarian Law, Geneva, which was awarded the 2007 Henry Dunant Prize.

That until that day
The dream of lasting peace, world citizenship
Rule of international morality
Will remain but a fleeting illusion
To be pursued, but never attained
Now everywhere is war.

Emperor Haile Selassie I (as immortalized
by Bob Marley in the anthem War)

It is quite likely that if states were to convene today in order to draft Common Article 3, the provision of the Geneva Conventions regulating non-international armed conflict, nothing would come of the effort. Even though the text of Common Article 3 explicitly declares that the “provisions shall not affect the legal status of the Parties to the conflict”, states are more concerned about the implicit status that the invocation of Common Article 3 grants to armed opposition groups – a *de facto* recognition of some sort of equality with an entity threatening the state’s sovereign status and, quite possibly, very existence. Such apprehension clearly existed prior to 1949, and largely accounts for the historical absence from the law of war of internal armed conflict treaty regulation. It also explains why it has been said that the drafting of Common Article 3 “gave rise to some of the most prolonged and difficult discussions at the Geneva Conference”.¹ Today, the proliferation of the image of international terrorism, as well as the drastically increased ability of non-state opposition groups not only to wage war, but also to mimic the functions of a state, has struck deeply into the psyche of states.

The principle of equality of belligerents, central to the traditional law of armed conflict, is arguably the most disagreeable aspect for states when it comes to adopting a law of non-international armed conflict. By its very nature, the principle strikes at the central tenet of the state, that being its authority over its constituents. Nevertheless, a humanitarian consensus was reached at the 1949 Diplomatic Conference in Geneva (Geneva Conference) imposing obligations on both state and non-state parties to a conflict, albeit in a trade-off that provided a minimum level of protection for a maximum scope of coverage.

Equality in non-international armed conflict, to the extent it exists, is consequently a more limited concept than in international armed conflict. This is due in part to the above-mentioned compromise based on minimum protection and stemming from the asymmetry of the parties. Most of the provisions of Common Article 3 are strictly limited to fundamental humanitarian protections, such as the prohibition of murder or ill-treatment. The fulfilment of these provisions by belligerent parties requires no legal capacity. Yet one provision of Common Article 3 directly impacts on the domain traditionally reserved to the

1 Joyce Gutteridge, “The Geneva Conventions of 1949”, *British Yearbook of International Law* (1949), p. 300.

state: the administration of criminal justice. Article 3(1)(d), protecting persons not or no longer taking part in hostilities, prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”.

Two possible conclusions can be drawn from the wording of Common Article 3(1)(d). The first is that it was adopted by states in a spirit of “inequality” consistent with traditional state monopoly on the administration of justice under domestic law. Under this interpretation, Article 3(1)(d) would effectively prohibit armed opposition groups from passing sentences or carrying out executions (except possibly where they have gained control over existing courts), as armed opposition groups would not be deemed to have the requisite capacity to establish a “regularly constituted” court and/or to legislate to meet the judicial guarantees component. Alternatively, armed opposition groups would have the legal capacity, a conclusion which would require states to accept a parallel non-state legislative and judicial system outside of their authority. The result is either a situation in which the principle of equality loses its effective meaning, or one in which a state is potentially obliged to relinquish fundamental components of its sovereignty to a proven enemy-from-within. Common Article 3 has been supplemented by Additional Protocol II to the Geneva Conventions (AP II), covering situations of non-international armed conflict. Applying only to high-threshold conflicts, it loosens the legal basis requirement while enumerating the judicial guarantees of Common Article 3.

Originally, the dilemma could be pursued within the contained legal regime of international humanitarian law (IHL), but gradually other areas of international law have become essential to the equation. While it is clear today that the international regimes of humanitarian, human rights and criminal law are generally interactive, in 1949 there were no binding international norms of international human rights law or international criminal law relating to non-international armed conflict. The personal scope of coverage of the legal regimes is also asymmetrical, which may lead to gaps in protection: IHL creates obligations on states and armed opposition groups and human rights law imposes obligations on states (and arguably armed opposition groups), whereas international criminal law deals essentially with individual responsibility (while imposing certain obligations at state and arguably armed opposition group level). As international criminal law incorporates human rights standards to interpret Common Article 3(1)(d), the provisions of the three international law regimes become cross-referential. Moreover, any hierarchy in the relationship of the legal regimes must be considered. All of these factors may result in the lack of coherence amongst the regimes, having a potential effect on the equality of belligerents with respect to fair trial guarantees.

The principle of equality of belligerents is especially sensitive in non-international armed conflict, due to the lack of combatant immunity. Effective equality would dictate that both sides would be able to prosecute captured combatants for mere participation in hostilities. In international armed conflict,

this would pose no conceptual problems.² Yet non-international armed conflict is a different story. If state authorities alone, due to their traditional monopoly on legislative and judicial organs, are allowed to prosecute rebel soldiers for mere participation in hostilities, and not vice versa, the question of equality comes into question.³

An effective principle of equality would require that armed opposition groups have the legal capacity to exercise the rights which flow from the obligations and prohibitions of IHL. Otherwise there is little left to convince them to comply with IHL at all. As the obligations and prohibitions are derived directly from international law, the corresponding rights should also exist in international law. This would compensate for the asymmetrical relationship of the parties, wherein the armed opposition group is a sub-state entity subject to the authority of the state. To the extent that the fair trial provisions of IHL require the right to legislate in order to establish courts and enact penal provisions covering conduct related to the conflict, such capacity should exist independent of the state party. On the other hand, the protection of individuals not (or no longer) participating in hostilities requires that they be afforded proper judicial guarantees if prosecuted for an offence related to hostilities. This balance can be best realized by an interpretation of the IHL penal provisions which grants those armed opposition groups possessing the capability in fact to meet the requirements of the law of non-international armed conflict with the *de jure* capacity to establish courts and legislate relevant penal sanctions, regardless of *de jure* status. Such a balance would demand that these courts operate according to a reasonable interpretation of the judicial guarantee requirements which is sensitive to the asymmetrical relationship between states and armed opposition groups, without reducing the *de facto* level of protection.

After assessing the notion of equality in non-international armed conflicts, this article will first take a critical look at the consequences of the interaction between IHL, human rights law and international criminal law in the context of armed opposition group capacity to pass sentences. Section 2 will then analyse the IHL provisions dealing with the passing of sentences and will be followed by a case study of two armed opposition groups which have done so in El Salvador and Nepal. Finally, in section 4, the issue will be looked at from the perspective of the international and individual responsibility of armed opposition groups and their members or affiliates, before proposing a means of confronting the practical and legal difficulties posed by the qualified prohibition on the passing of sentences.

2 Of course, it is not at issue in international armed conflict, as combatant immunity exists under Geneva Convention III.

3 See Marco Sassòli, "Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian and International Human Rights Law", paper submitted to the Armed Group Conference, Vancouver, 13–15 November 2003, p. 12, available at www.armedgroups.org/images/stories/pdfs/sassoli_paper.pdf (last visited 19 September 2007).

I. Equality of belligerents in non-international armed conflict

1.1. Assessing equality

Although the principle of equality of belligerents in the law of armed conflict is fundamental to the distinction between *jus ad bellum* and *jus in bello*, it does not explicitly appear anywhere in the Geneva Conventions of 1949. In the seminal treatment of the subject, Meyrowitz puts to rest any suggestion that an “unjust” belligerent should be treated differently from a “just” belligerent, even in situations where one belligerent is deemed an aggressor or during wars of national liberation. He concludes,

L'égalité des belligérants devant le *jus in bello* est un principe qui sous-tend le droit moderne de la guerre, principe qui allait tellement de soi qu'il n'avait pas besoin d'être formulé. Il est certain que ce principe est toujours solidement établi en droit positif.⁴

More recently this point of view has been affirmed by both the International Committee of the Red Cross (ICRC) and a number of legal commentators.⁵

Yet while the principle is undoubtedly established in the law of international armed conflict, there is good reason to question its status in the law of non-international armed conflict. This is because international law, or the law of nations as it was once termed, traditionally regulates interactions between sovereign and equal states. As Vattel put it, “A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.”⁶ There is of course no such traditional horizontal deference when it comes to the relationship between a state and an armed opposition group, as such groups have been considered to be under the vertical domain of domestic law – even though a dwarf state may be de facto less of a man than a giant armed opposition group.

4 Henri Meyrowitz, *Le Principe de L'égalité des Belligérants Devant Le Droit de La Guerre* Éditions A. Pedone, Paris, 1970, p. 400. Translated: “The equality of belligerents in *jus in bello* is an underlying principle of the modern law of war, a principle that was so self-evident that it needed no formulation. This principle is certainly still as firmly established as ever in positive law.”

5 See ICRC, *International Humanitarian Law and Challenges of Contemporary Armed Conflicts*, 28th Annual Conference of the Red Cross and Red Crescent, 2–6 December 2003, Geneva, p. 19, stating, “The principle of the equality of the belligerents underlies the law of armed conflict”, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/5XRDCC> (last visited 27 September 2007); see also Marco Sassoli and Antoine A. Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, ICRC, Geneva, 2005, p. 106; Nathaniel Berman, “Privileging Combat? Contemporary Conflict and the Legal Construction of War”, *Columbia Journal of Transnational Law*, 2004, Vol. 43, no. 1, p.12, stating, “The “equality of belligerents” in the eyes of *jus in bello*, regardless of their relative merits on *jus ad bellum* grounds, remains a cardinal principle of the law of war”; François Bugnion, “*Jus ad Bellum* and *Jus in Bello* and Non-International Armed Conflicts”, in T. McCormick (ed.), *Yearbook of International Humanitarian Law*, Vol. 6, T.M.C. Asser Press, The Hague, 2003, p. 174, stating, “This principle dominates the entire body of the laws and customs of war.”

6 Emerich de Vattel, *Law of Nations*, Preliminaries, para. 18, available at http://www.constitution.org/vattel/vattel_pre.htm (last visited 18 September 2007).

This axiomatic difference renders any analogous extension of the equality principle to internal conflict difficult. Based on the asymmetrical quality of the parties, one may therefore expect that the principle of equality of belligerents has not experienced a smooth transition into the law of non-international armed conflict.

Common Article 3 binds each party to the conflict. The ICRC Commentary to Article 3 (Geneva Commentary) proclaims that the words “each party” mark a step forward in international law.⁷ This statement is undoubtedly true, but the final text of AP II of 1977 may just as easily mark a step back. The 1973 ICRC Draft Protocol II was based on Four Principles, one of them being that “the guarantees should be granted to both sides of such conflicts on a basis of complete equality”.⁸ Draft Article 5 clearly enunciated such a principle:

The rights and duties of the parties to the conflict under the present Protocol are equally valid for all of them.⁹

However, when it became clear that AP II was in serious danger of being rejected at the Diplomatic Conference, Pakistan took the initiative to get rid of “any provision which made it appear that the two sides were on the same level or had equal rights”.¹⁰ Draft Article 5 was dropped, and the final text included no reference at all to parties to the conflict. The delegate from Zaire justified the rejection of the Draft Protocol, declaring that some of its provisions treated “a sovereign state and a group of insurgent nationals, a legal Government and a group of outlaws, a subject of international law and a subject of domestic law, on an equal footing”.¹¹ This statement is especially revealing, as it alludes to the position of many states that did not exist at the time of the Geneva Conference of 1949, and it was reaffirmed at the First Periodical Meeting on Humanitarian Law in 1998, about which Zegveld notes,

[S]everal states re-emphasized their objections to the qualifications of armed opposition groups as a party to the conflict within the meaning of international humanitarian law. In their view, the better way to deal with internal conflicts is through international criminal prosecution of individuals.¹²

7 International Committee of the Red Cross, *Commentary IV, Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, ICRC, Geneva, 1958, p. 37.

8 Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff Publishers, The Hague, 1982, p. 604.

9 ICRC, *Commentary to the Draft Additional Protocols to the Geneva Conventions of August 12, 1949*, ICRC, Geneva, 1973, p. 135.

10 Bothe et al., above note 8, p. 606.

11 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH)*, Geneva, 1974–7, Federal Political Dept., Bern, 1978, SR.56, para. 126.

12 Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p.10, at n. 1, citing ICRC, International Conference of the Red Cross and Red Crescent, 31 October–6 November 1999, Geneva, Annex II (1999). Note that the scope of this statement also reflects the opinion of these states with respect to Common Article 3.

One may therefore question the assertion of the Commentary to AP II, which alleges that the Protocol grants “the same rights and impose[s] the same duties on both the established government and the insurgent party”.¹³ In fact these developments may even cause one to speculate as to the durability of the principle of equality in non-international armed conflict overall.¹⁴

The issue of how armed opposition groups are bound by IHL cannot be separated from the notion of equality, as only states have the requisite legal personality to become parties to the Geneva Conventions and Additional Protocols. With respect to Common Article 3, the Geneva Commentary suggests that armed opposition groups are bound due to a principle of “effective sovereignty” over territory.¹⁵ Such an argument is compelling from a perspective of equality, as it purports to bind armed opposition groups in the same way that successive governments are bound by the international obligations of their predecessors. The weakness is, however, revealed in its scope of coverage, as, according to the Commentary, only those groups who “claim to represent the country, or part of the country” would be bound.¹⁶

An alternative yet popular view is that armed opposition groups are bound by nature of the customary status of the obligation requiring them to respect Common Article 3 (as distinct from the customary status of Common Article 3 itself). The Special Court for Sierra Leone (SCSL) has pronounced that

there is now no doubt that [Common Article 3] is binding on States and insurgents alike, and that insurgents are subject to international humanitarian law ... [a] convincing theory is that [insurgents] are bound as a matter of customary international law to observe the obligations declared by [Common Article 3] which is aimed at the protection of humanity.¹⁷

While this explanation may suffice for purposes of imposing international responsibility, the reasoning does not point towards equality if the practice of states alone determines the customary rule. Surely equality, in the broad, everyday

13 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Martinus Nijhoff Publishers, Geneva, Dordrecht, 1987, para. 4442. The failure to form a consensus on equal application is also highlighted by the different comments of the Belgian and Sudanese delegations to the CDDH. Belgium pointed to Article 1, wherein AP II “develops and supplements” Common Article 3, in order to conclude “the basic sovereign principle that the obligations of the Protocol are equally binding on both Parties to the conflict.” (CDDH, Vol. VII, Annex p.76, reproduced in Sassòli and Bouvier, above note 5, p. 964. Sudan stated that AP II is “simply a concession on the part of States”. CDDH/SR.56, para. 37.

14 Doswald-Beck argues that equality of belligerents “in every respect” is inappropriate for non-international armed conflict, as states do not accept the principle. Sassòli and Bouvier alternatively contend that while IHL respects the principle of equality in non-international armed conflict, “it cannot request domestic law to do so”. See Louise Doswald-Beck, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?”, *International Review of the Red Cross*, no. 864 (December 2006), p. 903; Sassòli and Bouvier, above note 5, p. 108.

15 Commentary IV, above note 7, p. 37.

16 Ibid., p. 37. However, effective sovereignty should not depend on intention but on fact.

17 *Kallon, Kamara, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*, SCSL-04-15-PT-060, 13 March 2004, paras. 45, 47.

sense of the term, would demand that in order for insurgents to be bound by a customary rule, their practice would need to be taken into account.

Sassòli, who advocates an “ownership” approach to the promotion of respect for IHL by armed opposition groups, claims that these non-state actors already participate in the formation of customary IHL and human rights law.¹⁸ The view that “rebel practice” and opinion helps to form the customary law of IHL is supported by the International Criminal Tribunal for the former Yugoslavia (ICTY) *Tadić* Jurisdiction decision and the Report of the UN Commission of Enquiry on Darfur (Darfur Commission).¹⁹ However, it is noteworthy that neither the ICTY Appeals Chamber nor the Darfur Commission pointed to any rebel practice that contradicted IHL norms created by states.²⁰ One may therefore question whether this partial acceptance of rebel practice is akin to the right to exercise a democratic vote under a totalitarian regime.

Customary International Humanitarian Law (ICRC Study), conversely, does not take rebel practice into consideration, declaring that “its legal significance is unclear”.²¹ Jean-Marie Henckaerts, a co-editor of the ICRC Study, has unequivocally stated that “Under current international law, only State practice can create customary international law”.²² While a theory that non-state actor participation in the development of customary law may make a great deal of sense in a post-Westphalian order, it remains controversial.²³ At any rate, the notion that armed opposition groups are bound by the customary nature of their Common Article 3 obligations makes one question the meaning of “equality” if they have been unable to participate in its formation.

The binding nature of AP II, which is not fully considered as customary law, is even more problematic. Sivakumaran contends that the only way that

18 Sassòli, above note 3, p. 6. For support of non-state actors forming customary law in general, see R. Gunning, “Modernizing Customary Law: The Challenge of Human Rights”, *Virginia Journal of International Law*, Vol. 4 (1999), p. 221.

19 *Prosecutor v. Duško Tadić*, ICTY, IT-94-1-AR72 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), 2 October, 1995, paras. 107–108; Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 2005, para. 156, available at www.ohchr.org/english/darfur.htm (last visited 18 September 2007). Note that Antonio Cassese was both the president of the 1995 ICTY Appeals Chamber and the chairman of the 2005 Darfur Commission.

20 For example, with respect to its 2006 conflict with Israel, the leader of Hezbollah is quoted by Amnesty International as saying, “As long as the enemy undertakes its aggression without limits or red lines, we will also respond without limits or red lines”. Hezbollah is also quoted as stating that it generally respects IHL. See BBC News, “Hezbollah Accused of War Crimes,” 14 Sept. 2006, available at http://news.bbc.co.uk/2/hi/middle_east/5343188.stm (last visited 18 September 2007). This practice would be contrary to Rule 148, *Customary International Humanitarian Law* (the ICRC Study), which prohibits belligerent reprisals against civilians. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, 2 vols., ICRC and Cambridge University Press, Geneva and Cambridge, 2005, Vol. 1, p. 526.

21 Henckaerts and Doswald-Beck, above note 20, p. xxxvi.

22 Jean-Marie Henckaerts, “Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law”, in *Proceedings of the Bruges Colloquium, Relevance of International Humanitarian Law to Non-State Actors, 25th-26th October 2002*, Collegium, Vol. 27 (Spring 2003), p. 128.

23 Although the concept with respect to armed opposition groups as *lex ferenda* is supported by both Sivakumaran (see below n. 24) and Henckaerts, above note 22, p.128. Further questions, such as the weight which should be given to rebel practice, remain outside the scope of the current study.

armed opposition groups will be bound in all circumstances is through the principle of domestic legislative jurisdiction, wherein armed opposition groups are simply subject to domestic law.²⁴ From a perspective of international duties, such an approach removes armed opposition groups from being the addressees of AP II. Yet, as Cassese correctly points out, it is not the status of rebels at domestic law, but at international law, that is at issue.²⁵ In the case of fair trial guarantees, the distinction is essential, assuming that domestic law would prohibit armed opposition groups from operating courts. Cassese instead looks to the customary law of treaties to conclude that armed opposition groups are only bound based on their consent to be bound.²⁶ While this conclusion would be consistent with any definition of the principle of equality, the result would be similar to the theory of the Common Article 3 Commentary, as it would leave many armed opposition groups outside of the scope of coverage by AP II.

1.2. Equality vs. parity

The above analysis highlights the dilemma in the application of the principle of equality of belligerents to the vertical relationship between state and non-state entities. It is clear that the principle of equality of belligerents cannot be transposed from international armed conflict if equality is to refer to the rights of the parties in relation to their ability to affect the law, rather than simply to their ability to act under the law.

One way around this problem is to acknowledge that the principle of equality of belligerents is a narrow concept that does not extend to status. The principle does not necessarily mean equal standing, but *equal rights and obligations flowing from the international law norms regulating the subject matter of IHL*. The significance of the term “international law” here requires further clarification. First, “international law” limits the scope of equality by excluding rules of municipal law, both state and insurgent, from the equation. Second, “international law” is not limited to IHL itself, but encompasses all international norms which have a bearing on the rights and obligations flowing from Common Article 3, AP II and the customary law of non-international armed conflict. These additional norms include international human rights law, international criminal law and international terrorism conventions.

We can therefore apply the term “parity” to represent a general equality of status as exists between states at international law, while restricting “equality” to the notion captured in the definition above. Disparity may mean that states have more general rights and obligations than armed opposition groups, but their rights and obligations with respect to the IHL subject matter should remain equal.

24 Sandesh Sivakumaran, “Binding Armed Opposition Groups”, *International Comparative Law Quarterly*, Vol. 55 (April 2006), p. 371.

25 Antonio Cassese, “The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts”, *International Comparative Law Quarterly*, Vol. 30 (April 1981), p. 429.

26 *Ibid.*, pp. 428–30.

For example, the creation of an international norm applying a strict definition of torture contained in the UN Convention against Torture (CAT), a human rights treaty, to the prohibition of torture contained in Common Article 3(1)(a) would in fact create an inequality (favouring the armed opposition group), as the definition requires the act to be committed by a “public official” or “person acting in an official capacity”.²⁷ In fact, the ICTY *Čelebići* decision²⁸ reinterpreted the “traditional” definition of torture in order to extend the concept of “official capacity” to armed opposition groups during armed conflict – in line with the equality principle – although such equality may not necessarily be maintained outside armed conflict. While the severing of equality from parity may suffice to bring most issues which arise in non-international armed conflict under the principle of equality,²⁹ the capacity of armed opposition groups to pass sentences remains problematic due to the convergence of the different international law regimes.

2. Convergence of international humanitarian, international human rights and international criminal law

2.1. Human rights implications

While it is no doubt true that the convergence of IHL and international human rights law has for the most part found a comfortable fit, Lubell notes that “[t]he focus of the arguments is now shifting from the question of if human rights law applies during armed conflict to that of how it applies, and to the practical problems encountered in its application.”³⁰ The intention here is to concentrate on one aspect that has not been generally tackled: the problem (from the point of view of armed opposition groups) of the convergence with respect to the passing of sentence during non-international armed conflict. Specifically, international human rights law requires that anyone being prosecuted on criminal charges is entitled to a hearing “by a competent, independent and impartial tribunal established by law”.³¹ To the extent that the “regularly constituted” requirement of IHL incorporates the “established by law” criterion as understood by human

27 Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1987, 1465 UNTS 85.

28 *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo*, ICTY, IT-96-21-T, 16 November 1998, para. 473.

29 There are other potential inequalities which remain outside the scope of this paper. See Article 4 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, 2000, Annexed to GA Resolution 54/263, and Article 2 of the Draft Comprehensive Convention on International Terrorism, A/57/37, available at <http://hei.unige.ch/~clapham/hrdoc/docs/a-57-37.pdf> (last visited 18 September 2007).

30 Noam Lubell, “Challenges of Applying Human Rights Law to Armed Conflict,” *International Review of the Red Cross*, no. 860 (December 2005), p. 738.

31 These principles are taken from Article 14 of the ICCPR, and are also expressed in the regional human rights treaties. See ECHR Article 6 and I-ACHR Article 8.

rights law, an armed opposition group may be barred from passing sentences. Furthermore, the judicial guarantees requirement is also at issue due to possible interpretations of the human rights *nullum crimen sine lege* requirement. The equality of belligerents, a principle with which human rights law is not concerned, is a potential casualty of the convergence.

The dilemma can be put in context by looking at how the two separate legal regimes (the law of non-international armed conflict and human rights law) came of age, since at the end of the Second World War neither regime existed in international law. With respect to the negotiations at the Geneva Conference of 1949, Elders points out, “Of course any suggestion that the [1948 Declaration on the Rights of Man] was a binding instrument of international law ... would have been met with looks of incredulous surprise.”³² Therefore, in negotiating the codification of minimum humanitarian norms to regulate non-international armed conflict for the first time, it would not have been especially problematic for the Geneva Conference delegates to assume that Common Article 3(1)(d) was a self-contained system which could theoretically be equally applied by state and non-state parties.

2.1.1. *Established by law*

Although the term “established by law” eventually became the norm of binding human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), it did not make its debut until 1950 in Article 6 of the European Convention on Human Rights. The Nowak commentary states that the word “competent”, as appearing in Article 14 of the ICCPR, “merely represents a more specific formulation of established by law”, and then continues,

Both conditions are to ensure that the jurisdictional power of a tribunal is determined generally and independent of the given case, i.e., not arbitrarily by a specific administrative act. The term “law” is ... to be understood in the strict sense of a general-abstract parliamentary law or an equivalent, unwritten norm of common law, which must be accessible to all persons subject to it. A law of this sort must establish the tribunals and define the subject matter and territorial scope of their jurisdiction.³³

The European Court of Human Rights has summarized its case law in the decision of *Coeme et al. v. Belgium*, stating that “the object of the term “established by law” in Article 6 of the Convention is to ensure “that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament”.³⁴ On the other hand, in the *Fals Borda* Communication, the Human Rights Committee

32 David Elders, “The Historical Background of Common Article 3 of the Geneva Conventions”, *Case Western Reserve Journal of International Law*, Vol. 11 (1979), pp. 56–7.

33 Manfred Nowak, *UN Covenant on Civil and Political Rights: ICCPR Commentary*, N. P. Engel, Kehl, 1993, p. 245.

34 *Coeme et al. v. Belgium*, European Court of Human Rights, 22 June 2000.

(HRC) did not consider the “established by law” criterion, stating that it “does not deal with questions of constitutionality, but whether a law is in conformity with the Covenant”.³⁵ This Communication has been the subject of scrutiny, as commentators have noted that “the constitutionality or legality of a tribunal’s existence is an issue with which the HRC should be concerned”.³⁶

The term “established by law” has also been considered by the ICTY Appeals Chamber *Tadić* (jurisdiction) decision. In assessing its own competency, the Court endeavoured to distinguish the international nature of the tribunal in order to loosen the problematic legislative requirement. The Court effectively created a two-tier system affirming in a municipal setting the responsibility of a state to guarantee the right to have criminal charges determined by a tribunal “established by law”.³⁷ By contrast, in an international setting, “established by law” was watered down to mean “in accordance with the rule of law”, whereby a tribunal must be established by a competent organ (e.g. the Security Council) and observe requirements of procedural fairness.³⁸

The case law of both treaty bodies treats the legal basis of “established by law” as a separate requirement from judicial guarantees. On the other hand the ICTY, at least with respect to international tribunals, considers essential guarantees to form part of the legal basis. The latter determination has been properly criticized as rendering “established by law” redundant.³⁹ Yet in none of the determinations were the rights and responsibilities of purely non-state actors considered.

2.1.2. Addressees of the law

A related and important issue in our analysis of the convergence of IHL and human rights law obligations is the asymmetry of the addressees. The imposition of IHL of non-international armed conflict obligations directly on both the state and non-state parties to a conflict is seen as a radical step in international law. Human rights treaties, however, were drafted by states within a more conventional framework, having only the obligations of states in mind. In its 3rd Report on Colombia, the Inter-American Commission of Human Rights stated,

35 *Fals Borda et al. v. Columbia*, Human Rights Committee, 46/79, 27 July 1982.

36 Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Material and Commentary*, 2nd edn, Oxford University Press, Oxford, 2004, p. 407.

37 *Tadić* (Jurisdiction), above note 19, para. 42.

38 *Ibid.*, para. 45.

39 For criticism, see Jose E. Alvarez, “Nuremberg Revisited: The *Tadić* Case”, *European Journal of International Law*, Vol. 7, no. 2 (1996), p. 17 of online version available at <http://www.ejil.org/journal/Vol7/No2/art7.pdf> (last visited 18 September 2007). While the Appeals Chamber seemed to put some emphasis on the Security Council being a competent organ, such an argument is inconsistent with Nowak, above note 33, wherein “competent” was equated with “established by law”. The judgment would also seem to run foul of the theory that the Security Council does not have the competence to legislate.

[H]umanitarian law rules governing internal hostilities apply equally to and expressly bind all the parties to the conflict, i.e. State security forces, dissident armed groups and all of their respective agents and proxies. In contrast, human rights law generally applies to only one party to the conflict, namely the State and its agents.⁴⁰

In applying human rights law, the Office of the High Commissioner for Human Rights (OHCHR) in Nepal differentiated between “obligations” of states and “commitments” of armed opposition groups.⁴¹

Clapham, a strong advocate for extending human rights obligations to non-state actors in general, suggests that even though the HRC goes out of its way to stress that the ICCPR does not create obligations for non-state actors, the “careful phrasing” of its General Comment 31 leaves the door open for an interpretation that general international law may in fact extend such obligations.⁴² Regarding Darfur, the Human Rights Commission has stated that “[t]he rebel forces also appear to violate human rights and humanitarian law.”⁴³ Further examples of international bodies seeming to hold armed opposition groups accountable for human rights violations are quite numerous.⁴⁴ It must be concluded that the jury is still out on the human rights law obligations of armed opposition groups.⁴⁵

The implications for our purposes are quite severe. With respect to a legal basis for detention in non-international armed conflict, asymmetry would create a gap in protection for individuals detained by armed opposition groups – IHL is silent on the subject matter and the human rights norm of freedom from arbitrary detention would only apply to the state party.⁴⁶ This would in fact allow armed

40 Inter-American Commission of Human Rights, *3rd Report on the Human Rights Situation in Columbia*, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, ch. 4, para. 13.

41 OHCHR-Nepal, “OHCHR-Nepal calls on CPN-Maoist to fulfil commitments to stop human rights abuses”, press release, 11 September 2006, available at http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/SEP2006/2006_09_12_HCR_PressRelease_E.pdf (last visited 19 September 2007).

42 Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, pp. 328–9. The relevant part of General Comment 31, para. 8, reads, “[the obligations to ensure respect for the Covenant] are binding on State parties, and do not, as such, have direct horizontal effect as a matter of international law”. Available at <http://www.ohchr.org/english/bodies/hrc/comments.htm>. Although Clapham does not mention what aspect of the phrasing is “careful”, one can assume that he is referring to “as such”.

43 E/CN.4/2005/3, CHR, 61st Session, Item 4, *Situation of Human Rights in the Darfur Region of the Sudan*.

44 For examples and discussion, see Clapham, above note 42, pp. 281–5.

45 One should also consider the problem of holding armed opposition groups accountable only during armed conflict, but not before or after. For discussion on human rights obligations of armed groups controlling territory, see Christian Tomuschat, “The Applicability of Human Rights Law to Insurgent Movements”, in H. Fischer, U. Froissart, W. Heintchel von Heinegg and C. Raap (eds.), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, Berliner Wissenschafts-Verlag, Berlin, 2004, pp. 586–7.

46 The carrying out of executions would still require a fair trial. For discussion on the right to detain without trial see Zegveld, above note 12, pp. 65–7, where she points out that some (but certainly not all) international bodies have dubiously filled the gap by importing either human rights standards for application to armed opposition groups, or by applying the law of occupation by analogy. While asymmetrical application would create disparity, it would not create inequality according to our definition as the norm derives from human rights law rather than IHL.

opposition groups to detain with impunity (from the viewpoint of international law) and would thereby act as a disincentive to provide for fair trials, since their international responsibility would only be invoked on the passing of sentences. Furthermore, the obligation on states to protect human rights may at any rate prevent states from recognizing the capacity of armed opposition groups to create courts if such courts are not considered to be “established by law”.

2.1.3. Derogations

Another discrepancy to consider is that human rights law allows for derogations from some of its provisions under certain stringent conditions where the “life of the nation” or “security or independence of the State party” is threatened.⁴⁷ For our purposes, such derogation must be strictly required and consistent with other obligations of international law, for example IHL.⁴⁸ Already here the problem of applying this principle to armed opposition groups is exposed. First, the personal scope of the capacity to derogate hardly seems to accommodate an armed opposition group. Second, the very existence of an armed opposition group involved in an armed conflict will mean that the derogation regime would tend to become the norm. The issue is especially relevant to the passing of sentence in situations of non-international armed conflict, since the “established by law” requirement has been considered a quasi non-derogable human rights obligation,⁴⁹ and the *nullum crimen sine lege* requirement is expressly non-derogable.

