

HUMAN RIGHTS

Interview with Luis Alfonso De Alba*

Ambassador Luis Alfonso De Alba was the first president of the United Nations Human Rights Council and held this mandate from 19 June 2006 to 18 June 2007. During that period the Council was entrusted by the General Assembly with the task of designing the new institutions of the international human rights system, while at the same time fulfilling its mandate to protect and promote human rights. Ambassador De Alba joined the Mexican foreign service in 1981 and since 2004 has been the permanent representative of Mexico at the United Nations and other international organizations in Geneva. Throughout his career he has participated in numerous multilateral meetings, both at global and regional levels. Among other posts, he was chairman of the Council of the International Organization for Migrations (IOM) at its 88th and 89th sessions (November 2004 to November 2005) and presided over the Disarmament and International Security Committee (First Committee) of the General Assembly during its 59th Session (2004).



The former UN Commission on Human Rights was considered to be politicized and was criticized as being inefficient. Has there been progress with its successor, the Human Rights Council?

The Human Rights Commission made a number of important contributions to the promotion of human rights, not only in terms of instruments and mechanisms, but also in developing a common view of the importance of human rights as something for all of us to protect. The heritage of the Commission should not be underestimated, misunderstood or forgotten. However, the Commission, in the last five or ten years, was indeed hindered by increased politicization.

The Commission was politicized in the sense that the human rights cause was being used as a political tool rather than as a means of changing the situation

* The interview was held on 24 July 2008 by Tony Pfanner, Editor-in-Chief of the *International Review of the Red Cross*.

for victims. States were much more interested in condemning or avoiding condemnation for political reasons than in identifying any areas where improvement was needed. The Commission was also politicized in terms of selectivity. Some countries were subjected to special review, special procedures and appointments of special rapporteurs or experts, while other countries with an equal and sometimes even worse level of human rights violations never got a review. At the end there were only Western countries putting developing countries on the spot.

Is the Council's response to that lack of impartiality the Universal Periodic Review?

Yes and no. There are two separate issues. We need to deal with all human rights in all places and under all circumstances. You need a balanced approach to all issues and mechanisms, and equal treatment. To avoid selectivity, we assume that there is no perfect country, that every single country has something to do to improve the human rights situation. The Universal Periodic Review (UPR) responds to this as the fulfilment of each state's human rights obligations and commitments are examined. It's a very long and time-demanding exercise. The soonest we are able to complete a first review of all 192 states is in four years' time, hence in 2011.

But it doesn't mean that you treat countries with different problems with the same medicines. You can approach states on a fair basis, but you should not treat crises or extreme violations with the same tool. If you have a crisis or emergency you cannot wait for the Universal Review process to deal with it. We now have the possibility of dealing with crisis situations in any session of the Council and even through the special sessions, which have been developed in a different way from that of the Commission. The Commission organized only five special sessions in 60 years. In the Council, however, there have already been seven special sessions in two years.

Four of seven special sessions of the new Council concerned the Middle East and Israel.

You may say three in the same context, no more than that. Three dealt with the situation in Palestine and one was a follow-up session thereto. One special session was quite different because it dealt with the invasion of Lebanon. But even so, there were four sessions on the Middle East. We had another one on Darfur, one on Myanmar and, finally, one thematic session on the world food crisis.

It has become much easier to call for a special session, because now a lower number of member states – only one third of the members of the Council – requesting that session is needed. But there is also a new approach to the special sessions. We opened the possibility of having thematic sessions, not only sessions on a country situation. And for these special sessions we developed a different approach. We highlight less the importance or gravity of a situation, and instead try to develop a quick reaction. The speed with which we react may allow us to take much more of a preventive approach, rather than just deploring what has happened.

The United States announced that it has withdrawn entirely from the Human Rights Council and resigned from its observer status, and the US Senate voted to cut off funding to the Council. How has the withdrawal of the United States affected the Human Rights Council?

As far as I recall, the United States supported the Council becoming a main body of the United Nations System. Their position from the start of negotiations on the resolution that established the Council was that they wanted to have a much smaller body than the present 47-member Council. We have addressed the concerns of the United States to a large extent, because we have agreed to reduce the membership and have made additional changes. It is more difficult to become a member today in terms of the amount of support that states need to be elected to the Council. States must receive a qualified majority of the vote. We are also asking each country to campaign solely on the basis of their contribution to the promotion and protection of human rights and the voluntary pledges and commitments they have made thereto. Finally, the General Assembly may suspend the rights of membership in the Council of any member that commits gross and systematic violations of human rights.

This was, at the time, an appropriate package to meet the concerns of the United States when taking into account the views of other countries who promoted alternative ideas, for instance, universal membership. Nonetheless, the United States has been extremely helpful in building the Council, and I can say openly that they shared quite a lot of the institution-building package. At the last moment, however, they went against it. I hope that the United States will give up on the reduced size of the Council and will look much more at its functions. We shall be reviewing the Council in three years and I hope that by then they will have a different approach to it.

One of the reasons for the resistance of the United States is that the Middle East took on too much importance. The UN Human Rights Council, like its predecessor, has been criticized mainly by Western countries for focusing too much on Israel.

First, the Council does not deal with Israel or with the situation in the Middle East in the same way that the Commission did. We have made an effort and it's reflected in the way we address this issue in the agenda. Previously, the Commission used to address Israeli violations only and did not address violations committed by Palestinians and other parties. In the Council, we talk about human rights situations in the whole Middle East, which is much wider, and about violations committed by any side. These are substantive changes that have been accepted by consensus by all members of the Council, including the members of the Organisation of the Islamic Conference (OIC).

The second element is that we have probably reacted too quickly, but without sustained efforts to reconcile positions at the beginning. But that was in a particular situation and context. It was the very beginning of the Council, and a crisis like the invasion of Gaza was developing during its first session. We were

discussing a paper that included a section on the Middle East and we were close to getting a consensus. The Western group was totally on the defensive and a group of countries, particularly the OIC member states, had a new tool in their hands: as few as 16 members could call for a special session. We hadn't even finished the first session of the Council and they were already calling for the first special session. And immediately after, they called for the second one in August 2007. The ambassador of Pakistan, who co-ordinated the OIC, acknowledged publicly a few months later that not enough efforts were made to reach a consensus.

The Council still seems to be politically divided and there remains a strong tendency towards bloc-building. How could these divisions be overcome?

Bloc-building is an issue that affects the United Nations as a whole, not only the Human Rights Council, and it is going to be very difficult to bypass. The European Union also faces a huge contradiction regarding blocs. On the one hand, it is a great achievement by Europe to have a common policy on human rights. On the other hand, this common policy forms a bloc position that obviously reflects the lowest common denominator.

Blocs are also a good tool for small countries that do not have the necessary resources to work individually on several issues at the same time. The group positions formed by these small countries can present very important coverage, in one sense an offensive coverage.

The only way the importance of the bloc position can be diminished is by developing among the various countries an individual sense of responsibility for the future of human rights. This has to include the biggest and the smallest countries in the Council. And you need to develop cross-regional ties and an overall sense of responsibility, which we have, to a certain extent, done at the Council. The institution-building package, because of the rule of consensus, forces us to do that. We were forced to identify countries in each of the regions that could interact with other regions and start developing this sense of responsibility, first individual responsibility and then a sense of collective responsibility.

Another much-disputed issue was the resolution on 'defamation of religions'. Again, some Western countries alleged that the resolution stifled expression and claimed that rather than promoting individual rights, the resolution was in particular referring only to Islam. Do you fear that human rights could lose their universal value, restricted by religious or cultural considerations?

There is a danger. I would like to see the issue much more in terms of dialogue between civilizations on religious issues. If you put this as a religious issue, it does not really reflect what it is – it's not a problem between religions or between human rights and any of the religions. However, it is also very much linked to stereotypes and developments in the context of the fight against terrorism.

To deal with human rights and religion, I think you have to take into account all the religions, all the attitudes. But this being said, it is a problem inasmuch as a number of countries did immediately support the OIC on those grounds. They feel threatened, and we need to reduce that feeling. Because they felt

threatened, they immediately stayed together and took a very tough position. The mandate of the Special Rapporteur on Freedom of Expression and the paragraph that was included do not promote freedom of expression, but aim at avoiding excesses of freedom of expression that may have negative effects on racial or religious discrimination. It is a very good proof of the danger of division in the Council.

Do you believe that many countries perceive human rights as a threat to their development, to their culture?

There is no country, whether developed or developing, that is not careful in dealing with human rights. Human rights involve a relationship between citizen and state, and every state has some kind of an apprehension towards human rights. This is not an issue like development, where one can argue that the government has taken the wrong or the right decision. Although human rights is still an issue you can argue with the government, it often involves the state trying to argue against its own citizens whenever it comes to fundamental, basic rights. The only way out is to say that there are some values which are not necessarily universal. However, we have always accepted that there are some universal values by accepting the Universal Declaration, by adopting universal solutions, by developing the system, so there is an inherent contradiction there.

In terms of substance, few would call into question the relevance of human rights. In the implementation of human rights, however, there are different approaches.

There are governments that are obviously committed to human rights and others that are not so committed. However, besides the willingness comes the capacity to implement. There are some governments that show political commitment but no ability to implement. They don't find the right solutions or don't have the necessary human, financial or legal resources to implement their human rights obligations.

What makes a difference is that we have all accepted that there are minimum standards of what we interpret as universal values that *must* be implemented. We have all accepted that there are no excuses regarding these values, and they must be achieved everywhere. What we thus need is to go to the next level, to make sure that these values are actually implemented and put into practice. This is why the idea of dialogue and co-operation in the Council is so important.

Do you think that the shift in approach from condemnation to collaboration has been successful?

Member states, NGOs (non-governmental organizations) and even the Secretariat are still divided. Most believe today that the dialogue and co-operation will be a much better use of resources than 'name and shame'. However, we still have to digest properly what dialogue and co-operation means. There are still a lot of voices that say that dialogue and co-operation is not going to work because it will allow extreme violations to continue, or will delay the solutions because it will take

much longer to get things changed. I believe that dialogue and co-operation are the modern approach and that it does not need to be soft. It is a collaborative approach that will recognize whenever there is a window of opportunity to make changes on the ground, and not just to name and shame.

How do you view participation of NGOs in the new process?

I put this dialogue approach to the NGOs immediately after the meeting we organized with human rights organizations, as a further step they could utilize. From an NGO perspective, naming and shaming continues to be a tool, but stopping there doesn't help much in advocating human rights. If they go a step further and engage with the country, they are part of the process of finding solutions. To promote human rights, you have to develop institutions and education systems, and you have to promote the legislative measures needed to improve the situation. It's not enough just to put a country on the spot.

Today, participation of civil societies in the Council needs to be seen in comparison with what it was at the Commission. Now it means interaction with the special procedures, special rapporteurs and other mechanisms; it means opportunities to interact during each session of the Council. That is a huge improvement. The civil societies, or NGOs, are present in every single session of the Council and are meeting and interacting with governments. No longer are NGOs relegated to a section of the agenda to which governments could go, or not, to see what the NGOs think about a particular issue.

Yet NGO participation in the Universal Periodic Review is very limited.

Civil society participation in the Universal Periodic Review itself is quite different. The proposal for the UPR started with the idea of a peer review. That was the original idea promoted by Canada. By definition, peer review does not include the NGOs. So we had to develop that concept and allow civil society participation in the exercise. We eliminated the 'peer' reference and we got something that is quite advanced. The UPR is conducted on the basis of three documents, one introduced by the civil society, one introduced by the government under review and the third one introduced by the Office of the High Commissioner for Human Rights. This is a landmark in the history of the United Nations, as we gave official status to the inputs of the NGOs. They now have at least 20 minutes in the plenary session. I wanted to have more interaction with civil society at the working group level, but that was not possible, so there is currently no NGO interaction there.

Is there a difference in the Human Rights Council between those states that have a regional human rights court system, such as those in Europe, the Americas and Africa, and other states that may perhaps only be exposed to human rights claims in the Human Rights Council?

Being a national of one of the countries that also has a regional human rights system at the inter-American level, I believe it can be positive in terms of the level of development around a state's institutions and legislation to be forced to introduce legislative and other procedures that some other countries do not need or

have. In that sense it's easier to work with states within a regional human rights system. At the same time, the European Court or the Inter-American Court is much more associated with cases, not with policies. The Human Rights Council conversely deals much more with policies rather than cases.

Obviously, you will have countries that have much more developed institutional frameworks, mainly legal ones, than others. But all states are committed to solving fundamental problems, and that's what we need to strengthen. The major differences between states would instead be because of culture, because of religion, because of the way they perceive human rights.

In the special sessions, most of the situations coming up were war-related – Sudan, the invasion of Lebanon, Israel and the occupied territories and so on. These are situations of armed conflicts governed by international humanitarian law. Many states are reluctant to deal with humanitarian law in a human rights forum.

Some states argue against dealing with international humanitarian law in the Council, assuming that a clear-cut distinction can be made between human rights and humanitarian law. But the majority recognize that there is an inter-linkage and it's very difficult to argue that in a conflict situation human rights are not as relevant. Humanitarian law specifically addresses armed conflict and gives fundamental rules to protect the rights of the victims of such situations. The human rights perspective widens the approach. That's why we are making constant reference to the promotion and protection roles for both branches of the law. In an armed conflict like Darfur, for instance, to draw a distinction between a violation of human rights law and humanitarian law is not always possible. You have to preserve the authority of the legally binding framework of humanitarian law, but also use the political pressure that the human rights machinery brings in. I'm not a lawyer, but human rights could only benefit from the international humanitarian law perspective. Conversely, I don't see how the discussion of armed conflicts and humanitarian law may harm the latter's implementation. A problem would arise if you diminish the capacity of existing treaties to follow up or to implement their obligations.