2.2. International criminal law: completing the circle

Until the 1995 ICTY *Tadić* (Jurisdiction) decision, the same “incredulous looks” associated with the suggestion that human rights instruments imposed obligations in 1949 would have followed a suggestion that breaches of Common Article 3 attract international individual criminal responsibility.⁵⁰ The Appeals Chamber, using a very thin retrospective of state practice and *opinio juris*, came to the conclusion that customary law creates individual criminal liability for Common

47 ICCPR Article 4; ECHR Article 15; I-ACHR Article 27

48 Ibid.

49 See General Comment 29, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16 and Article 27(2) of the Inter-American Convention on Human Rights. While the Comment considers that “fundamental guarantees must be respected during a state of emergency”, it does not make reference to “established by law”, instead stating that “only a court of law may try and convict a person for a criminal offence.” Article 27 prohibits derogations from the judicial guarantees essential to the protection of non-derogable rights, a notion which would be invoked and create a special regime in cases of the death penalty.

50 See Theodor Meron, “International Criminalization of Internal Atrocities”, *American Journal of International Law*, Vol. 89, no. 3 (1995), pp.559–63, where he notes that even the ICRC did not recognize such liability. Meron argues that criminalization has been confused with jurisdiction, which in his view accounts for the conservative view towards the individual responsibility of Common Article 3 violations. The Security Council, however, had already, and for the first time, criminalized violations of Common Article 3 in the ICTR Statute, and Meron points to some sources in the early 1990s (all Western) which had advocated the criminalization of Common Article 3.

Article 3 breaches.⁵¹ Certainly the ruling was a catalyst for self-fulfilling prophecy, as today, just over ten years later, the notion is established as a treaty obligation on the more than 100 states parties to the ICC.⁵²

The imposition of criminal responsibility for breaches of Common Article 3(1)(d) under Article 8(2)(c)(iv) of the ICC Statute complicates the puzzle with respect to equality of belligerents. First, it adds a further personal scope of coverage to the subject matter of Common Article 3, already made complex by the asymmetrical application of IHL and human rights law. This can lead to different outcomes for different classes of subjects exposed to different standards, for example, when it comes to command responsibility. Second, Article 21(3) of the ICC statute declares that the application and interpretation of the relevant law “must be consistent with internationally recognized human rights”.⁵³ In effect, this creates what Pellet critically calls a “super-legality”, wherein a hierarchy of norms gives an “intrinsic superiority” to certain rules due to their subject matter rather than their source.⁵⁴ Although one may be tempted to conclude that Article 21(3) refers only to procedural measures of the ICC, Arsanjani calls the provision “sweeping language”, creating a standard “against which all the law applied by the court should be tested”.⁵⁵ Accordingly, “regularly constituted” could be interpreted to encompass the state-centric human rights notion of “established by law” when it comes to individual responsibility but not necessarily state responsibility.

The principle of complementarity means that much of the effect of the ICC Statute will be realized within domestic jurisdictions controlled by courts of the state party, outside the scrutiny of international mechanisms. It is conceivable that a state, under cover of Article 21(3), may prosecute (or threaten the prosecution of) individuals associated with insurgent courts for the sake of political leverage, even when the armed opposition group in general, and these individuals specifically, respected IHL. The result would be a disturbing situation wherein the cross-referential interaction of IHL, human rights law and international criminal law would impose more exacting conditions for individual penal responsibility than for international responsibility.

51 ICTY, *Tadić* (Jurisdiction), above note 19, paras. 128–134.

52 ICC Statute Article 8(2)(c). It was easier for the ICC treaty drafters to include emerging law, or create new law, as ICC jurisdiction is not retroactive, whereas the ICTY jurisdiction applies retroactively.

53 ICC Statute, Article 21(3).

54 Alain Pellet, “Applicable Law”, in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds.), *Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, p. 1079.

55 M. Arsanjani, “The Rome Statute of the International Criminal Court”, *American Journal of International Law*, Vol. 93 (1999), p. 29.

3. The passing of sentences under international humanitarian law

3.1. Common Article 3(1)(d) and Additional Protocol II Article 6(2)

The text of Common Article 3(1)(d) prohibits both governments and armed opposition groups from passing sentence unless by a “regularly constituted court affording all the judicial guarantees recognized as indispensable by civilized peoples”. This article is divisible into two requirements, the first – “regularly constituted court” – addressing the legal basis for passing sentence, and the second addressing the judicial guarantees. While such proscriptive language does not in itself provide any legal basis for the establishment and operation of courts by armed opposition groups, it does not explicitly prohibit it either. Zegveld, in her seminal text on accountability of armed opposition groups, notes that the prohibition “does not make clear what specifically is expected from armed opposition groups”.⁵⁶

AP II, which “develops and supplements [Common Article 3] without modifying its existing conditions of application”,⁵⁷ also divides the prohibition into two parts. The *chapeau* of Article 6(2) prevents the passing of sentences “except pursuant to a conviction by a court offering all the essential guarantees of independence and impartiality”. In relation to Common Article 3, the first requirement drops the “regularly constituted” qualifying provision of what type of court is necessary, while the second requirement substitutes one standard of guarantees (i.e. independence and impartiality) for the other (i.e. recognized as indispensable by civilized peoples).

When it comes to the second prohibition, AP II does exactly what it purports to do, enumerating a list of six guarantees in the following sub-sections. These substitutions succeed in developing and supplementing the prohibition without modifying it. With respect to the first prohibition, however, by simply removing the qualifier “regularly constituted court”, Article 6 does nothing to “develop or supplement” the Common Article 3 prohibition. It in fact loosens it. Furthermore, it is hard to reconcile the deletion of the “regularly constituted” requirement with the disclaimer regarding the unmodified application of Common Article 3. Yet the reason for the deletion is clear enough. The ICRC Commentary to the Draft Additional Protocols of 1973 admits that “the words “regularly constituted”, qualifying the word “court” in Common Article 3, were removed, as some experts considered that it was not very likely that such a court could be regularly constituted within the meaning of national legislation if it were set up by the insurgent party”.⁵⁸ One may therefore be justified in questioning, in the specific case of the legal basis for the passing of sentences, whether this

⁵⁶ Zegveld, above note 12, p. 69.

⁵⁷ Article 1(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II).

⁵⁸ ICRC, *Commentary to Draft Additional Protocols*, above note 9, p. 142.

Protocol which purports to develop Common Article 3 does not, in fact, end up contradicting it.

The problem, however, goes beyond mere consistency of application. First, the lack of universal ratification, especially in countries experiencing internal conflict, means that AP II often does not apply to situations of non-international armed conflict. Second, the threshold gap means that a conflict may trigger the application of Common Article 3 but not AP II.⁵⁹ In either case, it is difficult to imagine how the provisions of Common Article 3 can be “developed and supplemented” by further provisions of AP II which do not necessarily apply to the situation at all. It is also difficult to reconcile the fact that a provision which applies to a lower threshold of conflict (i.e. Common Article 3) is actually narrower in terms of the conditions under which it will allow the passing of sentences (i.e. the requirement of “regularly constituted court”).⁶⁰ This specific anomaly relevant to the passing of sentences actually contradicts the Commentary to AP II on the general relationship between AP II and Common Article 3:

The Conference chose in favour of the solution which makes the scope of protection dependent on intensity of the conflict. Thus, in circumstances where the conditions of application of the Protocol are met, the Protocol and Common Article 3 will apply simultaneously, as the Protocol’s field of application is included in the broader one of Common Article 3.⁶¹

Yet one must not lose sight of the essential reality: a court established by law can still result in an unfair trial, while one which offers all the essential guarantees cannot. Therefore a disproportionate emphasis on the legal basis requirement at the expense of judicial guarantees could result in the weakening of protection for those not, or no longer, participating in hostilities, especially when one considers that these courts will continue to operate whether they meet international obligations or not.

3.1.1. *The first requirement: legal basis*

One aspect of the term “regularly constituted court” on which many authorities tend to agree is that the definition is difficult to pin down.⁶² The US Supreme Court, in its recent landmark *Hamdan* decision, notes that the term is “not

59 For a comprehensive analysis of the threshold gap, see Zegveld, above note 12, pp. 134–46 and Sandoz et al., above note 13, paras. 4446–4479. For a cautionary note on whether the gap does in fact exist, see Francoise Hampson, “Human Rights and Humanitarian Law in Internal Armed Conflict”, in Michael Meyer (ed.), *Armed Conflict and the New Law*, Vol. 1, British Institute of International and Comparative Law, London, 1989, p. 67.

60 On “regularly constituted court” as a more difficult prerequisite than AP II, see Peter Rowe, *The Impact of Human Rights Law on Armed Forces*, Cambridge University Press, Cambridge, 2006. See also below on ONUSAL.

61 Sandoz et al., above note 13, para. 4457.

62 See for example, Zegveld, above note 12, p. 69.

specifically defined in either Common Article 3 or its accompanying commentary”.⁶³ In order to help clarify the term, the *Hamdan* majority looked to the Commentary on Article 66 of Geneva Convention IV, which associates the “properly (or regularly) constituted courts” of an occupying power with its own “ordinary military courts”.⁶⁴ Article 66 declares that an occupying power may establish such courts in the territory it occupies for the purposes of adjudicating breaches of the laws it enacts under the exceptional authority of Article 64. Yet the fact that the Civilian Convention creates an explicit legal basis for courts of the occupying power, while Common Article 3 contains no such explicit basis, is not particularly relevant in considering the meaning of “regularly constituted” with respect to an armed opposition group. The Civilian Convention is of course only applicable to conflicts between states, and therefore does not consider the disparity between states and armed opposition groups when it comes to the legal basis for establishing courts. In the case of *Hamdan*, the Supreme Court was only concerned with the courts established by the state party, and did not touch on issues that could be prejudicial to the rights of armed opposition groups. This illustrates that for the purposes of non-international armed conflict, the definition of “regularly constituted court” must be seen as particularly nuanced in relation to definitions of similar terms appearing in the Geneva Conventions dealing with international armed conflict.

The ICRC Study concludes that in both international armed conflict and non-international armed conflict, the customary standard for passing sentence is a “fair trial offering all the essential guarantees”.⁶⁵ Unfortunately, in discussing this rule the analysis does not distinguish between the two types of conflict, even though it does so, for example, with regard to the Rule on Detention. One may wonder whether an opportunity to provide for some nuance with respect to the anomaly of disparity in non-international armed conflict was therefore lost. Even though the Rule itself does not make reference to the Common Article 3 standard, the accompanying discussion nevertheless makes a determinative finding on the requirements of “regularly constituted court” in the context of both Common Article 3 regulating non-international armed conflict and Additional Protocol I Article 75 regulating international armed conflict. However, the definition is not based on analysis of state practice or *opinio juris*, but rather is limited to the opinion of the authors. After establishing that human rights treaties require the “competent tribunal” and “established by law” criteria, the ICRC Study declares, “A court is regularly constituted if it has been established and organized in accordance with the laws and procedures already in force in a country.”⁶⁶ The Introduction to the ICRC Study further states that “international humanitarian law contains concepts the interpretation of which needs to include a reference to human rights law, for example the provision that no one may be convicted for a

63 *Hamdan v. Rumsfeld*, USSC, 548U.S. (2006), p. 69.

64 ICRC, *Commentary IV*, above note 7, p. 340.

65 See Rule 100 in Henckaerts and Doswald Beck, above note 20, Vol. 1, p. 353.

66 *Ibid.*, p. 355.

crime other than by a “regularly constituted court...”⁶⁷ The human rights *renvoi* suggests a state monopoly interpretation. Yet, as has been shown above in section 2, human rights obligations did not exist at the time when Common Article 3 was drafted.

One possibility is that the ICRC Study takes a *lex specialis* approach, wherein the substance of the law is determined by the more detailed rule. In two advisory opinions, the ICJ has ruled that when it comes to armed conflict, it is IHL which becomes the *lex specialis*.⁶⁸ Yet in the case of passing sentences related to an armed conflict, a *lex specialis* favouring the human rights obligations would be tenable, as the provisions of the ICCPR, the ECHR and the American Convention on Human Rights (ACHR) are all more detailed than Common Article 3 when it comes to procedural due process.⁶⁹ Another possibility is that the ICRC Study applies a *lex posterior* approach, wherein the development of new and overarching legal norms affects the interpretation of existing norms.⁷⁰ Still, both of these approaches require more attention when it comes to the regulation of non-international armed conflict; to the extent that human rights obligations do not apply to armed opposition groups, there is no *lex specialis* or *lex posterior* regulating their conduct at all. A better explanation would be a quasi-*lex posterior* approach in which the human rights “prescribed by law” criteria is imported into the IHL “regularly constituted” legal basis definition. It would also be consistent with Paust, who asserts that Common Article 3(1)(d) “incorporates customary human rights into due process by reference, and thus, all of the provisions of Article 14 of the International Covenant on Civil and Political Rights”.⁷¹

In a pre-AP II discussion on the meaning of Common Article 3(1)(d), James Bond advocated a functional approach to the requirements, noting that “Guerrillas, after all, are not apt to carry black robes and white wigs in their backpacks.”⁷² His cocktail of criteria was based on appropriateness, “whether the appropriate authorities, operating under appropriate powers, created the court

67 Ibid., p. xxxi.

68 *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion, 8 July 1996, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 9 July 2004, para. 106.

69 See William Abresch, “A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya”, *European Journal of International Law*, Vol. 16, no. 4 (2005).

70 Further evidence suggesting an adoption of the *lex posterior* approach is found in the ICRC Study, above note 20, at p. 349: “Since the adoption of the Geneva Conventions, there has been a significant development in international human rights law relating to the procedures required to prevent arbitrary deprivation of liberty.” One of the editors of the ICRC study has also stated that, “...international humanitarian law rules, although very advanced by 1949 standards, have now fallen behind the protections provided by Human Rights treaties”, see Louise Doswald-Beck, “Human Rights and Humanitarian Law: Are there Some Individuals Bereft of all Legal Protection?”, *ASIL Proceedings* 2004, p. 356.

71 Jordan J. Paust, “Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees”, *Columbia Journal of Transnational Law*, Vol. 43 (2005), n. 25 at p. 818.

72 James Bond, “Application of the Law of War to Internal Conflict”, *Georgia Journal of International and Comparative Law*, Vol. 3, no. 2 (1973), p. 372.

under appropriate standards”.⁷³ While this definition at least provides some implicit recognition of the problems associated with disparity, it is not necessarily helpful in answering the question raised by Zegveld above, as to what specifically is expected of armed opposition groups. It is especially the first two criteria that are problematic, as they relate to the legal basis requirement, while the third criterion relates to the judicial guarantees requirement.

In none of the definitions already discussed has precision been an essential feature. These definitions have been framed in the context of international responsibility, an area of law often intentionally laced with the ambiguity of political expediency. Yet the same cannot be said when it comes to individual criminal responsibility. In drafting the Elements of Crime of the Statute of the ICC, states were faced with the task of creating sufficient specificity to meet the requirements of the legality (i.e. *nullum crimen sine lege*) general principle of international criminal law.⁷⁴ There were no legal precedents to work from, as individual responsibility for non-international armed conflict did not generally exist at international law prior to the ICTY *Tadić* (Jurisdiction) decision of 1995, and none of the subsequent trials from either ad hoc tribunal was faced with the issue of insurgent courts.⁷⁵ Of course the Elements were drafted in the specific context of the criminal responsibility of the individual, but as the wording of ICC Article 8(2)(c) is functionally identical to that of Common Article 3, the Elements are still a useful tool of interpretation.⁷⁶ The definition of the Elements of Crime is also valuable in that it was drafted by signatories of the ICC Statute, and thereby represents the views of a number of states.⁷⁷

Element 4 of Article 8(2)(c)(iv) surprisingly borrows from AP II Article 6(2) in defining a “regularly constituted” court:

There was no previous judgement pronounced by a court, or the court that rendered judgement was not “regularly constituted”, that is, *it did not afford the essential guarantees of independence and impartiality*, or the court that rendered judgement did not afford all other judicial guarantees generally recognized as indispensable under international law. (emphasis added)

The repetition of the words “the court that rendered judgment” indicates that the definition of “regularly constituted court” is limited to that in italics above, specifically “independence and impartiality”. The final phrase would then

⁷³ Ibid., p. 372.

⁷⁴ For discussion of the extent to which *nullum crimen sine lege* forms a general principle of international criminal law, see Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003, pp. 139–56.

⁷⁵ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2002, p. 409.

⁷⁶ The relevant section of ICC Article 8(2)(c)(iv) prohibits “The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.” The difference in wording indicates a recognition of the dated terminology of Common Article 3 but does not represent a substantive effect.

⁷⁷ According to ICC Article 9, the Elements of Crime are not definitive but “assist the Court in the interpretation and application of articles 6, 7 and 8”.

refer to the second requirement of judicial guarantees as separate from the legal basis itself. Such an interpretation, however, confuses the definition of the legal basis of Common Article 3 with that of the essential guarantees of AP II. The adopted Element can be compared with an earlier draft proposal by Belgium which did in fact correctly separate the legal basis and essential guarantees. It listed three distinct situations where the passing of sentence would amount to a war crime: “either no previous judgment was pronounced, or the previous judgment was not pronounced by a regularly constituted court or did not offer all the essential guarantees which are generally recognised as indispensable”.⁷⁸

The uneasy relationship between AP II Article 6(2) and Common Article 3(1)(d) has already been discussed above, where it was noted that the “regularly constituted court” requirement was adapted based on the concerns of some experts who thought that armed opposition groups would not be able to establish such courts under the meaning of national law. It therefore appears odd that the drafters of the Elements of Crime simply imported the AP II Article 6(2) standard (and the wrong one, at that) to define “regularly constituted court”, when the drafters of the actual ICC Statute maintained the Common Article 3(1)(d) wording. As the discussion on equality of belligerents has revealed, AP II only survived by removing all reference to the parties. Furthermore, the high threshold, including the requirement of territorial control to the extent that armed opposition groups would be able to implement the Protocol, was a vital condition to get states to agree to adopt AP II.⁷⁹ It is of further interest to note that the threshold for the application of Article 8(2)(c)(iv) has been set objectively lower than that of AP II, as the former requires neither territorial control nor ability to implement the provisions of the Article.⁸⁰ The gap therefore becomes actual rather than theoretical, at least in terms of individual responsibility. The Elements of Crime at any rate takes the view that, with respect to the legal basis, the IHL of AP II becomes the *lex specialis* for any non-international armed conflict. The lack of any qualification to the word “court” in AP II Article 6(2) would justify an interpretation that this provision does not incorporate the “established by law” requirements of human rights law and would allow for the establishment of ad hoc courts.⁸¹

From the above analysis, it is clear that there is no agreement on the meaning of the term “regularly constituted court” when it comes to the insurgent party. Proposed definitions either brush over the nuances of disparity, are vague, or fail to adequately engage the substantive differences between Common Article 3

78 PCNICC/1999/WGEC/DP.13, reproduced in Eva LaHaye, “Violations of Common Article 3”, in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure & Evidence*, Transnational Publishers, Ardsley, NY, 2001, p. 212.

79 See for example CDDH/SR.49/ANNEX, explanation of vote on Material Field of Application, statement of Ghana.

80 ICC Article 8(2)(d) states, “Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”

81 To the extent that “established by law” may be considered non-derogable, this reasoning would be problematic. See below.

and AP II. The impact of AP II Article 6(2) has been to highlight the problem of Common Article 3(1)(d), but even if AP II is considered to be the *lex specialis* with respect to human rights law, it does not provide a universal solution, due to both the application gap and the threshold gap.

3.1.2. *The second requirement: judicial guarantees*

As has already been noted, when it comes to judicial guarantees, AP II clarifies Common Article 3 without expanding it. Therefore the AP II standards can be applied universally with respect to the second prohibition. Most of the guarantees listed in Article 6(2)(a–f) are not affected by the disparity between states and armed opposition groups, although armed opposition groups may find them difficult to apply due to factual capabilities. They are conceptually no different than, for example, the requirement to provide education to children under Article 4(3)(a). It is only the first sentence of Article 6(2)(c), an enumeration of the *nullum crimen sine lege* principle, that presents a potential inequality problem.

The relevant provision states, “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed”. The Commentary points out the difficulty caused by disparity, or the “special context of non-international armed conflicts”, explaining that “The possible coexistence of two sorts of national legislation, namely that of the States and that of the insurgents, makes the concept of national law rather complicated in this context.”⁸² Zegveld asserts that since the final wording seems to have come from Article 15 of the ICCPR, the provision “must therefore be understood as referring to state law”.⁸³ Bothe et al. take a more expansive view, asserting that the deletion of the ICCPR “national and international law” terminology at the CDDH “should be understood as broadening, not as limiting the concept of “law””.⁸⁴ The broader view would mean that armed opposition groups would be able to meet the *nullum crimen sine lege* criterion by relying on international law with respect to international crimes, while relying on either existing state legislation or their own existing “legislation” to prosecute crimes related to the mere participation in hostilities. Under the narrow view, armed opposition groups would not be able to rely on their own “legislation” with respect to mere participation-related crimes, although they could apply existing government legislation, for example, trying government soldiers for murder.

3.1.3. *The diplomatic conferences*

It is easy to imagine the objections that states, especially those engaged in non-international armed conflict, would have to recognizing a right of armed

⁸² Sandoz et al., above note 13, paras. 4604–4605.

⁸³ Zegveld, above note 12, p. 187.

⁸⁴ Bothe et al., above note 8, p. 652.

opposition groups to establish courts. Unfortunately, the intention of the drafters of Common Article 3 is difficult to discern from the Official Records of the Geneva Conference. The discussions had been mainly focused on whether the Geneva Conventions should apply in their entirety in cases of non-international armed conflict, and it was only towards the end of the Conference that the 2nd Working Party of the Special Committee came up with an exhaustive, limited list of provisions which were to become Common Article 3.⁸⁵ The Official Records give no indication as to how the passing of sentences prohibition ended up in the enumerated list, and contain no discussion on the meaning of “regularly constituted court”.

One important difference between the negotiations in 1949 and those in 1974–7 is that in the latter instance states were aware of their human rights obligations and hence the “established by law” requirement. While the discussions at the CDDH related the sensitivity of the issue, they did little to clarify it. The CDDH negotiations were based on the 1973 AP II draft Article 10 which stipulated:

No sentence shall be passed or penalty inflicted upon a person found guilty of an offence in relation to the armed conflict without previous judgment pronounced by a court offering the guarantees of independence and impartiality which are generally recognized as essential ...⁸⁶

The ICRC delegate began the discussion by emphasizing that draft Article 10 should be considered in light of the fact that Article 1 on the high threshold of application, including territorial control, had already been passed by the drafting committee.⁸⁷ The intention of such a comment was most probably to ensure that states recognized that the adoption of a provision with a wider scope of application than Common Article 3 would only be applicable to high-threshold conflicts. She then stated that it was no longer hypothetical for armed opposition groups to be in a position to try persons, and added, “La Partie insurgée pourrait utiliser à cette fin les tribunaux existant sur la partie du territoire qu’elle contrôle et qui pourraient continuer à fonctionner, ou pourrait créer des tribunaux populaires.”⁸⁸ The ICRC was therefore in favour of the right of armed opposition groups to establish courts, at least in conflicts wherein the armed opposition group asserts territorial control and meets the other AP II threshold requirements. Significantly, the ICRC delegate framed this assertion in the context of the subsequently abandoned draft Article 5 on equality of rights and obligations of the parties, implying that equality of belligerents was an underlying principle of the legal basis interpretation.⁸⁹

Many state delegates, recognizing the difficulties in reconciling disparity and equality in terms of insurgent courts, also made reference to draft Article 5

85 See 28th Meeting of the Special Committee, *Official Records*, II-B, p. 83.

86 CDDH/1.

87 CDDH/I/SR.33, para. 24.

88 *Ibid.*, para. 24. The French text is presented above as authoritative due to ambiguity in the English text.

89 *Ibid.*, para. 24; see also above, on draft Article 5.

and counselled caution in drafting the provision on due process.⁹⁰ The UK delegate stated that “the principle that “the rights and duties of the Parties to the conflict under the present Protocol are equally valid for all of them” must clearly be given special consideration when provisions concerning penal law were being drafted”.⁹¹ Yet none of the state delegate statements referred to above indicated whether they agreed with the ICRC delegate on the legal basis issue. It was only the Nigerian delegate who explicitly recognized that rebels “could certainly set up courts with a genuine legal basis”.⁹² The general warnings in connection with draft Article 5, and the subsequent jettisoning of that article, suggest that many states recognized with apprehension that their monopoly on the legislative and judicial branches of government was at stake.

With respect to the second prohibition regarding judicial guarantees, states also voiced their concern over the scope of the *nullum crimen sine lege* principle as discussed above. Although the initial ICRC draft only contained the term “law”, intermediate drafts contained the expression “national or international law”⁹³ as imported directly from Article 15 of the ICCPR.⁹⁴ This formulation was not well received. The Argentinean delegate expressed concern over the ambiguity of the term “national law”, questioning whether a government involved in a non-international armed conflict would “recognize the idea of “rebel law””.⁹⁵ The Mexican delegate called the meaning “vague”, noting that “no clear idea of it had emerged from the debate”.⁹⁶ Some delegations threatened that they would vote to exclude the entire sub-paragraph (d) if the wording was maintained,⁹⁷ and in the end the Conference reverted to the original, unqualified “law”.⁹⁸

3.2. Evidence of practice in the passing of sentences by armed opposition groups

The vast majority of evidence of actual practice on the issue of insurgent courts is either not well documented or remains confidential.⁹⁹ While the current study

90 In addition to the UK delegate, see Spanish delegate, CDDH/I/SR.34, para. 28, and Soviet delegate, CDDH/I/SR.34, para. 42.

91 CDDH/I/SR.29, para. 45.

92 CDDH/I/SR.34, para.20.

93 CDDH/I; CDDH/I/GT/88.

94 ICCPR Article 15 states:1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

95 CDDH /I/SR.64, para. 54.

96 Ibid., para. 78.

97 CDDH/I/262, fn. 1.

98 The actual wording adopted was proposed by the Pakistan amendment, CDDH/427.

99 In personal correspondence with Knut Dörmann, Deputy Director of ICRC Legal Division, the author was informed that no ICRC experience with insurgent courts exists in the public domain. ICRC archives are kept confidential for forty years.

does not purport to present a full survey of practice, it will look at two cases where relevant information is available. Rebel practice and opinion is presented without prejudice to the issue of whether it goes towards the formation of customary law. The author submits that a comprehensive survey on practice concerning rebel courts would be a valuable endeavour for any future research, as well as for international efforts to promote armed group compliance with IHL.

3.2.1. *The El Salvador conflict*

The conflict in El Salvador during the 1980s and 1990s is one of the few in which insurgent courts have received any international attention whatsoever. Security Council Resolution 693(1991) established the UN Observer Mission in El Salvador (ONUSAL), which interpreted its mission to include compliance with IHL as well as human rights commitments of the parties to the conflict.¹⁰⁰ Significantly, the El Salvador conflict was the first instance of the application of AP II,¹⁰¹ and therefore provides some insight into the relationship between the requirements of the two non-international armed conflict instruments. During the El Salvador conflict the Farabundo Martí National Liberation Front (FMLN) passed sentence on, and executed, suspected government agents and collaborators. The group stressed that it was “endeavouring to assure that its methods of struggle comply with the stipulations of Article 3 of the Geneva Conventions and Additional Protocol II”, and pointed to AP II Article 6(2) as the legal basis for its rebel courts.¹⁰² The FMLN further alleged that compliance “does not require the tribunal to have been set up according to government law in effect”.¹⁰³

In its Third Report, the ONUSAL Human Rights Division confirmed the norm of AP II 6(2) to be a “broader precept” than that of Common Article 3(1)(d), and in the same paragraph ONUSAL proclaimed that the “regularly constituted court” requirement is one which “an insurgent force may have difficulty meeting” while agreeing that “any responsible and organized entity can and must observe the principles established in article 6 of Additional Protocol II”.¹⁰⁴ The Report goes on to consider the principles of independence and impartiality, which suggests that ONUSAL applied the AP II legal basis requirement exclusively.

The FMLN sentenced individuals under its own “penal procedural law” that contained precise sanctions for each of the commonly committed infractions

100 Tathiana Flores Acuña, *The United Nations Mission in El Salvador: A Humanitarian Law Perspective*, Kluwer Law International, The Hague, 1995, pp. 36–40.

101 Michel Veuthey, Preface to *ibid.*, p. xiii.

102 Letter from Commander Nidia Díaz, Director, FMLN Secretariat for the Promotion and Protection of Human Rights, 19 October 1988 (hereinafter FMLN Memo), partially reproduced in *Americas Watch, Violation of Fair Trial Guarantees by the FMLN's Ad Hoc Courts*, Americas Watch, New York and Washington, 1990.

103 *Ibid.*

104 A/46/876, S23580, ONUSAL Human Rights Division, *Third Report*, para. 111. The latter statement is a reiteration of the *Commentary to the Additional Protocols*, above note 13, para. 4597.

in relation to the armed conflict.¹⁰⁵ Consequently, the *nullum crimen sine lege* problem of the second prohibition was at issue. In its memo the FMLN justified its actions:

Nor is it necessary according to [the government law] that the guilt of the accused must be proven; rather Protocol II presupposes the coexistence of “national legislation of the State with insurgent legislation”. As a result of this interpretation, each of the contending parties shall be able to try according to their own law in effect.¹⁰⁶

Furthermore, the FMLN argued that the “type of tribunal and law required by Protocol II have had to have been adapted to the existence and capacity of the contending party”.¹⁰⁷

The watchdog organization Americas Watch agreed with the opinion of the FMLN that “Article 6 of Protocol II undeniably presupposes that either of the contending parties has the authority to try and punish penal infractions committed in relation to the armed conflict”.¹⁰⁸ Americas Watch expressly agreed with the FMLN interpretation that AP II envisions two sets of national legislation, whereby the armed opposition group may have legislative authority over the territory it controls, but it did not accept that the standards should be adjusted according to the capacity of the party,¹⁰⁹ a reference to its physical capability rather than legal capacity. As Zegveld notes, ONUSAL implicitly accepted the right of the FMLN to legislate over the territory it controlled by the fact that it examined the armed group’s penal provisions.¹¹⁰

The El Salvador conflict also provides evidence of practice on armed opposition group prosecution of its own members for violations of the laws of war. According to Human Rights Watch, the FMLN announced that it would prosecute two of its own members for the January 1991 summary execution of two US servicemen after their helicopter had been shot down. The El Salvador government demanded that the FMLN members be handed over to its own state judicial system, and warned that any national or foreign individuals participating in an FMLN trial would be subject to prosecution under El Salvador law. The trial apparently never took place, since the FMLN decided instead to hand over the accused to the national truth and reconciliation process.¹¹¹ Human Rights Watch “expressed “disappointment” that the FMLN had not made more progress in fulfilling its obligations under international law to punish gross abusers”,¹¹² although it is not clear that such an obligation in fact existed at the time, or even

105 FMLN Memo at Americas Watch, above note 102, p. 511.

106 Ibid.

107 Ibid., p. 510.

108 Americas Watch, above note 102, p. 512, citing the FMLN Memo.

109 Ibid., p. 513. However, Americas Watch was unable to obtain the alleged penal code after several attempts, and concluded that the essential guarantee requirements were not met.

110 Zegveld, above note 12, p. 70.

111 Human Rights Watch, “El Salvador”, 1992 Annual Report, available at <http://www.hrw.org/reports/1992/WR92/AMW-08.htm#TopOfPage> (last visited 18 September 2007).

112 Ibid.

does now.¹¹³ ONUSAL did not report on the incident at all, most likely because it considered incidents which occurred prior to the launching of the Human Rights Verification Mission on 23 July 1991 to be outside its competence, “save in exceptional circumstances”.¹¹⁴

3.2.2. *The Nepal conflict*

The question looms as to what would have been the outcome had the El Salvador conflict been one in which AP II did not apply and the “regularly constituted” court requirement was the only one applicable. Such a question becomes relevant to the recent conflict in Nepal between the Communist Party of Nepal-Maoist (CPN-M) insurgent group and government forces. Although the factual situation of territorial control and sustained military operations (including 13,000 killed over a decade-long conflict)¹¹⁵ indicates that the AP II threshold has most likely been met, Nepal is not a party to the Protocol, and therefore Common Article 3 remains the only applicable conventional standard. A comprehensive peace agreement was signed in late 2006, which seems to be holding in general at the time of writing.

The CPN-M established “People’s Courts”, which operated during hostilities and reportedly blossomed after the cessation of hostilities. Furthermore, the CPN-M has created its own “wartime and transitional” comprehensive public legal code from 2003/04, which covers civil provisions as well as penal provisions both related and unrelated to the conflict.¹¹⁶ Article 2(9) established the legal basis of People’s Courts, stipulating that prosecutions shall be carried out “by the Peoples’ Prosecutor and decisions by the peoples’ Court”. Article 4(1) creates a duty to safeguard the Communist Party of Nepal, the Peoples’ Liberation Army, the Peoples Government and the Central Peoples’ Council, while Article 4(4)&(5) states:

4. Whoever commits or attempts to conspire or join the enemy or commits dishonesty against these agencies, persons, institutions and ideologies in defiance of the aforementioned duty, shall be punished with 10 years labour imprisonment based on the opinion of the ordinary people depending on the stage, planning, situation and severity of the offence.

5. Whoever collects arms, money or property with the intent to commit an insurgency against the Peoples’ Government by creating hostility,

113 See below. At the time of the incident, violations of Common Article 3 were not considered to entail individual criminal responsibility at international law. Even though the victims were agents of another state, the conflict, at least in this context, remained non-international, as the United States was allied with the El Salvador government. Therefore there was no international obligation to prosecute, although the situation would be different today in the light of the individual responsibility in non-international armed conflict.

114 ONUSAL Human Rights Division, *First Report*, A/45/1055, para. 8.

115 BBC News, “Violent clashes amid Nepal curfew,” 10 April 2006, available at http://news.bbc.co.uk/2/hi/south_asia/4894474.stm (last visited 18 September 2007).

116 United Revolutionary Peoples’ Council Nepal, Public Legal Code, 2060 (2003/2004), unofficial English translation (copy on file with the author).

confrontation, and hatred, in order to weaken fraternity at the national, regional, and international levels, and in relations with friendly nations, shall be punished with labour imprisonment not exceeding five years and the money and goods as collected shall be confiscated.

These provisions clearly provide “legislative” authority for the passing of sentence on individuals for acts hostile to the armed opposition group. The Code does not provide sanctions for specific war crimes, but it does for murder, battery, sexual offences (only if the victim is a woman), illegal detention and theft in general.¹¹⁷ It is not the intention of the author here to analyse whether the judicial guarantees are in line with the standards of the law of non-international armed conflict. However, what can be determined is that this “national” law provides both a legal basis and meets the *nullum crimen sine lege* requirements for the enumerated provisions (assuming, of course, that it is in fact national law). Under AP II these courts would most likely be *prima facie* acceptable, while under the “regularly constituted” requirement of Common Article 3, they would be problematic under a definition which incorporates human rights provisions *qua* human rights.

The OHCHR has stated, “OHCHR believes that the abductions, related investigations and punishment related to the “people’s courts”, including holding people in private houses, fail to provide minimum guarantees of due process and fair trial by an independent court”.¹¹⁸ The same report further declares that internal investigations of “abuses” by CPN-M members “cannot substitute for prosecutions carried out in a state court”.¹¹⁹ There is no mention in the report of whether the OHCHR applies IHL at all, and if so, whether its comments apply only to a post-conflict situation, in which human rights law would be the only applicable regime.¹²⁰ Yet it does note “the need to ensure full implementation of the CPN-M’s repeatedly stated commitment to human rights and humanitarian principles”.¹²¹ At any rate, the OHCHR seems to indicate that state courts are the only tribunals which may prosecute criminal acts.

4. Passing sentence on the capacity to pass sentence

4.1. The scenarios of prosecution

There are two distinct situations in which an armed opposition group would consider prosecutions in relation to the armed conflict: (i) for the perpetration of international crimes, by either its own members, opposing forces or civilians; and

¹¹⁷ See Public Legal Code, Articles 6, 7, 9, 12 & 16.

¹¹⁸ OHCHR-Nepal, *Human Rights Abuses by the CPN-M, Summary of Concerns*, September 2006, p. 4, available at <http://nepal.ohchr.org/reports.htm> (last visited 18 September 2007).

¹¹⁹ *Ibid.*, p. 8.

¹²⁰ The OHCHR-Nepal mandate includes the monitoring of IHL as per the 10 April 1995 agreement with the government of Nepal. See <http://nepal.ohchr.org/en/index.html> (last visited 18 September 2007).

¹²¹ OHCHR-Nepal, above note 118, p. 8.

(ii) for merely participating in, or aiding in the participation in, hostilities against the armed opposition group.

The following analysis will examine whether either of these situations impose further international law obligations on armed opposition groups and/or their members in terms of responsibility to punish, and how these obligations may interact with the “passing of sentences” prohibitions of Common Article 3 and AP II.

4.1.1. *Armed opposition group prosecution of perpetrators of international crimes*

A general trend of international law has developed in which there should be no impunity for international crimes committed during armed conflict.¹²² The prohibition on impunity covers all individuals, whether part of state armed forces or rebel forces, or civilians (including political office holders). In certain circumstances, international law may (or may not) impose obligations on either entities¹²³ or individuals to prosecute suspected perpetrators of international crimes in relation to an armed conflict. The scope of these obligations is somewhat different; individual responsibility encompasses only superior–subordinate relationships, and therefore does not cover crimes committed by the opposing party, while international responsibility may do so, depending on the circumstance, as it can involve universal jurisdiction or jurisdiction based on the territoriality or nationality principles.

International Responsibility. The penal-sanctions provision of the Geneva Convention grave-breach regime requires the high contracting party to “enact legislation necessary to provide effective penal sanctions” for persons responsible for grave breaches, and to “bring such persons ... before its own courts” or “hand such persons over for trial to another High Contracting Party”.¹²⁴ The grave-breach regime includes crimes that are also considered to be crimes in non-international armed conflict, such as wilful killing and torture, but the *Tadić* Appeals Chamber ruled that grave breaches only apply to international armed conflict as the law currently stands.¹²⁵

The overwhelming view,¹²⁶ supported by *Nicaragua*,¹²⁷ is that common Article 1 requiring states to “respect and ensure respect” for the Geneva

122 See, for example, Philippe Sands (ed.), *From Nuremberg to the Hague: The Future of International Criminal Justice*, Oxford University Press, Oxford, 2003, p. x.

123 The term “entity” is used to include both armed opposition group and state responsibility.

124 Convention I Article 50; Convention II Article 50; Convention III Article 129; Convention IV Article 146.

125 ICTY, *Tadić* (Jurisdiction), above note 19, paras. 80–84. If grave breaches were to apply to non-international armed conflict (as the United States argued in *Tadić*), questions of equality would arise since the obligation only applies to states.

126 See Laurence Boisson de Chazournes and Luigi Condorelli, “Common Article One of the Geneva Conventions Revisited: Protecting Collective Interests”, *International Review of the Red Cross*, no. 837 (March 2000).

127 ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, para 220.

Conventions now applies to non-international armed conflict, even though the Commentary to the Geneva Conventions expressly states that it does not.¹²⁸ Yet these opinions only consider whether the obligation applies either to the state engaged in such a conflict or to other states (the latter being the situation in *Nicaragua*). Zegveld considers the applicability of Common Article 1 to armed opposition groups, suggesting that “it may be inferred that it applies equally to armed opposition groups”.¹²⁹ She further surmises that an obligation to prosecute “may be deduced”, but she then fails to find much international practice to support such an obligation. However, the fact that Common Article 3 binds “each party to the conflict”, while Common Article 1 refers distinctly to undertakings of the “High Contracting Parties”, rather indicates that conventional obligations of armed opposition groups are limited to those contained in Common Article 3, and can not be “deduced” so easily.

The ICRC Study finds a parallel customary obligation in Rule 139: “each party to the conflict must respect and ensure respect for international humanitarian law”.¹³⁰ Yet for the “ensure respect” obligation of armed opposition groups, the evidence is not convincing, as it is limited to state participants in the conflicts in the former Yugoslavia (where it was unclear at the time whether the law of non-international armed conflict applied at all), two instances of intervention by the UN Security Council and the practice of the ICRC, a non-state entity. In terms of obligation to prosecute, Rule 158 of the ICRC Study, applying to both international armed conflict and non-international armed conflict, finds that

States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.¹³¹

The difference *ratione personae* between Rule 139 and Rule 158 indicates that the ICRC Study finds an obligation on states to prosecute war crimes in non-international armed conflict, while no similar obligation is extended to armed opposition groups. Henckaerts, a co-editor of the Customary Study, has stated in another context that IHL imposes an obligation to prosecute war criminals without clarifying whether this obligation is on both the state and non-state party to a non-international armed conflict.¹³² As discussed above with respect to the FMLN, Human Rights Watch seems to consider there to be an international obligation on armed opposition groups to prosecute “gross abusers”. Although the report does not clarify the obligation, one can assume that it refers to war crimes committed by members of its own ranks. If an IHL obligation exists, but only for the state, it would result in inequality of belligerents (creating a heavier burden on the state) as per our definition of section 1.

¹²⁸ *Commentary IV*, above note 7, p. 16.

¹²⁹ Zegveld, above note 12, p. 67.

¹³⁰ Rule 139, Henckaerts and Doswald-Beck, above note 20, Vol. I, pp. 495–8.

¹³¹ Rule 158, *ibid.*, pp. 607–11.

¹³² Henckaerts, above note 22, p. 133.

Individual responsibility. The jurisprudence of the ad hoc tribunals,¹³³ the findings of the ICRC Study¹³⁴ and the provisions of the ICC Statute¹³⁵ all conclude that from the individual penal responsibility perspective, the obligation to punish is the same in non-international armed conflict as it is in international armed conflict. Moreover, in all cases, there is no indication that the responsibility is not the same for both state and armed opposition group superiors. The standard requires commanders and superiors to take all necessary and reasonable measures within their power,¹³⁶ and it can be assumed that the “punishment” required for any war crime, crime against humanity or genocide would require penal prosecution – that is, would not be able to be met with mere disciplinary action. Paragraphs (a)(ii) and (b)(iii) of Article 28 of the ICC Statute require a superior or commander to take “all necessary and reasonable measures within his or her power to prevent or repress” crimes. The law as such, however, does not necessarily mean that armed opposition group superiors have an obligation to bring suspected war criminals before their own courts.¹³⁷ For the purposes of prosecution, the armed opposition group superior may hand over a suspected war criminal to the established government, or to another state, if a willing one can be found.¹³⁸ In fact, Acuña claims that with respect to the El Salvador conflict, the ICRC stated that, “in the presence of a serious violation of international humanitarian law, the rebels should have recourse to the national system of administration of justice”.¹³⁹ The problem, however, is that armed opposition group superiors will most likely not be willing to discharge their duty by engaging the government party, and it is hardly reasonable that the law requires them to do so. What if the armed opposition group superior has reason to fear that the government courts are not independent and impartial, and no other state were willing?

Respect for IHL by armed opposition groups will not be gained by imposing obligations without considering corresponding rights. If they do not have the option to hand over suspects to their own system of criminal justice or to another state, then armed opposition group superiors may find themselves in the untenable position of having to hand over prisoners to the opposing state party in

133 ICTY Appeals Chamber, *Prosecutor v. Hadzihasanovic et al.*, ICTY, IT-94-1-AR72 (Decision On Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) (2003), para. 18: “wherever customary international law recognizes that a war crime can be committed by a member of an organized military force, it also recognizes that a commander can be penally sanctioned”.

134 Rule 153, Henckaerts and Doswald-Beck, above note 20, p. 558: “Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.” This Rule is listed as applying to non-international armed conflicts.

135 ICC Statute Article 28, entitled “Responsibility of commanders and other superiors”, imposes criminal responsibility “for crimes within the jurisdiction of the Court”. This clearly includes Articles 8(2)(c) and (e) regulating non-international conflict.

136 The *Hadzihasanovic* Decision, above note 133, does not include the “within their power” condition.

137 Crimes Against Humanity and Genocide are also covered by command responsibility, raising questions of obligations of armed opposition groups outside an armed conflict context.

138 This could also raise legal questions with regards to extradition.

139 Acuña, above note 100, n. 247 at p. 6.

order to discharge their individual obligations. It is more likely than not that in such a situation members of armed opposition groups would consider the impositions of international justice to be overly burdensome and prejudicial towards them, with the result that overall compliance would suffer.

4.1.2. Prosecution for mere participation in hostilities

Even more controversial is the ability of armed opposition groups to pass sentence on individuals – either government soldiers or others – for mere participation in hostilities or for aiding in such participation. Both the legal basis requirement and the *nullum crimen sine lege* criterion of the judicial guarantees requirement would pose potential problems for conflicts governed by Common Article 3. AP II conflicts would be less problematic, at least from the standpoint of IHL, due to the lack of legal basis requirement.

Unlike the prosecution of international crimes, international law is silent on this subject matter, so armed opposition groups would not be able to rely on further international law obligations to suggest subsequently flowing rights. Here, the disparity between states and armed opposition groups is most prevalent. States would consider similar conduct by armed opposition group members or supporters to fall under domestic criminal legislation and therefore would have the right (and possibly even the obligation, from a human rights point of view) to prosecute rebels and rebel collaborators.

The limited practice from section 3 shows that armed opposition groups have created penal codes for the purpose of punishing enemy soldiers or civilians for mere-participation-type crimes, and have established courts to judge such violations in both Common Article 3 and AP II-governed conflicts.¹⁴⁰ A new trend may be emerging where armed opposition groups are showing an increasing ability not just to mimic the functions of the state, but to deliver services, including the administration of justice, more efficiently if not more effectively than the state.¹⁴¹ As the propaganda value has not gone unnoticed, it is likely that more and more armed opposition groups who control territory will create parallel justice systems.

While it is not necessarily in the best interests of humanity to grant broad legislative and judicial powers to non-state actors, it must be remembered that IHL is rooted in the realities and exigencies of armed conflict, wherein the principle of equality of belligerents has been considered to be crucial for compliance with IHL. The legal capacity of armed opposition groups to administer justice remains tempered in that IHL would only envision such rights in situations amounting to armed conflict, and then only for conduct related to hostilities.

¹⁴⁰ for a statement by the Maoist rebel leader indicating that informers may be tried and executed by People's Courts, see Charles Haviland/BBC News, "Meeting Nepal's Maoist Leader", 16 June 2006, available at http://news.bbc.co.uk/2/hi/south_asia/4707058.stm (last visited 18 September 2007).

¹⁴¹ Charles Haviland/BBC News, "Parallel Justice, Maoist Style", 14 October 2006, available at http://news.bbc.co.uk/2/hi/south_asia/6048272.stm (last visited 18 September 2007).

4.2. Towards a solution

A realistic solution should aim towards levelling the playing field, so that both sides of a non-international armed conflict will determine that it is in their best interest to refrain from carrying out the harshest measures.¹⁴² If it is generally acknowledged that armed opposition groups can establish and operate courts, there will be greater leverage towards creating ad hoc agreements with respect to analogous prisoner-of-war status and/or postponement of the death penalty. At the end of hostilities there is always a greater chance that amnesties will be granted for participation-related offences by whichever party ends up forming the government.¹⁴³

With these considerations in mind, a realistic solution should entail a mixture involving a loose interpretation of the legal basis, with emphasis on the judicial guarantees requirement. This would recognize that the rights implied by the prohibitions of Common Article 3 would be granted to those groups capable of fulfilling the conditions to exercise those rights. In fact, this would shift the focus back on to the obligations associated with the functioning of courts. In reality, an IHL norm that all but prevents armed opposition groups from operating courts will remain merely a norm. These courts would continue to exist, but their “illegal” nature would obstruct efforts to improve compliance with judicial guarantees. Therefore there is reason to believe that the protection of those individuals not or no longer participating in hostilities would at least be maintained, or even increased. Furthermore, the solution would be consistent with an effective equality of belligerents principle. The value of this final point should not be lost in encouraging the compliance of armed groups with IHL obligations. Armed opposition groups which have no interest in complying will not be swayed by international prohibitions. Others will be more likely to work towards compliance if they feel that the law allows them to meet their obligations without it being prejudicial towards them.

It is also important to consider at this juncture that the threshold of Common Article 3 should not be reduced to irrelevancy. IHL contains compromise solutions that should not be applied in situations short of substantial armed conflict. If the IHL of non-international armed conflict is to also entail rights for the non-state party, it is important that rights only arise in situations for which they were considered. Moreover, the different legal basis standards for Common Article 3 and AP II conflicts also remain relevant for practical reasons related to the control of territory. In conflicts where armed opposition groups do not have control of territory, it will be very difficult to meet the “regularly constituted” standard, even in a loose interpretation; it is hard to imagine that

142 A preferred solution would be to recognize PoW status in non-international armed conflict, or even to prohibit the death penalty until the end of hostilities, but states have been consistently unwilling to do so.

143 Both AP II Article 6(5) and the ICRC Customary Study Rule 159 state that at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty. The ICRC study explicitly excludes those accused or convicted of war crimes.

“basement” or “portable” courts would be considered “regularly constituted”. When armed opposition groups control territory, however, the relevance of “regularly constituted” is reduced, as the proper means to establish courts would be available. Therefore the legal basis difference under a loose interpretation of “regularly constituted” actually acts as a safeguard in situations short of control of territory, while becoming largely obsolete when armed opposition groups do control territory. Besides being consistent with the equality of belligerents, it conforms to the spirit in which AP II was adopted, above, wherein control of territory appeared to be an essential precondition in negotiating AP II Article 6(2). Finally, as the provisions of AP II do not have customary law status in their entirety, and as many states involved in non-international armed conflict are not parties to the Protocol, the proposed solution would nevertheless reduce the practical differences between the standards.

As has been shown, human rights law was scripted only with states in mind, while IHL, under the principle of equality of belligerents, contemplates equal rights and obligations of states and armed opposition groups. It has also been shown that the philosophical origins of the two regimes differ in key respects. Provost warns that “cross-pollination” between IHL and human rights “must be done with an appreciation of the fundamental differences between the normative frameworks of human rights and humanitarian law”.¹⁴⁴ In circumstances such as the passing of sentences related to the armed conflict, cross-pollination may be undesirable. Therefore it is valid to question the approach, above, wherein Common Article 3(1)(d) incorporates all of ICCPR Article 14.

Instead, we can revisit the Bond definition in order to derive its meaning.¹⁴⁵ Since “appropriate” is based on circumstance, the ambiguity of the term is in fact its strong point. The “appropriate authorities” become those with obligations under Common Article 3, while the “appropriate powers” include those necessary to overcome the disparity of parties to a non-international armed conflict. IHL fair trial guarantees could import human rights law not qua human rights law, but by analogy, such that the equality of belligerents is respected. The legal basis requirement would thereby be met by insurgent “legislation” which establishes a penal tribunal. As already stated, the third criterion of “appropriate standards” is the definitive safeguard upon which any insurgent court must ultimately be judged, and upon which the most attention should be directed. On the other hand, it is important that in applying standards derived from the case law of the various human rights treaty bodies or various international standards, an IHL interpretation takes disparity into account. For example, the UN Basic Principles on the Independence of the Judiciary require constitutional protection of judicial independence, as well as statutory tenure standards for judges,¹⁴⁶ while

144 René Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002, p. 117.

145 Above, at note 72.

146 Articles 1 and 11, Basic Principles on the Independence of the Judiciary, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

case law requires independence from the executive.¹⁴⁷ To overcome disparity, focus should be on fairness rather than any institutional requirements.

The proposed solution of respecting the equality of belligerents wherever rights and obligations flow from international law norms regulating the subject matter of IHL is certainly not without drawbacks when it comes to fair trial rights. From a practical point of view, problems such as the uncertainty of territorial jurisdiction of insurgent penal legislation, as well as the subjecting of individuals to different and potentially contradictory criminal legislation, must be recognized as serious challenges. On the other hand, it would be contrary to the interests of justice if the hierarchy established by the ICC Statute provided an excuse for states to prosecute otherwise compliant insurgent personnel. Legal questions remain as to whether the term “law” is flexible enough to allow for armed opposition groups to create courts and legislation when the interaction of international criminal, humanitarian and human rights law comes out in the wash. Yet even to the extent that fair trial guarantees represent either non-derogable rights or peremptory norms, the creativity of the ICTY Appeals Chamber in defining special contexts of “established by law” can provide inspiration for accommodating interpretations which respect the equality of belligerents in non-international armed conflict. Otherwise, as was noted above, armed opposition groups will have the incentive simply to detain individuals indefinitely in order to avoid their international obligations. Such a solution is certainly far from perfect, but perfect solutions will have to wait “until that day”.

Conclusion

By nature, insurgent groups are transient. Neither their own members nor their adversaries want them to remain as insurgent groups. The very idea of a “regularly constituted” court therefore seems to be hostile to their nature, as the term “regular” implies continuity of some sort. One may easily question how institutions can be built to ensure the proper administration of justice when the goal of all concerned is to eliminate the status quo. “Jungle justice”, in its pejorative sense, is primitive and brutal, like the unscrupulous rebels whom one may imagine occupy the territory. The deadly serious implications of criminal justice warrant a cautious approach to any legal principle which purports to extend its administration to entities outside state control.

One such principle is the equality of belligerents in non-international armed conflict. This paper has argued that in order for the international humanitarian law principle of equality to be effective, the fair trial guarantees should not incorporate human rights criteria which *de jure* prohibit an armed opposition group from establishing courts and passing sentences for offences related to the armed conflict. While such an approach may appear ill-advised, two

147 See collection of case law in Henckaerts and Doswald-Beck, above note 20, Vol. 1, p. 356.

considerations should be taken into account. First, the number of breaches of fair trial guarantees perpetrated by “regularly constituted” state courts would fill volumes. Second, insurgent courts will continue to operate whether or not they are sanctioned by international law.

Recently, the London *Guardian* quoted Mullah Omar, leader of the transient Taliban (once government, now armed opposition group) as intending to try President Hamid Karzai “in an Islamic court for the “massacre” of Afghan civilians”.¹⁴⁸ Right or wrong, it is doubtful whether many Western observers would expect the fair trial guarantees to be observed if Karzai is captured. In Nepal, on the other hand, the OHCHR reports that local residents have reacted positively to Maoist People’s Courts with respect to serious crimes, and that in many cases these courts have been sought out by citizens due in part to “lack of trust” in the state criminal justice system.¹⁴⁹ Such courts and the particular circumstances may or may not be governed by Common Article 3, but the OHCHR evaluation should at least deflect the prejudicial view of insurgent courts in general.

There are to date no instances in which an international body has accepted a sentence passed by an insurgent court to be in conformity with the obligations imposed by either Common Article 3 or AP II. However, there is also precious little reported practice to consider. This paper has further argued that the crucial aspect for the protection of individuals facing prosecution by insurgent courts is not the legal basis of those courts, but rather the judicial guarantees they offer. The challenges of establishing courts which offer all the fundamental guarantees are formidable. To a transient group, they become enormous. It is unlikely that all but the most organized armed opposition groups would be able to meet the standards. However, many armed opposition groups will endeavour to create such courts either out of a desire for justice or to influence public opinion. Some will be more sincere than others. No matter, the international engagement of such efforts will not only potentially result in improved compliance with fair trial requirements, but will also create opportunities for broader armed opposition group engagement to encourage compliance with the law of non-international armed conflict in general.

148 Jason Burke, “Taliban Plan to Fight Through the Winter”, *Guardian*, 29 October 2006.

149 OHCHR-Nepal, above note 118, p. 4.

Selected article on international humanitarian law

Transitional justice and the International Criminal Court – in “the interests of justice”?

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Abstract

Transitional justice encompasses a number of mechanisms that seek to allow post-conflict societies to deal with past atrocities in circumstances of radical change. However, two of these mechanisms – truth commissions and criminal processes – might clash if the former are combined with amnesties. This article examines the possibility of employing the Rome Statute’s Article 53 so as to allow these two mechanisms to operate in a complementary manner. It considers three arguments – an interpretation of Article 53 in accordance with the relevant rules on treaty interpretation, states’ obligations to prosecute certain crimes and the Rome Statute’s approach to prosecutorial discretion – and concludes that Article 53 is ill-suited to accommodate truth commissions in conjunction with amnesties.

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As is well known, the rebellion of the Lord’s Resistance Army (LRA), one of the longest running conflicts in Africa, continues to wreak havoc across the north of Uganda even today. Hundreds of thousands of people have been displaced, scores have been maimed, massacred or raped and thousands of children have been forcibly conscripted in a conflict rivalled by few in its cruelty. Following an

* This contribution is an abridged version of the author’s thesis, University Centre for International Humanitarian Law, Geneva, which was awarded the Certificate of Merit of the 2007 Henry Dunant Prize.

unsuccessful military campaign, the Kampala government enacted an Amnesty Act in 2000 guaranteeing freedom from prosecution and punishment to any Ugandan “who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda” for “any crime committed in the cause of the war or armed rebellion”.¹

However, following Uganda’s ratification of the Rome Statute on 14 June 2002, President Museveni referred the situation concerning the LRA to the International Criminal Court (ICC) in December 2003. He indicated his intention to amend the scope of the Amnesty Act “so as to exclude the leadership of the LRA, ensuring that those bearing the greatest responsibility for the crimes against humanity committed in Northern Uganda are brought to justice”.² In spite of attempts by a delegation of religious, cultural and district leaders from northern Uganda to persuade the ICC Prosecutor to spare the rebels,³ arrest warrants against Joseph Kony, the LRA leader, and four of his closest henchmen were issued soon thereafter.⁴

Nevertheless, the rebellion raged on ferociously and the government, in an attempt to end the cycle of violence, engaged in peace talks with the rebels. These talks, marred by stalemate and frequent walk-outs, put the amnesty question back on the table again. As the rebels are demanding that the arrest warrants be revoked and the ICC Prosecutor seems determined to pursue the prosecution of LRA leaders,⁵ justice and peace seem to have been set on a collision course once more.

Transitional justice

The preceding example illustrates the challenge, faced by many societies emerging from a period of intense turmoil, of how to respond to a legacy of grave crimes. This conundrum forms part of the conceptual underpinnings of transitional justice.

In essence, the concept of transitional justice coalesces the notions of “transition” and “justice”. The former aspect is commonly seen as the transition societies make towards a more legitimate form of governance and/or peace in the wake of repressive rule and/or mayhem. However, the transitional context of a society may vary considerably as, for instance, crimes may have ceased long before

1 The Amnesty Act 2000, Article 3(1) and (2), available at http://www.c-r.org/our-work/accord/northern-uganda/documents/2000_Jan_The_Amnesty_Act.doc (last visited 4 September 2006).

2 “President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC”, ICC Press Release, ICC-20040129-44-En, 29 January 2004, available at http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html (last visited 4 September 2006).

3 “Ugandans ask ICC to spare rebels”, *BBC News*, 16 March 2005, available at <http://news.bbc.co.uk/2/hi/africa/4352901.stm> (last visited 4 September 2006).

4 “Warrant of arrest unsealed against five LRA commanders”, ICC Press Release, ICC-20051014-110-En, 14 October 2005, available at http://www.icc-cpi.int/pressrelease_details&id=114&l=en.html (last visited 4 September 2006).

5 “Ugandan rebels in amnesty demand”, *BBC News*, 6 September 2006, available at <http://news.bbc.co.uk/2/hi/africa/5320254.stm> (last visited 6 September 2006).

the transition takes place (e.g. Spain), they may have been committed up until the transition (Timor Leste) or they may even continue to be committed during the transition (Uganda). As transitional justice remains cognizant of the potential hurdles in such circumstances, it seeks a holistic sense of justice instead of relying solely on a classical, retributive notion of justice.⁶ Therefore, first and foremost, four instruments are employed: (i) trials – of a civil or criminal nature, conducted before national, foreign, international and/or hybrid courts; (ii) truth-seeking – by truth commissions or similar mechanisms; (iii) reparations – which may be of a monetary or a symbolic nature, for instance; and (iv) reforms – through, for example, vetting programs.⁷

Amnesties erase the legal consequences of certain crimes and have been employed in many post-conflict contexts in order to foster national reconciliation. Evidently, the nature of amnesties may vary, ranging from self-serving measures enacted by outgoing regimes (e.g. Chile) to ostensibly sincere attempts to deal with post-conflict legacies (South Africa). Although amnesties are not considered to be part and parcel of transitional justice, they may certainly intersect with its mechanisms, as will be explained in more detail below.

A transitional-justice approach to past atrocities is faced, quite inevitably, with a number of conflicting priorities. One of these, to which the remainder of this contribution is devoted, is the interrelationship between international criminal trials before the ICC and truth-seeking by truth commissions.

The ICC and truth commissions

Having entered into force on 1 July 2002, the Rome Statute establishing the ICC aims at eradicating impunity for the most serious crimes of concern to the international community as a whole. The ICC may assert jurisdiction over genocide, crimes against humanity, war crimes and, once a definition has been adopted, aggression, as soon as a situation is referred to the Prosecutor either by a state party or by the UN Security Council, or, in case of a *proprio motu* investigation, initiated by the Prosecutor.⁸

Truth commissions have functions that are very different from those of a court. Although every truth commission seems to be of a *sui generis* character, reflective of a country's specific experiences, certain common traits have been identified by commentators.

First, a truth commission focuses on the past. Second, a truth commission is not focused on a specific event, but attempts to paint the overall picture of

6 The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary General, UN Doc. S/2004/616, 23 August 2004, p. 9.

7 Mark Freeman, *Truth Commissions and Procedural Fairness*, Cambridge University Press, New York, 2006, p. 5.

8 Rome Statute of the International Criminal Court, 21 UNTS 90, 17 July 1998, entry into force 1 July 2002 (hereinafter Rome Statute), Articles 5, 6, 7, 8, 13.

certain human rights abuses, or violations of international humanitarian law, over a period of time. Third, a truth commission usually exists temporarily and for a pre-defined period of time, ceasing to exist with the submission of a report of its findings. Finally, a truth commission is always vested with some sort of authority, by way of its sponsor, that allows it greater access to information, greater security or protection to dig into sensitive issues, and a greater impact with its report. Most truth commissions are created at a point of political transition within a country, used either to demonstrate or underscore a break with a past record of human rights abuses, to promote national reconciliation, and/or to obtain or sustain political legitimacy.⁹

At the outset, it must be noted that ICC trials and truth commissions are not intrinsically inimical, nor are they mutually exclusive. For instance, transitional justice strategies involving criminal trials based on the evidence amassed by a truth commission could be devised (e.g. Peru). Nevertheless, during or in the aftermath of deadly conflict, practical, logistical and political impediments to conducting criminal trials might exist, such as a devastated institutional framework and/or strongholds retained by ousted regimes. At the same time, amnesties may be the sole incentive for perpetrators to come forward and tell the truth before a truth commission. Amnesties may be conferred in different manners: by a truth commission itself (e.g. South Africa) or by a state following the termination of a truth commission's activities (El Salvador), or they may have come into being through political negotiation prior to the establishment of the truth commission (Sierra Leone).

The Rome Statute does not incorporate a specific provision on amnesties, whether granted in combination with truth commissions or not, most likely due to the widely diverging opinions of negotiating delegations on this matter at the Rome Conference. Villa-Vicencio concludes that the establishment of the ICC is “a little frightening because it could be interpreted, albeit incorrectly, as foreclosing the use of truth commissions which could otherwise encourage political protagonists to turn away from ideologically fixed positions that make for genocide and instead to pursue peaceful coexistence and national reconciliation”.¹⁰ Yet Scharf writes that in the opinion of Kirsch, the chairman of the Preparatory Commission for the ICC and current president of the ICC,

the issue was not definitely resolved during the Diplomatic Conference. Rather, the provisions that were adopted reflect “creative ambiguity” which could potentially allow the prosecutor and judges of the International Criminal Court to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the court.¹¹

9 Priscilla Hayner, “Fifteen truth commissions – 1974 to 1994: a comparative study”, *Human Rights Quarterly*, Vol. 16 (1994), p. 604.