However, we have an institutional package problem. It is related to the Universal Periodical Review. We need to take into account the principles of international law, including humanitarian law, in doing the review.

The creation of the Human Rights Council also affected the United Nations as a whole. What adjustments are to be made? How do you see the relationship between the Office of the Human Rights Commissioner and the Council developing?

We are at the very beginning of this adjustment. This is the element on which we have probably advanced the least so far. The first year was basically spent gaining institutional knowledge, institution building and dealing with crises. The fact that we were able to agree by consensus on such a package is a very important sign. Nobody imagined that that was going to be possible, not even me. We now have a

body that meets much more frequently – which is quite demanding for governments – and which meets in a much more open way. The level of participation of civil society is also completely different now.

The Council without a strong Office of the High Commissioner would face a lot of difficulties, and vice versa. Both depend on each other. The Office provides secretariat services to the Council, which are important. It's going to be extremely important that the Office provides support for the implementation stages of the UPR. We have to agree on what the Office does to follow up in each of the countries to accomplish the objectives, to follow up the recommendations and so on.

The Office basically has three areas in which it works. One is the relationship with the Council and substantive support for the Council. The second is field operations, including the regional and local offices. The third is the relationship with all other UN entities, including the Secretary-General, the Security Council and so on. I would say that the relationship with the Commission used to be probably 10 per cent, compared with 40 per cent for field operations and half for the work for the other UN entities. Today it should be the other way round: the Office should be devoted to the relationship with the Council and much less to the field operations and the other UN bodies. Because of the different dynamic that the Council has taken on, and the need for the Office to get into more substantive work, I would even recommend forgetting about the conference services and facilities. With regard to supporting the Human Rights Council, the Office should devote all its resources to substantive aspects.

Politically it is also important, because the High Commissioner remains a visible figure. The Commissioner needs to be a promoter of human rights, without forgetting that the post is that of an international civil servant. The link with the governments is not an NGO job, nor is the Office a tribunal. This balance in the Office is important both in terms of how the Office should be structured to support the Council more, and how the relations, the personal relations between the High Commissioner and the Council, are developed. Today there are different tendencies. A few countries would like to see the Council as a governing body to the Office – that's one extreme. The other extreme would be to say that the Office is independent and autonomous and should not be linked to the Council, or at least not closely linked. Both extremes are impossible to sustain. The resolution that established the Office of the High Commissioner doesn't speak about independence; it is not an autonomous Office but part of the UN Secretariat.

Are the activities of the Council duplicated by those of the Third Committee (Social, Humanitarian and Cultural Affairs Committee) of the General Assembly?

One position held is that the Third Committee could be discharged altogether of human rights because the Council replaces it on this issue. Another less extreme position, which I would be more comfortable with, holds that there is a need for a division of labour between the Council and the Third Committee. We can take

advantage of two facts relating to the Third Committee. The first is that it meets in New York, which is closer to the political bodies of the United Nations, such as the General Assembly, the Security Council and the Secretary-General. The second point is that the Third Committee has universal membership, which the Council does not have. Taking into account those two elements, you can envisage a division of labour by which you can identify features that may be better dealt by the Third Committee than by the Council.

Even so, they are often the same persons in the Council and the Third Committee.

No, most of them are not. Only very few developed countries send the same people to deal with human rights. Most of the countries have different delegations and different approaches. Sometimes you get the impression that you are dealing with two different countries, because there are some delegations that do not communicate between Geneva and New York.

You have to identify the issues that the Third Committee should address, and it's primarily with mainstream government officials. What is happening is that some countries – at the beginning it was above all the African Group, but today it includes several Western countries – would like the Third Committee to be in control of the Human Rights Council, to be kind of a second and controlling layer, able to modify positions of the Council. However, this would amount to reducing the Council's authority and would drastically limit the possibility of it becoming a main organ of the United Nations in the future.

Are human rights becoming one of the pillars of the international system?

The political decision to transform human rights into one of the three pillars of collective action is taken, but its implementation is still not certain. It came from the more than 150 heads of state who met at the 2005 World Summit at UN Headquarters in New York, and was confirmed by the General Assembly of the United Nations. The three-pronged approach to collective action hinges on the idea that there can be no development without security, no security without development, and neither development nor security without the universal application and protection of human rights. This is a political commitment with a lot of implications. And the newly created Council should promote effective co-ordination and the mainstreaming of human rights within the UN system.

However, the timing for the promotion of human rights was not ideal in terms of realities on the ground. On the one hand, the more universal approach to human rights and the level of development of the political relationship between states allowed the agreement to be reached on transforming human rights into collective action. On the other hand, with the fight against terrorism and concerns surrounding migration and other issues, it was not necessarily the best time for promoting human rights. Some of the promoters of human rights that have helped develop those principles are on hold, or sometimes even in reverse. Right now there are coexistent negative and positive elements. Nonetheless, it is very important to use this opportunity to promote human rights universally. There is no longer only

a group of countries pushing for an ideal. Instead there is now understanding among the international community as a whole that without human rights you cannot have peace and security and you cannot have development.

If human rights were gradually to become a pillar of the international system, this may conflict with other pillars such as peace and security, not to mention international criminal jurisdiction. Do you fear even bigger political interference in the Human Rights Council?

There is always some degree of conflict. You have to consider it in terms of opportunities, using one tool or another as appropriate. Whenever you have a conflict, you want to promote peace and security and an agreement in that particular country or region. An indictment by the International Criminal Court of one of the main players, for instance, is an issue that can only be solved in accordance with the Rome Statute, which may make exceptions, and that the Security Council could delay. We have agreed to this and it is binding on all human rights players. In the human rights field, however, you have a little more flexibility because you can, to a certain extent, consider time and opportunity. This is the main difference we were talking about when we were debating Darfur with the High Commissioner. As a member of that tribunal you don't have a choice. It is in black and white: there is a crime to pursue and you have to do that. With regard to human rights, it's not so absolute. You have to consider the medium- and long-term perspective. At the end, as regards human rights you are not talking only about the issue of responsibilities, but about collective rights that may be very much involved.

What is your vision of where human rights will be in ten years?

I hope peace and security will increasingly prevail, bringing more development. I also wish that human rights will become a stronger feature and a pillar equal to that of peace and security. However, the provision of peace and security is aided by a number of tools that have been developed in the Security Council, and it would be very difficult to develop similar tools for human rights. What has encouraged me is that human rights are becoming an issue of concern for everybody and are no longer an issue promoted or pushed only by a certain group of countries. Now all members of the United Nations are very much aware of the importance of human rights.

While some states may be doing much more than others in ensuring rights and others are going backwards in terms of protection, there is, generally speaking, a growing sentiment that a world of peace and progress is inconceivable without human rights. To go from the Universal Declaration of Human Rights, where a group of very eloquent people from a limited number of countries imagined what should and should not be done, to a time where 192 countries with different cultures and traditions are all committed to some minimum standard of behaviour in terms of the relationship between the citizen and the state, is a major achievement.

What we need now is to speed up the process. The tools are there, but because of the lack of US participation and some difficulties we still face at procedural levels, the process may take quite a long time. I'm afraid that in three years we may not yet be ready to take the next step as we envisaged two years ago. In other words, we are going in the right direction but progress is still much slower than expected.

Elective affinities? Human rights and humanitarian law

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Abstract

Complementarity and mutual influence inform the interaction between international humanitarian law and international human rights law in most cases. In some cases when there is contradiction between the two bodies of law, the more specific norm takes precedence (lex specialis). The author analyses the question of in which situations either body of law is more specific. She also considers the procedural dimension of this interplay, in particular concerning the rules governing investigations into alleged violations, court access for alleged victims and reparations for wrongdoing.



Traditionally, international human rights law (IHRL)¹ and international humanitarian law (IHL)² are two distinct bodies of law with different subject matters and different roots, and for a long time they evolved without much mutual influence. This has changed. A brief overview of historical developments and of recent cases shows that – whatever the understanding of governments in 1864, 1907 or 1949 – there is today no question that human rights law comes to complement humanitarian law in situations of armed conflict. In international jurisprudence, case law since the report of the European Commission of Human Rights on northern Cyprus after the Turkish invasion³ and continuing through to later national and

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international jurisprudence on the Palestinian territories, Iraq, the Democratic Republic of the Congo or Chechnya leaves no doubt as to the applicability of human rights to situations of armed conflict.

In short, these regimes overlap, but as they were not necessarily meant to do so originally, one must ask how they can be reconciled and harmonized. As M. Bothe writes,

[T]riggering events, opportunities and ideas are key factors in the development of international law. This fact accounts for the fragmentation of international law into a great number of issue-related treaty regimes established on particular occasions, addressing specific problems created by certain events. But as everything depends on everything, these regimes overlap. Then, it turns out that the rules are not necessarily consistent with each other, but that they can also reinforce each other. Thus, the question arises whether there is conflict and tension or synergy between various regimes.⁴

How human rights and humanitarian law can apply coherently in situations of armed conflict is still a matter of discussion. Jurisprudence over the last few years has changed the picture considerably and, to a certain extent, the law is constantly evolving. Jurisprudence on concrete cases will, hopefully, provide more clarity over time. So far, some areas are becoming clearer and in other areas patterns are emerging but are not consolidated.

This article seeks to provide some parameters which can inform the interplay between human rights and humanitarian law in a given situation. Indeed, two main concepts should govern their interaction: complementarity and mutual influence of the respective norms in most cases, and in some cases precedence of the more specific norm (*lex specialis*) when there is contradiction between the two bodies of law. The question is: in which situations is either body of law the more specific?

Lastly, the procedural dimension will be considered, for that is possibly where the interplay between human rights law and humanitarian law has its most practical effect: what are the rules governing investigations into alleged violations, court access for alleged victims and reparations for wrongdoing?

1 In the following, “international human rights law”, “human rights law” and “human rights” are used interchangeably.

2 In the following “international humanitarian law”, “humanitarian law” and “law of armed conflict” are used interchangeably.

3 See, e.g., Report of the European Commission of Human Rights, *Cyprus v. Turkey*, Appl. No. 6780/74 and 6950/75, Eur Comm HR Decisions and Reports (hereinafter DR) 125; European Court of Human Rights (hereinafter ECtHR), *Cyprus v. Turkey*, Judgment of 10 May 2001, Reports of Judgments and Decisions (hereinafter Reports) 2001-IV.

4 Michael Bothe, “The historical evolution of international humanitarian law, international human rights law, refugee law and international criminal law”, in Horst Fischer, Ulrike Froissart, Wolff Heintschel von Heinegg and Christian Raap (eds.), *Crisis Management And Humanitarian Protection*, Berliner Wissenschafts-Verlag, Berlin, 2004, p. 37.

The overlap of international human rights law and international humanitarian law in situations of armed conflict

The converging development of human rights law and humanitarian law

Beyond their common humanist ideal, international human rights law and international humanitarian law had little in common at their respective inception. The theoretical foundations and motivations of the two bodies of law differed.

The rationale for modern human rights is to find a just relationship between the state and its citizens, to curb the power of the state vis-à-vis the individual.⁵ To begin with, human rights were a matter of constitutional law, an internal affair between the government and its citizens. International regulation would have been perceived as interference in the exclusive domain of the state. Except for the protection of minorities after the First World War, human rights remained a subject of national law until after the Second World War. They then became part of international law, starting with the adoption of the Universal Declaration of Human Rights in 1948.

Humanitarian law, for its part, was based first and foremost on the reciprocal expectations of two parties at war and on notions of chivalrous and civilized behaviour.⁶ It did not emanate from a struggle of rights claimants, but from a principle of charity – “*inter arma caritas*”.⁷ The primary motivation was a principle of humanity, not a principle of rights, and its legal development was made possible by the idea of reciprocity between states in the treatment of one another’s troops.⁸ Considerations of military strategy and reciprocity have historically been central to its development.⁹ Whereas human rights were an internal affair of states, international humanitarian law, by its very nature, took root in the relations between states, in international law (even if some of its precedents, such as the Lieber Code, were meant for civil war).

5 See, for a brief account, Louise Doswald-Beck and Sylvain Vité, “International Humanitarian Law and Human Rights Law”, *International Review of the Red Cross*, No. 293 (March–April 1993), pp. 94–119.

6 See, e.g., the Lieber Code: United States War Department, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, 24 April 1863, reprinted in Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed Conflicts*, 3rd edn (1988).

7 First used as a motto on the title page of the “Mémorial des vingt-cinq premières années de la Croix-Rouge, 1863–1888,” published by the International Committee of the Red Cross on the occasion of the 25th anniversary of the foundation of the Committee; the wording was adopted by the Committee on 18 September 1888 following a suggestion by Gustave Moynier. This is now the motto of the International Committee of the Red Cross: see Statutes of the International Committee of the Red Cross 1973, Article 3(2).

8 See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (hereinafter First Geneva Convention); Theodor Meron, “On the inadequate reach of humanitarian and human rights law and the need for a new instrument”, *American Journal of International Law*, Vol. 77 (1983), p. 592.

9 Theodor Meron, “The humanization of humanitarian law”, *American Journal of International Law*, Vol. 94 (2000), p. 243.

After the Second World War the protection of civilians under the Fourth Geneva Convention, although largely destined only for those of the adversary or third parties, added a dimension to humanitarian law that brought it much closer to the idea of human rights law, especially with regard to civilians in detention. Here, humanitarian law started to apply to the traditional realm of human rights law, namely the relationship of the state to its citizens. The codification of Article 3 common to the four Geneva Conventions of 1949 likewise brought the two bodies of law closer, for it concerned the treatment of a state's own nationals. But although the Universal Declaration of Human Rights was adopted in 1948, just one year before the codification of the Geneva Conventions, the drafting histories show that the elaboration of the Declaration and that of the Geneva Conventions were not mutually inspired. While general political statements referred to the common ideal of both bodies of law, there was no understanding that they would have overlapping areas of application. It was probably not assumed, at the time, that human rights would apply to situations of armed conflict, at least not to situations of international armed conflict.¹⁰ Yet there are clear reminiscences of the newly ended war in the debates on the Universal Declaration. It is probably fair to say that “for each of the rights, [the delegates] went back to the experience of the war as the epistemic foundation of the particular right in question”.¹¹ Many of the worst abuses the delegates discussed took place in occupied territories. Even so, the Universal Declaration was meant for times of peace, since peace was what the United Nations sought to achieve.

As the four Geneva Conventions had been formulated at some speed in the late 1940s, there was still scope for development and improvement, especially for situations of non-international armed conflict. But the development of humanitarian law came to a standstill after the 19th International Conference of the Red Cross and Red Crescent in New Delhi in 1957. While the Conference adopted the “Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War”¹² drawn up by the International Committee of the Red Cross (ICRC), the initiative was not pursued.

At the United Nations, on the other hand, states slowly started to emphasize the relevance of human rights in armed conflict. As early as 1953, the General Assembly invoked human rights in connection with the Korean conflict.¹³ After the invasion of Hungary by Soviet troops in 1956, the UN Security Council called upon the Soviet Union and the authorities of Hungary “to respect ... the

10 Robert Kolb, “The relationship between international humanitarian law and human rights law: a brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Convention”, *International Review of the Red Cross*, No. 324 (1998).

11 Johannes Morsink, “World War Two and the Universal Declaration”, *Human Rights Quarterly*, Vol. 15 (1993), p. 358.

12 Reprinted in Dietrich Schindler and Jiri Toman (eds.), *Droit des Conflits Armés* (1996), p. 251.

13 Questions of atrocities committed by the North Korean and Chinese Communist forces against United Nations prisoners of war in Korea. GA Res. 804 (VIII), UN Doc. A/804/VIII, 3 December 1953 (on the treatment of captured soldiers and civilians in Korea by North Korean and Chinese forces).

Hungarian people's enjoyment of fundamental human rights and freedoms".¹⁴ The situation in the Middle East, especially, triggered the will to discuss human rights in situations of armed conflict.

In 1967 the Security Council, with regard to the territories occupied by Israel after the Six Day War, clearly made known its consideration that "essential and inalienable human rights should be respected even during the vicissitudes of war".¹⁵ A year later the Tehran International Conference on Human Rights marked a decisive step by which the United Nations accepted, in principle, the application of human rights in armed conflict. The first resolution of the International Conference, entitled "Respect and enforcement of human rights in the occupied territories", called on Israel to apply both the Universal Declaration of Human Rights and the Geneva Conventions in the occupied Palestinian territories.¹⁶ Then followed the resolution entitled "Respect for human rights in armed conflict", which stated that "even during the periods of armed conflicts, humanitarian principles must prevail". It was reaffirmed by General Assembly Resolution 2444 of 19 December 1968 with the same title, requesting the Secretary-General to draft a report on measures to be adopted for the protection of all individuals in times of armed conflict. His two reports concluded that human rights instruments, especially the International Covenant on Civil and Political Rights (ICCPR) – which had not even entered into force at that time – afforded a more comprehensive protection to persons in times of armed conflict than did the Geneva Conventions alone.¹⁷ The Secretary-General even mentioned the state-reporting system under the Covenant – not yet in force – which he thought "may prove of value in regard to periods of armed conflict",¹⁸ thus already anticipating the later practice of the Human Rights Committee.

Pursuant to the two reports of the Secretary-General, the UN General Assembly affirmed in its resolution on "Basic principles for the protection of civilian populations in armed conflict" that "[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict".¹⁹ It was around this period that one observer wrote, "the two bodies of law have met, are fusing together at some speed and ... in a number of practical instances the regime of human rights is setting the general direction and objectives for the revision of the law of war".²⁰

14 GA Res. 1312 (XIII), UN Doc. A/38/49, 12 December 1958.

15 SC Res. 237, preambular para. 1(b), UN Doc. A/237/1967, 14 June 1967; see also GA Res. 2252 (ES-V), UN Doc. A/2252/ESV, 4 July 1967, which refers to this resolution.

16 *Final Act of the International Conference on Human Rights*, UN Doc. A/Conf.32/41, 22 April–13 May 1968.

17 Report on Respect for Human Rights in Armed Conflict, UN Doc. A/7720, 20 November 1969, esp. ch. 3; Report on Respect for Human Rights in Armed Conflict, paras. 20–29, annex 1, UN Doc. A/8052, 18 September 1970.

18 *Ibid.*, para. 29.

19 GA Res. 2675 (XXV), Basic Principles for the Protection of Civilian Populations in Armed Conflict (9 December 1970).

20 G. I. A. D. Draper, "The relationship between the human rights regime and the laws of armed conflict", *Israel Yearbook on Human Rights*, Vol. 1 (1971), p. 191.

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, which met from 1974 to 1977, was in part a reaction to the UN process. The ICRC in particular could now relaunch the process of developing international humanitarian law to improve the protection of civilians not only in international but also in non-international armed conflict. The Diplomatic Conference and its outcome, the two Additional Protocols of 1977, owed an undeniable debt to human rights – some rights which are derogable under human rights law were notably made non-derogable as humanitarian law guarantees. Both Additional Protocols acknowledge the application of human rights in armed conflict.²¹ While the ICRC did not follow this course in the early stages of the discussion,²² it later accepted that “[h]uman rights continue to apply concurrently [with IHL] in time of armed conflict”.²³ Ever since then the application of human rights in armed conflict has been recognized in international humanitarian law, even if the details of their interaction remain under discussion. Indeed, there have constantly been resolutions by the Security Council,²⁴ the General Assembly²⁵ and the Commission on Human Rights²⁶ reaffirming or implying the application of human rights in situations of armed conflict. The United Nations has also conducted investigations into violations of human rights, for example in connection with the conflicts in Liberia²⁷ and Sierra Leone,²⁸ Israel’s military occupation of the

21 Article 72 of Protocol I Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, 1125 UNTS 3 (hereinafter Additional Protocol I); Preamble of Protocol II Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, 1125 UNTS 609 (hereinafter Protocol II).

22 ICRC, Draft Additional Protocols to The Geneva Conventions of August 12, 1949 – Commentary 131, 1973; see also Jean Pictet, *Humanitarian Law and the Protection of War Victims*, Sijthoff D. Henry Dunant Institute, Leyden/Geneva 1975, p. 15. One can assume that there was also an institutional motivation for the ICRC to keep its distance from human rights, which were associated with the “politicised” organs of the United Nations.

23 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva 1987, see esp. para. 4429.

24 SC Res. 1019, UN Doc. S/RES/1019 (9 November 1995) and SC Res. 1034, UN Doc. S/RES/1034 (21 December 1995) (in regard to Former Yugoslavia); SC Res. 1635, UN Doc. S/RES/1635 (28 October 2005) and SC Res. 1653, UN Doc. S/RES/1653 (27 January 2006) (Great Lakes region).

25 GA Res. 2546 (XXIV), UN Doc. A/RES/2546/XXIV (December 11, 1969)(territories occupied by Israel); GA Res. 3525 (XXX), UN Doc. A/RES/3525/XXX (December 15, 1975)(territories occupied by Israel); GA Res. 50/193, UN Doc. A/RES/50/193 (22 December 1995)(Former Yugoslavia); GA Res. 3525 (XXX), UN Doc. A/3525 (15 December 1975)(territories occupied by Israel); GA Res. 46/135, UN Doc. A/RES/46/135 (19 December 1991)(Kuwait under Iraqi occupation); GA Res. 52/145, UN Doc. A/RES/52/145 (12 December 1997)(Afghanistan).

26 Commission on Human Rights, Resolutions and Decisions see, e.g., UN Docs E/CN.4/1992/84 (3 March 1992)(Iraq); E/CN.4/2003/77 (25 April 2003)(Afghanistan), A/E/CN.4/RES/2003/16 (17 April 2003) (Burundi); E/CN.4/RES/2001/24 (20 April 2001)(Russian Federation); E/CN.4/RES/2003/15 (17 April 2003)(Congo); and reports to the Commission on Human Rights: OHCHR/STM/CHR/03/2 (2003) (Colombia); OHCHR/STM/CHR/03/3 (2003) (Timor-Leste); see also the Report of the Special Rapporteur of the UN Commission on Human Rights on the Situation of Human Rights in Kuwait under Iraqi Occupation, UN Doc. E/CN.4/1992/26 (16 January 1992).

27 The Secretary-General, Progress Report on UNOMIL, UN Doc. S/1996/47, 23 January 1996.

28 The Secretary-General, Progress Report on UNOMSIL, UN Doc. S/1998/750, 12 August 1998.

Palestinian territories²⁹ and Iraq's military occupation of Kuwait.³⁰ The Security Council has also addressed human rights violations by "militias and foreign armed groups" in the Democratic Republic of the Congo.³¹

The applicability of human rights treaties to situations of armed conflict is also confirmed by the existence of derogation clauses allowing for, but also restricting, derogation from human rights in times of emergency, which either explicitly or implicitly include wartime situations.³² Finally, some newer international treaties and instruments incorporate or draw from both human rights and international humanitarian law provisions. This is the case of the Convention on the Rights of the Child of 1989,³³ the Rome Statute of the International Criminal Court,³⁴ the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict,³⁵ the 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,³⁶ and, most recently, the draft Convention on the Rights of Persons with Disabilities.³⁷

Developments in international jurisprudence

A further important development leading to the recognition that human rights law applies to situations of armed conflict is the vast body of jurisprudence by universal and regional human rights bodies.

The UN Human Rights Committee has applied the ICCPR to both non-international and international armed conflict, including situations of occupation, in its concluding observations on country reports as well as its opinions on

29 Commission on Human Rights Resolution, UN Doc. E/CN.4/S5/1, 19 October 2000.

30 Commission on Human Rights Resolution, UN Doc. E/CN.4/1991/74, 6 March 1991.

31 SC Res. 1649, UN Doc. S/RES/1649, 21 December 2005 (The situation concerning the Democratic Republic of Congo), preambular paras. 4 and 5.

32 International Covenant on Civil and Political Rights, Article 4, 16 December 1966, 99 UNTS 171 (hereinafter ICCPR); European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 15, 213 UNTS 222, 3 September 1953 (hereinafter ECHR); and American Convention on Human Rights, Article 27, 1144 UNTS 123, 22 November 1969 (hereinafter ACHR). Article 27 of the ACHR has a virtually identical wording to Article 4 ICCPR; see also UN Doc. E/CN.4/SR.195, 1950, para. 23; UN Doc. E/CN.4/SR.196, 1950, para. 3; UN Doc. E/CN.4/SR.196, 1950, para. 5.

The omission of the term "war" in the ICCPR does not mean that derogations were not meant for situations of armed conflict, as the drafting history shows. Indeed, the drafters included a non-discrimination clause in Article 4, but deliberately left out discrimination on the ground of nationality in order to permit discrimination against enemy aliens, UN SCOR, 14th Sess, Supp No. 4, paras. 279–280; UN Doc. E/2256-E/CN.4/669, 1952. See also UN Doc. A/C.3/SR.1262, 1963, where the point was stressed that Article 4 could only apply within the territory of a state (Romania) para. 46, UN Doc. A/C.3/SR.1261, 1963.

33 Convention on the Rights of the Child of 1989, Article 38, 20 November 1989, 1577 UNTS 3 (hereinafter CROC).

34 Rome Statute of the International Criminal Court, 2187 UNTS 3, 1 July 2002.

35 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000, 1577 UNTS 3, 20 November 1989.