10 Charles Villa-Vicencio, “Why perpetrators should not always be prosecuted: where the International Criminal Court and truth commissions meet”, *Emory Law Journal*, Vol. 49 (2000), p. 205.

11 Michael Scharf, “The amnesty exception to the jurisdiction of the International Criminal Court”, *Cornell Law Journal*, Vol. 32 (1999), pp. 521–2 (footnotes omitted).

Bearing Kirsch's comments in mind, three principal provisions in the Rome Statute could arguably allow for criminal trials and truth commissions to coexist. At first sight, Articles 16 and 17 seem well situated to accommodate truth commissions combined with amnesties. The former stipulates that "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect." It could thus be argued that the Security Council, provided it has determined the existence of a threat to peace, a breach of the peace or an act of aggression, could request the ICC to defer temporarily an investigation or prosecution when states employ truth commissions combined with amnesties. In addition, 17(1)(a) and (b) declare a case inadmissible where "The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution" or where "The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute." It appears plausible to contend that, under certain circumstances, the meting out of amnesties in combination with truth-telling could lead to the inadmissibility of a case before the ICC.

Yet it has been submitted that, should transitional justice mechanisms be taken into consideration by the ICC, Article 53, empowering the ICC Prosecutor to refrain from initiating an investigation or a prosecution "in the interests of justice", could be brought into play as well.¹² This contribution will therefore focus on Article 53 in order to attempt to shed light on the suitability of applying this article in a potential clash between the ICC and truth commissions.

Interpreting "the interests of justice" clauses

In order to determine which situations allow the Prosecutor to invoke the discretionary right to forego an investigation or a prosecution, the first logical matter to consider is the actual wording of Article 53. In the relevant part, the article reads,

12 Ibid., p. 524; Richard Goldstone and Nicole Fritz, "In the interests of justice" and independent referral: the ICC Prosecutor's unprecedented powers", *Leiden Journal of International Law*, Vol. 13 (2000), p. 663; Darryl Robinson, "Serving the interests of justice: amnesties, truth commissions and the International Criminal Court", *European Journal of International Law*, Vol. 14 (3) (2003), p. 486; Jessica Gavron, "Amnesties in light of developments in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly*, Vol. 51 (2002), p.110; Carsten Stahn, "Complementarity, amnesties and alternative forms of justice: some interpretative guidelines for the International Criminal Court", *Journal of International Criminal Justice*, Vol. 3 (2005), pp. 697-8.

1. ... In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

...

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve *the interests of justice*. (emphasis added)

...

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

...

(c) A prosecution is not in *the interests of justice*, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime, he shall inform the Pre-Trial Chamber and the State making a referral under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.” (emphasis added)

The Vienna Convention on the Law of Treaties

As Article 53 does not specifically indicate the possibility of deferral to non-prosecutorial truth-seeking efforts, the prosecutor would appear to have the most leeway in this regard by applying the notion of “the interests of justice”. The phrase’s precise meaning is, at first sight, hardly evident and requires elucidation. The standard test for interpreting treaty rules is laid down in Article 31 of the Vienna Convention on the Law of Treaties (VCLT).¹³ Article 31 of the VCLT calls for the interpretation of a treaty “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. As this formula shows, the emphasis is laid on the treaty terms’ ordinary meaning in their context, while the reference to the treaty’s object and purpose is relegated to a slightly less important role.¹⁴ It is namely only “in the light of” a treaty’s object and purpose that “the initial and preliminary conclusion must be tested and either confirmed or modified”.¹⁵

The ordinary meaning of “the interests of justice” in its context seems to revolve around the question whether “the interests of justice” standard denotes a retributive notion of “justice” or whether additional, broader conceptions of

13 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, entry into force 27 January 1980, Article 31.

14 Ian Sinclair, *The Vienna Convention of the Law of Treaties*, 2nd edn, Manchester University Press, Manchester, 1984, p. 130.

15 Ibid., p. 130.

“justice” may also be taken into account. In other words, when considering “the interests of justice”, should the prosecutor exclusively take into account matters bearing directly on the criminal trial itself, such as the gravity of the crime as indicated in Article 53, or are broader concerns, such as jeopardizing a fragile peace bargain by initiating an investigation or prosecution, also valid? In transitional societies, truth commissions followed by amnesties are often applied as the only feasible accountability mechanism, due to politically precarious circumstances. Therefore, if the scope of “the interests of justice” could reasonably be interpreted to incorporate such concerns, a strong indication of the suitability of Article 53 to allow the Rome Statute to accommodate truth commissions combined with amnesties would be provided.

Article 53 seems to reserve a different role for “the interests of justice” within the investigation phase and within the prosecution phase. In the decision whether to initiate an investigation, “the interests of justice” appears to constitute a criterion which may defeat the other criteria mentioned, that is, the gravity of the crime and the interests of victims. As suggested by its place at the end of the sentence, “the interests of justice” are contrasted with the aforementioned traditional considerations and may be used by the prosecutor to reject commencing an investigation even though the gravity of the crime and the interests of victims may so warrant. This could denote an intention to allow “the interests of justice” to encompass wide-ranging considerations not relating directly to a criminal trial.

In the prosecution phase, “the interests of justice” provides one of the bases, as in the investigation phase, for not initiating a prosecution upon the completion of an investigation. The phrase is placed at the beginning of the sentence and calls upon the Prosecutor to take into account “all the circumstances” in determining whether a prosecution would be in “the interests of justice”. Yet, here, the structure of the sentence does not seem to elevate “the interests of justice” criterion above the other considerations but rather subsumes more traditional issues that could be raised in this matter “including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime”.¹⁶ The disparity in structure with Article 53(1)(c) and the examples of factors to be taken into account seem to indicate an exclusion of broader considerations. However, the door does not seem to be completely closed, since the article speaks of “all the circumstances, *including...*” (emphasis added), which renders the list of factors illustrative instead of exhaustive.

Authors’ opinions

Authors have also voiced diverging interpretations on Article 53. Robinson believes that Article 53 is a relatively broad concept since, according to him,

¹⁶ Rome Statute, above note 8, Article 53(2)(c).

¹⁷ Robinson, above note 12, p. 488.

53(2)(c) contemplates broad considerations such as the age and infirmity of the accused and 53(1)(c) allows “the interests of justice” to trump the other criteria.¹⁷ Stahn, while considering that the value of Article 53 has been overestimated in this context, holds that the express distinction between specific criteria and “the interests of justice” may suggest that the latter embodies a broader concept.¹⁸ Gavron argues that Article 53 could accommodate wider considerations, although it could lead to speculation about future events and the deterrence argument would be turned on its head.¹⁹ Amnesty International (AI) favours a restrictive interpretation of Article 53. Its basic presumption, bearing the Rome Statute’s preamble in mind, is that the interests of justice are always served by prosecuting the crimes within the ICC’s jurisdiction, absent a compelling justification.²⁰ It furthermore considers that “National amnesties, pardons and similar measures of impunity that prevent judicial determinations of guilt or innocence, the emergence of the truth and full reparations to victims are contrary to international law and it would not be in the interests of justice for the Prosecutor to decline to prosecute on the ground that the suspect had benefited from one of these measures.”²¹ Human Rights Watch (HRW) is also a strong proponent of a narrow construction of Article 53, as that would be most consistent with, *inter alia*, the context and the object and purpose of the Rome Statute.²²

As the first of three sub-arguments, HRW puts forward that the Rome Statute’s context, including preambular paragraphs, reflects the ICC’s *raison d’être*, that is, a safeguard against impunity for exceptionally grave crimes.²³ The preamble states, for instance, that “the most serious crimes of concern to the international community as a whole must not go unpunished” and that it is “determined to put an end to impunity for the perpetrators of these crimes”.²⁴ As a treaty’s preamble commonly also contains proof of the treaty’s object and purpose, HRW concludes that “if the phrase “in the interests of justice” is construed in light of the object and purpose of the Rome Statute, a construction that permits consideration of a domestic amnesty, domestic truth commission or peace process and results in permanently not initiating an investigation or proceeding from investigation to trial would be in principle at odds with the object and purpose of the Rome Statute, as set forth in its preamble”.²⁵ As a second contextual argument, although separately, HRW indicates that the Rome Statute

18 Stahn, above note 12, pp. 697–698.

19 Gavron, above note 12, p. 110.

20 Christopher Hall, “Suggestions concerning International Criminal Court prosecutorial policy and strategy and external relations”, *Contribution to an Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor*, 28 March 2003, p. 28, available at <http://www.icc-cpi.int/library/organs/otp/hall.pdf> (last visited 5 October 2006).

21 Ibid., pp. 28–9.

22 “Policy paper: the meaning of “the interests of justice” in Article 53 of the Rome Statute”, Human Rights Watch, June 2005, pp. 4–6 (hereinafter HRW Policy Paper), available at <http://hrw.org/campaigns/icc/docs/ij070505.pdf> (last visited 5 October 2006).

23 Ibid., pp. 5–6.

24 Rome Statute, above note 8, Preamble, paras. 4, 5.

25 HRW Policy Paper, above note 22, p. 6.

preserves the prerogative to deal with issues on the intersection between international peace and security and international justice for the UN Security Council. Acting under Chapter VII, the Security Council is entitled to halt the commencement or continuation of an investigation or prosecution for a renewable period of twelve months.²⁶ This, then, would preclude the ICC Prosecutor from engaging in political determinations as no such power has been allocated to him, and, mindful of the irrefutable political impact of the Prosecutor's activities, the Rome Statute's architects sought to eliminate any possibly negative political consequences by inserting Article 16.²⁷

Interestingly, HRW seems to qualify its previous comments on the Rome Statute's context and object and purpose somewhat with the second sub-argument. First, HRW denies the possibility of Article 53 covering wider notions of justice by a review of the Rome Statute's preamble, the main purpose of which, it is concluded, is to eradicate impunity for the crimes over which the ICC has jurisdiction. However, contradictorily to a certain extent, it is then held that wider notions of justice are also precluded by the fact that the framers of the Rome Statute had already envisaged a possible collision between peace and justice by inserting a role for the UN Security Council in Article 16. Proof that the Rome Statute is aware of this may, however, also be found in its preamble in the recognition that "such grave crimes threaten the peace, security and well-being of the world" and in the reaffirmation of "the Purposes and Principles of the Charter of the United Nations".²⁸ These expressions could therefore also signify that, when framing the Rome Statute, peace, security and well-being were seen as overarching aims to which the ICC is to contribute through repressing criminally odious crimes. Admittedly, as noted by HRW, the main aim is to set up a judicial machinery, but the Rome Statute certainly does not discount the wider context in which it is to function. According to Sinclair, conflicting interpretations of the object and purpose of a treaty are not rare, "given that most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes".²⁹

HRW, finally, points out that other instances of the use of "the interests of justice" in the Rome Statute and in the Rules of Procedure and Evidence do not hint at a broad notion either.³⁰ For example, HRW refers to Article 55, setting out the rights of persons during investigation, requiring, for certain persons, the assigning of legal assistance if the person does not have such assistance or "in any case where the interests of justice so require".³¹ Whereas this certainly is true, the direct context of Article 53 should not be overlooked. Although its exact contours

26 Rome Statute, above note 8, Article 16.

27 HRW Policy Paper, above note 22, p. 7.

28 Rome Statute, above note 8, Preamble, paras. 3, 7.

29 Sinclair, above note 14, p. 130.

30 HRW Policy Paper, above note 22, p. 6.

31 Rome Statute, above note 8, Article 55(2)(c). According to HRW, the use of the phrase in Articles 61, 65 and 67 of the Rome Statute and in Rules 69, 73(6), 82(5), 100(1), 136(1), 165(3) of the Rules of Procedure and Evidence suggests a similar interpretation.

remain ambiguous, it is clear that Article 53 intends to formulate some circumstances in which the initiation of an investigation or a prosecution would be ill-advised. Where references to “the interests of justice” are made in other articles in the Rome Statute, the intention seems to be to secure, as put by HRW, a “good administration of justice”.³² As the decision whether to initiate an investigation or a prosecution, theoretically at least, opens the possibility of embracing wider considerations of justice, a similar use of the phrase in articles seeking to ensure a “good administration of justice” seems less likely. Except for far-fetched, imaginative scenarios, a nascent society’s future will not hinge upon the assigning of legal representation in an individual case.

The *travaux préparatoires* of the Rome Statute, which in any case is a supplementary method of treaty interpretation utilized to confirm the meaning resulting from the application of Article 31 VCLT or to determine the meaning when the first test leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable,³³ do not express an authoritative interpretation either. Syria expressed reservations about “allowing the Prosecutor to stop an investigation in the supposed interests of justice”.³⁴ Denmark, on the other hand, preferred that “the Court might itself consider that suspending a case would serve the interests of justice” instead of assigning the power to suspend proceedings in a particular case to the UN Security Council.³⁵ Whereas the latter comments do seem to allude to a broader dimension to be considered as, in the determination to whom to allot the authority to suspend proceedings, a choice is considered between the Security Council and the Court itself, the Syrian delegate’s remarks appear to be of a general nature. Yet only two delegates pronounced themselves on this issue and neither elaborated on the exact scope of “the interests of justice”.

Conclusion

In conclusion, an interpretation of “the interests of justice” in conformity with the rules of the VCLT is unlikely to lead to a definite answer. Two principal interpretations, both with different nuances and emphases, have emerged and both contain a degree of validity. Therefore the question of whether Article 53 is apt to serve as a tool for reconciling the Rome Statute with truth commissions accompanied by amnesties will have to be assessed on the basis of additional criteria.

32 HRW Policy Paper, above note 22, p. 6.

33 Vienna Convention on the Law of Treaties, above note 13, Article 32.

34 “United Nations diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court, official records”, *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, Vol. II, UN Doc. A/CONF.183/13 (Vol. II), Rome, 15 June–17 July 1998, p. 359, available at http://www.un.org/law/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf (last visited 7 October 2006).

35 Ibid., p. 302.

The obligation to prosecute, the legality of amnesties and “the interests of justice”

In the debate on the question whether Article 53 may serve as a conduit between truth commissions and the ICC, the exigencies posed by international law form a second dimension. The VCLT indicates, namely, that the general rule on treaty interpretation requires that, together with the context, “any relevant rules of international law applicable in the relations between the parties” shall be taken into account.³⁶ Additionally, the applicable law of the ICC includes, as a secondary source, and only where appropriate, “applicable treaties and the principles and rules of international law”.³⁷ With regard to the principal focus of this article, the most relevant rules of international law are those governing the obligation to prosecute certain crimes and, closely connected thereto, the legality of amnesties.

On account of conciseness, a few comments on the scope of the obligation to prosecute the crimes overlapping with the ICC’s jurisdiction *ratione materiae* will follow.³⁸ Overall, neither international customary rules nor international general principles oblige states to exercise jurisdiction, on any ground, over all international crimes.³⁹ Nonetheless, Cassese believes that it is possible to argue that “in those areas where *treaties* provide for such an obligation, a corresponding customary rule may have emerged or be in the process of evolving”.⁴⁰

The obligation to prosecute genocide

As is well known, the 1948 Genocide Convention, crafted in the wake of the Second World War, defines genocide and sets out several provisions relating to the punishment of this offence. It stipulates, for instance, that all persons guilty of genocide – that is, constitutionally responsible rulers, public officials or private persons – shall be punished and, so as to give effect to the provisions of the Genocide Convention, states parties must enact the necessary legislation and, especially, provide for effective penalties.⁴¹ An international penal tribunal and domestic courts of the territorial state are envisaged as enforcement mechanisms.⁴² On a normative level, according to the International Court of Justice (ICJ), “the principles underlying the Convention are principles which are recognized by the

36 Vienna Convention on the Law of Treaties, above note 13, Article 31(3)(c).

37 Rome Statute, above note 8, Article 21(1)(b).

38 The crime of aggression will not be discussed as article 5(2) of the Rome Statute says that the ICC will only have jurisdiction over this crime of aggression once a provision defining the crime and setting out the conditions under which the court shall exercise jurisdiction with respect to this crime has been adopted.

39 Antonio Cassese, *International Criminal Law*, Oxford University Press, New York, 2003, pp. 301–2.

40 Ibid., p. 302.

41 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, 9 December 1948, entry into force 12 January 1951, Articles 4–5.

42 Ibid., Article 6.

civilized nations as binding on states, even without any conventional obligations”.⁴³ Orentlicher considers that “although the opinion does not specify which provisions reflect customary norms, those requiring punishment pursuant to the territorial principle, which are the heart of the Convention, surely are included”.⁴⁴ It appears, therefore, that an obligation to prosecute those guilty of genocide is endorsed by conventional and customary rules.

The obligation to prosecute war crimes

Furthermore, the ICC purports to exercise jurisdiction over four types of war crimes: grave breaches of the Geneva Conventions; other serious violations of the laws and customs applicable in international armed conflict; serious violations of Article 3 common to the four Geneva Conventions; and other serious violations of the laws and customs applicable in armed conflicts not of an international character.⁴⁵ On the level of the obligation to prosecute war crimes, however, important distinctions may be discerned.

All four Geneva Conventions explicitly define the breaches that are deemed “grave”⁴⁶ and detail the consequences attached to their special status. High contracting parties are required to enact legislation necessary to provide for penal sanctions, to search for persons who have allegedly committed such breaches and to bring such persons before their own courts or to extradite them to another high contracting party concerned.⁴⁷ These provisions, supplemented by the relevant provisions of Additional Protocol I (API), also apply to the repression of breaches and grave breaches of API.⁴⁸ The aforementioned obligations form the basis of what the commentary to the Geneva Conventions deems “the cornerstone of the system used for the repression of breaches of the Convention”.⁴⁹

For breaches of the Geneva Conventions other than grave breaches, the common articles on the repression of grave breaches stipulate that each high

43 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, International Court of Justice, Advisory Opinion, 1951 ICJ 15, 28 May 1951, para. 24.

44 Diane Orentlicher, “Settling accounts: the duty to prosecute human rights violations of a prior regime”, *Yale Law Journal*, Vol. 100 (1990–1), p. 2565.

45 Rome Statute, above note 8, Article 8(a), 8(b), 8(c), 8(e).

46 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter GCI), 75 UNTS 31, 12 August 1949, entry into force 21 October 1950, Article 50; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter GCII), 75 UNTS 85, 12 August 1949, entry into force 21 October 1950, Article 51; Convention (III) relative to the Treatment of Prisoners of War (hereinafter GCIII), 75 UNTS 135, 12 August 1949, entry into force 21 October 1950, Article 130; and Convention (IV) relative to the Protection of Civilian Persons in Time of War (hereinafter GCIV), 75 UNTS 287, 12 August 1949, entry into force 21 October 1950, Article 147.

47 GCI, above note 46, Article 49; GCII, above note 46, Article 50; GCIII, above note 46, Article 129; GCIV, above note 46, Article 146.

48 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter API), 1125 UNTS 3, 8 June 1977, entry into force 7 December 1978, Articles 11, 85.

49 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. II, ICRC, Geneva, 1960, p. 590.

contracting party shall take measures necessary for the suppression thereof.⁵⁰ Although the wording is imprecise, according to the commentary “there is no doubt that what is primarily meant is the repression of breaches other than the grave breaches listed and only in the second place administrative measures to ensure respect for the provisions of the Convention”, and, therefore, “all breaches of the Convention should be repressed by national legislation”.⁵¹ Meron concludes that “*mandatory* prosecution (or extradition) of perpetrators of grave breaches of the Geneva Conventions and *discretionary* prosecution for other (nongrave) breaches are left to the penal courts of the detaining power”.⁵²

Common Article 3 of the Geneva Conventions, as well as Additional Protocol II (APII), which develops and supplements common Article 3 without modifying its existing conditions of application,⁵³ applies to conflicts of a non-international character. Unlike provisions relating to grave breaches and other breaches of the Geneva Conventions, common Article 3 and APII are devoid of explicit references to measures to be taken in response to breaches of their provisions. Common Article 3 arguably is covered by the third paragraph of the provision on grave breaches requiring measures for the suppression of “non-grave” breaches of the Conventions. In Meron’s opinion, criminal jurisdiction over these crimes could be of a non-compulsory nature, since violations of common Article 3 are not encompassed by the list of grave breaches of the Geneva Conventions.⁵⁴

The question whether customary law requires the permissive or obligatory prosecution of war crimes is not obvious. The authors of the International Committee of the Red Cross (ICRC) customary law study assert that international customary law requires states to

investigate war crimes allegedly committed by their national or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.⁵⁵

This would imply that, in international and non-international armed conflicts, “states must exercise the criminal jurisdiction which their national legislation confers upon their courts, be it limited to territorial and personal jurisdiction”.⁵⁶ Universal jurisdiction for war crimes, obligatory for grave breaches

50 GCI, above note 46, Article 49(3); GCII, above note 46, Article 50(3); GCIII, above note 46, Article 129(3); GCIV, above note 46, Article 146(3).

51 Pictet, above note 49, p. 594.

52 Theodor Meron, “International criminalization of internal atrocities”, *American Journal of International Law*, Vol. 89 (1995), p. 564 (emphasis added).

53 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter APII), 1125 UNTS 609, 8 June 1977, entry into force 7 December 1978, Article 1(1).

54 Meron, above note 52, p. 566.

55 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I: Rules*, ICRC and Cambridge University Press, Geneva and Cambridge, 2005, p. 607.

56 *Ibid.*, p. 607.

only, may be claimed as a right.⁵⁷ Whereas “must” seems to imply an obligation, the insertion of “if appropriate” could be interpreted in at least two ways. First, “if appropriate” could relate to evidentiary issues requiring sufficient evidence to initiate criminal proceedings against an alleged offender. Second, keeping in mind that breaches of the Geneva Conventions falling short of grave breaches might not necessitate penal measures, it could be taken to mean that a criminal prosecution is merely one of the available alternatives. “Must” also seems to emphasize the investigation of war crimes rather than the prosecution of these acts. The obligation to prosecute alleged perpetrators of grave breaches does seem to have attained customary law status by virtue of “the almost universal ratification of the Geneva Conventions and the widespread occurrence of implementing legislation enacted by States around the world”.⁵⁸

Therefore, while it is outside the scope of this article to examine this matter in depth, it is unclear whether the sources of the war crimes within the jurisdiction of the ICC require the permissive or obligatory prosecution of these acts. Suffice it to say, for the purposes of this contribution, that only grave breaches of the Geneva Conventions attract an unequivocal obligation, conventional and customary, of criminal prosecution.

The obligation to prosecute crimes against humanity

Crimes against humanity have not been made the subject of a specialized convention. As the offences underlying crimes against humanity coincide, to a large extent, with human rights law, obligations to prosecute single acts might arise from other sources. Torture, for example, laid down in Article 7(1)(f) of the Rome Statute, is also a crime under the Convention against Torture (CAT). The CAT requires states parties, among other things, to “ensure that all acts of torture are offences under its criminal law”, and once a state party finds an alleged torturer on its territory it shall, if it does not extradite him, “submit the case to its competent authorities for the purpose of prosecution”.⁵⁹

A clearly enunciated conventional obligation to prosecute crimes with the distinctive features of crimes against humanity is therefore non-existent. It could, on the other hand, be argued that if underlying offences of crimes against humanity attract a conventional or customary obligation to prosecute, perpetrators of the same crimes committed as part of a systematic or widespread attack should, *a fortiori*, be brought to trial. Should Cassese’s stipulation be accepted that customary rules on obligations to prosecute may only emerge in areas where treaties provide for such an obligation, it will be hard to defend that this has occurred with regard to crimes against humanity. Nonetheless, authors

57 Ibid., pp. 604–7.

58 Yasmin Naqvi, “Amnesty for war crimes: defining the limits of international recognition”, *International Review of the Red Cross*, Vol. 85 (851), 2003, pp. 596–7.

59 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984, entry into force 26 June 1987, Articles 4(1), 7(1).

such as Bassiouni have written that customary law obliges states to prosecute or to extradite perpetrators of crimes against humanity.⁶⁰ It seems, therefore, that the matter remains open for debate.

The Rome Statute

Those convinced of the existence of a customary obligation to prosecute genocide, crimes against humanity and war crimes also contend that, regarding states parties, the Rome Statute itself recognizes such an obligation.⁶¹ According to this line of reasoning, the Rome Statute's preambular paragraphs affirming that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" and recalling that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" correspond thereto.⁶²

Although framed ambiguously, it has been suggested that the latter is sort of a "Martens Clause" referring not directly to the core crimes within the jurisdiction of the ICC but to a broad class of crimes which states must prosecute.⁶³ In addition, it is said, Article 17, setting out the ICC's pivotal complementarity mechanism, indicates that states not only possess the first right to prosecute perpetrators of the crimes within the ICC's jurisdictional reach but also a duty to do so.⁶⁴ Neither this article nor the remainder of the Rome Statute's operative part explicitly espouses an obligation to prosecute emanating from the Statute, but, mindful of concerns of state sovereignty, it effectively circumscribes the instances allowing the ICC to exercise its jurisdiction. A violation of an obligation to prosecute is not unambiguously foreseen as a jurisdictional trigger and a failure of an obligation to prosecute derived from other sources than the Rome Statute cannot alter the envisaged triggering mechanisms either.

Yet a logical reading of Article 17, and the Rome Statute as a whole, would certainly suggest that states parties are under an obligation to prosecute the crimes within the jurisdiction of the ICC. The nature of the ICC as a safety net, ensuring that the perpetrators of the most serious crimes of concern to the international community as a whole will not escape punishment, indicates that, one way or the other, perpetrators of these crimes must be held accountable.

An important qualifier in the admissibility requirements of ICC cases is Article 17(1)(d), excluding cases not of sufficient gravity, thus seemingly limiting states parties' obligation to prosecute crimes surpassing this, arguably hazy, threshold. Taking into account the characteristics of genocide and crimes against

60 Cherif M. Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd rev. edn, Kluwer Law International, The Hague, London, Boston, 1999, p. 219.

61 HRW Policy Paper, above note 22, p. 11.

62 Rome Statute, above note 8, Preamble, paras. 4 and 6.

63 Otto Triffterer and Morten Bergsmo, "Preamble", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, pp. 12–13.

64 HRW Policy Paper, above note 22, p. 11.

humanity and the fact that the Court intends to exercise its jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of war crimes, it will be hard to imagine that these acts, as such, will be deemed of insufficient gravity.

The ICC Office of the Prosecutor (OTP) considers, however, that, in determining whom to prosecute, the criterion of the gravity of the crime also entails an assessment of the degree of participation.⁶⁵ Consequently, it is concluded that “The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.”⁶⁶ In respect of possible impunity ensuing for other offenders it is said that “alternative means for resolving the situation may be necessary, whether by encouraging and facilitating national prosecutions by strengthening or rebuilding national justice systems, by providing international assistance to those systems or by some other means”.⁶⁷

Whether the degree of responsibility of the offender, apart from the objective gravity of the crime, should also be taken into account in determining the extent of states parties’ obligation to prosecute is not certain. Yet it seems reasonable to translate the OTP’s comments into an understanding of the Rome Statute obliging states parties to prosecute those most responsible for the crimes whereas other means might suffice in dealing with other offenders. The OTP’s statement, namely, juxtaposes “some other means” against national prosecutions whereby the former could reasonably be interpreted to cover non-prosecutorial accountability mechanisms.

Additionally, it is submitted by Naqvi that “the attempt to reach a definite conclusion as to whether there is indeed a customary duty to prosecute international crimes on the basis of the complementarity principle infers too much from what is essentially a mechanism to establish which court is competent to try a case”.⁶⁸ Support for this argument is found in the facts that states are reluctant to assume additional obligations under customary law as a result of the ratification of a new legal instrument and, with regard to the war crimes enumerated in the Rome Statute, negotiators restricted themselves to identifying the war crimes recognized in customary law implying that they, hence, did not pronounce themselves on the customary obligation to prosecute these acts.⁶⁹

65 ICC Office of the Prosecutor, “Paper on some policy issues before the Office of the Prosecutor”, September 2003, p. 7, available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf (last visited 12 October 2006).

66 Ibid., p. 7.

67 Ibid.

68 Naqvi, above note 58, p. 599.

69 Ibid., p. 600.

The legality of amnesties

A close corollary of an obligation to prosecute certain crimes would be a ban on the granting of amnesties. Bases for amnesties certainly do exist in international law, such as Article 6(5) of APII. Although APII does not specify which acts shall be eligible for an amnesty, commentators have suggested that acts constituting war crimes are to be excluded, as the object and purpose of APII, in line with the VCLT rules on the interpretation of treaties, is greater protection for victims of non-international armed conflicts.⁷⁰ It is also held that the ICRC reads the article narrowly, as its main rationale is seen as the encouragement of immunity for the mere participation in hostilities but not for violations of international humanitarian law (IHL).⁷¹ At the same time, the ICRC notes that amnesties are not excluded by IHL “as long as the principle that those having committed grave breaches have to be either prosecuted or extradited is not voided of its substance”.⁷² The ICRC customary law study shares the assertion that war crimes may not be the object of an amnesty.⁷³

Recent developments also confirm such a position and indicate, more generally, a changing attitude towards amnesties in international law. For instance, following the inclusion of an amnesty provision in a peace accord concluded between the Sierra Leone government and a rebellious faction,⁷⁴ the UN Special Representative appended a handwritten disclaimer to the agreement stating that the United Nations interprets the amnesty provision as not applying to international crimes of genocide, crimes against humanity, war crimes and other serious violations of IHL.⁷⁵ Accordingly, Article 10 of the Statute of the Special Court for Sierra Leone (SCSL) provides that an amnesty for crimes falling under the court’s jurisdiction “shall not be a bar to prosecution”, and the SCSL’s Appeals Chamber explicitly held that the Lomé agreement amnesty could not deprive it of its jurisdiction.⁷⁶

Therefore, in recent times, a strong presumption in favour of the illegality of amnesties in international law seems to have appeared. However, the state of international law as it stands today does not yet support a “general obligation for States to refrain from enacting amnesty laws” with regard to international crimes.⁷⁷

70 Ibid., p. 604.

71 Ibid., pp. 604–5. Douglass Cassel, “Lessons from the Americas: guidelines for international response to amnesties for atrocities”, *Law and Contemporary Problems*, Vol. 59 (4) (1996), p. 218.

72 Cassel, above note 71, p. 218.

73 Henckaerts and Doswald-Beck, above note 55, pp. 612–14.

74 Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Article ix, available at <http://www.sierra-leone.org/lomeaccord.html> (last visited 12 October 2006).

75 Human Rights Watch, “World Report 2001”, available at <http://www.hrw.org/wr2k1/africa/sierraleone.html> (last visited 12 October 2006).

76 Special Court for Sierra Leone, *Prosecutor against Morris Kalon, Brima Bazzy Kamara*, Case No. SCSL-04-15-PT-060, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Appeals Chamber), 13 March 2004, para. 88.

77 Cassese, above note 39, p. 315.

Conclusion

The previous paragraphs attempted to point out that the law on the obligation to prosecute certain crimes is still unsettled. A general duty obliging states to prosecute international crimes, which, existing independently from the Rome Statute, would not trigger or alter the jurisdiction of the ICC at any rate, has not yet crystallized. Closely connected thereto, loopholes through which amnesties could pass remain, although there is an incontestable drift in international law towards the outlawing of amnesties.

Even in respect of the accepted or least contested customary obligations to prosecute specific crimes, difficult problems would arise for the ICC Prosecutor when applied in the context of “the interests of justice”. For example, in terms of overlapping crimes, the *actus reus* of genocide may coincide to a considerable extent with crimes underlying crimes against humanity, such as “killing members of the group” in comparison with “murder” and “extermination”.⁷⁸ Especially in the initial stages of an investigation, it might still not be entirely clear which legal qualification best fits the crimes under investigation. Consequently, from a practical perspective, a complex analysis as to the role of potentially differing obligations to prosecute appended to distinct crimes might not be suitable at this stage of the process.