36 Adopted by GA Res. 60/147 of 16 December 2006, UN Doc. A/RES/60/147, 21 March 2006.

37 Adopted by GA Res. 61/106, UN Doc. A/RES/61/106, 13 December 2006, see esp. Article 11.

individual cases.³⁸ The same is true of the concluding observations of the UN Committee on Economic and Social Rights,³⁹ the Committee on the Elimination of Racial Discrimination,⁴⁰ the Committee on the Elimination of Discrimination against Women⁴¹ and the Committee on the Rights of the Child.⁴² The European Court of Human Rights has recognized the application of the European Convention both in non-international armed conflict⁴³ and in situations of occupation in international armed conflict.⁴⁴ The Inter-American Commission and Court have recognized the applicability of the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights to armed conflict situations.⁴⁵

The International Court of Justice has echoed the jurisprudence of human rights bodies. Its first statement on the application of human rights in situations of armed conflict can be found, with reference to the ICCPR, in the 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*:

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in

- 38 Concluding Observations: Democratic Republic of Congo, UN Doc. CCPR/C/COD/CO/3, 26 April 2006; Belgium, UN Doc. CCPR/CO/81/BEL, 12 August 2004; Colombia, UN Doc. CCPR/CO/80/COL, 26 May 2004; Sri Lanka, UN Doc. CCPR/CO/79/LKA, 1 December 2003; Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003; Guatemala, UN Doc. CCPR/CO/72/GTM, 27 August 2001; Netherlands, UN Doc. CCPR/CO/72/NET, 27 August 2001; Belgium, 14, UN Doc. CCPR/C/79/Add.99, 19 November 1998; Israel, UN Doc. CCPR/C/79/Add.93, 18 August 1998; United States of America, UN Doc. CCPR/C/USA/CO/3/Rev1, 18 December 2006; United Kingdom, UN Doc. CCPR/C/GBR/CO/6, 30 July 2008; *Sarma v. Sri Lanka*, UN Doc. CCPR/C/78/D/950/2000, 31 July 2003; *Bautista v. Colombia*, UN Doc. CCPR/C/55/D/563/1993, 13 November 1995; *Gurrero v. Colombia*, Communication No. R.11/45, UN Doc. Supp. No. 40(A/37/40), 31 March 1982.
- 39 Committee on Economic, Social and Cultural Rights, Concluding Observations: Colombia, UN Doc. E/C.12/1/Add.74, 30 November 2001; Guatemala, UN Doc. E/C.12/1/Add.93, 12 December 2003; Israel, UN Doc. E/C.12/1/Add.90, 23 May 2003.
- 40 Committee on the Elimination of Racial Discrimination: Concluding Observations: Israel, UN Doc. CERD/C/304/Add.45, 30 March 1998.
- 41 Committee on the Elimination of Discrimination against Women, Concluding Observations: Sri Lanka, paras. 256–302, UN Doc. A/57/38 (Part I), 7 May 2002; Democratic Republic of the Congo, paras. 194–238, UN Doc. A/55/381, February 2000; Colombia, paras. 337–401, UN Doc. A/54/38, 4 February 1999.
- 42 Committee on the Rights of the Child, Concluding Observations: Democratic Republic of Congo, UN Doc. CRC/C/15/Add.153, 9 July 2001; Sri Lanka, UN Doc. CRC/C/15/Add.207, 2 July 2003; Colombia, UN Doc. CRC/C/COL/CO/3, 8 June 2006.
- 43 See, e.g., ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Judgment of 24 February 2005; *Isayeva v. Russia*, Judgment of 24 February 2005; *Ergi v. Turkey*, Judgment of 28 July 1998, Reports 1998-IV; *Ahmet Özkan and others v. Turkey*, Judgment of April 6, 2004.
- 44 *Cyprus v. Turkey*, above note 3; for an overview see Aisling Reidy, “The approach of the European Commission and Court of Human Rights to international humanitarian law”, *International Review of the Red Cross*, No. 324 (1998), pp. 513–29.
- 45 Inter-American Court of Human Rights (hereinafter I/A Ct HR), *Bámaca Velásquez v. Guatemala*, Judgment of 25 November 2000, Series C No. 70, para. 209; Inter-American Commission on Human Rights (hereinafter I/A Cm HR) *Coard v. the United States of America*, Case 10.951, OEA Doc. OEA/ser.L/V/II.106.doc.3rev, 1999, para. 37; *Alejandro v. Cuba*, Case 11.589, Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev, 1999; *Victor Saldaño v. Argentina*, Report No. 38/99, OEA/Ser.L/V/II.95, Doc. 7 rev at 289, 1998, para. 18; *Rafael Ferrer-Matorra and others v. the United States*, Case No. 9903, Report No. 51/01, OEA/Ser.L/V/II.111, Doc. 20 rev 289, 1980, para. 179; *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba*, Decision of 12 March 2002, 41 ILM 532.

a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁴⁶

In the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Wall case) the Court expanded this argument to the general application of human rights in armed conflict:

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.⁴⁷

It confirmed this statement in the case concerning the territory in eastern Congo occupied by Uganda (*DRC v. Uganda*). In this judgment, it repeated the holding of the advisory opinion in the Wall case that international human rights law applies in respect to acts done by a state in the exercise of its jurisdiction outside its own territory and particularly in occupied territories.⁴⁸ It thereby made it clear that its previous advisory opinion with regard to the occupied Palestinian territories cannot be explained by the long-term presence of Israel in those territories,⁴⁹ since Uganda did not have such a long-term and consolidated presence in the eastern Democratic Republic of the Congo. Rather there is a clear acceptance of the Court that human rights apply in time of belligerent occupation.

46 International Court of Justice (hereinafter ICJ) *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Reports, p. 226, para. 25 (hereinafter *Nuclear Weapons* case).

47 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Reports, p. 136, para. 106 (hereinafter *Wall* case).

48 ICJ, *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment of 19 December 2005, para. 216 (hereinafter *DRC v. Uganda*).

49 As argued by Michael J. Dennis, "Application of human rights treaties extraterritorially in times of armed conflict and military occupation", *American Journal of International Law*, Vol. 99 (2005), p. 122.

Extraterritorial application of human rights

Like the International Court of Justice, human rights bodies have not only applied human rights to armed conflict situations within the territory of a country, but also to armed conflict situations abroad. The extraterritorial reach of human rights has, more recently, and in particular in connection with the armed conflicts in Iraq and Afghanistan, sparked some controversy.

While the International Court of Justice, as explained above, affirms the application of human rights extraterritorially as a general principle, arguments about this question focus on the wording of the different treaties and must be dealt with separately.

International Covenant on Civil and Political Rights

The ICCPR contains the most restrictive application clause of international human rights treaties, since its Article 2(1) confines the Covenant's application to the obligation of the state to respect and ensure human rights "within its territory and subject to its jurisdiction". The ordinary meaning of this clause implies that both criteria apply cumulatively. However, the Human Rights Committee has interpreted the clause to mean persons *either* within the jurisdiction *or* within the territory of the state, and understands persons "within the jurisdiction" to mean anyone "within the power or effective control of the state".⁵⁰

The origins of this jurisprudence lie in cases that have no link to armed conflict. They concern the abduction, outside the state party, of dissidents by agents of the secret service. One of the first cases relating to violations of the ICCPR by state agents on foreign territory is *López Burgos v. Uruguay*.⁵¹ Kidnapped in Buenos Aires by Uruguayan forces, the applicant had been secretly detained in Argentina before being clandestinely transported to Uruguay. Had the Committee applied the Covenant according to the literal meaning of Article 2, it could not have held Uruguay responsible. Instead it used a teleological argument and took the view that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a state party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory".⁵²

The long-standing jurisprudence of the Human Rights Committee has confirmed this approach. In particular, the Committee has consistently applied the Covenant to situations of military occupation⁵³ and with regard to national troops

50 General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev1/Add.13, 26 May 2004, para. 10.

51 *López Burgos v. Uruguay*, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981; see also *Celiberti v. Uruguay*, UN Doc. CCPR/C/13/D/56/1979, 29 July 1981.

52 *López Burgos v. Uruguay*, above note 51, para. 12.3; *Celiberti v. Uruguay*, above note 51, para. 10.3.

53 Human Rights Committee, Concluding Observations on Cyprus, UN Doc. CCPR/C/79/Add.39, 21 September 1994, para. 3; Concluding Observations on Israel, UN Doc. CCPR/C/79/Add.93,

taking part in peacekeeping operations.⁵⁴ It has summed up this interpretation of Article 2 in its General Comment 31:

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. ... This 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.⁵⁵

On the basis of the requirement of *power or effective control*, the Human Rights Committee thus accepts the extraterritorial applicability of the Covenant in two types of situations: in the case of control over a territory, such as in the case of occupation, or over an individual, such as in the abduction cases.

The International Court of Justice has followed the Human Rights Committee's approach and furthermore relied on the *travaux préparatoires* of the Covenant:

The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, *vis-à-vis* their state of origin, rights that do not fall within the competence of that state, but of that of the state of residence.⁵⁶

There is considerable controversy over the drafting history of the Covenant, especially between the Human Rights Committee and the United States, since the latter is of the opinion that the drafting history shows precisely that the Covenant was not meant to apply extraterritorially.⁵⁷ During the drafting, the United States proposed the addition of the requirement "within its territory" to

18 August 1998, para. 10; Concluding Observations on Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11.

54 Concluding Observations on Belgium, UN Doc. CCPR/C/79/Add.99, 19 November 1998, para. 14; Netherlands, UN Doc. CCPR/CO/72/NET, 27 August 2001, para. 8; Belgium, CCPR/CO/81/BEL, 12 August 2004, para. 6.

55 General Comment No. 31, above note 50, para. 10 (emphasis added).

56 *Wall* case, above note 47, paras. 108–111.

57 Annex I: Territorial Scope of the Application of the Covenant, 2nd and 3rd periodic reports of the United States of America, Consideration of reports submitted by States parties under Article 40 of the Covenant, UN Doc. CCPR/C/USA/3, 28 November 2005; Summary Record of the 2380th meeting, 18 July 2006, Second and third periodic reports of the United States of America, UN Doc. CCPR/C/SR.2380, 27 July 2006; Human Rights First, Submission to the Human Rights Committee, 18 January 2006, p. 7, available at <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/hrfirst.doc>.

Article 2, which only had the requirement “within its jurisdiction”.⁵⁸ Eleanor Roosevelt, the US representative and the then chair of the Commission, emphasized that the United States was “particularly anxious” not to assume “an obligation to ensure the rights recognized in it to citizens of countries under United States occupation”.⁵⁹ She explained that

The purpose of the proposed addition [is] to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of the contracting states. The United States [is] afraid that without such an addition the draft Covenant might be construed as obliging the contracting states to enact legislation concerning persons, who although outside its territory were technically within its jurisdiction for certain purposes. An illustration would be the occupied territories of Germany, Austria and Japan: persons within those countries were subject to the jurisdiction of the occupying states in certain respects, but were outside the scope of legislation of those states. Another illustration would be leased territories; some countries leased certain territories from others for limited purposes, and there might be question of conflicting authority between the lessor nation and the lessee nation.⁶⁰

The United States took the view that the amendment was necessary “so as to make clear that a state was not bound to enact legislation in respect of its nationals outside its territory”.⁶¹ The United Kingdom followed the same line, and stated that “there were cases in which such nationals were for certain purposes under its jurisdiction, but the authorities of the foreign country concerned would intervene in the event of one of them committing an offence”.⁶²

However, with regard to *troops maintained by a state in foreign areas* Mrs Roosevelt stated that “such troops, although maintained abroad, remained under the jurisdiction of the State”.⁶³

Considering these exchanges, it becomes clear that reliance on the *travaux préparatoires* is of little help. Indeed, while it is clear that the amendment “within its territory” was added to the text in order to constitute a cumulative requirement together with the jurisdiction requirement, the reasons for the amendment relate to very precise situations. The fear was of a conflict between the jurisdictions of sovereign states; there was no reason for one state to intervene on the territory of

58 Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles, UN ESCOR Hum Rts Comm, 6th Sess, UN Doc. E/CN.4/365, 1950, p. 14 (United States proposal).

59 Summary Record of the Hundred and Thirty-Eighth Meeting, UN ESCOR Hum Rts Comm, 6th Sess, 138th mtg, UN Doc. E/CN.4/SR.138, 1950, p. 10.

60 Summary Record of the Hundred and Thirty-Eighth Meeting, UN ECOSOC, Commission on Human Rights, UN Doc. E/CN.4/SR.138, 6 April 1950, p.10; see also Summary Record of the Hundred and Ninety-Third Meeting, E/CN.4/SR.193, 26 May 1950, para. 53, and Summary Record of the Hundred and Ninety-Fourth Meeting, E/CN.4/SR.194, 25 May 1950, paras. 14, 16, 25.

61 UN Doc. E/CN.4/SR.329, p. 10; see also Summary Record of the Hundred and Ninety-Fourth Meeting, UN Doc. E/CN.4/SR.194, 25 May 1950, para. 16.

62 UN Doc. E/CN.4/SR.329, p. 12.

63 Summary Record of the Hundred and Ninety-Fourth Meeting, E/CN.4/SR.194, 25 May 1950, para. 32.

another if that other state had the means to uphold human rights. This is an altogether different scenario from the one envisaged in the *López Burgos* case or situations of occupation in which the authority of the occupied state has disappeared and been replaced by that of the occupying state.

The approach of the Human Rights Committee and the International Court of Justice can thus be justified in several ways. According to Article 31(1) of the Vienna Convention on the Law of Treaties, “A treaty shall be interpreted 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”. The Human Rights Committee appears to have adopted this approach in its recent observations, as it held that in good faith the Covenant must apply extraterritorially.⁶⁴ Furthermore, the “preparatory work of the treaty and the circumstances of its conclusion” can be considered for purposes of interpretation not only if the meaning is ambiguous or obscure, but also if the interpretation according to the ordinary meaning “leads to a result which is manifestly absurd or unreasonable” (Article 32). In this sense, one member of the Human Rights Committee wrote in the *López Burgos* case,

To construe the words “within its territory” pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, *lead to utterly absurd results*. ... Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad.⁶⁵

Thus, even relying on the *travaux préparatoires*, which at first glance indicate otherwise, the interpretations of the Human Rights Committee and the International Court of Justice are convincing and the Covenant must be understood to apply to persons abroad when they are under the effective control of a state party, at least when that control is exercised to the exclusion of control by the territorial state.

European Convention on Human Rights

The European Convention on Human Rights rests on broader terms of application than the ICCPR in that, according to Article 1 ECHR, the states parties “shall secure to everyone within their jurisdiction” the rights set forth in the Convention.⁶⁶ The drafting history of Article 1 thereof does not give much

64 “The State party should review its approach and interpret the Covenant in good faith in accordance with the ordinary meaning to be given to its terms in their context including subsequent practice, and in the light of its object and purpose”. Concluding Observations on the United States of America, United States of America, UN Doc. CCPR/C/USA/CO/3/Rev1, 18 December 2006, para. 10.

65 *Lopez Burgos v. Uruguay*, above note 51. Individual opinion of Mr Tomuschat (emphasis added). Note that Tomuschat also excluded the situation of occupation from the scope of Article 2 – a conclusion that was not followed subsequently by the Human Rights Committee.

66 Article 1 ECHR.

indication as to the meaning of this article. The first draft made reference to “all persons residing within the territory” and was replaced by a reference to persons “within their jurisdiction”. The underlying consideration was that the word “residing” could be too restrictive and only encompass persons legally residing within the territory. It was consequently changed to “within their jurisdiction”, based on Article 2 of the then Draft Covenant on Civil and Political Rights discussed by the UN Commission.⁶⁷

The European Court of Human Rights has therefore more readily applied the Convention extraterritorially, as it merely had to interpret the meaning of the term “jurisdiction”. The Court found in the *Loizidou* case that where a state exercises *effective overall control over a territory* – a condition that is particularly fulfilled in the case of military occupation – it exercises jurisdiction for the purposes of Article 1 of the Convention.⁶⁸ It justified the effective control argument by saying that “any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention’s fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court”.⁶⁹

In the *Banković* case the European Court restricted its jurisprudence on extraterritorial application of the Convention. The case dealt with NATO’s aerial bombardment of the Serbian Radio-Television station. The Court took the view that such bombardments did not mean that the attacking states had jurisdiction within the meaning of Article 1 ECHR; it stated that “[h]ad the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949”.⁷⁰ The Court clearly saw a difference between warfare in an international armed conflict, where one state has no control over the other at the time of the battle, and the situation of occupation. It further argued that

In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights’ protection has so far been relied on by the Court in favour of establishing

67 *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights* (Vol. III, p. 260), cited in ECtHR, *Banković and others v. Belgium and others*, application No. 52207/99, Admissibility Decision [GC], 12 December 2001, para. 19.

68 ECtHR, *Loizidou v. Turkey* (Preliminary Objections), Judgment of 23 March 1995, Series A No. 310, para. 62; *Loizidou v. Turkey*, Judgment of 18 December 1996, Reports 1996-VI, para. 56; *Cyprus v. Turkey*, application No. 25781/99 above note 3, para. 77.

69 *Cyprus v. Turkey*, above note 3, para. 78.

70 ECtHR, *Banković and others v. Belgium and others*, above note 67, para. 75.

jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.⁷¹

This argumentation leads to the understanding that the Court would not find that a state is exercising jurisdiction if it exercises overall control over a territory outside the Council of Europe.⁷²

However, subsequent judgments contradict this conclusion. In *Öcalan v. Turkey* the Court found Turkey responsible for the detention of the applicant by Turkish authorities in Kenya: it considered the applicant within the jurisdiction of Turkey by virtue of his being held by Turkish agents.⁷³ This broader extraterritorial application was confirmed in the case of *Issa and others v. Turkey*, in which the Court made it clear that control over an individual also engages the state's responsibility:

[A] State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.⁷⁴

In both the *Öcalan* and the *Issa* case, the Court recognized that states have “jurisdiction” over persons who are in the territory of another state but who are in the hands of their own state's agents. Interestingly, in its justification the Court relied on the case law of the Human Rights Committee in the *López Burgos* case and of the Inter-American Commission of Human Rights. It held that “[a]ccountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory”.⁷⁵ This argument was not confined to the “European legal space”.

It is difficult to reconcile the *Banković* decision with later jurisprudence of the Court. One way of understanding *Banković* is that the Court simply did not find that the state had effective control either over the territory or the persons, so that no “jurisdiction” was given under Article 2 of the European Convention on Human Rights. This does not, however, explain the argument about the European legal space. Another way of trying to find coherence in the jurisprudence is to

71 *Ibid.*, para. 80.

72 See the severe criticism of the *Banković* judgment by Luigi Condorelli, “La protection des droits de l'Homme lors d'actions militaires menées à l'étranger”, *Collegium* 32 (2005), p. 100.

73 ECtHR, *Öcalan v. Turkey*, Judgment of 12 March 2003, para. 93.

74 ECtHR, *Issa and others v. Turkey*, Judgment of 16 November 2004, para. 71; see also *Isaak and others v. Turkey*, Appl. No. 44587/98, Admissibility decision of 28 September 2008, p. 19.

75 *Issa and others v. Turkey*, above note 74, para. 71.

follow the approach of the UK House of Lords in the *Al-Skeini* case. The House of Lords, after reviewing the case law of the European Court,⁷⁶ based its considerations on *Banković* as the authoritative case, excluding jurisdiction outside the area of the Council of Europe with the narrow exception of “activities of diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state”⁷⁷ and military prisons.⁷⁸ That approach, on the other hand, disregards the argument of the Court in the *Issa* case or in even in the *Öcalan* case, where it was uncontroversial that *Öcalan* came within the jurisdiction of Turkey from the moment he was handed over to Turkish agents, without fulfilling any of the conditions set out in the interpretation of the House of Lords. Future jurisprudence of the European Court of Human Rights will have to provide more clarity. An interesting case in this regard will be the decision in the interstate application from Georgia against Russia.⁷⁹

In sum, the case law of the European Court of Human Rights on the meaning of “jurisdiction” in Article 1 is not entirely coherent. While it remains unclear to what extent the regional nature of the Convention will limit jurisdiction to territory within the geographical area of the Council of Europe in future cases, it appears that at least it will not take this limitation into account if people are in detention abroad. Another question that remains unclear is whether, if state agents committed an unlawful targeted killing abroad without controlling that area, this would mean that they exercised jurisdiction. The *Issa* case seems to indicate this, and it would indeed seem contradictory to hold a state accountable under the European Convention for killing a person in detention but not for a targeted shooting. But, again, the matter is not entirely settled.

It is submitted that the term “jurisdiction” in itself cannot support the contention that it means exercise of control abroad only when it is exercised in some states and not in others. A state may in practice, with or without the agreement of the host state, lawfully or unlawfully, exercise jurisdiction abroad. Thus “persons will come within the jurisdiction of a State in circumstances in which they can be said to be under the effective control of that State or are affected by those acting on behalf of the State more generally, wherever this occurs”.⁸⁰ However, even if the Court in some cases cannot limit the application of the Convention because

76 Including cases such as Eur Comm HR, *Sánchez Ramírez v. France*, 86-A DR 155, 1996; *Freda v. Italy*, 21 DR 250, 1980; *Hess v. the United Kingdom*, 2 DR 72, 1975.

77 As described in *Banković and others v. Belgium and others*, above note 67, para. 73.

78 House of Lords, *Al-Skeini and others v. Secretary of State for Defence*, Judgment of 13 June 2007, [2007] UKHL 26, paras. 61–83, 91, 105–132; the Court of Appeals had interpreted the jurisprudence of the European Court of Human Rights to be broader and cover both overall control over a territory and control over a person: *R v. the Secretary of State for Defence, ex parte Al-Skeini and others*, Judgment of 21 December 2005, [2005] EWCA Civ 1609, paras. 62–112.

79 Press Release issued by the Registrar, “European Court of Human Rights grants requests for interim measures”, No. 581, 12 August 2008.

80 Sir Elihu Lauterpacht and Daniel Bethlehem, “The scope and content of the principle of *non-refoulement*: opinion”, in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations On International Protection* 87, 2003, para. 67.

of lack of “jurisdiction”, it may decide to do so on the basis of a more general argument that the Convention is a regional and not a universal treaty.

American Declaration on the Rights and Duties of Man

The Inter-American Commission on Human Rights has long asserted jurisdiction over acts committed outside the territory of a state.⁸¹ It has based this approach on the American Declaration on the Rights and Duties of Man, which contains no application clause. The Commission’s argument is teleological: since human rights are inherent to all human beings by virtue of their humanity, states have to guarantee those rights to any person under their jurisdiction, which the Commission understands to mean any person “subject to its authority and control”.⁸²

The Commission also took rather a broader view with respect to military operations than the European Court of Human Rights. While the European Court rejected jurisdiction in *Banković*, the Inter-American Commission, effectively using a “cause and effect” test, stated in the case of the invasion of Panama by the United States in 1989 that

Where it is asserted that a use of military force has resulted in non-combatant deaths, personal injury, and property loss, the human rights of the non-combatants are implicated. In the context of the present case, the guarantees set forth in the American Declaration are implicated. This case sets forth allegations cognizable within the framework of the Declaration. Thus, the Commission is authorized to consider the subject matter of this case.⁸³

However, this case has been pending since 1993 and no decision has been reached on its merits.

The Inter-American Commission has also had to decide on killings of persons by state agents acting abroad. Thus it condemned as a violation of the right to life the assassination of Orlando Letelier in Washington and Carlos Prats in Buenos Aires by Chilean agents.⁸⁴ Similarly, it condemned attacks on Surinamese citizens by Surinamese state agents in the Netherlands.⁸⁵

To sum up, the Inter-American Commission holds states accountable for any acts subject to their authority and control and has understood these criteria in the widest possible manner, including situations of armed attack on foreign territory.

81 For an overview of its jurisprudence see Cristina Cerna, “Extraterritorial application of the human rights instruments of the Inter-American system”, in Fons Coomans and Menno Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, 2004, pp. 141–74, and Douglas Cassel, *ibid.*, pp. 175–81.

82 *Coard v. the United States*, above note 45, para. 37.

83 *Salas v. the United States*, Report No. 31/93, Case No. 10.573, 14 October 1993, Annual Report 1993, OEA/Ser.L/V/85, Doc. 9 rev., 11 February 1994, para. 6.

84 Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, Doc.17, 9 September 1985, Chapter III, paras. 81–91, 181.

85 Second Report on the Human Rights Situation in Suriname, OEA/Ser.L/V/II.66, doc.21 rev 1, 2 October 1985, Chapter V, E.

Convention against Torture, Convention on the Rights of the Child, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination

Article 2 of the Convention against Torture requires each state party to take effective measures to prevent torture “in any territory under its jurisdiction”. The original proposal had only used the formulation “within its jurisdiction”. It was stated that this could be understood to cover citizens of one state who are resident within the territory of another state. It was proposed to change the phrase to “any territory under its jurisdiction”, which would “cover torture inflicted aboard ships or aircraft registered in the State concerned as well as occupied territories”.⁸⁶ In line with this purpose, the Committee against Torture has understood this to include territories under the effective control of a state party to the Convention, but has done so against the protests of some states such as the United Kingdom⁸⁷ and the United States.⁸⁸

The International Covenant on Economic, Social and Cultural Rights does not contain an application clause at all.⁸⁹ Both the UN Committee on Economic, Social and Cultural Rights and the International Court of Justice have nevertheless affirmed the applicability of this treaty to all persons within the control of a state, especially in occupied territory.⁹⁰

The Convention on the Rights of the Child (Article 2(1)) guarantees the rights set forth in the Convention to each child within the jurisdiction of states party thereto; the Committee on the Rights of the Child and the International Court of Justice have understood this to include occupied territories.⁹¹

The International Court of Justice has found in its Order of 15 October 2008 in the case between Georgia and the Russian Federation that the International Convention on the Elimination of All Forms of Racial Discrimination applies to actions beyond a State’s territory.⁹²

86 Report of the Working Group on A Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. E/CN.4/L.1470, 12 March 1979, para. 32; France proposed that “within its jurisdiction” should be replaced by “in its territory” throughout the draft, E/CN.4/1314, para. 54.

87 Committee against Torture, Conclusions and Recommendations on the United Kingdom, UN Doc. CAT/C/CR/33/3, 10 December 2004, para. 4(b).

88 Committee against Torture, Summary Record of the 703rd meeting, UN Doc. CAT/C/SR.703, 12 May 2006, para. 14.

89 The same is true for the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on all Forms of Discrimination against Women.

90 *Wall case*, above note 47, para. 112.

91 Committee on the Rights of the Child, Concluding observations on Israel, UN Doc. CRC/C/15/Add.195, 9 October 2002; *Wall case*, above note 47, para. 113.

92 ICJ, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *Request for the Indication of Provisional Measures*, Order of 15 October 2008, para No. 109.

State practice

Member states of the Council of Europe have unanimously adopted resolutions in the Committee of Ministers, the Council's decision-making body, for the execution of judgments of the European Court of Human Rights which had applied the Convention extraterritorially, for example in the case of *Cyprus v. Turkey* for the violations committed by Turkey during its occupation⁹³ or for the violations committed by the Russian Federation in Transnistria in Moldova.⁹⁴

The positions and practice of states concerning the extraterritorial application of human rights, as expressed over a long period in General Assembly or Security Council resolutions, tend to confirm the application of human rights in international armed conflict. After the invasion of Hungary by Soviet troops in 1956, the Security Council called upon the Soviet Union and the authorities of Hungary "to respect ... the Hungarian people's enjoyment of fundamental human rights and freedoms".⁹⁵ In 1967 it considered, with regard to the territories occupied by Israel, that "essential and inalienable human rights should be respected even during the vicissitudes of war".⁹⁶ More recently, it has condemned human rights violations by "militias and foreign armed groups" in the Democratic Republic of the Congo.⁹⁷ As mentioned above, resolutions of the UN General Assembly and the UN Commission on Human Rights have also sometimes invoked human rights in such situations.⁹⁸

Few states have contested, vis-à-vis the human rights bodies, the application of the human rights treaties abroad.⁹⁹ Apart from Israel, it is doubtful whether any state has consistently objected to the extraterritorial application of human rights instruments. Also, it should be noted that some important

93 Interim Resolution ResDH(2005)44, concerning the judgment of the European Court of Human Rights of 10 May 2001 in the case of Cyprus against Turkey (adopted by the Committee of Ministers on 7 June 2005, at the 928th meeting of the Ministers' Deputies).