States parties to the Rome Statute are arguably under an obligation to prosecute the crimes enumerated therein, although it seems too great a stretch to extrapolate from the Statute a customary duty to prosecute. HRW contends that this obligation is reflected in Article 17 relating to the Statute’s admissibility requirements. Yet, relying on this obligation, not a specific feature of Article 17 in any case, so as to determine whether the Prosecutor may invoke “the interests of justice” provision to halt an investigation or a prosecution seems to constitute a misconstruction of the Rome Statute’s structure. As said earlier, the Prosecutor must base his assessment as to the existence of a reasonable basis to proceed with an investigation or a prosecution under the Rome Statute on several factors. Besides having to consider whether “the interests of justice” do not warrant an investigation or a prosecution, the Prosecutor has to determine whether, in the case of an investigation, “the case is or would be admissible under Article 17”, and, in the case of a prosecution, whether “the case is inadmissible under Article 17”.⁷⁹ Although the formulations differ slightly, it is apparent that the admissibility requirements of Article 17, which, according to HRW, also contains states parties’ obligation to prosecute, must be appraised. A certain amount of overlap between these factors may be detected as “the gravity of the crime” is mentioned as an admissibility requirement in Article 17, but it also has to be considered within “the interests of justice” clauses. However, the obligation to prosecute, unlike the “gravity of the crime”, is not explicitly mentioned within “the interests of justice”, and a second determination of this aspect, or at least a *renvoi* thereto, seems

78 Rome Statute, above note 8, Articles 6(a), 7(1)(a), 7(1)(b).

79 Ibid., Articles 53(1)(b), 53(2)(b).

therefore illogical. Admissibility requirements, including the obligation of states parties to prosecute according to HRW, and the issue of whether “the interests of justice” would oppose an investigation or prosecution are thus separate determinations within the Prosecutor’s assessment as to the basis to proceed, leaving no room for a re-evaluation of Article 17 within the latter aspect, despite a certain overlap.

Therefore it is submitted here that the Prosecutor’s decision whether to decline to investigate or to prosecute based on “the interests of justice” should not be weighed against a general or a specific obligation to prosecute ICC crimes and the legality of amnesty bargains. Yet fully fledged international rules relating to the obligation to prosecute certain crimes and the legality of amnesties would seem to possess the potential to become a relevant factor within assessments as to “the interests of justice”. If, or when, this occurs, the issue whether a treaty rule is to be interpreted in the light of the rules of international law in force at the time of the conclusion of the treaty or whether a development of international law should also be taken into account will have to be resolved first.⁸⁰

Prosecutorial discretion and “the interests of justice”

Black’s Law Dictionary holds that “when applied to public functionaries, discretion means a power or right conferred upon them by law of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others”.⁸¹ The concept serves, among other things, to secure the Prosecutor’s independence by removing extraneous factors in the prosecutorial decision-making process.⁸² This may become especially important in international criminal proceedings as the international Prosecutor exerts his or her discretionary powers in a politically charged judicial arena.

As has been indicated already, in situations of transitional justice, a truth commission combined with amnesties might be the only mechanism available to a fledgling society to deal with its past. What is more, demands for criminal trials might spark a renewed outbreak of hostilities or lead to the overthrow of a newly installed government.

The questions arises whether political considerations of this kind are to be taken into account by the ICC Prosecutor in deciding whether to defer to truth commissions combined with amnesties. The following paragraph will seek to provide an answer from the perspective of the Rome Statute’s approach to prosecutorial discretion, of which “the interests of justice” clauses of Article 53

80 Sinclair, above note 14, p. 139.

81 Henry Campbell Black, *Black’s Law Dictionary: Definition of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 6th edn, West Publishing Co., St. Paul, Minn., 1990, p. 466.

82 Matthew Brubacher, “Prosecutorial discretion within the International Criminal Court”, *Journal of International Criminal Justice*, Vol. 2 (2004), pp. 75–7.

form part. Before turning to the Rome Statute’s position, elements of the discretion enjoyed by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) will first be discussed, so as to illustrate the development of international prosecutorial discretion.

The ICTY Prosecutor

The ICTY has, in general, moved from a strong adversarial paradigm towards a mixed system permeated by aspects of common law as well as of civil law.⁸³ The Tribunal’s Statute guarantees the Prosecutor a broad, though not unlimited, discretion in the discharge of his or her duties. Namely it entrusts the Prosecutor, “ex-officio or on the basis of information obtained from any source”, with the exclusive authority to initiate investigations as soon as he or she has decided that there is a sufficient basis to proceed upon an assessment of the information received or obtained.⁸⁴ Once satisfied that a *prima facie* case exists, the Prosecutor shall prepare an indictment which a Trial Chamber Judge must confirm before trial proceedings may be commenced.⁸⁵ Therefore, apart from a review of the *prima facie* threshold, the ICTY Statute leaves the Prosecutor’s discretion virtually unchecked, as preceding decisions as to the initiation of investigations, the persons being investigated and the conduct of investigations are not subject to judicial scrutiny. In the words of Judge Wald, “nowhere in the Statute is any Chamber of the ICTY given authority to dismiss an indictment or any count therein because it disagrees with the wisdom of the Prosecutor’s decision to bring a case”.⁸⁶

The jurisprudence, however, indicates that the nature of the Prosecutor as an official vested with specific duties imposed by the Statute of the Tribunal circumscribes his or her discretion in a more general way, requiring the discharge of his or her functions with full respect for the law and recognized principles of human rights.⁸⁷ In this regard, the evolution of the Prosecutor’s role, compared with historic international criminal tribunals, is of relevance too. According to May, the ICTY Prosecutor is no longer limited to presenting the facts in a manner most favourable to his or her standpoints; a commitment to the establishment of the truth and the interests of justice has arisen too.⁸⁸ The jurisprudence indicates that “the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal

83 Darryl Mundis, “From common law towards civil law: the evolution of the ICTY Rules of Procedure and Evidence”, *Leiden Journal of International Law*, Vol. 14 (2001), p. 368.

84 Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), 25 May 1993, Article 18(1).

85 Ibid., Articles 18(4), 19(1).

86 ICTY, *Prosecutor v. Goran Jelisić*, Case No. IT-95-10, Judgement (Appeals Chamber), Partial Dissenting Opinion of Judge Wald, 5 July 2001, para. 4.

87 ICTY, *Prosecutor v. Zejnil Delalić, Zdravko Mučić (aka “PAVO”), Hazim Delić and Esad Landžo (aka “ZENGA”) (“Čelibići Case”)*, Case No. IT-96-21-A, Judgement (Appeals Chamber), 20 February 2001, para. 604.

88 Richard May and Marieke Wierda, *International Criminal Evidence*, Transnational Publishers, Ardsley, NY, 2002, pp. 33–4.

justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting”.⁸⁹

The ICC Prosecutor

The Rome Statute, envisaging similarly to the ICTY an adversarial model infused with certain non-adversarial elements,⁹⁰ departs significantly from the ICTY’s approach to prosecutorial discretion. States in favour of broad prosecutorial discretion and those wary of an overzealous, politically inspired Prosecutor encroaching upon their sovereignty eventually compromised on additional checks on the Prosecutor’s discretion. Regarding the Prosecutor’s *proprio motu* powers, one of the major stumbling blocks during the negotiations, the Rome Statute provides a complicated construction. Article 15 of the Rome Statute sets this power out in more detail and reads in the relevant part:

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received ...
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation ...
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation ...⁹¹

After laying down the Prosecutor’s unconditional discretionary power in the first paragraph to initiate investigations, the second paragraph of Article 15 contains an obligation as to the analysis of the seriousness of the information on which a *proprio motu* investigation is based. Bergsmo and Pejić indicate that an evidentiary analysis pertaining to the information’s seriousness is required, which may concern the nature of the alleged crimes and the information’s incriminatory strength, as opposed to a test of appropriateness.⁹² Although Article 15(1) speaks of the initiation of investigations, Article 15(6) refers to the steps to be taken in the first and second paragraphs as a “preliminary investigation”. This description seems more accurate, since a full-blown investigation requires judicial approval pursuant to the third and fourth paragraphs of Article 15.

89 ICTY, *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Santić, also known as “Vlado”*, Decision on Communication between the Parties and their Witnesses (Trial Chamber), IT-95-16, 21 September 1998.

90 Cassese, above note 39, p. 385.

91 Rome Statute, above note 8, Articles 15(1)–(4).

92 Morten Bergsmo and Jelena Pejić, “Article 15”, Triffterer, above note 63, p. 365.

As soon as the Prosecutor is convinced of the existence of a reasonable basis on which to proceed, on the basis of the criteria enumerated in Article 53(1)(A)–(C)⁹³, article 15(3) imposes the obligation on the Prosecutor to submit a request for an investigation to the Pre-Trial Chamber. The Pre-Trial Chamber will review, together with a jurisdictional assessment, whether the information in the possession of the Prosecutor warrants the conclusion that there is a reasonable basis to proceed, upon which it may authorize the Prosecutor to start a full investigation in conformity with Articles 53 and 54. Article 53, applicable to all three jurisdictional triggers,⁹⁴ contains further judicial restraints in respect of prosecutorial discretion. Should the Prosecutor base his decision not to proceed with an investigation or prosecution solely on “the interests of justice” clause, a requirement arises to “inform the Pre-Trial Chamber” or to “inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion”.⁹⁵ In any event, the Pre-Trial Chamber may review “interests of justice” decisions on its own initiative and, should it decide to do so, the entry into force of the decision will be contingent upon the Chamber’s confirmation.⁹⁶ In addition, when requested by a state making a referral under Article 14 or by the UN Security Council under Article 13(b), the Pre-Trial Chamber may review decisions to forsake an investigation or a prosecution on any of the grounds enumerated in Articles 15(1) and 15(2) and request the Prosecutor to reconsider.⁹⁷

With regard to the confirmation of charges, the Rome Statute, in contrast to the ICTY, foresees the holding of a hearing, in the presence of the person charged, his or her counsel and the Prosecutor, to confirm the charges on which the Prosecutor intends to seek trial.⁹⁸ In certain circumstances, upon request of the Prosecutor or on a motion of the Pre-Trial Chamber, the hearing may also be held in the absence of the person charged.⁹⁹ On the basis of this hearing, the Pre-Trial Chamber determines whether “there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”.¹⁰⁰

Besides Pre-Trial Chamber control, the Rome Statute also puts forward several additional constraints on the Prosecutor. For instance, Article 18, pertaining to preliminary rulings regarding admissibility, is one of the manifestations of the Rome Statute’s complementary character and requires the Prosecutor to notify all states parties and those which normally would exercise jurisdiction over the crimes concerned when an investigation pursuant to state referral or *proprio motu* powers is commenced.¹⁰¹ Unless the Pre-Trial Chamber

93 ICTY Rules of Procedure and Evidence, ICC-ASP/1/3, 3–10 September 2002, rule 48.

94 Morten Bergsmo and Pieter Kruger, “Article 53”, Triffterer, above note 63, p. 702.

95 Rome Statute, above note 8, Articles 15(1)(c), 15(2)(c).

96 Ibid., Article 15(3)(b).

97 Ibid., Article 15(3)(a).

98 Ibid., Article 61(1).

99 Ibid., Article 61(2).

100 Ibid., Article 61(7).

101 Ibid., Article 18(1).

authorizes an investigation on application of the Prosecutor, a national investigation will take precedence once a state has informed the Court that it is investigating or has investigated the acts in question.¹⁰² Also, as stated earlier, Article 16 allows the UN Security Council, in case of intrusion into its domain, to halt the commencement or continuation of an investigation or prosecution under the Rome Statute.

In addition, the expansion of the international Prosecutor's role has continued with the adoption of the Rome Statute. Where the ICTY Prosecutor was merely obliged to disclose exculpatory evidence, all facts and evidence must be covered by an ICC investigation and incriminating and exonerating circumstances must be investigated equally in order to establish the truth.¹⁰³ The Prosecutor thus assumes "a role more akin to that of an investigating judge in the civil law system".¹⁰⁴

The final example of an additional constraint to be mentioned here is the position of victims. Whereas the architects of the ad hoc Tribunals withheld from victims the right to partake individually in proceedings and to obtain compensation,¹⁰⁵ the Rome Statute considerably expands their role in the judicial process of the ICC.¹⁰⁶ With regard to prosecutorial discretion, both "interests of justice" clauses in Article 53 specifically oblige the Prosecutor to take account of the interests of victims in deciding whether there is a reasonable basis to proceed with an investigation or a prosecution. Furthermore, the Prosecutor is under a duty to respect the interests and personal circumstances of victims when taking appropriate measures for his investigations and prosecutions.¹⁰⁷

Prosecutorial discretion's side effects

Yet besides securing the Prosecutor's independence, prosecutorial discretion as to issues of investigation and prosecution may give rise to misgivings of various kinds. Two examples with regard to the ICTY may be helpful.

Virtually all sides involved in the Yugoslav disintegration have accused the ICTY Prosecutor of, among other things, employing a politically motivated prosecutorial policy. Côté holds that the criteria on which discretionary decisions are based are "numerous, ill-sorted and sometimes hazy" and that, despite Prosecutors' repudiation of the existence of a political dimension to the exercise of discretionary powers, it is hard to imagine that such considerations are always discarded in matters closely linked to vast political interests.¹⁰⁸ In addition, the

102 Ibid., Article 18(2).

103 Ibid., Article 54(1)(a).

104 May and Wierda, above note 88, p. 34.

105 Claude Jorda and Jérôme De Hemptinne, "The Status and Role of the Victim", in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, Vol. II, Oxford University Press, New York, 2002, p. 1389.

106 Rome Statute, above note 8, Articles 15(3), 19(3), 68(3).

107 Ibid., Article 54(1)(b).

108 Luc Côté, "Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law", *Journal of International Criminal Justice*, Vol. 3 (2005), pp. 169–71.

same author rightly maintains that the exercise of discretionary power is inherently political and that the truly disturbing aspect is the secretive nature of discretionary decision-making, casting doubt on the legitimacy and impartiality of decisions.¹⁰⁹ Thus the ICTY Prosecutor’s decision to establish a committee to assess the allegations that NATO committed serious violations of IHL and to advise the ICTY whether there is a sufficient basis to proceed with an investigation into some or all the allegations¹¹⁰ was initially hailed as an attempt to elucidate the process of discretionary decision-making. Interestingly, as explained above, the ICTY Prosecutor was not under an obligation to reveal the criteria guiding her decisions to investigate and, as has been pointed out, the report seems to resemble a preliminary examination as required for *proprio motu* investigations of the ICC Prosecutor.¹¹¹ Although a thorough discussion would be outside the scope of this research, the report’s conclusion not recommending the commencement of an investigation into the bombing campaign has met with considerable criticism. Côté writes that the reasoning behind this conclusion raises doubts as to double standards in respect of the Federal Republic of Yugoslavia (FRY) and NATO and that, consequently, the reaffirmation of the Prosecutor’s independence and impartiality, insofar as this was the Prosecutor’s principal aim, has not been achieved.¹¹²

Additionally and closely connected to the previous issue, the ICTY Prosecutor has had to face allegations of ethnic bias. One of the accused in the aforementioned *Čelebići* case maintained that he had been the victim of selective prosecution as, in order to appear more even-handed, the Prosecutor allegedly singled him out as a young Bosnian Muslim camp guard to represent the group to which he belonged, while indictments against all other defendants without military rank who were non-Muslims of Serbian ethnicity were withdrawn.¹¹³ The Appeals Chamber, as indicated above, described the limitation to prosecutorial discretion posed by the recognized principles of human rights and said, with regard to the ICTY Statute’s right to equality before the law, that it “prohibits discrimination in the application of the law based on impermissible motives such as, *inter alia*, race, colour, religion, opinion, national or ethnic origin”.¹¹⁴ The Appeals Chamber went on to say that a presumption exists that the prosecutorial functions under the Statute are exercised regularly, although evidence establishing that the discretion has in fact not been exercised in accordance with the ICTY Statute may rebut this presumption.¹¹⁵ With regard to the right to equality before the law, a two-pronged

109 Ibid., p. 171.

110 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000, para. 3, available at <http://www.un.org/icty/pressreal/nato061300.htm> (last visited 19 October 2006).

111 Côté, above note 108, p. 180.

112 Ibid., p. 183.

113 ICTY, *Prosecutor v. Zejnil Delalić, Zdravko Mučić (aka “PAVO”), Hazim Delić and Esad Landžo (aka “ZENGA”) (“Čelebići Case”)*, Case No. IT-96-21-A, Judgement (Appeals Chamber), 20 February 2001, para. 596.

114 Ibid., para. 605.

115 Ibid., para. 611.

test must be satisfied: first, evidence must be brought “from which a clear inference can be drawn that the Prosecutor was motivated in that case by a factor inconsistent with that principle” and, second, “because the principle is one of *equality* of persons before the law, it involves a comparison with the legal treatment of other persons who must be similarly situated for such a comparison to be a meaningful one”.¹¹⁶

Conclusion

The Rome Statute seems unpromising in terms of a prosecutorial appraisal of political factors in order to determine what is in “the interests of justice”. Certainly, the interplay between international politics and international criminal justice is not overlooked by the Rome Statute, as, in the words of Zappalà, “it appeared necessary to preserve the integrity of the proceedings without turning a blind eye to their political dimension”.¹¹⁷ This has been achieved by allowing the UN Security Council to request that investigations or prosecutions not be commenced or proceeded with in the interests of international peace and security and by “entrusting the Pre-Trial Chamber with the duty to safeguard the interests of a correct administration of justice”.¹¹⁸

Thus the latter aspect, as attested to by various provisions in the Rome Statute, seems to exclude, or at least to limit significantly, the possibility of the Prosecutor resorting to political considerations within his discretionary powers. The Rome Statute in other words goes to great lengths to reduce the obscure nature of discretionary decision-making by imposing obligations on the Prosecutor to provide reasons for decisions not to proceed with investigations or prosecutions.

First, should the Prosecutor decide not to initiate a *proprio motu* investigation once a preliminary investigation has been conducted in accordance with Article 15(1) and (2), a duty arises to inform those who provided the information.¹¹⁹ For instance, the Prosecutor’s decisions on communications regarding Venezuela and Iraq were made public and, in both cases, the Prosecutor indicated that the first threshold had not been met – that is, a reasonable basis for believing that a crime within the jurisdiction of the Court had been committed was absent.¹²⁰

Second, as explained above, the Pre-Trial Chamber has to be informed of the Prosecutor’s decisions not to proceed with an investigation based solely on

116 Ibid.

117 Salvatore Zappalà, *Human Rights in International Criminal Proceedings*, Oxford University Press, Oxford, 2003, pp. 43–4.

118 Ibid., p. 44.

119 Rome Statute, above note 8, Article 15(6).

120 Venezuela Response, Letter of the Office of the Prosecutor, 9 February 2006, available at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf (last visited 21 October 2006). Iraq Response, Letter of the Office of the Prosecutor, 9 February 2006, available at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (last visited 21 October 2006).

“the interests of justice”, and, in addition, the Prosecutor is obliged to notify the Pre-Trial Chamber, the UN Security Council and the referring state, depending on who referred the situation, of a determination, on any ground, that there is no reasonable basis for a prosecution. Furthermore, the Pre-Trial Chamber’s powers to review “interests of justice” decisions on its own initiative are even greater than at first glance. Although Article 53(3)(b) apparently lays down a discretionary power, the final sentence makes the validity of these decisions contingent upon Pre-Trial Chamber approval. Whereas it may be questioned whether the approval is required only if the Pre-Trial Chamber decides to exercise its right to review “interests of justice” decisions on its own initiative, Bergsmo and Kruger write that

If the Prosecutor’s decision has no validity unless confirmed by the Pre-Trial Chamber, the Chamber is *necessarily* bound to review all such decisions of the Prosecutor. A different interpretation would result in the potential paralysis of the Court were the Pre-Trial Chamber to refrain from reviewing such a decision.¹²¹

Therefore, by obliging the Prosecutor to provide reasons for decisions based on discretionary powers and by allowing the Pre-Trial Chamber to review decisions based on delicate criteria on its own initiative, the Rome Statute seeks to avoid arbitrary decisions veiled by prosecutorial discretion. Logically, if the Prosecutor, in the exercise of his discretionary powers, was to take political factors into account in determining “the interests of justice”, his decision would have to be corroborated by reasoning and communicated to those providing the information, the Pre-Trial Chamber, the UN Security Council or a state referring the situation.

This situation might give rise to auxiliary negative effects. The Pre-Trial Chamber would, for instance, become mired in political judgement, having to express itself on the Prosecutor’s assessment of certain political circumstances on the basis of Article 53(3)(b) of the Rome Statute. The appearance of the Court as an independent and impartial institution would be gravely impaired the moment it explicitly affixes a political dimension to the discharge of its judicial functions. In addition, states referring situations to the Prosecutor and those providing information, especially victims’ organizations and non-governmental organizations (NGOs), might become disinclined to continue their co-operation with the Prosecutor were political parameters to be applied by the OTP. Cumulatively, these and other consequences of the Prosecutor playing an explicit political role might affect the Court as a whole and entail its marginalization on the international scene.

Other considerations also militate against interpreting prosecutorial discretion as leaving room for political contemplations. The Security Council entrusted the Prosecutors of the ad hoc tribunals with the task of safeguarding the interests of the international community, including those of the victims of the

¹²¹ Bergsmo and Kruger, above note 94, p. 713 (emphasis added).

conflicts, throughout the proceedings. However, after pointing out that the interests of the Prosecutor and the victims may diverge,¹²² Jorda and de Hemptinne ask,

Would it not have constituted an additional guarantee of fairness, justice, and legal certainty to have granted the victim or his representatives a right to scrutinize the exercise of the Prosecutor's discretionary power, or even an actual right of appeal ...? Such measures would guarantee fairness and justice. First of all, because persons whose most fundamental rights have been flouted would thus have not only the certainty of being heard but also the formal assurance that, if it were decided to take no action on their case, the reasons for such decision would be based on overriding public-interests considerations and not on purely political grounds.¹²³

The situation at the ICC is different. As mentioned previously, the ICC Prosecutor is obliged to weigh his decision not to investigate or to prosecute against the interests of victims, who, in addition, may make presentations to the Pre-Trial Chamber when the Prosecutor submits a request for an investigation, and, if they provided information, the Prosecutor must inform them of decisions not to pursue *proprio motu* investigations. While it is recognized that a political assessment may not necessarily be to the detriment of victims, the thrust of the victims' role seems to be to reduce the risk of murky political interference with discretionary decision-making. Nevertheless, the line between Jorda and de Hemptinne's "overriding public-interests considerations" and "purely political grounds" in matters on the juncture between politics and law is thin and, above all, a matter of perception. Therefore it appears that the expansion of the role of victims may plausibly be interpreted as another attempt by the Rome Statute to reduce as far as possible the political dimension of discretionary decision-making.

What is more, Article 54(1)(c) explicitly binds the Prosecutor to respect the rights of persons arising under the Rome Statute. As recognized by the ICTY in *Čelebići*, the improper exercise of prosecutorial discretion could impair an accused's right to equality before the law, recognized in the Rome Statute in the requirement that "the application and interpretation of law ... must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status".¹²⁴ The factoring in of political circumstances could bring about dissimilar treatment of perpetrators of similar crimes based on some of the aforementioned criteria, violating the requirement of equality before the law.

However, the standard applied by the ICTY, were the ICC judges to follow it, seems exacting and not easy to prove. Also, Côté notes that, in selecting

122 Jorda and De Hemptinne, above note 105, p. 1392.

123 Ibid., pp. 1394–5.

124 Rome Statute, above note 8, Article 21(3).

potential indictees, taking account of their belonging or affiliation to a certain group may seem legitimate in light of international tribunals’ mandate to contribute to national reconciliation and the maintenance and restoration of peace, although, considered alone, these criteria may violate the right to equality.¹²⁵ If accepted, this element would additionally complicate proving an infringement of the right to equality.

Finally, the development of the role of the international Prosecutor has led Zappalà to describe the ICC Prosecutor as an “organ of justice” rather than a mere party to the proceedings.¹²⁶

Concluding remarks

The perception of a Prosecutor sensitive to political circumstances, and perhaps to political pressure, would irreparably harm the Prosecutor’s status as an independent party to international criminal proceedings.

On the other hand, due to the inescapable political reverberations of international criminal proceedings, it is suggested neither that the Prosecutor will escape political pressure nor that political assessments by the Prosecutor are unavoidable. Despite the Rome Statute’s safeguards, those hostile to the Court will relentlessly seek to politicize the Prosecutor’s acts. Moreover, as the Prosecutor ultimately retains the discretionary power to decide whether to initiate a *proprio motu* investigation despite the obligation to inform providers of information, political factors can not be discarded completely.

In any event, even a decision not to take account of political factors would, somehow contradictorily, have a certain political dimension to it. However, as the preceding paragraphs have endeavoured to demonstrate, allowing blatant political judgements through the back door of “interests of justice” assessments would be uncongenial to the Rome Statute’s strenuous attempts to curb prosecutorial discretion. Extensive obligations to motivate decisions taken pursuant to discretionary powers would produce additional negative effects impacting the Court as a whole.

125 Côté, above note 108, p. 176.

126 Zappalà, above note 117, p. 42.

REPORTS AND DOCUMENTS

International humanitarian law and the challenges of contemporary armed conflicts

Document prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26–30 November 2007

I. Introduction

This is the second report on “International Humanitarian Law (IHL) and the Challenges of Contemporary Armed Conflicts” that has been prepared by the International Committee of the Red Cross (ICRC) for an International Conference of the Red Cross and Red Crescent. In the years that have elapsed since the first report was presented to the 28th International Conference in Geneva, in December 2003, the daily reality of armed conflict has, unsurprisingly, not changed. While a factual description of the various conflicts that are being waged around the world today is beyond the scope of this report, suffice it to say that war has continued, inexorably, to bring death, destruction, suffering and loss in their wake.

Today, civilians still bear the brunt of armed conflicts. Civilians have remained the primary victims of violations of IHL committed by both State parties and non-State armed groups. Deliberate attacks against civilians, forced displacement of civilian populations, the destruction of infrastructure vital to the civilian population and of civilian property are just some examples of

prohibited acts that have been perpetrated on a regular basis. Individual civilians have also been the victims of violations of the law such as murder, forced disappearance, torture, cruel treatment and outrages upon personal dignity, and rape and other forms of sexual violence. They have been used as human shields. Persons detained in relation to armed conflicts have been deprived of their basic rights, including adequate conditions and treatment while in detention, procedural safeguards aimed at preventing arbitrary detention and the right to a fair trial. Medical personnel and humanitarian workers have also been the targets of IHL violations. In many instances, humanitarian organizations have been prevented from carrying out their activities or hampered in their efforts to do so effectively. This has further aggravated the plight of those whom they are meant to assist and protect. Attacks on journalists and other members of the media are a source of increasing concern as well.

While the suffering inflicted in war has not changed, the past four years have been characterized by growing public awareness of IHL and its basic rules – and therefore of acts that constitute violations of those rules. IHL principles and standards have been the focus not only of the usual expert debates but also, increasingly, of intense and wide-ranging governmental, academic and media scrutiny. Heightened interest in and awareness of IHL must be welcomed and encouraged, bearing in mind the fact that knowledge of any body of rules is a prerequisite to better implementation. Moreover, the 1949 Geneva Conventions have now become universal, making the treaties legally binding on all countries in the world. It is hoped that the ICRC's Study on Customary International Humanitarian Law, published in 2005, will also contribute to improved awareness of the rules governing behaviour in all types of armed conflicts.

The fact that IHL may be said to have stepped out of expert circles and to have fully entered the public domain has meant, however, that the risk of politicized interpretations and implementation of its rules has also increased. The past four years have provided evidence of this general trend. States have, on occasion, denied the applicability of IHL to certain situations even though the facts on the ground clearly indicated that an armed conflict was taking place. In other instances, States have attempted to broaden the scope of application of IHL to include situations that could not, based on the facts, be classified as armed conflicts. Apart from controversies over the issue of how to qualify a situation of violence in legal terms, there have also been what can only be called opportunistic misinterpretations of certain time-tested, specific legal rules. The tendency by some actors to point to alleged violations by others, without showing any willingness to acknowledge ongoing violations of their own, has also been detrimental to the proper application of the law.

The politicization of IHL, it must be emphasized, defeats the very purpose of this body of rules. IHL's primary beneficiaries are civilians and persons *hors de combat*. The very edifice of IHL is based on the idea that certain categories of individuals must be spared the effects of violence as far as possible regardless of the side to which they happen to belong and regardless of the justification given for armed conflict in the first place. The non-application or selective application of

IHL, or the misinterpretation of its rules for domestic or other political purposes, can – and inevitably does – have a direct effect on the lives and livelihoods of those who are not or are no longer waging war. A fragmentary approach to IHL contradicts the essential IHL principle of humanity, which must apply equally to all victims of armed conflict if it is to retain its inherent meaning at all. Parties to armed conflicts must not lose sight of the fact that, in accordance with the very logic of IHL, politicized and otherwise skewed interpretations of the law can rarely, if ever, have an impact on the opposing side alone. It is often just a question of time before one's own civilians and captured combatants are exposed to the pernicious effects of reciprocal politicization or deliberate misinterpretation by the adversary.

The purpose of this report, like the previous one, is to provide an overview of some of the challenges posed by contemporary armed conflicts for IHL, to generate broader reflection on those challenges and to outline ongoing or prospective ICRC action. The report is based on the premises outlined below.

First of all, the treaties of humanitarian law, notably the Geneva Conventions and their two Additional Protocols of 1977, supplemented by rules of customary humanitarian law, remain the relevant frame of reference for regulating behaviour in armed conflict. In the ICRC's view, the basic principles and rules governing the conduct of hostilities and the treatment of persons in enemy hands (the two core areas of IHL), continue to reflect a reasonable and pragmatic balance between the demands of military necessity and those of humanity. As discussed further on in this report, acts of violence with transnational elements, which have presented the most recent overall challenge for IHL, do not necessarily amount to armed conflict in the legal sense. Moreover, IHL is certainly not the only legal regime that can be used to deal with various forms of such violence.

Secondly, in the ICRC's view, the main cause of suffering during armed conflicts and of violations of IHL remains the failure to implement existing norms – whether owing to an absence of political will or to another reason – rather than a lack of rules or their inadequacy.

Thirdly, the law is just one among many tools used to regulate human behaviour and no branch of law, whether international or domestic, can – on its own – be expected to completely regulate a phenomenon as complex as violence. While IHL aims to circumscribe certain behaviour in armed conflict, there will always be States, non-State armed groups and individuals who will not be deterred from violating the rules, regardless of the penalty involved. The increase in suicide attacks targeting civilians in and outside of armed conflict is just a current case in point. In other words, the law, if relied on as the sole tool for eliminating or reducing violence, must be understood to have limits. Political, economic, societal, cultural and other factors that influence human conduct just as decisively must also be taken into account when contemplating comprehensive solutions to any form of violence.

Lastly, this report examines a number of issues that may be considered to pose challenges for IHL. The selection is non-exhaustive and does not purport to

include the full range of IHL-related subjects that the ICRC is currently considering or working on, or to which it may in future turn its attention.

II. IHL and terrorism

If, as has been asserted above, IHL principles and rules have entered the public domain over the past few years, it is in large part owing to debate over the relationship between armed conflict and acts of terrorism. The question that is most frequently asked is whether IHL has a role to play in addressing terrorism and what that role is.

IHL and terrorist acts

An examination of the adequacy of international law, including IHL, in dealing with terrorism obviously begs the question, “What is terrorism?” Definitions abound, both in domestic legislation and at the international level but, as is well known, there is currently no comprehensive international legal definition of the term. The United Nations draft Comprehensive Convention on International Terrorism has been stalled for several years because of the issue, among others, whether and how acts committed in armed conflict should be excluded from its scope.¹

However, regardless of the lack of a comprehensive definition at the international level, terrorist acts are crimes under domestic law and under the existing international and regional conventions on terrorism and they may, provided the requisite criteria are met, qualify as war crimes or as crimes against humanity. Thus, as opposed to some other areas of international law, “terrorism” – although not universally defined as such – is abundantly regulated. The ICRC believes, however, that the very term remains highly susceptible to subjective political interpretations and that giving it a legal definition is unlikely to reduce its emotive impact or use.