94 Interim Resolution ResDH(2006)26 concerning the judgment of the European Court of Human Rights of 8 July 2004 (Grand Chamber) in the case of *Ilaşcu and others* against Moldova and the Russian Federation (Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies).

95 GA Resolution 1312 (XIII), 12 December 1958. See above note 14.

96 SC Resolution 237 (1967) of 14 June 1967, preambular paragraph 2. See above note 5.

97 UN Doc. S/RES/1649 of 21 December 2005.

98 See above notes 30 and 31.

99 See Replies of the Government of the Netherlands to the Concerns Expressed by the Human Rights Committee, UN Doc. CCPR/CO/72/NET/Add.1, 29 April 2003, para. 19; Second periodic report of Israel to the Human Rights Committee, UN Doc. CCPR/C/ISR/2001/2, 4 December 2001, para. 8; Second periodic report of Israel to the Committee on Economic, Social and Cultural Rights, UN Doc. E/1990/6/Add.32, 16 October 2001, para. 5; Committee against Torture, Conclusions and Recommendations on the United Kingdom, UN Doc. CAT/C/CR/33/3, 10 December 2004, para. 4 (b); Summary Record of the 703rd meeting, UN Doc. CAT/C/SR.703, 12 May 2006, para. 14; Annex I: Territorial Scope of the Application of the Covenant, 2nd and 3rd periodic reports of the United States of America, Consideration of reports submitted by States parties under Article 40 of the Covenant, UN Doc. CCPR/C/USA/3, 28 November 2005.

national courts, for instance in Israel¹⁰⁰ and the United Kingdom,¹⁰¹ have applied human rights extraterritorially. The objection of these governments therefore does not necessarily reflect internally coherent state practice, since such practice includes all branches of government (the executive, the legislature and the judiciary).¹⁰²

It would go beyond the scope of this article to analyse which human rights are customary. But it is uncontroversial that core human rights such as the prohibition of arbitrary deprivation of life, the prohibition of torture and cruel, inhuman or degrading treatment, the prohibition of arbitrary deprivation of liberty or the right to a fair trial form part of customary international law. As for their territorial scope, it can be seen from the above-mentioned UN resolutions that extraterritorial application has not been called into question outside treaty law.¹⁰³ Human rights in customary international law are of a universal nature and therefore belong to every human being, wherever he or she may be. It can hence be argued that customary human rights apply in all territories of the world and that any state agent, whether acting in his or her own territory or abroad, is bound to respect them. In other words, respect for customary human rights is not a matter of extraterritorial application, because outside of treaty application clauses, respect for human rights has never been territorially confined.

Complementarity and *lex specialis*

The concurrent application of human rights and humanitarian law has the potential to offer strong protection to the individual, but it can also raise many problems. With the increasing specialization of different branches of international law, different regimes overlap, complement or contradict each other. Human rights and humanitarian law are but one example of this phenomenon.¹⁰⁴ It is therefore necessary to review the pertinent international rules and general principles of interpretation in order to analyse the relationship between human rights and humanitarian law.

100 See, e.g., *Marab v. IDF Commander in the West Bank*, HCJ 3239/02, Judgment of 18 April 2002.

101 *Al-Skeini and others v. Secretary of State for Defence*, [2004] EWHC 2911 (Admin), No. CO/2242/2004, 14 December 2004; see also *Al-Skeini and others v. Secretary of State for Defence*, [2005] EWCA Civ 1609, 21 December 2005, paras. 3–11, 48–53, 189–190; *Al-Jedda, R v. Secretary of State for Defence*, [2005] EWHC 1809 (Admin), 12 August 2005.

102 The importance of court decisions in forming customary law when conflicting with positions of the executive is subject to debate: see International Law Association, Final Report of the Committee on Formation of Customary International Law, Statement of principles applicable to the formation of general customary international law, pp. 17, 18.

103 See, e.g., the United States Army *Operational Handbook* of 2006, ch. 3, p. 47. For the extraterritorial scope of the customary right to life, see Nils Melzer, *Targeted Killing*, 2007, pp. 287 f.; David Kretzmer, “Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of defence?”, *European Journal of International Law*, Vol. 16 (2005), pp. 171, 185; Orna Ben Naftali and Yuval Shany, “Living in denial: the application of human rights in the occupied territories”, *Israel Law Review*, Vol. 37 (2004), pp. 17, 87.

104 Bothe, above note 4, pp. 37.

Distinguishing features of human rights law and humanitarian law

Before the possibilities of concurrent application are discussed, some fundamental distinctions between the two bodies of law should be recalled. First, humanitarian law only applies in times of armed conflict, whereas human rights law applies at all times. Second, human rights law and humanitarian law are traditionally binding on different parties. While it is clear that humanitarian law is binding for “parties to the conflict”¹⁰⁵ – that is, both state authorities and non-state parties – this question is far more controversial in human rights law. Traditionally, international human rights law is understood to be binding only for states, and it will have to be seen how the law evolves in this regard.¹⁰⁶ Third, while most international human rights are with few exceptions derogable,¹⁰⁷ humanitarian law is non-derogable (with the sole limited exception of Article 5 of the Fourth Geneva Convention). Lastly, there are considerable differences in procedural and secondary rights, such as the right to an individual remedy, as will be further discussed below.¹⁰⁸

It is thus clear from the outset that a complete merging of the two bodies of law is impossible. It is natural, therefore, that the approach in jurisprudence and practice is rather that human rights and humanitarian law are not mutually exclusive, but complementary and mutually reinforcing. The concept of complementarity is, however, of a policy rather than a legal nature. To form a legal framework within which the interplay between human rights and humanitarian law can be applied, the principles of legal interpretation have to provide the tools. This leads to two main concepts: the concept of complementarity in its legal understanding in conformity with the Vienna Convention on the Law of Treaties, and the concept of *lex specialis*.

The meaning of “complementarity”

Complementarity means that human rights law and humanitarian law do not contradict each other but, being based on the same principles and values, can influence and reinforce each other mutually. In this sense, complementarity reflects a method of interpretation enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which stipulates that, in interpreting a norm, “any relevant rules of international law applicable in the relations between the parties” shall be taken into account. This principle, in a sense, enshrines the idea of international law understood as a coherent system.¹⁰⁹ It sees international law as a regime in

105 See Common Article 3 to the Fourth Geneva Convention.

106 Article 2 ICCPR; Article 1 ECHR; Article 1 ACHR; see Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006.

107 See Article 4 ICCPR; Article 15 ECHR; Article 27 ACHR.

108 See below. Investigation, remedies, reparation, pp. 540 *et seq.*

109 Campbell McLachlan, “The principle of systemic integration and Article 31(3)(c) of the Vienna Convention”, *International and Comparative Law Quarterly*, Vol. 54 (2005), pp. 279–320; International Law Commission, Report of the Study Group on Fragmentation of International Law: Difficulties arising from Diversification and Expansion of International Law, UN Doc. A/CN.4/L.676, 29 July 2005,

which different sets of rules cohabit in harmony. Thus human rights can be interpreted in the light of international humanitarian law and vice versa.

The meaning of the principle of *lex specialis*

Frequently, however, the relationship between human rights law and humanitarian law is described as a relationship between general and specialized law, in which humanitarian law is the *lex specialis*. This was the approach of the International Court of Justice in the *Nuclear Weapons* case cited above, in which the Court held that

the test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.¹¹⁰

The Court repeated the reference to the *lex specialis* principle in the *Wall* case.¹¹¹ It did not do so in the *DRC v. Uganda* case.¹¹² Since the Court gave no explanation for the omission, it is not clear whether the omission was deliberate and shows a change in the approach of the Court.

Among international human rights bodies the Inter-American Commission has followed the jurisprudence of the International Court of Justice, citing the *lex specialis* principle,¹¹³ but other human rights bodies have not. Neither the African Commission on Human and Peoples' Rights nor the European Court of Human Rights have yet made known their views on the subject. The Human Rights Committee has done so, but has avoided the use of the *lex specialis* formulation and instead found that "both spheres of law are complementary, not mutually exclusive".¹¹⁴

The principle of *lex specialis* is an accepted principle of interpretation in international law. It stems from a Roman principle of interpretation according to which, in situations especially regulated by a specific rule, this rule would displace the more general rule (*lex specialis derogat legi generali*). The *lex specialis* principle can be found in the writings of such early writers as Vattel¹¹⁵ or Grotius. Grotius writes,

What rules ought to be observed in such cases [i.e. where parts of a document are in conflict]? Among agreements which are equal ... preference should be

para. 27; see also Philippe Sands, "Treaty, Custom and the Cross-fertilization of International Law", *Yale Human Rights and Development Law Journal*, Vol. 1 (1999), p. 95.

110 *Nuclear Weapons* case, above note 46, para. 25.

111 *Wall* case, above note 47, para. 106.

112 *DRC v. Uganda*, above note 48, para. 216.

113 *Coard v. the United States*, above note 45, para. 42.

114 Human Rights Committee, General Comment No. 31, above note 50, para. 11.

115 Emerich de Vattel, *Le Droit Des Gens ou Principes de la Loi Naturelle*, Book II, ch xvii, para. 316 (reproduction of Books I and II edn 1758, in: *The Classics of International Law*, Geneva, Slatkine Reprints, Henry Dunant Institute, 1983).

given to that which is most specific and closest to the subject in hand, for special provisions are ordinarily more effective than those that are general.¹¹⁶

In legal literature a number of commentators criticize the lack of clarity of the principle of *lex specialis*. First, it has been said that international law, as opposed to national law, has no clear hierarchy of norms and no centralized legislator, but a “variety of fora, many of which are disconnected and independent from each other, creating a system different from the more coherent domestic legal order”.¹¹⁷ Second, it is stressed that the principle of *lex specialis* was originally conceived for domestic law and is not readily applicable to the highly fragmented system of international law.¹¹⁸ Third, critics point out that nothing indicates, particularly between human rights law and humanitarian law, which of two norms is the *lex specialis* or the *lex generalis*;¹¹⁹ some, for instance, argue that human rights law might well be the prevailing body of law for persons in the power of an authority.¹²⁰ It has even been criticized that “this broad principle allows manipulation of the law in a manner that supports diametrically opposed arguments from supporters that are both for and against the compartmentalization of IHL and IHRL”.¹²¹ Critics have therefore proposed alternative models to the *lex specialis* approach, calling them a “pragmatic theory of harmonization”,¹²² “cross-pollination”,¹²³ “cross-fertilization”¹²⁴ or a “mixed model”.¹²⁵ Without going into detail, these approaches have in common an emphasis on harmony between the two bodies of law rather than tension.

Lastly, there appears to be a lack of consensus in legal literature about the meaning of the *lex specialis* principle. The Report of the Study Group of the International Law Commission on Fragmentation of International Law has found that *lex specialis* is not necessarily a rule to solve conflicts of norms; that it has, in

116 Hugo Grotius, *De Jure Belli Ac Pacis*, Book II, section XXIX. Library Ires.

117 Anja Lindroos, “Addressing the norm conflicts in a fragmented system: the doctrine of *lex specialis*”, *Nordic Journal of International Law*, Vol. 74 (2005), p. 28.

118 See, e.g., International Law Commission, Report of the Study Group, above note 108; Lindroos, above note 117, pp. 27–8.

119 Nancie Prud’homme, “*Lex specialis*: oversimplifying a more complex and multifaceted relationship?”, *Israel Law Review*, Vol. 40 (2) (2007), pp. 356; Gloria Gaggioli and Robert Kolb, “A right to life in armed conflicts? The contribution of the European Court of Human Rights”, *Israel Yearbook on Human Rights*, Vol. 37 (2007), pp. 115–69.

120 Louise Doswald-Beck, “International humanitarian law and the International Court of Justice on the legality of the threat or use of nuclear weapons”, *International Review of the Red Cross*, No. 316 (January–February 1997), p. 35.

121 Prud’homme, above note 119, p. 14.

122 *Ibid.*, p. 6.

123 Rene Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2005, p. 350.

124 Sands, above note 109, pp. 85–105.

125 Kretzmer, above note 103, p. 171.

fact, two roles – either as a more specific interpretation of or as an exception to the general law. As Martti Koskenniemi explains,

There are two ways in which law takes account of the relationship of a particular rule to a general rule (often termed a principle or a standard). A particular rule may be considered an application of the general rule in a given circumstance. That is to say, it may give instructions on what a general rule requires in the case at hand. Alternatively, a particular rule may be conceived as an exception to the general rule. In this case, the particular derogates from the general rule. The maxim *lex specialis derogat legi generali* is usually dealt with as a conflict rule. However, it need not be limited to conflict.¹²⁶

Understood not as a principle to solve conflicts of norms but as a principle of more specific interpretation, the principle of *lex specialis* in itself incorporates the complementarity approach mentioned above. It comes very close to the principle of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, according to which treaties must be interpreted in the light of each other.