IHL is the body of rules applicable when armed violence reaches the level of armed conflict, *and is confined only to armed conflict*, whether international or non-international. The relevant treaties are, of course, the four Geneva Conventions of 1949 and their two Additional Protocols of 1977, although IHL encompasses a range of other legally binding instruments and customary law as well. While IHL does not provide a definition of terrorism, it explicitly prohibits most acts committed against civilians and civilian objects in armed conflict that would commonly be considered “terrorist” if committed in peacetime.

It is a basic principle of IHL that persons engaged in armed conflict must at all times distinguish between civilians and combatants and between civilian objects and military objectives. The principle of distinction is a cornerstone of

¹ See note 3.

IHL. Derived from it are specific rules aimed at protecting civilians, such as the prohibition of deliberate or direct attacks against civilians and civilian objects, the prohibition of indiscriminate attacks and of the use of “human shields,” and other rules governing the conduct of hostilities that are aimed at sparing civilians and civilian objects from the effects of hostilities. IHL also prohibits hostage-taking, whether of civilians or of persons no longer taking part in hostilities.

Once the threshold of armed conflict has been reached, it may be argued that there is little added value in designating most acts of violence against civilians or civilian objects as “terrorist” because such acts already constitute war crimes under IHL. Individuals suspected of having committed war crimes may be criminally prosecuted by States under existing bases of jurisdiction in international law; and, in the case of grave breaches as defined by the Geneva Conventions and Additional Protocol I, they must be criminally prosecuted, including under the principle of universal jurisdiction.

IHL also specifically prohibits “measures of terrorism” and “acts of terrorism” against persons in the power of a party to the conflict. Thus, the Fourth Geneva Convention (Article 33) provides that “collective penalties and likewise all measures of intimidation or of terrorism are prohibited,” while Additional Protocol II (Article 4(2)(d)) prohibits “acts of terrorism” against persons not or no longer taking part in hostilities. The context in which referral is made to these prohibitions suggests that the main aim is to underline a general principle of law, namely, that criminal responsibility is individual and that neither individuals nor the civilian population as a whole may be subjected to collective punishment, which is, obviously, a measure likely to induce terror.

In sections dealing with the conduct of hostilities, both Protocols additional to the Geneva Conventions also prohibit acts aimed at spreading terror among the civilian population. Additional Protocol I (Article 51(2)) and Additional Protocol II (Article 13(2)) stipulate that:

The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

The main purpose of these provisions is to reiterate the prohibition of acts committed in international or non-international armed conflict that do not provide a definite military advantage. While even a lawful attack against a military objective is likely to spread fear among civilians, these rules prohibit attacks specifically designed to terrorize civilians – such as campaigns of shelling or sniping at civilians in urban areas – that cannot be justified by the anticipated military advantage.

The explicit prohibition of acts of terrorism against persons in the power of the adversary, as well as the prohibition of such acts committed in the course of hostilities – along with the other basic provisions mentioned above – demonstrate that IHL protects civilians and civilian objects against these types of assault when committed in armed conflict. Thus, in current armed conflicts, the problem is not a lack of rules, but a lack of respect for them.

A recent challenge for IHL has been the tendency of States to label as “terrorist” all acts of warfare committed by organized armed groups in the course of armed conflict, in particular non-international armed conflict. Although it is generally agreed that parties to an international armed conflict may, under IHL, lawfully attack each other’s military objectives, States have been much more reluctant to recognize that the same principle applies in non-international armed conflicts. Thus, States engaged in non-international armed conflicts have, with increasing frequency, labelled any act committed by domestic insurgents an act of “terrorism” even though, under IHL, such an act might not have been unlawful (e.g. attacks against military personnel or installations). What is being overlooked here is that a crucial difference between IHL and the legal regime governing terrorism is the fact that IHL is based on the premise that certain acts of violence – against military objectives – are not prohibited. Any act of “terrorism” is, however, by definition, prohibited and criminal.²

The need to differentiate between lawful acts of war and acts of terrorism must be borne in mind so as not to conflate these two legal regimes. This is particularly important in non-international armed conflicts, in which all acts of violence by organized armed groups against military objectives remain in any event subject to domestic criminal prosecution. The tendency to designate them additionally as “terrorist” may diminish armed groups’ incentive to respect IHL, and may also be a hindrance in a possible subsequent political process of conflict resolution.

Legal qualification

The legal qualification of what is often called the “global war on terror” has been another subject of considerable controversy.³ While the term has become part of daily parlance in certain countries, one needs to examine, in the light of IHL, whether it is merely a rhetorical device or whether it refers to a global armed conflict in the legal sense. On the basis of an analysis of the available facts, the ICRC does not share the view that a global war is being waged and it takes a case-by-case approach to the legal qualification of situations of violence that are colloquially referred to as part of the “war on terror.” Simply put, where violence reaches the threshold of armed conflict, whether international or

2 As already mentioned, one of the main issues holding up the conclusion of negotiations on the draft UN Comprehensive Convention on International Terrorism is whether and how acts committed in armed conflicts should be excluded from its scope. While there is general agreement that acts committed by State armed forces in international armed conflicts would not be covered by the Convention, the point in dispute is whether acts committed by non-State armed groups should be excluded. For the reasons mentioned above, the ICRC believes that the Convention must not define as “terrorist” those acts that are permissible under IHL when committed by organized armed groups in non-international armed conflict. As already emphasized, all acts of violence committed by organized armed groups are already punishable under domestic criminal law.

3 More recently, it has been said that the “global war on terror” is limited to “Al-Qaeda, the Taliban and associated forces,” but that characterization does not change the basic premises of the approach.

non-international, IHL is applicable. Where it does not, other bodies of law come into play.

Under the 1949 Geneva Conventions, international armed conflicts are those fought between States. Thus, the 2001 war between the US-led coalition and the Taliban regime in Afghanistan (waged as part of the “war on terror”) is an example of an international armed conflict.

IHL does not envisage an international armed conflict between States and non-State armed groups for the simple reason that States have never been willing to accord armed groups the privileges enjoyed by members of regular armies.⁴ To say that a global international war is being waged against groups such as Al-Qaeda would mean that, under the law of war, their followers should be considered to have the same rights and obligations as members of regular armed forces. It was already clear in 1949 that no nation would contemplate exempting members of non-State armed groups from criminal prosecution under domestic law for acts of war that were not prohibited under international law – which is the crux of combatant and prisoner-of-war status. The drafters of the Geneva Conventions, which grant prisoner-of-war status under strictly defined conditions, were fully aware of the political and practical realities of international armed conflict and crafted the treaty provisions accordingly.

The so-called “war on terror” can also take the form of a non-international armed conflict, such as the one currently being waged in Afghanistan between the Afghan government, supported by a coalition of States and different armed groups, namely, remnants of the Taliban and Al-Qaeda. This conflict is non-international, albeit with an international component in the form of a foreign military presence on one of the sides, because it is being waged with the consent and support of the respective domestic authorities and does not involve two opposed States. The ongoing hostilities in Afghanistan are thus governed by the rules applicable to non-international armed conflicts found in both treaty-based and customary IHL. The same body of rules would apply in similar circumstances where the level of violence has reached that of an armed conflict and where a non-State armed actor is party to an armed conflict (e.g. the situation in Somalia).

The question that remains is whether, taken together, all the acts of terrorism carried out in various parts of the world (outside situations of armed conflict such as those in Afghanistan, Iraq or Somalia) are part of one and the same armed conflict in the legal sense. In other words, can it be said that the bombings in Glasgow, London, Madrid, Bali or Casablanca can be attributed to one and the same party to an armed conflict as understood under IHL? Can it furthermore be claimed that the level of violence involved in each of those places has reached that of an armed conflict? On both counts, it would appear not.

Moreover, it is evident that the authorities of the States concerned did not apply conduct of hostilities rules in dealing with persons suspected of planning or having carried out acts of terrorism, which they would have been allowed to do if

4 The sole exception is set out in Article 1(4) of Additional Protocol I and is subject to specific conditions, i.e. the existence of a war of national liberation.

they had applied an armed conflict paradigm. IHL rules would have permitted them to directly target the suspects and even to cause what is known as “collateral damage” to civilians and civilian objects in the vicinity as long as the incidental civilian damage was not excessive in relation to the military advantage anticipated. Instead, they applied the rules of law enforcement. They attempted to capture the suspects for later trial and took care in so doing to evacuate civilian structures in order to avoid all injury to persons, buildings and objects nearby.

To sum up, each situation of organized armed violence must be examined in the specific context in which it takes place and must be legally qualified as armed conflict, or not, based on the factual circumstances. The law of war was tailored for situations of armed conflict, both from a practical and a legal standpoint. One should always remember that IHL rules on what constitutes the lawful taking of life or on detention in international armed conflicts, for example, allow for more flexibility than the rules applicable in non-armed conflicts governed by other bodies of law, such as human rights law. In other words, it is both dangerous and unnecessary, in practical terms, to apply IHL to situations that do not amount to war. This is not always fully appreciated.

Status of persons

The ICRC also adopts a case-by-case approach, based on the available facts, in determining the legal regime that governs the status and rights of persons detained in connection with what is called the “global war on terror”. If a person is detained in relation to an international armed conflict, the relevant treaties of IHL fully apply. If a person is detained in connection with a non-international armed conflict, the deprivation of liberty is governed by Article 3 common to the four Geneva Conventions, other applicable treaties, customary international law, and other bodies of law such as human rights law and domestic law. If a person is detained outside an armed conflict, it is only those other bodies of law that apply.

In this context, it bears repeating that *only in international armed conflicts* does IHL provide combatant (and prisoner-of-war) status to members of the armed forces. The main feature of this status is that it gives combatants the right to directly participate in hostilities and grants them immunity from criminal prosecution for acts carried out in accordance with IHL, such as lawful attacks against military objectives. In case of capture, combatants become prisoners of war and, as such, cannot be tried or convicted for having participated in hostilities. The corollary is that captured combatants can be interned, without any form of process, until the end of active hostilities. Captured combatants may, however, be criminally prosecuted for war crimes or other criminal acts committed before or during internment. In the event of criminal prosecution, the Third Geneva Convention provides that prisoners of war may be validly sentenced only if this is done by the same courts and according to the same procedure as for members of the armed forces of the detaining power. It is often not understood that prisoners of war who have been acquitted in criminal proceedings may be held by the Detaining Power until the end of active hostilities. In case of doubt about the

status of a captured belligerent, such status must be determined by a competent tribunal.

IHL treaties contain no explicit reference to “unlawful combatants.” This designation is shorthand for persons – civilians – who have directly participated in hostilities *in an international armed conflict* without being members of the armed forces as defined by IHL and who have fallen into enemy hands. Under the rules of IHL applicable to international armed conflicts, civilians enjoy immunity from attack “unless and for such time as they take a direct part in hostilities.” It is undisputed that, in addition to the loss of immunity from attack during the time in which they participate directly in hostilities, civilians – as opposed to combatants – may also be criminally prosecuted under domestic law for the mere fact of having taken part in hostilities. In other words, they do not enjoy the combatant’s “privilege” of not being liable to prosecution for taking up arms, and they are thus sometimes referred to as “unprivileged belligerents” or “unlawful combatants.”

Regarding the status and rights of civilians who have directly participated in hostilities *in an international armed conflict* and have fallen into enemy hands, there are essentially two schools of thought. According to the first, “unprivileged belligerents” are covered only by the rules contained in Article 3 common to the four Geneva Conventions and (possibly) in Article 75 of Additional Protocol I, applicable either as treaty law or as customary law. According to the other view, shared by the ICRC,⁵ civilians who have taken a direct part in hostilities, and who fulfil the nationality criteria set out in the Fourth Geneva Convention (Article 4),⁶ remain protected persons within the meaning of that Convention. Those who do not fulfil the nationality criteria are at a minimum protected by the provisions of Article 3 common to the Geneva Conventions and Article 75 of Additional Protocol I, applicable either as treaty law or as customary law.

Thus, there is no category of persons affected by or involved in international armed conflict who fall outside the scope of any IHL protection. Likewise, there is no “gap” between the Third and Fourth Geneva Conventions, i.e. there is no intermediate status into which “unprivileged belligerents” fulfilling the nationality criteria could fall.

The obvious question that arises here is what constitutes “direct” participation in hostilities and how the temporal aspect of participation should be defined (the wording is: “for such time as they take a direct part in hostilities”). As

- 5 This interpretation is implicitly recognized in Article 45(3) of Additional Protocol I – at least for States party to that treaty: “Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol.”
- 6 Pursuant to Article 4 of the Fourth Convention: Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

is explained in Chapter IV.2 of the report, this is an issue that the ICRC has been striving to clarify since 2003.

Persons who have directly participated in hostilities can be interned by the adversary if this is absolutely necessary to the security of the detaining power. Under the Fourth Geneva Convention, a protected person who has been interned is entitled to have the decision on internment reconsidered without delay and to have it automatically reviewed every six months. While interned, a person can be considered as having forfeited certain rights and privileges provided for in the Fourth Geneva Convention, the exercise of which would be prejudicial to the security of the State, as laid down in Article 5 of that Convention and subject to the safeguards of treaty law and customary international law.

Under the Fourth Geneva Convention, persons who have been interned must be released as soon as possible after the close of the hostilities in the international armed conflict during which they were captured, if not sooner, unless they are subject to criminal proceedings or have been convicted of a criminal offence. This means that, after the end of an international armed conflict, the Fourth Geneva Convention can no longer be considered a valid legal framework for the detention of persons who are not subject to criminal proceedings.

In sum, it is difficult to see what other measures, apart from: (a) loss of immunity from attack, (b) internment if warranted by security reasons, (c) possible forfeiture of certain rights and privileges during internment and (d) criminal charges, could be applied to persons who have directly participated in hostilities without exposing them to the risk of serious violations of their right to life, physical integrity and personal dignity under IHL, such as attempts to relax the absolute prohibition of torture, and cruel and inhuman treatment. The ICRC would oppose any such attempts.

Combatant status, which entails the right to participate directly in hostilities, and *prisoner-of-war status*, do not exist in *non-international armed conflicts*. Civilians who take a direct part in hostilities in such conflicts are subject, for as long as they continue to do so, to the same rules regarding loss of protection from direct attack that apply during international armed conflict. The expert process mentioned above also aims to clarify the meaning of the notion of “direct participation in hostilities” in the context of non-international armed conflicts. Upon capture, civilians detained in non-international armed conflicts do not, as a matter of law, enjoy prisoner-of-war status and may be prosecuted by the detaining State under domestic law for any acts of violence committed during the conflict, including, of course, war crimes. Their rights and treatment during detention are governed by humanitarian law, human rights law and domestic law.

It must be emphasized that no one, regardless of his or her legal status, can be subjected to acts prohibited by IHL, such as murder, violence to life and person, torture, cruel or inhuman treatment or outrages upon personal dignity or be denied the right to a fair trial. “Unlawful combatants” are in this sense also fully protected by IHL and it is incorrect to suggest that they have minimal or no rights. One of the purposes of the law of war is to protect the life, health and dignity of all

persons involved in or affected by armed conflict. It is inconceivable that calling someone an “unlawful combatant” (or anything else) should suffice to deprive him or her of rights guaranteed to every individual under the law.

The preceding observations on the relationship between IHL and terrorism should not be taken to mean that there is no scope or need for further reflection on the interplay between the two legal regimes – IHL and the one governing terrorism – or for clarification or development of the law. Indeed, as will be demonstrated in the discussion on procedural principles and safeguards for internment or administrative detention (see Chapter III and Annex 1), the ICRC has been working on ways of dealing with specific legal challenges that are also posed by acts of terrorism. What is submitted is that the fight against terrorism requires the application of a range of measures – investigative, diplomatic, financial, economic, legal, educational and so forth – spanning the entire spectrum from peacetime to armed conflict and that IHL cannot be the sole legal tool relied on in such a complex endeavour.

Throughout its history, IHL has proven adaptable to new types of armed conflict. The ICRC stands ready to help States and others concerned to clarify or develop the rules governing armed conflict if it is those rules that are deemed insufficient – and not the political will to apply the existing ones. The overriding challenge for the ICRC, and others, will then be to ensure that any clarifications or developments are such as to preserve current standards of protection provided for by international law, including IHL. The ICRC is well aware of the significant challenge that States face in their duty to protect their citizens against acts of violence that are indiscriminate and intended to spread terror among the civilian population. However, the ICRC is convinced that any steps taken – including efforts to clarify or develop the law – must remain within an appropriate legal framework, especially one that preserves respect for human dignity and the fundamental guarantees to which each individual is entitled.

III. Procedural principles and safeguards for internment or administrative detention

Under the Fourth Geneva Convention, internment is the severest measure of control that may be taken against a protected person by a party to an international armed conflict. The Convention provides that internment, which is a form of deprivation of liberty without criminal charges, may be imposed only for “imperative reasons of security” (Article 78) or if the security of the detaining power makes it “absolutely necessary” (Article 42). Internment must cease once the reasons for it no longer exist, or at the very latest upon the end of active hostilities. The Convention also spells out basic procedural rules to ensure that States do not abuse the considerable measure of discretion they have in determining what acts constitute a threat to their security. It must be admitted, however, that the rules are fairly rudimentary from the point of view of individual protection. Moreover, recent State practice – e.g. internment by States party to

multinational coalitions – has been characterized by divergences in the interpretation and implementation of the relevant rules, which has given rise to serious concern.

Internment is also practised in non-international armed conflicts, and is explicitly mentioned in Additional Protocol II, which further elaborates on Article 3 common to the Geneva Conventions. However, the treaty provisions provide no further guidance on what procedure is to be applied in cases of internment. It is submitted that the gap must be filled by reference to applicable human rights law and domestic law, given that IHL rules applicable in non-international armed conflicts constitute a safety net that is supplemented by the provisions of these bodies of law.

The challenge of interpreting the existing provisions of IHL in relation to internment is therefore not a new one. What has posed a problem more recently, mainly as a result of counter-terrorist operations conducted outside armed conflict, is the administrative detention, i.e. the detention without criminal charges, of persons suspected of various degrees of involvement in acts of terrorism. While international human rights law does not prohibit all forms of such detention (e.g., confinement, under certain circumstances, of immigrants with a view to expulsion), it has been argued that administrative detention for national security reasons is not one of them. A related but separate issue is whether and when cases of administrative detention require States to derogate from the right to liberty of person under the relevant human rights treaties.

The recent practice of States in drafting and implementing anti-terrorism legislation has shown that administrative detention is being increasingly used as a preventative tool in the fight against terrorism. However, it has also demonstrated wide divergences in the interpretation of human rights law as regards the procedural rights of persons affected. Moreover, there is no agreement at the international level on whether administrative detention for security reasons is lawful. While many States seem to think so, some non-governmental organizations and experts vigorously contest that approach.

In addition to obvious protection needs and in order to ensure consistency in its dialogue with various detaining authorities, the ICRC has developed institutional guidelines, entitled “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence.” The document, which reflects the ICRC’s official position and now guides its operations, was published in the *International Review of the Red Cross*, Vol. 87 No. 858 June 2005, pp. 375–391. It sets out a series of broad principles and specific safeguards that the ICRC believes should, at a minimum, govern any form of detention without criminal charges. The accompanying commentary serves to illustrate the sources – both treaty-based and other types, including policy and best practice – from which the standards were derived. It is important to stress that the principles and safeguards enunciated in the guidelines provide minimum standards that are meant to be further calibrated in each specific context of application.

An informal expert meeting on the procedural guarantees that should apply in situations of internment or administrative detention was co-organized by the ICRC and Case Western Reserve University in Ohio (USA) in September 2007 and may be the starting point of a subsequent broader discussion with States and other actors.

IV. The conduct of hostilities

A number of current and recent armed conflicts have placed questions relating to the conduct of hostilities high on the agenda of legal and military debate. These questions have also aroused growing public interest, not least because of the many pictures and news stories carried by the media of civilians killed or injured and civilian property destroyed in the course of military operations. The twin issues of targeting and the choice of weapons are at the heart of the debate. The following sections therefore focus on methods and means of warfare.

1. General issues, in particular asymmetric warfare

In its report to the 28th International Conference in 2003, the ICRC presented a comprehensive survey of the main challenges for the law regulating the conduct of hostilities. The report highlighted the divergences in the interpretation of certain rules, such as those relating to the definition of a military objective, the principle of proportionality and the precautions in attack and against the effects of attacks. For the most part, this analysis remains pertinent today.

Research carried out for the ICRC's Study on Customary International Humanitarian Law, published in 2005, shed further light on the rules applicable to the conduct of hostilities in international and non-international armed conflict. The Study confirmed that the main provisions of Additional Protocol I on the conduct of hostilities reflect customary law applicable in international armed conflicts. It also found that many of these provisions were customary in non-international armed conflicts. Thus, the development of customary law has largely filled gaps existing in treaty law, which is still fairly rudimentary.

It should nevertheless be noted that, for the most part, the relevant rules discussed in the study simply reiterate the provisions of Additional Protocol I and thus do not clarify existing divergences in the interpretation and application of certain rules on the conduct of hostilities. This should come as no surprise since the aim of the study was to examine the practice and *opinio iuris* of States in order to identify the content of customary law. The extensive review of practice collected on the subject did not allow for the formulation of customary rules that would be more detailed than the relevant treaty-based provisions.

It is also worth noting that the concrete application of the treaty-based and customary rules that were identified in the 2003 ICRC report as requiring clarification are probably even more challenging in today's conflict environment,

which is increasingly characterized by asymmetric warfare (in particular owing to the growing involvement of non-State armed groups) and by urban warfare.

Asymmetric warfare

Asymmetric warfare is characterized by significant disparities between the military capacities of the belligerent parties.⁷ Its fundamental aim is to find a way round the adversary's military strength. Asymmetry often causes today's armed confrontations to take a more brutal turn, in which there is seemingly little place for the rule of law. While asymmetric warfare may have many facets, it specifically affects compliance with the most fundamental rules on the conduct of hostilities, namely the principle of distinction and the prohibition of perfidy. The following section focuses solely on challenges related to this facet, contains various illustrations and does not purport to be exhaustive.

When under attack, a belligerent party that is weaker in military strength and technological capacity may be tempted to hide from modern sophisticated means and methods of warfare. As a consequence, it may be led to engage in practices prohibited by IHL, such as feigning protected status, mingling combatants⁸ and military objectives with the civilian population and civilian objects, or using civilians as human shields. Such practices clearly increase the risk of incidental civilian casualties and damage. Provoking incidental civilian casualties and damage may sometimes even be deliberately sought by the party that is the object of the attack. The ultimate aim may be to benefit from the significant negative impression conveyed by media coverage of such incidents. The idea is to "generate" pictures of civilian deaths and injuries and thereby to undermine support for the continuation of the adversary's military action.

Technologically disadvantaged States or armed groups may tend to exploit the protected status of certain objects (such as religious or cultural sites, or medical units) in launching attacks. Methods of combat like feigning civilian, non-combatant status and carrying out military operations from amidst a crowd of civilians will often amount to perfidy. In addition, the weaker party often tends to direct strikes at "soft targets" because, in particular in modern societies, such attacks create the greatest damage or else because the party is unable to strike the military personnel or installations of the enemy. Consequently, violence is directed at civilians and civilian objects, sometimes in the form of suicide attacks. Resort to hostage-taking is also a more frequent phenomenon.

The dangers of asymmetry also relate to the means of warfare likely to be used by the disadvantaged forces. It appears more and more likely that States or

7 Many different definitions of "asymmetric warfare" have been provided in the doctrine, but it is beyond the scope of this report to attempt to define the term. As used here, it simply denotes a relationship characterized by inequality between the belligerents – in particular in terms of weaponry. Asymmetry is certainly not a new phenomenon, but it is an increasing common feature of contemporary conflicts.

8 The notion of "combatant" is used here in its generic sense, indicating persons who do not enjoy the protection against attack granted to civilians, but does not imply a right to combatant or prisoner-of-war status. It therefore includes civilians directly participating in hostilities.

armed groups that are powerless in the face of sophisticated weaponry will seek to acquire – or construct – chemical, biological and even possibly nuclear weapons (in particular, the “dirty bomb scenario”), against which traditional means of defending the civilian population and civilian objects are inadequate.

A militarily superior belligerent may tend to relax the standards of protection of civilian persons and civilian objects in response to constant violations of IHL by the adversary. For example, confronted with enemy combatants and military objectives that are persistently hidden among the civilian population and civilian objects, an attacker – who is legally bound by the prohibition of disproportionate attacks – may, in response to the adversary’s strategy, progressively revise his assessment of the principle of proportionality and accept more incidental civilian casualties and damage. Another likely consequence could be a broader interpretation of what constitutes “direct participation in hostilities” (see Section 2 below). The militarily stronger party may also be tempted to adopt a broader interpretation of the notion of military objective.⁹ Such developments would make the civilian population as a whole more vulnerable to the effects of hostilities.

In sum, military imbalances carry incentives for the weaker party to level out its inferiority by disregarding existing rules on the conduct of hostilities. Faced with an enemy that systematically refuses to respect IHL, a belligerent may have the impression that legal prohibitions operate exclusively for the adversary’s benefit. The real danger in such a situation is that the application of IHL will be perceived as detrimental by all the parties to a conflict (“spiral-down effect”) and this will ultimately lead to all-around disregard for IHL and thus undermine its basic tenets.

Urban warfare

Similar challenges concerning the definition of a military objective and the interpretation of the principle of proportionality and of precautionary measures also arise from the spread of urban warfare.¹⁰ Military ground operations in urban settings are particularly complex: those resisting attack benefit from innumerable firing positions and may strike anywhere at anytime. The fear of surprise attacks is likely to reduce the attacker’s armed forces ability to properly identify enemy forces and military objectives and to assess the incidental civilian casualties and

- 9 Of particular concern is the thinking, which is not necessarily specific to asymmetric warfare, that advocates attacks on “non-military” targets in order to better achieve the desired effect(s) of military operations. For example, in order to lower the enemy’s morale or turn the population against the government, a belligerent may decide to choose targets deemed not essential for the survival of the civilian population, such as entertainment or recreational facilities, stores or shops distributing luxury goods and the like, targets which do not correspond to the traditional definition of military objectives.
- 10 There is a link between the spread of urban and asymmetric warfare: technologically inferior belligerents, being unable to defend themselves on open ground, will often seek refuge in an urban environment. However, the link between the two is not automatic: disadvantaged forces in asymmetric warfare may also seek refuge in remote mountainous settings, for example; also, urban warfare is increasingly common in symmetric armed conflicts.

damages that may ensue from its operations. Likewise, artillery and aerial bombardments of military objectives located in cities are complicated by the proximity of those objectives to the civilian population and civilian objects.

The ICRC believes that the challenges posed to IHL by asymmetric and urban warfare cannot *a priori* be solved by developments in treaty law. It must be stressed that in such circumstances, it is generally not the rules that are at fault, but the will or sometimes the ability of the parties to an armed conflict – and of the international community – to enforce them, in particular through criminal law. The ICRC recognizes that today's armed conflicts, especially asymmetric ones, pose serious threats to the rules derived from the principle of distinction. It is crucial to resist these threats and to make every effort to maintain and reinforce rules that are essential to protecting civilians, who so often bear the brunt of armed conflicts. The rules themselves are as pertinent to “new” types of conflicts and warfare as they were to the conflicts or forms of warfare that existed at the time when they were adopted. The fundamental values underlying these rules, which need to be safeguarded, are timeless. While it is conceivable that developments in IHL might occur in specific areas, such as in relation to restrictions and limitations on certain weapons, a major rewriting of existing treaties does not seem necessary for the time being.

Nevertheless, there is an ongoing need to assess the effectiveness of existing rules for the protection of civilians and civilian objects, to improve the implementation of those rules or to clarify the interpretation of specific concepts on which the rules are based. However, this must be done without disturbing the framework and underlying tenets of existing IHL, the aim of which is precisely to ensure the protection of civilians. Despite certain shortcomings in some of the rules governing the conduct of hostilities, mostly linked to imprecise wording, these rules continue to play an important role in limiting the use of weapons. Any further erosion of IHL may propel mankind backwards to a time when the use of armed force was almost boundless.

The 30th Round Table organized jointly by the International Institute of Humanitarian Law and the ICRC in San Remo from 6 to 8 September 2007 “revisited” the law on the conduct of hostilities. This topic, chosen to commemorate the centenary of the 1907 Hague Conventions, as well as the 30th anniversary of the first two Protocols additional to the Geneva Conventions, led to discussions on existing treaty law and on developments in the rules governing the conduct of hostilities. Emphasis was also placed on a prospective analysis of the issues raised by the implementation of the relevant rules and on possible solutions to the alleged shortcomings that may be problematic for those in charge of their practical application.

2. The notion of “direct participation in hostilities”

As far as the conduct of hostilities is concerned, IHL essentially distinguishes between two generic categories of persons, namely members of the armed forces,

who conduct the hostilities on behalf of the parties to an armed conflict, and civilians, who are presumed to be peaceful¹¹ and must be protected against the dangers arising from military operations. While it is true that, throughout history, the civilian population has always contributed to the general war effort to a greater or lesser degree, such activities were typically conducted at some distance from the battlefield. They included, for example, the production or provision of arms, equipment, food and shelter, as well as economic, administrative and political support. Traditionally, only a small minority of civilians became involved in the actual conduct of military operations.

Recent decades have seen this pattern change radically. There has been a continuous shift of military operations away from distinct battlefields into civilian population centres, as well as an increasing involvement of civilians in activities more closely related to the actual conduct of hostilities. Even more recently, there has been a trend towards the “civilianization” of the armed forces, by which is meant the introduction of large numbers of private contractors, as well as intelligence personnel and other civilian government employees, into the reality of modern armed conflict. Moreover, in a number of contemporary armed conflicts, military operations have attained an unprecedented level of complexity and have involved a great variety of interdependent human and technical resources, including remotely operated weapons systems, computer networks and satellite reconnaissance or guidance systems.

Overall, the increasingly blurred distinction between civilian and military functions, the intermingling of armed actors with the peaceful civilian population, the wide variety of tasks and activities performed by civilians in contemporary armed conflicts and the complexity of modern means and methods of warfare have caused confusion and uncertainty as to how the principle of distinction should be implemented in the conduct of hostilities. These difficulties are further aggravated wherever armed actors do not distinguish themselves from the civilian population, such as during the conduct of clandestine or covert military operations or when persons act as “farmers by day and fighters by night.” As a result, peaceful civilians are more likely to fall victim to erroneous, unnecessary or arbitrary targeting, while members of the armed forces, unable to properly identify their adversary, run an increased risk of being attacked by persons they cannot distinguish from peaceful civilians – at the same time as they must, and should have been trained to, protect civilians.

Key legal questions

This trend has emphasized the importance of distinguishing not only between civilians and the armed forces, but also between civilians who do not participate directly in hostilities and civilians “directly participating in hostilities.” Under IHL, the notion of “direct participation in hostilities” describes individual

11 This term is used to denote civilians who do not take a direct part in hostilities.

conduct which, if carried out by civilians, suspends their protection against the dangers arising from military operations. Most notably, for the duration of their direct participation in hostilities, civilians may be directly attacked as if they were combatants.¹² The notion of “direct” or “active” participation in hostilities, which is derived from Article 3 common to the Geneva Conventions, is found in multiple provisions of IHL. However, despite the serious legal consequences involved, neither the Geneva Conventions nor their Additional Protocols provide a definition of what conduct amounts to direct participation in hostilities. Answers are therefore needed to the following three questions in relation to both international and non-international armed conflict:

- *Who is considered a civilian for the purpose of conducting hostilities?* The answer to this question will delimit the circle of persons who are protected against direct attack “unless and for such time as they directly participate in hostilities.”
- *What conduct amounts to direct participation in hostilities?* The answer to this question will define the individual conduct that entails the suspension of a civilian’s right to protection against direct attack.
- *What are the precise conditions under which civilians directly participating in hostilities lose their protection against direct attack?* The answer to this question will elucidate issues such as the duration of the loss of civilian protection, the precautions and presumptions that apply in case of doubt, the restraints imposed by IHL on the use of force against lawful targets and the consequences of restoring civilian protection.