There are thus two aspects to the *lex specialis* principle. One is its meaning as a principle of interpretation whereby a more general rule is interpreted in the light of a more specific rule. The other is its function as a rule governing conflicting norms.

In light of this understanding, the following conclusion can be drawn. While complementarity – that is, *lex specialis* in the sense of a rule of interpretation – can often provide solutions for harmonizing different norms, it has its limits. When there is a genuine conflict of norms, one of the norms must prevail.¹²⁷ In such situations the *lex specialis* principle, in the sense of a conflict-solving rule, gives precedence to the rule that is most adapted and tailored to the specific situation. There may be controversy as to which norm is the more specialized in a concrete situation, and indeed “an abstract determination of an entire area of law as being more specific towards another area of law is not, in effect, realistic”.¹²⁸ But this should not call the application of the principle of *lex specialis* as such into question. While the respective rules of humanitarian law and human rights law can mostly be interpreted in the light of one another, some of them are contradictory, and it has to be decided which one prevails. In determining which rule is the more specialized one, the most important indicators are the precision and clarity of a rule and its adaptation to the particular circumstances of the case.

The application of *lex specialis* in its two different functions to the interplay between human rights and humanitarian law can be illustrated by the example of the use of force, especially in non-international armed conflict and in situations of occupation.

126 Martti Koskenniemi, Study on the Function and Scope of the Lex Specialis Rule and the Question of “Self Contained Regimes”, UN Doc. ILC(LVI)/SG/FIL/CRD.1 and Add.1 (2004), p. 4.

127 See International Law Commission, Report of the Study Group, above note 109, para. 42.

128 Lindroos, above note 117, p. 44.

The use of force

Different standards for the use of force in human rights law and humanitarian law

The rules governing the use of force in humanitarian law and in human rights law are based on different assumptions. Human rights law “seeks review of every use of lethal force by agents of the state, while [humanitarian law] is based on the premise that force will be used and humans intentionally killed”.¹²⁹

In human rights law, lethal force can be used only if there is an *imminent* danger of serious violence that cannot be averted save for such use of force. The danger cannot be merely hypothetical, it must be imminent.¹³⁰ This extremely narrow use of lethal force to protect the right to life is confirmed in the Principles on the Use of Force and Firearms by Law Enforcement Officials, which state that “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life” and requires clear warning before the use of firearms, with sufficient time for the warning to be observed.¹³¹ Under human rights law, the planning of an operation with the purpose of killing is unlikely ever to be lawful. Police officers are trained in de-escalation techniques or in the use of weapons in a manner completely different from that of soldiers. The European Court of Human Rights, for instance, has developed extensive case law on the requirements for planning and controlling the use of force in order to avoid the use of lethal force.¹³²

In international humanitarian law, the main principles reining in the use of force are the principles of distinction, of precaution and of proportionality in order to avoid incidental loss of civilian life or damage to civilian objects.¹³³ The principle of proportionality in humanitarian law is different from proportionality in human rights law.¹³⁴ Whereas human rights law requires that the use of force be proportionate to the aim to protect life, humanitarian law requires that the incidental loss of civilian life, injury to civilians or damage to civilian objects caused by

129 Kenneth Watkin, “Controlling the use of force: a role for human rights norms in contemporary armed conflict”, *American Journal of International Law*, Vol. 98 (2004), p. 32.

130 See Principles 9 and 10 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; see also Nigel Rodley, *The Treatment of Prisoners Under International Law*, Oxford University Press, Oxford, 1999, pp. 182–8; Kretzmer, above note 103, p. 179.

131 Principles 9 and 10 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

132 ECtHR, *McCann and Others v. United Kingdom*, 18984/91, 1995, paras. 202–213; *Andronicou and Constantinou v. Cyprus*, Judgment of 9 October 1997, Reports 1997-VI, paras. 181–186, 191–193; *Hugh Jordan v. the United Kingdom*, Judgment of 4 May 2001, paras. 103–104; *Ergi v. Turkey*, above note 43, para. 79; *Isayeva, Yusupova and Bazayeva v. Russia*, above note 43, paras. 169–171; *Isayeva v. Russia*, above note 43, para. 189.

133 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, ICRC and Cambridge University Press, Cambridge, 2005, Rules 11–21.

134 See the discussion on the principle of proportionality in Noam Lubell, “Challenges in applying human rights law to armed conflict”, *International Review of the Red Cross*, Vol. 87 No. 860 (December 2005), pp. 737, 745–46.

an armed attack must not be excessive “in relation to the concrete and direct military advantage anticipated”.¹³⁵ The two principles can lead to different results. On the other hand, some authors argue that the “differences are fading progressively away and as HRL bodies develop an increasing branch of wartime human rights, sensitive to the peculiar characteristics of that type of situation”.¹³⁶

There is a growing position that even under humanitarian law the ability to use lethal force is limited not only by a principle of proportionality protecting incidental loss of civilian life or damage to civilian objects, but also by other limitations inherent to humanitarian law, in particular the principle of military necessity and the principle of humanity.¹³⁷ One of the oldest norms cited in this respect is the preambular paragraph of the St. Petersburg Declaration of 1868, which states that “the only legitimate object which States should endeavour to accomplish ... is to weaken the military forces of the enemy”.¹³⁸ Other rules could be cited to support this approach, in particular the prohibition on refusing quarter¹³⁹ or on the use of weapons causing unnecessary suffering or superfluous injury.¹⁴⁰ In this sense, military necessity is understood not only as an underlying principle of international humanitarian law or even as an enabling principle subjecting other rules of humanitarian law to the military objective, but as a principle which imposes constraints on the means and methods of warfare. In terms of the use of force, it limits that use to the degree and kind of force necessary to achieve the enemy’s submission. Hence, “the fact that [humanitarian law] does not prohibit direct attacks against combatants does not give rise to a legal entitlement to kill combatants at any time and any place so long as they are not *hors de combat* within the meaning of Article 41 [2] AP I”.¹⁴¹ However, this approach is not without controversy among scholars and practitioners of international humanitarian law.

In view of these distinct rules, it is interesting to look at recent developments in jurisprudence. Have they called the rules into question? Have they led to a convergence, as is sometimes contended? It must be borne in mind, however, that most of the existing jurisprudence is of human rights bodies and courts and, to

135 See the codification in Additional Protocol I, Article 51(5).

136 Gaggioli and Kolb, above note 119, p. 138.

137 For an in-depth analysis of the concept of military necessity and its use in modern military manuals see Melzer, above note 103, pp. 336–56; Gaggioli and Kolb, above note 119, p. 136.

138 Preamble of the Saint Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weights, 1868. Article 14 of the Lieber Code contains a similar clause: “Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.” See also Articles 15 and 16 of the Lieber Code, which define military necessity.

139 1907 Hague Regulations, Article 23(c); Geneva Convention II, Article 12; Additional Protocol I, Article 40.

140 Additional Protocol I, Article 35 (2).

141 Nils Melzer, above note 103, p. 347; in the words of Jean Pictet: “If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil”. *Development and Principles of International Humanitarian Law*, p. 75 f. (1985).

some extent, national courts. The judgments of these bodies and courts have no universally binding effect. Also, they adjudicate cases within the framework of specific treaties or laws. In particular, human rights bodies can often simply ignore humanitarian law because states have not acknowledged that they are involved in an armed conflict. An attempt must therefore be made to discover in which respect their statements can or cannot be generalized and whether or how they influence the broader, dogmatic discussion on human rights and humanitarian law.

Non-international armed conflict

While it would be fairly uncontroversial to assume that for the conduct of hostilities – that is, put simply, battlefield situations – humanitarian law is generally the *lex specialis* in relation to human rights law, two situations are more problematic: the use of force in non-international armed conflict; and the use of force in situations of occupation, where human rights have an important role to play. Is humanitarian law always the *lex specialis* in those situations?

Humanitarian law

The treaty-based humanitarian law of non-international armed conflict contains very few rules on the conduct of hostilities. The most important one is the protection of civilians against attack, unless and for such time as they take a direct part in hostilities, enshrined in Article 13(3) of Additional Protocol II. However, it is relatively uncontroversial that the rules regulating the conduct of hostilities – for example, distinction, proportionality, precaution – are part of customary international humanitarian law applicable to non-international armed conflicts.¹⁴²

The difficulty is that there is no combatant status in non-international armed conflict. This could lead to the conclusion that, apart from the government's armed forces, there are only civilians in such conflicts – meaning that members of armed groups could only be attacked when they are actually conducting hostilities, but not at any other time. From a military point of view, this is held to be unfeasible and not to reflect the reality of armed conflict. It moreover creates an imbalance between members of government armed forces, who could then be attacked at any time, and members of armed groups, who could not. During the drafting of Additional Protocol II there was no intention of precluding attacks at all times on members of armed groups who are fighting the government. On the contrary, the Commentary on 1977 Additional Protocol II states that “[t]hose belonging to armed forces or armed groups may be attacked at any time”.¹⁴³ Indeed, the principle of distinction only makes sense if not everyone is a civilian – that is, if the government is required to distinguish between the civilian population

142 See Henckaerts and Doswald-Beck, above note 133, Rules 1, 2, 5–24.

143 Sandoz, Swinarski and Zimmerman, above note 23, para. 4789.

and fighters of armed opposition groups. So who can be attacked and under what conditions?

There are, broadly speaking, three ways of approaching the targeting of members of armed groups in non-international armed conflict. The first is to hold that if a member of an armed group has a permanent fighting function, although he or she remains a civilian,¹⁴⁴ the mere fact of having the fighting function amounts to direct participation in hostilities and that person can therefore be attacked at all times (a sort of “continuous” direct participation in hostilities).¹⁴⁵ The second approach is to define those members of armed groups which have a permanent fighting function as “combatants for the purposes of the conduct of hostilities”, but without conferring on them a combatant *status* and combatant immunity as in international armed conflict (“membership approach”).¹⁴⁶ The third approach is to consider that anyone who is not formally a combatant – that is, not a member of the armed forces – is a civilian and can only be attacked during the actual times when he/she is directly participating in hostilities.

The consequence of the first two approaches is that members of armed groups who have a fighting function could be attacked at all times under international humanitarian law. The rules restricting the use of force against them would be the rules regulating the means and methods of war, for example rules on the use of weapons, the prohibition of perfidy, or denial of quarter.

Both in doctrine and in jurisprudence, however, many feel uncomfortable with at least one part of this solution, for while it is unproblematic to accept that “rebels who are organized, armed and assembled cannot be arrested”,¹⁴⁷ it is far more controversial to maintain that a member of an armed group, even a member with a permanent fighting function, can at all times be targeted without

144 The Supreme Court of Israel has taken the approach that members of “terrorist” groups continue to be civilians that can be targeted if and for such time as they directly participate in hostilities. *The Public Committee against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment v. the Government of Israel, the Prime Minister of Israel, the Minister of Defence, the Israel Defense Forces, the Chief of General Staff of the Israel Defense Forces, and Surat HaDin – Israel Law Center and 24 Others*, the Supreme Court of Israel sitting as the High Court of Justice, Judgment of 14 December 2006, (hereinafter *Targeted Killings* case), para. 28. It has, however, avoided the question of what “for such time” means (para. 40).

145 See Third Expert Meeting on Direct Participation in Hostilities, Summary Report 2005, pp. 48–9, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct_participation_in_hostilities_2005_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf) (hereinafter DPH Report 2005). This seems to be the approach of the Supreme Court of Israel in the *Targeted Killings* case, above note 144, para. 39: “a civilian who has joined a terrorist organization which has become his ‘home’, and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack ‘for such time’ as he is committing the chain of acts.” But the Supreme Court also recognizes that between this situation and a civilian who only once or sporadically participates in hostilities and can only be attacked at those times, there is a grey area “about which customary international law has not yet crystallized”, para. 40.

146 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflicts*, Cambridge University Press, Cambridge, 2004, p. 29; Kretzmer, above note 103, pp. 197–8; Sandoz, Swinarski and Zimmermann, above note 23, para. 4789; I/A Commission HR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev 1 corr., 22 October 2002, para. 69.

147 Louise Doswald-Beck, “The right to life in armed conflict: does international humanitarian law provide all the answers?,” *International Review of the Red Cross*, Vol. 88 (864) (December 2006), p. 885.

the restrictions imposed by human rights law. Can a member of the Revolutionary Armed Forces of Colombia (FARC) be targeted when shopping in Bogotá, instead of the operation being so planned that he can be arrested? Can a suspected member of the Kurdistan Workers' Party (PKK) be targeted with lethal force in accordance with the principles of humanitarian law when taking part in a demonstration? Can lethal force be used without any warning against a Chechen rebel in Moscow while he is at home? The main practical question is whether such persons have to be arrested, if that is a possibility, rather than killed. Should the traditional rules of humanitarian law prevail in such a situation, should they be influenced by human rights law, or should human rights law as *lex specialis* displace humanitarian law?

Treaty-based international humanitarian law does not greatly clarify the question. As explained above, the principle of military necessity in its restrictive sense might stand in the way of shooting to kill a fighter in circumstances where there is no need to do so to achieve a concrete military aim, but this interpretation of military necessity remains, as yet, controversial.¹⁴⁸ On the other hand, such cases have increasingly been submitted to human rights bodies, which have addressed them from a human rights angle.