ICRC initiative

In 2003, the ICRC, in co-operation with the TMC Asser Institute, initiated a process of research and expert reflection on the notion of “direct participation in hostilities” under IHL. The aim was to identify the constitutive elements of the notion and provide guidance for its interpretation in both international and non-international armed conflict. The emphasis was placed on interpreting the notion of “direct participation” in relation to the conduct of hostilities only and did not, or only very marginally, address the legal regime applicable in the event of capture or detention of persons having directly participated in hostilities. Moreover, the expert process was concerned with the analysis and interpretation of IHL only, without prejudice to questions which might be raised by the direct participation of civilians in hostilities under other regimes of international law, such as, most notably, human rights law or, where cross-border operations are concerned, the law regulating the use of inter-State force.

¹² Article 51(3) of Additional Protocol I; Article 13(3) of Additional Protocol II; Rule 6, J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, ICRC, Geneva and Cambridge, 2005.

Four informal expert meetings were held in The Hague and in Geneva between 2003 and 2006.¹³ Each meeting brought together 40 to 50 legal experts from military, governmental and academic circles, as well as from international and non-governmental organizations, attending in a personal capacity.

The *first expert meeting* laid the foundations for the research and led to the unanimous conclusion that the notion of direct participation in hostilities required further interpretation and that the ICRC should take the lead in this process. The *second expert meeting* delved deeper into the topic on the basis of an extensive questionnaire, which was distributed to the experts before the meeting and which focused on a wide range of practical examples and theoretical issues. The *third expert meeting* addressed some of the most complex legal issues relating to the topic, such as the implications of membership in organized armed groups during non-international armed conflicts as regards the applicability of the rule on direct participation in hostilities, the duration of the loss of protection, and the presence of private contractors and civilian employees in conflict areas.

Following these meetings, the organizers prepared a draft “Interpretive Guidance” document on the notion of direct participation in hostilities for discussion during the *fourth expert meeting*. The comments received during that meeting led to a revised version of the document, which was submitted to the experts for a round of written comments in July 2007. Taking those comments into account, the organizers will finalize the document.

The “Interpretive Guidance” document will endeavour to present a coherent interpretation of IHL as far as it relates to the direct participation of civilians in hostilities. The document, along with the complete proceedings of the expert process, is to be published in the course of 2008.

3. Regulating the use of cluster munitions

The use of cluster munitions is certainly not the only weapons-related issue of concern in the framework of contemporary armed conflict. However, it has recently come to the forefront of the international debate on means and methods of warfare. Given that the challenges posed by cluster munitions are closely linked to the core rules on the conduct of hostilities (distinction, prohibition of indiscriminate attacks, proportionality and precautions), the topic is addressed here.

Cluster munitions: A persistent problem

Cluster munitions have been a persistent problem for decades. In nearly every armed conflict in which they have been used, significant numbers of cluster

13 The Hague on 2 June 2003, The Hague on 25 and 26 October 2004, Geneva from 23 to 25 October 2005 and Geneva on 27 and 28 November 2006. An overview of the discussions and of the various views expressed during the expert meetings is provided in the summary reports, which are available at www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl311205 (visited on 15 October 2007).

munitions have failed to detonate as intended. Long after the fighting has ended, they have continued to claim the lives and limbs of innumerable civilians, with tragic social and economic consequences for entire communities. In Laos and Afghanistan – for example – cluster munitions used in the 1970s and 1980s still kill and injure civilians today. Because they have contaminated large swathes of land, unexploded submunitions have also made farming a dangerous activity and hindered development and re-construction. In both countries, the clearance of these weapons and other explosive remnants of war has consumed scarce national and international resources.

Unfortunately, more recent conflicts have only added to the list of States already dealing with the consequences of these weapons. Eritrea, Ethiopia, Iraq, Lebanon, Serbia, and Sudan are examples of countries in which cluster munitions have been used in the last decade. Like Afghanistan and Laos, they are now having to deal with this deadly legacy of war.

The concerns raised by cluster munitions, however, are not limited to the post-conflict and long-term effects of unexploded submunitions. They include the dangers posed by these weapons during armed conflicts as well, even when they function as intended. Cluster munitions distribute large numbers of explosive submunitions over very wide areas. Some models will saturate a target area of up to 30,000 square metres. In addition, the accuracy of the released submunitions is often highly dependent on wind, weather conditions, and the reliability of complex delivery systems. As a result, it is difficult to control the effects of these weapons and there is a serious risk of significant civilian casualties, particularly where military objectives and civilians intermingle in a target area.

Concerns under international humanitarian law

No IHL treaty has specific rules governing cluster munitions. However, the characteristics and consequences of these weapons raise serious questions as to whether they can be used in accordance with fundamental rules of IHL. Some of the key questions are outlined below.

1. There are concerns as to whether cluster munitions may be used against military objectives in populated areas in accordance with *the rules of IHL concerning distinction and the prohibition of indiscriminate attacks*. These rules are intended to ensure that attacks are directed at specific military objectives and are not of a nature to strike military objects and civilians or civilian objects without distinction.

As indicated earlier, most cluster munitions are designed to disperse large numbers of submunitions over very wide areas. In addition, many types of submunitions are free-falling and use parachutes or ribbons to slow and arm themselves. This means that these explosives can be blown by the wind or diverted from their intended target when released at an incorrect airspeed or altitude. They can often land in areas other than the specific military objective targeted.

In addition, the wide-area effects of these weapons and the large number of unguided submunitions released would appear to make it difficult, if not

impossible, to distinguish between military objectives and civilians or civilian objects in a populated target area.

2. There are also concerns arising in relation to *the rule of proportionality*. This rule recognizes that civilian casualties and damage to civilian objects may occur during an attack against a legitimate military objective but requires, if an attack is to proceed, that the incidental impact on civilians not outweigh the military advantage anticipated. An attack that causes excessive incidental civilian casualties or damage in relation to the concrete and direct military advantage anticipated would be disproportionate and therefore prohibited.

It is clear that implementing the rule of proportionality during the planning and execution of an attack using cluster munitions must include an evaluation of the foreseeable incidental consequences for civilians during the attack (immediate death and injury) and consideration of the foreseeable effects of submunitions that become explosive remnants of war (ERW). With regard to ERW, this was most recently confirmed in the Final Declaration of the Third Review Conference of the Convention on Certain Conventional Weapons (CCW), in which States party noted “the foreseeable effects of explosive remnants of war on civilian populations as a factor to be considered in applying the international humanitarian law rules on proportionality in attack and precautions in attack.”

The principal issue in this regard is what is meant by “foreseeable.” Is it credible to argue today that the short-, mid- or long-term consequences of unexploded submunitions are unforeseeable, particularly when these weapons are used in or near populated areas? As we know from past conflicts, civilians present in a target area will predictably need to gather food and water, seek medical care and conduct other daily activities which put them at risk. If they have left the area during the hostilities, it is quite foreseeable that they will return at the earliest opportunity and be at risk from unexploded submunitions.

3. *The rules on feasible precautions* are particularly important when cluster munitions are used, given their effects both during and after a conflict.¹⁴ These rules require that both sides take specific action to reduce the chances that civilians or civilian objects be mistakenly attacked and to minimize civilian casualties when an attack is launched. Such action includes careful selection and verification of targets, the cancellation or suspension of attacks, the dissemination of warnings before an attack and efforts to avoid locating military objectives in populated areas.

The main issue here is how the rules on feasible precautions in attack are implemented in the light of the known characteristics and foreseeable effects of cluster munitions. Implementing the obligation to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental civilian casualties and damages would require, for example, that a party consider the accuracy of the cluster munition and its targeting system, the size of the dispersal pattern, the amount of ERW likely to

14 Additional Protocol I (Articles 57 and 58) and customary international law.

result, the presence of civilians and their proximity to military objectives, and the use of alternative munitions and tactics. It could also require that submunitions not be used in populated areas and that alternative weapons be considered. Given the range of possible measures, why do high levels of civilian casualties resulting from cluster munitions remain a regular and predictable feature of conflicts in which these weapons are used? The persistence of this problem raises questions concerning the extent to which the rules on feasible precautions are being applied in the case of cluster munitions.

4. An important step towards reducing the post-conflict impact of cluster submunitions and other ERW was taken in 2003 when States party to the CCW adopted the *Protocol on Explosive Remnants of War*. The Protocol, which entered into force on 12 November 2006, provides an important framework for reducing the post-conflict dangers posed by all forms of unexploded and abandoned ordnance. The International Red Cross and Red Crescent Movement has called on all States to adhere to this landmark agreement at the earliest opportunity.

However, the Protocol does not contain legally binding measures to prevent the steady increase in the global burden of explosive remnants of war. The scale of the problem is growing far more rapidly than clearance operations can remedy it. One of the greatest contributors to this burden, when they are used, is cluster munitions. The Protocol also does not address the high risk of indiscriminate effects from a cluster-munitions attack when the submunitions *do* detonate as intended, particularly if the attack is in a populated area.

ICRC action

The ICRC and many National Societies have been urging governments to take urgent steps to address the problem of cluster munitions. In order to consider ways of doing this, the ICRC organized a meeting in Montreux, Switzerland (18 to 20 April 2007) for government and independent experts. The meeting produced a frank and in-depth exchange of views on many of the humanitarian, military, technical and legal issues relating to cluster munitions and considered ways of reducing their impact on civilian populations.

The ICRC believes that the specific characteristics of cluster munitions, their history of causing severe problems from a humanitarian standpoint, particularly when used against military objectives in populated areas, and the questions raised above strongly argue for the development of specific rules to regulate these weapons. In view of recent international developments and the insights gained at the Montreux meeting, the ICRC is of the opinion that a new IHL treaty regulating cluster munitions should be concluded. The treaty should (i) prohibit the use, development, production, stockpiling and transfer of inaccurate and unreliable cluster munitions; (ii) require the elimination of current stocks of inaccurate and unreliable cluster munitions; and (iii) provide for victim assistance, the clearance of cluster munitions and activities to minimize the impact of these weapons on civilian populations. Until such a treaty is adopted, the ICRC believes

that States should, on an individual basis, immediately end the use of such weapons, prohibit their transfer and destroy existing stocks.

An international agreement of this type would, if adopted, go a long way towards reducing the future impact of cluster munitions. The ICRC will, as a matter of urgency, continue to work with governments and National Societies to advance the negotiation and conclusion of a new IHL treaty on cluster munitions.

V. Non-international armed conflicts

The majority of contemporary armed conflicts are not of an international character. The daily lives of many civilians caught up in these conflicts are ruled by fear and extreme suffering. The deliberate targeting of civilians, the looting and destruction of civilian property, the forced displacement of the population, the use of civilians as human shields, the destruction of infrastructure vital to civilians, rape and other forms of sexual violence, torture, indiscriminate attacks: these and other acts of violence are unfortunately all too common in non-international armed conflicts throughout the world. The challenges presented by these conflicts are, to a certain extent, related to a lack of applicable rules, but more importantly, to a lack of respect for IHL.

Substantive challenges

Article 3 common to the four Geneva Conventions laid down the first rules to be observed by parties to non-international armed conflicts. These rules protect persons not or no longer taking an active part in hostilities by prohibiting murder, mutilation, torture, cruel treatment, the taking of hostages, and outrages upon personal dignity, in particular humiliating and degrading treatment. The passing of sentences without the observance of “all the judicial guarantees which are recognized as indispensable by civilized peoples” is also prohibited. The article states that the obligations listed constitute a “minimum” safety net that the parties are bound to observe.

Over time, the protections set out in common Article 3 came to be regarded as so fundamental to preserving a measure of humanity in war that they are now referred to as “elementary considerations of humanity” that must be observed in all types of armed conflict as a matter of customary international law.¹⁵ Common Article 3 has thus become a baseline from which no departure, under any circumstances, is allowed. It applies to the treatment of all persons in enemy hands, regardless of how they may be legally or politically classified or in whose custody they may be held.

The law governing non-international armed conflict has gone through constant development since it was first codified, in particular with the adoption, in

15 International Court of Justice, *Nicaragua v. United States*, para. 218.

1977, of Protocol II additional to the Geneva Conventions, which “develops and supplements Article 3 common to the Geneva Conventions.”¹⁶ However, treaty law may be said to still fall short of meeting some essential protection needs in non-international armed conflicts.

The rudimentary nature of treaty law has been partly overcome by the development of customary international law over the last 30 years.¹⁷ Customary rules have the advantage of being applicable to all parties to an armed conflict – State and non-State – independent of any formal ratification process. In substance, they fill certain gaps and regulate some issues that are not sufficiently addressed in treaty law, in particular in relation to the conduct of hostilities. The crystallization of customary law therefore both extended and strengthened the rules of IHL applicable in non-international armed conflicts. However, while customary international law is as much a source of international law as is treaty law, its rules or contents are frequently challenged owing to its mostly non-written form. In addition, there are still areas in which treaty law and customary law remain limited. Some of these are mentioned elsewhere in this report:

- Article 3 common to the four Geneva Conventions sets out minimum obligations with respect to persons who are detained. However, it does not provide guidance for all aspects of detention to which it may apply. It does not, for example, spell out procedural safeguards for internment, which is a form of deprivation of liberty imposed for imperative reasons of security that is recognized by humanitarian law (see Chapter III). In the ICRC’s view, other bodies and sources of law, as well as appropriate policies, should be relied on to develop a regime consistent with common Article 3. The ICRC institutional position takes cognizance of this (cf. Annex 1).
- Despite the significant development of customary international law, certain issues relating to the *law on the conduct of hostilities*, namely the notion of direct participation in hostilities, deserve further examination.

Other challenges, either to the rules themselves or to the facts on the ground, relate to the scope of application of treaty law. Determining if and when a given situation amounts to a non-international armed conflict remains sometimes difficult.

In certain cases, for example, it is unclear whether a group resorting to violence can be considered as a “party to the conflict” within the meaning of common Article 3. Apart from the level of violence involved, the nature of the non-governmental group must also be taken into account when a situation is

16 Other treaties applicable to non-international armed conflicts include the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects and its Protocols, and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

17 See Henckaerts and Doswald-Beck, above note 12: out of 161 existing customary rules identified in this study, 147 are considered to be applicable in such situations. In some areas, the rules are identical or similar to those provided by treaty law, in particular by Additional Protocol II. In other areas, the study identified rules that go beyond current treaty law and have therefore contributed to filling gaps in the regulation of internal armed conflicts.

qualified in legal terms. Where the internal structure of the group is loose or where a clandestine chain of command is at play, the question that arises is whether the group is sufficiently organized to be characterized as a party to an armed conflict. Such determinations must be made on a case-by-case basis.¹⁸ Only when the level of violence and the parties involved meet the requirements for a non-international armed conflict do the relevant rules of IHL apply.

In conclusion, despite the development of customary international law, the clarification and possibly the development of the law applicable in non-international armed conflicts remains a major challenge.

In addition to these legal challenges, the law governing non-international armed conflict faces other challenges in practice, the most prominent of which is probably asymmetric warfare. However, the answer to the challenges posed by it does not seem to lie in the legal domain – in particular in the development of IHL. Conduct by the militarily inferior party (often the non-State party), which is regularly condemned in this type of warfare, already involves serious violations of IHL and may entail individual criminal responsibility (attacks against civilians, civilian objects and specially protected objects, the use of human shields, hostage-taking, etc.) A relaxation of the obligations of the militarily superior party in reaction to violations by the other side is not an option either. Such a step would lead first to a weakening and then to an erosion of various types of protection for which the international community has fought for a long time. This would almost inevitably lead to serious violations of life, physical integrity and dignity thus far prohibited by IHL. States and other actors that may be too quick to claim that the law is no longer adequate in dealing with contemporary forms of armed violence should bear this in mind.

Taking these considerations into account, the ICRC plans to examine current and new types of armed violence and assess the current status of the law of non-international armed conflict, in the light of treaty law and customary international law. On the basis of the results, it will evaluate whether there is a need for further clarification or development of the law with a view to strengthening the protection of persons and objects affected by non-international armed conflicts.

Respect for IHL in non-international armed conflicts

Discussions at the regional expert seminars organized by the ICRC in 2003 showed that improving compliance with IHL is most challenging in non-international armed conflicts, especially in relation to non-State parties to such conflicts. Specific circumstances, such as the increasingly fragmented nature of armed conflicts occurring in weak or failed States, the asymmetric nature of most conflicts and the growing involvement of civilians in hostilities tend to undermine observance of the law. Against this background, looking for new ways of achieving

18 See also “IHL and Terrorism”.

better implementation and enforcement of humanitarian law must be seen as a priority.

It should be noted that considerable efforts have been made over the last 15 years to ensure that individuals responsible for serious violations of IHL are prosecuted and punished. Ad hoc tribunals have been established, as well as the International Criminal Court and special or mixed tribunals. While these developments should continue, particular attention must also be paid to improving compliance with IHL while an armed conflict is going on. It is of utmost importance that preventive mechanisms be consolidated if the law is to fulfil its protective role. States have a crucial role to play in such an effort.

At the suggestion of the experts convened for the regional seminars, the ICRC has focused its attention on this aspect of the problem. One result has been the publication of *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts* (ICRC, April 2007). This publication is based on ICRC experience in non-international armed conflicts. It summarizes some of the considerable challenges the ICRC has faced and the lessons it has learnt in its efforts to increase respect for IHL. It also includes an overview of the dissemination activities, the legal tools, and the methods of persuasion that the ICRC has used for improving compliance with IHL. The main findings are outlined in the following paragraphs. In addition, to the tools presented, it should not be forgotten that States not involved in a non-international have a role to play – individually or collectively – in ensuring respect for IHL, also with regard to non-State armed actors. This responsibility exists to the extent that States have or can have some influence on the behaviour of the parties to an armed conflict. It is not an obligation to reach a specific result, but rather an “obligation of means” on States to take all appropriate measures possible, in an attempt to end IHL violations.

When seeking to engage with the parties to non-international armed conflicts and to improve their compliance with IHL, the ICRC has faced the following challenges.

Diversity of conflicts and parties

Non-international armed conflicts differ enormously. They range from those that resemble conventional warfare, similar to international armed conflicts, to those that are essentially unstructured. The parties – whether States or organized armed groups – vary widely in character. Depth of knowledge of the law, motives for taking part in an armed conflict, interest in or need for international recognition or political legitimacy all have a direct impact on a party’s compliance with the law. Organized armed groups, in particular, are extremely diverse. They range from those that are highly centralized (with a strong hierarchy, effective chain of command, communication capabilities, etc.) to those that are decentralized (with semi-autonomous or splinter factions operating under an ill-defined leadership structure). Groups may also differ in relation to the extent of their territorial

control, their capacity to train members, and the disciplinary or punitive measures that are taken against members who violate IHL.

Denial of applicability of IHL

Not infrequently, a party to a non-international armed conflict – either a State or an armed group – will deny the applicability of humanitarian law. Governmental authorities, for example, might disagree that a particular situation qualifies as an armed conflict. They might claim instead that it is a situation of “tension” or one that involves banditry or terrorist activities that do not amount to a non-international armed conflict, as recognition that such an armed conflict is taking place would, in their view, implicitly grant “legitimacy” to the armed group. Non-State armed groups might also deny the applicability of IHL on the grounds that it is a body of law created by States and that they cannot be bound by obligations ratified by the government against whom they are fighting. In such cases, the law will seldom be a relevant frame of reference, especially for groups whose actions are shaped by strong ideology.

Lack of political will to implement humanitarian law

A party may have no – or not enough – political will to comply with the provisions of humanitarian law. Where the objective of a party to a non-international armed conflict is itself contrary to the principles, rules and spirit of humanitarian law, there will be no political will to implement the law.

Ignorance of the law

In many non-international armed conflicts, bearers of arms with little or no training in IHL are directly involved in the fighting. This ignorance of the law significantly impedes efforts to increase respect for IHL and to regulate the behaviour of the parties to conflicts.

Based on its long experience in situations of non-international armed conflict, the ICRC has drawn a number of lessons which could be helpful to more effectively address parties to non-international armed conflicts with a view to an improved respect for IHL.

Present the law “strategically”

Merely making the parties to an armed conflict aware of the law or of their specific obligations is not enough to ensure compliance. The law should be presented and discussed “strategically,” in a manner that is relevant and adapted to the context, and as part of a deliberate plan to engage the parties. This is necessary if parties are to develop a receptive attitude towards the law, which is the first step towards compliance. To present the law “strategically” implies knowing and understanding a party’s motivations and interests. This will make it easier to explain why it is in

the party's interest to observe the law. Arguments may be based on the following considerations: military efficacy and discipline; expectation of reciprocal respect and mutual interest; reputation (adherence to IHL can improve the party's image or public standing), appeal to core cultural values that mirror those of IHL, long-term interests (e.g. facilitation of post-conflict national reconciliation and a return to peace) and the risk of criminal prosecution.

Understand and adapt to the unique characteristics of the conflict and the parties

Given the great diversity of armed conflicts and parties, there is no uniform approach to the problem of lack of respect for humanitarian law. Any effort to increase respect for the law will be more effective if it takes into account the unique characteristics of a specific situation. This is especially true with regard to the parties themselves. It is particularly helpful to know and to understand a party's motivations and interests in order to explain why it is in the party's interest to comply with the law.

Work in the context of a long-term process of engagement

Attempts to influence the behaviour of parties to a non-international armed conflict will be most effective if they are part of a process of engaging and building up a relationship with each of those parties. Carried out over the long term, such a process will also provide opportunities for acquiring insight into the characteristics of the parties and thus form a basis for discussing the law "strategically." It will also lead to opportunities for addressing issues such as the party's political will and capacity to comply with the law.

In addition to dissemination and training activities, which are crucial to making the rules of IHL known and to building a foundation for discussions concerning respect for the law, a number of legal tools have been used by the ICRC and other humanitarian actors in their efforts to improve compliance with humanitarian law by parties to non-international armed conflicts. Such tools do not themselves guarantee increased respect, but they nevertheless provide a basis on which legal representations can be made and on which accountability can be required. These tools, which are interrelated and reinforce each other, include the following:

- Special agreements between the parties to non-international armed conflicts whereby they explicitly commit themselves to comply with humanitarian law (see Article 3 common to the four Geneva Conventions)
- Unilateral declarations (or "declarations of intention") by armed groups party to non-international armed conflicts whereby they commit themselves to comply with IHL
- Inclusion of humanitarian law in codes of conduct for armed groups
- References to humanitarian law in ceasefire or peace agreements
- Grants of amnesty for mere participation in hostilities

It is hoped that the contents of the publication *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, which have only been summarized here, will serve to inform and assist others who might wish to undertake efforts to increase respect for IHL in non-international armed conflicts.

VI. Regulating private military and private security companies

Over the last few years, the traditional roles of the State and its armed forces in wartime have increasingly been contracted out to private military and security companies (PMCs/PSCs). While the presence of these companies in conflict situations is not new, their numbers have grown and, more significantly, the nature of their activities has changed. In addition to the more traditional logistical support, PMCs/PSCs have been involved more and more in activities that bring them close to the heart of military operations – and thereby into close proximity to persons protected by IHL. These activities include protecting military personnel and assets, training and advising armed forces, maintaining weapons systems, interrogating detainees and sometimes even fighting.

Many of the discussions relating to PMCs/PSCs centre on the legitimacy of outsourcing the use of force and on the question of whether there should be formal limits placed on the right of States to do so. Whatever the outcome of those discussions, the only realistic assumption in the medium term is that the presence of PMCs/PSCs in armed conflicts is bound to increase. The tendency of many States to downsize their armed forces means that there will be fewer troops available for active combat. Given the highly complex nature of modern weapons systems, the armed forces are also increasingly dependent on outside expertise in this area. PMCs/PSCs will also continue to be hired by States whose armies are understaffed or insufficiently trained. Even some international and non-governmental organizations now use the services of PMCs/PSCs for their own security. It is not to be excluded that in the future armed opposition groups will also hire PMCs/PSCs. It is likewise possible, although it appears unlikely for the moment, that PMCs/PSCs will be hired for multinational military operations if States cannot provide the troops required.

Given its exclusively humanitarian mandate, the ICRC's interests lie not in joining the debate over the legitimacy of the use of private companies in armed conflicts but rather in finding ways of bringing about greater compliance with IHL. The question for the ICRC is not whether PMCs/PSCs should be present in armed conflicts but rather what IHL says when they are. What are the obligations of PMCs/PSCs and their staff and what are the obligations of States? This is the focus of the following section of the report.

It is sometimes said that PMCs/PSCs operate in a legal vacuum, that international law gives no answers as to how violations committed by their staff should be handled. This has been the tenor of numerous media reports. Such a broad statement is incorrect from a legal point of view and it is important to stress

that obligations do exist in that regard. However, it is also true that there are problems of implementation due to the unwillingness or inability of States and other parties to uphold the rules in practice. Moreover, existing international rules are sometimes so broadly formulated as to require clarification in order to give practical and realistic guidance as to how States should transpose them into their national legal systems and practice. This is the case, in particular, with regard to two main issues:

1. The status, rights and obligations of the employees of PMCs/PSCs
2. The obligation of States to respect and ensure respect for IHL in connection with the activities of PMCs/PSCs

While the former question is rather clear as a matter of law, although often confusing in practice, the latter requires further clarification.

Status, rights and obligations of the employees of PMCs/PSCs

PMCs/PSCs are private companies. While IHL is binding on non-State actors, this is only the case insofar as they are parties to an armed conflict (namely, organized armed groups). As legal entities, private companies are not bound by IHL, contrary to their staff who, as individuals, must abide by IHL in armed conflicts.

Individuals working for private companies in armed conflicts have rights and obligations under IHL – but there is no single status covering all employees. The status of each individual depends on the particular situation in which he or she is operating and the role that he or she performs. Also, the attitude towards mercenaries, which is often emotionally charged and highly political, tends to complicate the legal examination of their status.

In international armed conflicts, employees of PMCs/PSCs can fall into any of several legal categories:

First of all, they can be members of the armed forces in the sense of Article 4(A)(1) and (3) of the Third Geneva Convention¹⁹ if they are incorporated into those forces, as has been the case in a number of instances. Far more frequently, however, States resort to PMCs/PSCs because they are downsizing their own armed forces. Thus, there are likely to be few instances where PMCs/PSCs form part of the armed forces.

Secondly, employees of PMCs/PSCs can be militias or other volunteer corps belonging to a State party to an armed conflict within the meaning of Article 4(A)(2) of the Third Geneva Convention.²⁰ This is the case if, in a situation of international armed conflict, they constitute a group “belonging to” a party to the conflict and fulfil the four criteria defining that group: to be under responsible command, to have a fixed distinctive sign, to carry arms openly and to obey the laws and customs of war.

Thirdly, a number of employees of PMCs/PSCs are likely to fall into the category of civilians accompanying the armed forces within the meaning of Article

¹⁹ See also Article 43 of Additional Protocol I.

²⁰ Ibid.

4(A)(4) of the Third Geneva Convention – one of the examples explicitly mentioned in that article are civilian members of military aircraft crews or supply contractors. It is important to stress that civilians accompanying the armed forces remain civilians. While they are entitled to prisoner-of-war status in an international armed conflict, they are not, as civilians, entitled to directly participate in hostilities and can arguably be prosecuted under domestic law for doing so. However, not all contractors will fall into the category of civilians accompanying the armed forces. In order for a person to qualify as such, there must be a real link, namely he or she must provide a service to the armed forces, not merely to the State.

In fact, given the limitations on all the above categories, the majority of PMC/PSC employees will fall into the category of civilians. As such, they benefit from the protection afforded to civilians under IHL. In international armed conflicts, they are covered by the Fourth Geneva Convention (as long as they fulfil the nationality criteria set out in Article 4), Additional Protocol I and customary law. In non-international armed conflicts, they come under common Article 3, Additional Protocol II and customary law. If they participate directly in hostilities, however, they lose the protection from attack afforded to them as civilians in both types of conflict.

Lastly, in relation to status, the term “mercenary” must be mentioned, as it is often used, particularly by the media, to describe PMC/PSC employees. From a strictly legal point of view, this description is incorrect in most cases owing to the narrow definition given to the term under IHL. In order to qualify as a “mercenary” under IHL, a person must meet each of the following six criteria: he or she must (1) have been recruited specially to fight in an armed conflict, (2) in fact be taking a direct part in hostilities, (3) be motivated essentially by the desire for private gain; (4) be neither a national of a party to the conflict nor a resident of any territory controlled by a party to the conflict, (5) not be a member of the armed forces of a party to the conflict, (6) not have been sent by a State that is not a party to the armed conflict on official duty as a member of its own armed forces. A number of these criteria may lead to the exclusion of most PMC/PSC staff from the category of “mercenary” as defined under IHL. This is because, first of all, most PMC/PSC employees are not specifically contracted to fight in an armed conflict and do not take a direct part in hostilities. They are quite often hired to provide other services, for example in the areas of training, personal security or intelligence. Secondly, all nationals of one of the parties to the conflict are excluded. Lastly, simply by incorporating them into its armed forces, a State wishing to use PMCs/PSCs can avoid having its staff considered as mercenaries even if all the other conditions are met.

In any event, from the point of view of IHL applicable in international armed conflicts, a person who falls into the category of mercenary is not considered a combatant and has no right to prisoner-of-war status (Article 47 of Additional Protocol I). Consequently, mercenaries can be prosecuted under domestic law for directly participating in hostilities. Nonetheless, provided they fulfil the nationality criteria set out in Article 4 of the Fourth Geneva Convention,

mercenaries are protected persons (within the limits set by Article 5 of that Convention). Otherwise, the provisions of Article 75 of Additional Protocol I would apply to them as a matter of treaty law or customary international law.

States remain, of course, free to prohibit PMCs/PSCs altogether, or to prohibit certain services they provide, such as those involving direct participation in hostilities. For instance, States party to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries and the Convention for the Elimination of Mercenarism in Africa have an obligation to criminalise mercenarism in their internal domestic order. The issue of mercenarism is closely linked to the question as to how much a State can and should outsource the use of force and remains important. IHL, however, does not address that question.

Obligations of States

States have a number of obligations under international law with regard to the activities of PMCs/PSCs. These obligations need to be clarified in order for States to put adequate legislation and mechanisms into place.

Under Article 1 common to the four Geneva Conventions, all States have an obligation to respect and ensure respect for IHL. Several categories of States have a role to play, in particular: States that hire PMCs/PSCs, States on whose territory PMCs/PSCs operate, States in whose jurisdictions PMCs/PSCs are incorporated, and States whose nationals are PMC/PSC employees.

States that hire PMCs/PSCs have the closest relationship with them. At the outset, it is important to stress that those States themselves remain responsible for respecting and fulfilling their obligations under IHL. For instance, Article 12 of the Third Geneva Convention clearly stipulates that whoever is individually responsible, the detaining power remains responsible for the treatment of prisoners of war. This close relationship also means that States can be directly responsible for the acts of PMCs/PSCs when these are attributable to them under the law of State responsibility, particularly if the PMCs/PSCs are empowered to exercise elements of governmental authority or if they act on the instructions or under the direction or control of State authorities.

In addition, States contracting a PMC/PSC have an obligation to ensure respect for IHL by the company. This is a rather broad legal obligation, but best practice gives an indication of how it can be fulfilled by States. For instance, States could include certain requirements in the company's contract, such as adequate training in IHL, the exclusion of specific activities such as participation in military operations or the vetting of employees to ensure they have not committed violations in the past.

Lastly, States that hire PMCs/PSCs, like all other States, must repress war crimes and suppress other violations of IHL committed by PMC/PSC staff.

States on whose territory PMCs/PSCs operate also have an obligation to ensure that IHL is respected within their jurisdictions. In practice, this can be done by enacting regulations providing a legal framework for the activities of PMCs/PSCs. For instance, States could establish a registration system imposing certain

criteria for PMCs/PSCs; or they can have a licensing system, either for individual companies, or for specific pre-defined services, or on a case-by-case basis for each service.

States in whose jurisdictions PMCs/PSCs are incorporated or have their headquarters likewise have an obligation to ensure respect for IHL. They are particularly well-placed to take practical, effective measures because, like States on whose territory PMCs/PSCs operate, they have the possibility to regulate and license PMCs/PSCs. They could enact regulations requiring that PMCs/PSCs meet a number of conditions to operate lawfully, for instance that their employees receive appropriate training and be put through an adequate vetting process.

Lastly, States whose nationals are PMC/PSC employees should be mentioned. While these States may have virtually no link to the company as such or to the operation, they have a strong jurisdictional link to the employees and may thus be well-placed to exercise criminal jurisdiction over them should they commit violations of IHL, even abroad.

In short, different States have obligations under IHL. Taken together, these obligations form quite an extensive international legal framework surrounding the operations of PMCs/PSCs. Some of the obligations are relatively broad, and there is a need for guidance so that States can put them into practice. There are a variety of ways in which this can be done effectively and in which remaining gaps in accountability can be filled.

The Swiss initiative on PMCs/PSCs (carried out in co-operation with the ICRC)

In view of the increasing presence of PMCs/PSCs in armed conflicts, the government of Switzerland has launched an initiative to promote respect for IHL and propose ways of dealing with the issue. The objectives of the initiative²¹ are:

1. to contribute to the intergovernmental debate on the issues raised by the use of private military and security companies;
2. to study and develop good practices, on the basis of existing obligations, in order to assist States in respecting and ensuring respect for IHL and human rights law.

The ICRC is working closely with the Swiss government on this initiative with the aim of achieving greater respect for IHL.

After initial consultations, two meetings, for governmental experts, academics, non-governmental organizations and members of the industry were held in 2006 to discuss existing obligations and the possibility of regulation. The process will continue throughout 2008 with expert consultations on specific issues and intergovernmental meetings.

21 For further information, please consult the website of the initiative at <http://www.eda.admin.ch/psc>.

VII. Occupation and other forms of administration of foreign territory

Occupation

Occupation is a situation that is regulated by international law. It is essentially based on the concept of effective control of a territory as implied by the definition provided in Article 42 of The Hague Regulations of 1907: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

It is not disputed that the relevant provisions of the Hague Regulations of 1907, of the Fourth Geneva Convention of 1949 and of Additional Protocol I of 1977 are still fully applicable in all cases of total or partial occupation of a foreign territory, whether or not the occupation meets with armed resistance. In general terms, the law of occupation provides the legal framework for the temporary exercise of authority by an occupying power; it tries to strike a balance between the security needs of that power, on the one hand, and the interests of the ousted authority and those of the local population, on the other. In the classical interpretation of occupation law, sovereign title does not pass to the occupying power and the latter essentially has to preserve the *status quo ante* as far as possible. The occupying power is thus obliged to respect the existing laws and institutions and to introduce changes only where necessary to carry out his duties under the law of occupation, to maintain public order and safety, to ensure orderly government and to maintain security.

Occupation law has, however, been challenged on the grounds that it is unsuitable to the complex features of more recent situations of occupation. The reluctance of certain States to accept the applicability of occupation law to situations in which they are involved has been justified by claims that those situations differ considerably from classical occupation by a belligerent force and should be governed by a more specific body of rules than the law of occupation currently affords.

According to some scholars, certain fundamental concepts of public international law, such as the right to self-determination, as well as developments in human rights law, have not been duly reflected in occupation law. The applicability of human rights law to situations of occupation has generated important questions deserving examination, such as how far an occupying power can go in implementing that law in occupied territory. Particular issues have also arisen in relation to the right to self-determination, including whether an occupying power can take legislative action to further the exercise of this right by the people and whether the right to self-determination can justify wholesale changes in the occupied territory, be they social, economic, political or institutional.

Linked to that is a broader debate about the alleged increasing inadequacy of the premise underlying occupation law, namely that the exercise of provisional authority to which the occupant is entitled does not permit the introduction of

wholesale changes to the legal, political, institutional and economic structure of the territory in question. Indeed, it has been argued that the static nature of occupation law places an undue emphasis on preserving the socio-political *continuum* of the occupied territory. In that context, it has been pointed out that the transformation of an oppressive governmental system or the rebuilding of a collapsing society – by means of occupation – could be in the international community's interest and possibly necessary for the maintenance or restoration of international peace. Consequently, it may be said that there has been a growing divergence between occupation law, which requires that the laws and institutions in place be respected, and the perceived necessity of fundamentally altering a society under occupation in certain circumstances.

The questions raised above are equally relevant when the transformative goals of certain occupations, often justified by human-rights considerations, ensue from a UN Security Council mandate. Certain rules of occupation law have given rise to debate about their consistency with responsibilities outlined by the Council given that, in certain situations, the obligation to preserve *the status quo ante* can hardly be reconciled with the goal of overhauling a system of government. Some have described this situation as a clash of obligations, or as a “carve-out” by the UN Security Council of parts of occupation law. Departure from occupation law seems to be accepted by legal scholars to the extent that it does not affect *jus cogens* norms contained in IHL instruments.

For the purposes of this report, it is premature to propose any definite answers. It is submitted nevertheless that some limits must be set on change that may be effected during a situation of occupation, if one accepts the need for change, as advocated by some. While an occupying power may have a degree of flexibility in implementing human rights norms, including the right to self determination, it certainly cannot be given *carte blanche* to change legislation and institutions so as to conform to its own political, legal, cultural and economic needs or values. Occupation law, it should not be forgotten, is a coherent whole that carefully balances a variety of different interests, from which derogations should only be possible in exceptional circumstances.

Other forms of administration of foreign territory

Aside from the various challenges posed by contemporary situations of occupation, another set of challenges has arisen in relation to the applicability of IHL to UN peace-keeping operations, particularly those that involve the international administration of a territory under a Chapter VII mandate. In its various interventions under that Chapter, the UN has not always assumed direct governmental functions, but has instead relied on domestic institutions or, where they were not available, assigned responsibility to the forces engaged on the ground or to a specific body charged with administering the territory concerned. Important questions arising from such situations include whether IHL and occupation law are applicable to this type of UN operation and under what circumstances. Consequently, it seems necessary to clearly define the legal

framework regulating the administration of a territory by multinational forces or by an international civil administration and the particular relevance of IHL and occupation law in that context. To this end, an examination of whether IHL provides practical solutions to many of the problems faced by an international civil or military administration would seem appropriate.

On the basis of the issues raised above, as well as others that have presented recent challenges for occupation law (some of them already mentioned in the ICRC report submitted to the 28th International Conference), the ICRC intends to analyse whether and how far the rules of occupation law might need to be reinforced, clarified or developed. In 2007 the ICRC initiated a project on occupation law aimed at examining questions arising in connection with recent situations of occupation and other forms of administration of foreign territory. The project, which includes consultations with key actors and the organization of expert meetings, is expected to follow up on discussions held at a 2003 expert meeting that focused on the applicability of IHL and occupation law to multinational peace operations. The ICRC hopes, with the assistance of legal experts, to propose substantive and procedural ways of moving forward.

VIII. Increasing respect for IHL: the role of sanctions

Better implementation of IHL both in peacetime and in armed conflicts is a constant priority for the ICRC. In its report to the 28th International Conference, the ICRC focused its attention on means and methods of achieving greater respect for and compliance with IHL in armed conflicts, in particular by highlighting the extent and scope of States' obligation to "respect and ensure respect" for IHL in all circumstances. It also organized a series of five regional expert seminars that examined, along with other issues, existing and potential IHL supervisory and enforcement mechanisms.²²

Four years after the report was presented to the 28th International Conference, the goal of achieving greater respect, implementation and enforcement of humanitarian law remains an abiding challenge. This is primarily the responsibility of the parties to armed conflicts, whether State or non-State.

Implementation presupposes an understanding of and a commitment to respect the law by all belligerents. It also requires sustained action by States in their legal orders and practice with a view to adopting the wide range of national implementation measures required by IHL, including the enactment of legislation, the development of military manuals, and proper training and command supervision within the armed and security forces. In addition, appropriate sanctions, of a criminal or disciplinary character, must be provided for and applied against those who violate the rules.

²² One concrete outcome of the expert meetings is discussed in Chapter V.

Important progress has been achieved over the past four years in the domestic legal orders of a great number of States, which have sought to adapt their legislation and practice to the provisions of IHL and resulting obligations. This is, *inter alia*, reflected in the establishment by an increasing number of States of national committees and other bodies in charge of advising their governments on matters relating to IHL and its domestic implementation. Nevertheless, much remains to be done and this is an issue of constant concern to the ICRC.

Significant strides have also been made in the last 15 years with regard to the creation of international mechanisms for the recognition of individual criminal responsibility. Ad hoc tribunals have been established, as well as the International Criminal Court and special or mixed tribunals. Some States have also proved willing to exercise extraterritorial jurisdiction over war crimes in order to prosecute and punish serious violations of IHL in their own domestic courts. However, while recognition of individual criminal responsibility may thus be said to have undergone important developments, improving compliance with IHL by all belligerents on the battlefield is and remains a key challenge.

ICRC initiative on the role and deterrent effect of sanctions against perpetrators of serious violations of IHL

In 2004 the ICRC published a study²³ on the roots of behaviour in war, the object of which was to identify the factors that are crucial in conditioning the conduct of belligerents. One of the study's main conclusions was that training, strict orders and effective penalties for failure to obey those orders are the best means of influencing the behaviour of weapon bearers.

The ICRC has been examining these conclusions in greater depth, focusing in particular on the role of sanctions in ensuring greater respect for IHL. It also sought to further substantiate the conclusions and to reflect on two questions identified as essential. These questions relate to the nature and characteristics of sanctions and to the environment in which they are applied. Both questions are being examined with a view to dissuading arms carriers from committing serious violations of IHL.

The nature and characteristics of sanctions

The first part of the ICRC's examination focuses on three main issues, beginning with the deterrent nature of sanctions, namely the role played by the threat of punishment as opposed to the punishment itself.

In this connection, the ICRC observed that if sanctions were applied randomly and were thus unpredictable, combatants were generally willing to take a chance and violate the law since they considered that there was a high probability that they would not be punished. Moreover, if sanctions were regarded as purely

23 Daniel Munoz-Rojas and Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, Geneva, October 2004.

hypothetical, they would not be effective in preventing violations, no matter how heavy the penalty might be. This shows that the effectiveness and legitimacy of sanctions must be strengthened at all levels. Indeed, the problem is less one of inadequate criminal provisions as one of lack of implementation. In the heat of armed conflict, courts – whether domestic or international – usually cannot and do not intervene by sentencing and punishing violators. Thus, there is a need for alternative or complementary solutions that make sanctions a reality. If the perpetrators of serious IHL violations expected to be punished, whether through the criminal justice system or by any other means, their behaviour could change. In this respect, disciplinary sanctions should be explored because of the rapid and effective signal they send combatants and the heavy stigma attached to them in terms of peer rejection. However, caution should be exercised in two regards: first of all, disciplinary sanctions might be seen as leading to efforts to conceal the gravity of a crime and, secondly, they might be insufficient to satisfy the interests of the victims.

The second question relates to the issue of *to whom sanctions apply*. In all types of armed conflict, international law extends criminal responsibility for violations beyond the circle of actual perpetrators to encompass a large number of potential participants, including senior military and civilian officials. The ICRC is particularly interested in assessing the impact of this extended responsibility in relation to the role of the individuals concerned (arms carriers, heads of field units, commanders or civilian officials) and the sanctions that could be attached to their unlawful behaviour.

The third topic studied is the *forms of justice* – civilian or military – and their impact in terms of ensuring greater respect for IHL. Where no provision has been made for the exclusive jurisdiction of either civilian or military courts, additional work is required to set the criteria according to which the division of competences should be established.

The influence of the environment on the deterrent effect of sanctions

The second part of this reflection seeks to examine the context in which violations of IHL occur and the applicability of sanctions. Identifying the factors that influence behaviour in armed conflicts calls for a reflection that goes beyond the topic of sanctions and considers all the elements likely to influence that behaviour, especially since sanctions are clearly not seen and understood in the same manner by arms carriers everywhere. There is also merit in attempting to reconcile the values of different groups with those of IHL. The ICRC is willing to conduct a study on sanctions' efficiency which would take into account the influence of factors characterising pre-identified scenarios in which sanctions are called to be applied, which is a highly under-explored area of research.

The expectations and needs of victims

When considering the role of sanctions, it is important to give serious thought to the interests of victims of IHL violations and to the type of system that could best

meet their expectations and needs. The fact that criminal proceedings do not always take the interests of victims into account is often a source of frustration, disappointment and anger. Issues such as truth, reparation and vetting, which play a key role in permitting societies and the individuals that make them up to heal and rebuild their lives, cannot be appropriately dealt within a traditional criminal-justice system. Alternative mechanisms should be considered in this regard. These mechanisms could also impose sanctions on perpetrators – albeit of a different nature than strictly criminal sanctions – which would result from a bargaining process between the victims, the perpetrators and the affected society. The ICRC hopes to further explore alternative or complementary processes and measure their impact on preventing serious IHL violations.

How the research is being carried out

In order to carry out this examination, the ICRC has been working with a group of independent experts from various fields. They were invited to respond in writing to four case studies and attended two informal meetings, held in April 2006 and June 2007, where they discussed topics such as the nature of sanctions, various forms of responsibility and justice, the risks of court action, and amnesty, the needs of victims and mechanisms of transitional justice. The meetings helped narrow down the issues that will be addressed at a broader inter-regional meeting to be held in November 2007. The purpose of the November meeting will be to develop and draft concrete proposals designed to assist the ICRC in its efforts to help establish an integrated system of sanctions, one that would have an effective long-term influence on the behaviour of combatants and on their environment with a view to promoting better compliance with IHL.

REPORTS AND DOCUMENTS

National implementation of international humanitarian law

Biannual update on national legislation and case law January – June 2007

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A. Legislation

Argentina

*Law No. 26.247 on the implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*¹ was adopted on 25 April 2007.

The Law sets out the obligations established by the Convention; it forbids the production, acquisition, stockpiling, retaining or use of the chemical substances defined in the Convention's List 1. It provides that any individual or corporate body can, for purposes not prohibited by the Convention, develop, produce, acquire in any form, retain, transfer and use, import and export any toxic chemicals or substances and their precursors. Subject to the control, supervision and inspection of an Inter-Ministerial Commission for the Prohibition of Chemical Weapons, the chemical substances defined in List 1 may, however, be produced or transferred to another State Party for research, medical, pharmaceutical or protective purposes. The Law also allows for inspections to be carried out by the Organization for the Prohibition of Chemical Weapons. Finally, the Law provides for administrative and criminal sanctions in case of violation of its provisions.

¹ Ley No. 26.247, sobre la implementación de la Convención sobre la prohibición del desarrollo, la producción, el almacenamiento y el empleo de armas químicas y sobre su destrucción. Published on 22 May 2007.

Comoros

Law No. 07-002/AU relating to cooperation with the International Criminal Court was adopted by the Assembly of the Union of Comoros on 13 January 2007.

The Law deals with issues such as arrest, surrender and all other forms of cooperation with the International Criminal Court provided for in article 93 of the ICC Statute. This Law provides for a detailed procedure to be followed by the Comorian authorities in cases where they receive a request for the arrest of suspects and their surrender to the ICC. In addition, it grants the judicial authorities the competence to interrogate any person, including witnesses and experts, on behalf of the ICC. The Law provides that the execution of the ICC's sentences, whether through the imposition of penalties, confiscation and forfeiture of property and assets or other measures of reparation, shall be authorized by the Moroni Magistrates' Court (*Tribunal Correctionnel*). Lastly, the Law authorizes the execution in the Comoros of sentences of imprisonment delivered by the ICC.

Estonia

The *Act on protection of war graves* was adopted on 10 January 2007 and entered into force on 20 January 2007.²

In furtherance of article 30 of the Fourth Geneva Convention of 1949 and article 34 of Protocol I of 1977 additional to the Geneva Conventions, the Act sets out the regulations and procedures to guarantee respect for, protection and dignified treatment of the remains of persons who died during or as a consequence of acts of war during the Estonian War of Independence. In accordance with the new Law, the Ministry of Defence, with the advice of a War Graves Committee, shall be responsible for keeping a list of war graves, deciding upon the reburial of human remains or their transportation to cemeteries, as well as for organizing the exhumation and identification of human remains from a gravesite.

Mexico

The *Law on the use and protection of the red cross and red crescent emblems* was adopted on 19 December 2006 and entered into force on 24 March 2007.³

The Law defines the rules applicable to the use and the protection of the red cross, red crescent and any other distinctive emblem under an international agreement to which Mexico is a State Party. Subject to the authorization of the Secretary of National Defence and in accordance with the Geneva Conventions of 1949, the medical and religious personnel of the armed forces, hospital ships and other vessels providing medical services, medical transport companies operating by land, sea and air, civilian hospitals, hospital zones and localities, as well as the Mexican Red Cross and other voluntary aid societies, are entitled to use the

² Protection of War Graves Act. Published in the Riigi Teataja I 2007, 4, 21 on 19 January 2007.

³ Published in the Diario Oficial de la Federación, Tomo DCXLII, No. 16 on 23 March 2007.

emblem as a protective device in the event of armed conflict. The International Committee of the Red Cross and the International Red Cross and Red Crescent Federation do not require such authorization. The Law also provides that the components of the International Movement of the Red Cross and Red Crescent, including the Mexican Red Cross, are entitled to use the emblem as an indicative device. Finally, the Law outlines that any unauthorized use of the emblem is subject to administrative sanctions.

Panama

Law No. 14 establishing a new Criminal Code was adopted by the National Assembly on 5 April 2007.⁴ The new Criminal Code contains a chapter incorporating crimes against humanity, genocide and war crimes as offences in domestic law.

The Code defines a number of offences against persons, goods and cultural property protected under international humanitarian law, with reference *inter alia* to the provisions of the 1949 Geneva Conventions and their 1977 Additional Protocols, the 1998 Rome Statute of the International Criminal Court, the 1972 Convention on Biological and Toxin Weapons, the 1980 Convention on Certain Conventional Weapons and the 1993 Convention on Chemical Weapons. In its definitions of the above offences, the Code does not establish a distinction between international and non-international armed conflicts. Additionally, the Criminal Code provides that domestic courts shall enjoy jurisdiction to try the specified international crimes based on the principle of universal jurisdiction and that such crimes shall not be subject to any statute of limitations. It also recognizes the criminal liability of commanders and of other superiors and precludes the granting of an amnesty or pardon in relation to such offences.

Senegal

*Law No. 2007-02 amending the Criminal Code*⁵ and *Law No. 2007-05 amending the Code of Criminal Procedure relating to the implementation of the Rome Statute instituting the International Criminal Court*⁶ were adopted on 12 February 2007 and entered into force on 11 March 2007.

Law No. 2007-02 incorporates as offences in domestic law the crimes of genocide, crimes against humanity and war crimes, as well as the offences against the administration of justice of the ICC. The Law follows the same wording as the Rome Statute in order to “reaffirm the *ius cogens* character of those rules”.

4 Ley No. 14 que adopta el Código Penal. Published on 22 May 2007. It will enter into force on 19 May 2008.

5 Loi No. 2007-02 modifiant le Code pénal. Published in the Official Gazette on 10 March 2007, pp. 2377–2378.

6 Loi No. 2007-05 modifiant le Code de Procédure pénale relative à la mise en oeuvre du Traité de Rome instituant la Cour pénale internationale. Published in the Official Gazette on 10 March 2007, pp. 2384–2386.

Additionally, the Law declares that any person can be tried for any act or omission, which, at the time when it was committed, was a crime according to the general principles of law recognized by the community of nations.

In regard to the core crimes of the Rome Statute as defined in the Criminal Code pursuant to Law No. 2007-02, Law No. 2007-05 allows for the trial of suspects based on the principle of universal jurisdiction and provides that such offences shall not be subject to any statute of limitations. The Law establishes the legal basis for compliance with requests received from the ICC for the arrest and surrender of suspects and for other assistance in criminal matters, such as the transmission of different types of evidence and information to the Court or the protection of victims and witnesses. Finally, the Law establishes that requests for cooperation shall be received by the Ministry of Justice and executed by the General Prosecutor attached to the Court of Appeals of Dakar.

United States

On 14 February, the President of the United States issued *Executive Order Trial of Alien Unlawful Enemy Combatants by Military Commission*.⁷

The new Executive Order authorizes the establishment of military commissions to try persons named as possible “alien unlawful enemy combatants”. The new order performs a technical step required under the Military Commissions Act of 17 October 2006.⁸

B. National Committees on International Humanitarian Law

France

On 5 March 2007, the National Assembly and the Senate adopted *Law No. 2007-292 relating to the French National Consultative Commission for Human Rights*.⁹

The new Law replaces Decree No. 84-72 of 30 January 1984 (as amended) and confirms the Commission’s mandate as a consultative body to the Government in matters relating to human rights, international humanitarian law and humanitarian action. The Law provides that the Commission shall assist the Prime Minister and concerned Ministries by providing advisory opinions and recommendations and shall be composed of representatives of international and non-governmental organisations specializing in the field of human rights and

7 Available online at <<http://www.whitehouse.gov/news/releases/2007/02/20070214-5.html>> (visited on 30 September 2007).

8 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (17 October 2006), enacting Chapter 47A of title 10 of the United States Code (also known as Senate Bill 3930).

9 Loi N° 2007-292 relative à la Commission nationale consultative des droits de l’homme, published in the Official Journal No. 55 of 6 March 2007, p. 4215.

humanitarian law, national experts, members of Parliament and other relevant State bodies, such as the Economic and Social Council.

The modalities of operation of the Commission under the new Law were subsequently outlined in Decree No. 2007-1137 relating to the Composition and Operation of the National Consultative Commission for Human Rights, adopted by the Prime Minister on 26 July 2007¹⁰.

Honduras

The Honduran Commission on International Humanitarian Law was set up by *Decree No. 31,283*, adopted on 8 March 2007.¹¹

The Commission is chaired by the Ministry of Foreign Affairs and is composed of representatives of the Ministries of Interior and Justice, Public Security, Defence, Education, Health, the Office of the Presidency, as well as of different academic institutions and the Honduran Red Cross. Representatives of the legislative and the judiciary authorities, as well as of civil society and interested international organizations may also be invited to take part in the work of the Commission. The Decree provides that the ICRC shall be invited to support and advise the Commission in the performance of its mandate. The main roles of the Commission include dissemination and promotion of IHL, evaluation of domestic law and practice with respect to IHL, and the preparation of recommendations to national authorities in this field.

Saudi Arabia

The National Commission on International Humanitarian Law of the Kingdom of Saudi Arabia was set up by *Decree No. 144* adopted by the Saudi Arabian Council of Ministers on 14 May 2007.¹²

The Commission, which is placed under the auspices of the Saudi Red Crescent Society, enjoys permanent status and is composed of representatives of the Ministries of Foreign Affairs, Defence and Aviation, Interior, Justice, Culture and Information, Economy and Planning, Education and Higher Education, as well as the Saudi Red Crescent Society and the Human Rights Committee under the Consultative Council. The Commission is responsible for the domestic implementation and dissemination of IHL treaties to which Saudi Arabia is a State party.

10 Décret N° 2007-1137 du 26 juillet 2007 relatif à la composition et au fonctionnement de la Commission nationale consultative des droits de l'homme, published in the Official Journal of 27 July 2007.

11 Decree N° 005/2007, published in La Gaceta, República de Honduras – Tegucigalpa, M.D.C. 20 de Abril del 2007, N° 31,283, pp.17–18.

12 Decree N° 144 of the Saudi Council of Ministers on the Creation of the National Commission on International Humanitarian Law of 27-04-1428 (AH).

C. Case law

The Netherlands

On 9 May 2007, the Court of Appeals in The Hague found a Dutch businessman guilty of the offence of complicity in the commission of war crimes committed by the Iraqi regime in Iran and in Northern Iraq in the mid- and late eighties.¹³

The defendant was accused of having supplied to Saddam Hussein's regime chemical substances which subsequently served in the manufacturing of chemical weapons used during the armed conflict between Iraq and Iran, as well as against the Kurdish population in Northern Iraq. The court of first instance had found the defendant guilty of complicity in war crimes and sentenced him to 15 years in prison. However, the court had found him not guilty of complicity in genocide.

The Appeals Court upheld the verdict of the Court of first instance and acquitted the defendant on the charge of being an accessory to the crime of genocide, concluding that there was not enough evidence that the defendant had known of the genocidal intentions of the perpetrators at the time he supplied the chemical substances. However, the Appeals Court upheld the guilty verdict on the charge of complicity in multiple violations of the laws and customs of war (war crimes), considering that the defendant knew, or at least had constructive knowledge, that the substances he delivered were precursors for the production of chemical weapons which would be used on the battlefield. The Appeals Court increased the defendant's prison sentence to 17 years.

United States

On 20 February 2007, the United States Court of Appeals for the District of Columbia rendered a decision in which it reviewed whether federal courts have jurisdiction over petitions for writs of habeas corpus filed by non-US citizens detained at Guantánámo Bay naval base after the enactment of the Military Commissions Act (MCA) and, in the negative, whether the MCA was unconstitutional in suspending the writ.¹⁴

In its ruling, the Court, after reviewing the recent US case law relating to the habeas corpus petitions filed by Guantánámo Bay detainees and recounting the provisions of the MCA, concluded that the MCA strips the courts of the ability to hear petitions for habeas corpus filed by Guantánámo Bay detainees. The Court further reviewed whether the MCA, in depriving the courts of jurisdiction over the detainees' habeas petitions, violated the Suspension Clause under the US Constitution, which holds that the writ of habeas corpus shall not be suspended

¹³ *Case against Frans van Anraat*, Gerechtshof's-Gravenhage, N° 22-00050906-2, decided 09 May 2007.

¹⁴ United States Court of Appeals for the District of Columbia Circuit, *Lakhdar Boumediene, Detainee, Camp Delta, et al. v. George W. Bush, President of the United States et al.*, No. 05-5062; *Khaled A. F. Al Odah v. United States of America, et al.*, No. 05-5064; 20 February 2007.

safe in cases of rebellion or invasion, or when the public safety so requires. The Counsel for the detainees argued that there was a Federal common law right to the writ of habeas corpus extending to aliens captured and detained beyond the territory of the United States. Citing the Supreme Court's decision in *Johnson v. Eisentrager*, the Court did not concur and opined that Cuba exercises sovereignty over Guantánamo Bay despite the indefinite lease concluded between the US and Cuba in 1903 and authorising the US to operate Guantánamo Bay. Consequently, the Court of Appeal held that it had no jurisdiction in the case and vacated the District Court decisions below it.¹⁵

On 2 May 2007, the United States District Court for the Southern District of New York issued a decision dismissing the class action brought against a former Director of Israel's General Security Service in connection with his alleged role in the bombing of an apartment building in Gaza City on 22 July 2002.¹⁶ Fifteen people had been killed in the attack and 150 others injured. The defendant was alleged to have committed war crimes, crimes against humanity, cruel, inhuman and degrading treatment and punishment, and extrajudicial killings.

The case was filed by the plaintiffs on behalf of the Palestinian victims killed or injured in the bombing on the basis of the Alien Tort Statute and the Torture Victim Act. In dismissing the claim, the District Court found that the defendant benefited from the immunity extended under the Foreign Sovereign Immunities Act (FSIA) to agents of a foreign State acting in their official capacity. The Court concluded that nothing in the complaint permitted an inference that the defendant's action had been personal or private in nature and referred to Israel's representation to the Court that the defendant had acted "in the course of his official duties and in the furtherance of official policies of the State". The Court also stated that, even had the FSIA not been applicable, it would have dismissed the claim on the basis of the "political question doctrine" according to which complaints involving foreign policy questions in a volatile context may be non-justiciable. In this case, the Court noted that the action was brought by the plaintiffs "against a foreign official for implementing the anti-terrorist policy of a strategic United States ally in a region where diplomacy is vital". The US Government submitted a statement of interest in the case in which, while arguing

15 On 5 March 2007, a Petition was filed before the Supreme Court of the United States on behalf of detainees at Guantánamo Bay requesting the Court to issue a writ of certiorari to review the lower court decisions dismissing the claims in the *Boumediene v. Bush* and *Al Odah v. United States* cases. On 02 April 2007, the Supreme Court ruled that it would not be hearing the cases of Guantánamo Bay detainees for the time being and denied the motion to hear the case. Three justices dissented and two others issued a statement emphasising that the "decision does not constitute an expression of any opinion on the merits" and holding that the detainees should first exhaust the legal steps available to them under the DTA – notably the right of detainees to challenge in the Court of Appeals the decisions of the Combatant Status Review Tribunals – before the Court could consider ruling on constitutional questions. On 29 June 2007, the U.S. Supreme Court granted a writ of certiorari to *Boumediene* and his co-defendants, indicating that it would hear their challenge to the Court of Appeals' decision when the Supreme Court's next Term begins (in October 2007).

16 *Ra'ed Mohamad Ibrahim Matar, et al. v. Avraham Dichter, former Director of Israel's General Security Service*, United States District Court Southern District of New York, 05 Civ. 10270 (WHP), 2 May 2007.

that the defendant should be immune for his official acts on grounds of sovereign immunity, it expressed its serious objections to the attack.

On 11 June 2007, the United States Fourth Circuit Court of Appeals rendered a decision in which it held that a citizen of Qatar, arrested in the United States in connection with the 11 December 2001 attacks and declared an “enemy combatant” by the US President, could not be held in indefinite military detention on the basis of the Military Commissions Act of 2006 (MCA).¹⁷ In July 2004, counsel for the accused had filed a petition for a writ of habeas corpus, challenging the accused’s detention as an “enemy combatant”. In August 2006, following the dismissal of the petition in the District Court, the matter was brought to appeal. The Government contended that the US President had both statutory and inherent constitutional authority to subject a person to indefinite military detention as an “enemy combatant” without criminal process and that the Military Commissions Act of 2006 (MCA) denied the Court’s jurisdiction over the Defendant’s petition and appeal. The defendant argued that the MCA did not deny his right to habeas corpus and that the denial of jurisdiction would violate his right to due process and other constitutional guarantees.

In its decision of 11 June, the Appeals panel found that the court had jurisdiction over the case and that the MCA could not be construed as stripping a lawful resident alien of his right of habeas corpus. Responding to the US Government’s other contentions, the Court held that the Authorization for Use of Military Force (AUMF)¹⁸ does not authorize the President to order the seizure and indefinite detention of an individual as an “enemy combatant”. It also concluded that the President could not be considered to enjoy an “inherent constitutional authority” to subject persons legally residing in the US and protected by the US Constitution to indefinite military detention without the benefit of criminal process. Finally, the Court noted that, even under the Patriot Act, which provides the President with broad authority to handle “terrorist aliens”, only short-term detention by civilian authorities prior to deportation or criminal prosecution is permitted.

Consequently, the Court of Appeals overturned the decision of the District Court and remanded the case to the District Court with instructions for it to issue a writ of habeas corpus directing the Secretary of Defence to release the Appellant from military custody within a “reasonable period of time”. However, the Court concluded that the Government could transfer the accused to civilian authorities for prosecution on criminal charges, to initiate deportation proceedings, to hold him as a material witness in connection with grand jury proceedings, or to detain him for a limited period of time pursuant to the Patriot Act.

17 *Ali Saleh Kahliah Al-Marri and Mark A. Berman v. Commander S.L. Wright, USN Commander, Consolidated Naval Brig*, United States Court of Appeals for the Fourth Circuit, N° 06-7427, decided 11 June 2007.

18 *Authorization for the Use of Military Forces*, Pub. L. No. 107-40, 115 Stat. 224 (2001).

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