Human rights jurisprudence

One of the first cases was that of *Guerrero v. Colombia*,¹⁴⁹ which came before the UN Human Rights Committee. The authorities suspected that members of an armed opposition group had kidnapped a former ambassador and were holding him hostage in a house in Bogotá. While the hostage was not found, the police forces waited for the rebels to return and shot them. The UN Human Rights Committee held that

[T]he police action was apparently without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned ... the action of the police resulting in the death of Mrs. Maria Fanny Suarez de Guerrero was disproportionate to the requirements of law enforcement.¹⁵⁰

The Human Rights Committee has also criticized Israel's policy of targeted killings insofar as they are used, in part, as a deterrent or punishment, and has required that "before resorting to the use of deadly force, all measures to arrest a

148 See DPH Report 2005, above note 145, pp. 45–6.

149 Human Rights Committee, Communication No. R.11/45, UN Doc. Supp. No. 40(A/37/40), 31 March 1992.

150 *Ibid.*, paras. 13.2, 13.3.

person suspected of being in the process of committing acts of terror must be exhausted”.¹⁵¹

The Inter-American Commission has generally held that members of armed groups who assume combatant functions cannot “revert back to civilian status or otherwise alternate between combatant and civilian status”.

The most extensive case law is that of the European Court of Human Rights. Before relating it here, it should be noted that in none of the cases that have come before the Court have the respondent governments put forward the argument that an armed conflict prevailed in their country.

The European Court of Human Rights’ seminal case on the use of force was *McCann and others v. the United Kingdom*, which concerned the killing of members of the Irish Republican Army (IRA) by UK special forces in Gibraltar. In this case, the Court held that the use of force must not only be proportionate in the moment that it is exercised, but that operations, even against suspected terrorists, must be planned so as to minimize to the greatest extent possible recourse to lethal force.¹⁵² This fundamental tenet lies at the heart of all subsequent cases on the use of force, be they law-enforcement or military operations.¹⁵³

In *Güleç v. Turkey*, in which police fired guns into a crowd to disperse demonstrators, the government argued that it had needed to use lethal force in a demonstration because of the suspected presence of PKK members.¹⁵⁴ The Court did not accept the argument and instead held that the authorities should have planned their operation so as to avoid lethal force, such as by using the necessary equipment such as truncheons, riot shields, water cannons, rubber bullets or tear gas, especially since the demonstration took place in a region in which a state of emergency had been declared and where at the time in question disorder could have been expected.¹⁵⁵ In *Gül v. Turkey*, the police fired at the door which Mehmet Gül was unlocking after they had knocked. The Court found the allegation by the police that Mehmet Gül had fired one pistol shot at them unsubstantiated. It held that opening fire with automatic weapons on an unseen target in a residential block inhabited by innocent civilians, including women and children, was grossly disproportionate.¹⁵⁶ In *Oğur v. Turkey*, the government asserted that the objective of the members of the security forces had been to apprehend the victim, who was thought to be a terrorist. On that occasion they had had to face a “major armed response”, to which they had replied with warning shots, one of which had hit Musa Oğur, who had allegedly been running away. The Court did not accept that the security forces had come under attack and held that the use of force was

151 Concluding Observations: Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 15.

152 *McCann and others v. the United Kingdom*, above note 132, para. 194; *Gül v. Turkey*, Appl. No. 22676/93, Judgment of 14 December 2000, para. 84.

153 See the latest case of *Akhmadov and others v. Russia*, Judgment of 14 November 2008, para. 100.

154 *Güleç v. Turkey*, Judgment of 27 July 1998, Reports 1998-IV, para. 67.

155 *Ibid.*, paras. 71–73.

156 *Gül v. Turkey*, above note 152, para. 82.

disproportionate, since no warning had been given and the warning shot had been badly executed.¹⁵⁷

In the case of *Hamiyet Kaplan v. Turkey*, the Court accepted that there was serious fighting between the government forces and the PKK. Four persons, including two children, died during a police raid on suspected members of the PKK, in the course of which a senior police officer was also killed by gunfire from the suspects' home. The Court accepted that there had been an armed confrontation between the police and the persons in the house and thus discarded the hypothesis that there had been an extrajudicial killing on the part of the police officers.¹⁵⁸ It nonetheless noted that during the organization of the operation, no distinction had been made between lethal and non-lethal force: the police officers had used only firearms, not tear gas or stun grenades. The uncontrolled violence of the assault on the house had inevitably put the suspects' lives in great danger. It criticized that there had been no sufficient legal framework and instruction to avoid the use of lethal force by the police officers and that therefore there had been a violation of the right to life.¹⁵⁹ Here again, although the Court did not contest the armed response of the suspect PKK members, it applied the strict requirements of law enforcement to the situation.

The common feature of these cases is that, even though the persons were alleged terrorists or suspected terrorists, the Court applies the full panoply of human rights safeguards for the right to life, including the necessity to avoid force, to use weapons which will avoid lethal injuries and to give warning.

In a number of recent cases, concerning security operations against Kurdish rebels in Turkey and Chechen rebels in Russia, the European Court of Human Rights has used language that is much closer to humanitarian law than to human rights law. In several cases since *Ergi v. Turkey* the Court, in assessing the proportionality of the use of force under Article 2 of the ECHR, has found that the state was responsible for "tak[ing] all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding, and, in any event, minimising incidental loss to civilian life"¹⁶⁰ – a standard found textually not in human rights law but in the obligation in Article 57(2)(a)(ii) of Additional Protocol I to take such precautions in attacks. The Court has accepted that injury to civilians might be a result of the use of force against members of organized armed groups, without qualifying that use of force as disproportionate.¹⁶¹ As said above, this test differs somewhat from that in human rights law in that it neither requires that force may only be used as a last resort or

157 *Oğur v. Turkey*, Judgment of 20 May 1999, Reports 1999-III, paras. 82–84.

158 *Hamiyet Kaplan v. Turkey*, Judgment of 13 September 2005, para. 50.

159 *Ibid.*, paras. 51–55. See also *Akhmadov and others v. Russia*, Judgement of 14 November 2008, para. 99.

160 *Ergi v. Turkey*, above note 43, para. 79; *Ahmed Özkan and others v. Turkey*, above note 43, para. 297. In *Ergi* the Court went very far in its requirement of precautionary measures, which included protection against firepower against civilians by PKK member caught in the ambush: *Ergi*, paras. 79, 80.

161 *Ahmed Özkan and others v. Turkey*, above note 43, para. 305; however, the Court found that the security forces should have verified after the combat operations whether any civilians were injured, para. 307.

that force must be avoided, to the extent possible, to spare not only innocent civilians but also the targeted person.

In the *Isayeva, Yusupova and Bazayeva* case, civilians were killed in a missile attack on a civilian convoy. While the Court made a general statement as to the need to avoid lethal force,¹⁶² its test was, in effect, whether harm to civilians could be avoided “in the vicinity of what the military could have perceived as military targets”.¹⁶³ On the other hand, in *Isayeva v. Russia*, in which the applicant and her relatives were attacked by missiles when trying to leave a village through what they had perceived as safe exits from heavy fighting, the Court took a slightly different approach. While accepting the need for exceptional measures in the context of the Chechen conflict,¹⁶⁴ the Court nonetheless recalled that Russia had not declared a state of emergency or made a derogation within the terms of Article 15 of the ECHR, so that the situation had to be “judged against a normal legal background”.¹⁶⁵ It then held that

[e]ven when faced with a situation where, as the Government submit, the population of the village had been held hostage by a large group of well-equipped and well-trained fighters ... the massive use of indiscriminate weapons ... cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by state agents.¹⁶⁶

It further held that the villagers should have been warned earlier of the attacks and should have been able to leave the village earlier.¹⁶⁷ Thus the Court used the human rights model based on a law enforcement situation, but then also took into account the insurgency and focused more on the indiscriminate nature of the weapons and the lack of warning and safe passage for the civilians. It did not question that the rebels could be attacked, even if they posed no immediate threat.¹⁶⁸

From its case law it can be concluded that the European Court of Human Rights – albeit never explicitly and not always entirely consistently – appears broadly to distinguish between two kinds of situations: on the one hand, situations like *McCann, Gül, Oğur* or *Kaplan*, in which individual members of armed groups or alleged members of such groups are killed and insufficient precautions are taken to avoid the use of lethal force altogether, including against those persons; on the other hand, situations like *Ergi, Özkan* or *Isayeva, Yusupova and Bazayeva* and *Isayeva*, in which the government forces are engaged in military counter-insurgency operations or fully fledged combat against an armed group. In the latter

162 *Isayeva, Yusupova and Bazayeva v. Russia*, above note 43, para. 171; in *Isayeva v. Russia*, above note 43, paras. 175–176, the Court cites both standards.

163 *Isayeva, Yusupova and Bazayeva v. Russia*, above note 43, para. 175.

164 *Isayeva v. Russia*, above note 43, para. 180.

165 *Ibid.*, para. 191.

166 *Ibid.*, para. 191.

167 *Ibid.*, paras. 193–200.

168 It appears, however, to require that illegal fighters posed a danger to the military in *Akhmadov and others v. Russia*, Judgement of 14 November 2008, para. 101.

cases the Court appears to use standards that are, if not explicitly then implicitly, inspired by humanitarian law, especially the criterion of whether incidental civilian loss was avoided to the greatest extent possible. It does not question the right of government forces to attack opposition forces, or require that lethal force be avoided even in the absence of an immediate threat. The Court does, however, appear to go a little further than traditional humanitarian law, in particular when it requires that the local population be warned of the probable arrival of rebels in their village,¹⁶⁹ or that the fire from the opposition group which could endanger the villagers' lives be taken into account.¹⁷⁰

Lastly, mention should be made of a recent case decided by the Supreme Court of Israel. The Supreme Court had to decide on the targeted killing of members of armed groups – not in the context of a non-international armed conflict, but of occupation. Its findings are nonetheless instructive for our analysis, because the Supreme Court in effect combined the standards of humanitarian law and human rights law. While considering that “terrorists” were “civilians who are unlawful combatants”¹⁷¹ and that at least those civilians who have joined a “terrorist organisation” and commit a chain of hostilities lose their immunity from attack for such time as they commit the chain of acts – that is, also between the single acts constituting the chain – it ruled as follows:¹⁷²

[A] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest ... Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated and tried, those are the means which should be employed ... A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force ... Arrest, investigation and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers that it is not required ... However, it is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation and trial are at times realisable possibilities ... Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs it should not be used ... [A]fter an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack

169 *Ibid.*, para. 187.

170 *Ergi v. Turkey*, above note 43, para. 79.

171 *Targeted Killings* case, above note 144, para. 28.

172 *Ibid.*, para. 39.

upon him is to be performed (retroactively). That investigation must be independent ...¹⁷³

While the basis for its findings was national law, the Supreme Court quoted extensively from doctrine and from the case law of the European Court of Human Rights. In other words, the Supreme Court did take human rights into account, as its formulation (“the means whose harm to the human rights of the harmed person is smallest”) shows. The Supreme Court required arrest wherever possible, and an investigation after the use of force. While it did not require an arrest in every situation, it required an investigation after every killing.

The possible interplay between humanitarian law and human rights law

What emerges from all the decisions discussed above (with the caveat that most of the decision are those of the European Court of Human Rights) is that presumed members of armed groups, “insurgents” or “terrorists” cannot be shot with intention to kill when there is a possibility of arresting them. This is typically the case when they are found in or around their homes¹⁷⁴ or far from any combat situation.¹⁷⁵ The case law of the European Court of Human Rights indicates that this is not the case when government forces are engaged in combat with armed groups.

As many emphasize, humanitarian and human rights law frequently lead to the same result. The outcome of most cases brought before human rights bodies would probably have been the same if decided by virtue of humanitarian law, for if the restrictive principles of military necessity and humanity are accepted, fighting members of armed groups not taking a direct part in hostilities must, if feasible in the actual circumstances, be arrested rather than killed.

However, unless an extremely expansive view is taken of the interpretation of humanitarian law in the light of human rights law,¹⁷⁶ the restrictions on the use of force do still appear to go further in human rights law than in humanitarian law. The first is that any operation including military operations in non-international armed conflict¹⁷⁷ involving the use of force must be planned in advance so as to avoid, to the greatest extent possible, the use of lethal force. Second, weapons must be chosen to avoid lethal force as far as possible. Third, any suspected violation of the right to life must entail an independent and impartial investigation; the relatives of the person killed have a right to a remedy if they can reasonably claim that

173 Ibid., para. 40, citations omitted.

174 Such as in *Guerrero v. Colombia*, above note 38; *Gül v. Turkey*, above note 152, *Oğur v. Turkey*, above note 157.

175 Such as in *Güleç v. Turkey*, above note 154.

176 Such as Gaggioli and Kolb, above note 119, pp. 148–9; Francisco Forrest Martin, “The united use of force rule: amplifications in light of the comments of Professors Green and Paust”, *Saskatchewan Law Review*, Vol. 65 (2002), p. 405; Francisco Forrest Martin, “The united use of force rule revisited: the penetration of the law of armed conflict by international human rights law”, *Saskatchewan Law Review*, Vol. 65 (2002), p. 451.

177 See *Akhmadov and others v. Russia*, above note 153, para. 100.

the right to life has been violated, and to individual reparation if such violation has occurred. In view of these differences, the question of which law applies to a particular use of force remains of practical importance. There are several ways of approaching the question of interplay.

With regard to the use of force in non-international armed conflict, the first would be to confine the application of humanitarian law to the geographical area where the fighting is taking place. Some arguments for this approach could possibly be found in the *Tadić* case:

Although the Geneva Conventions are silent as to the geographical scope of international “armed conflicts”, the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited.¹⁷⁸

This passage of *Tadić* could be understood to restrict certain rules of humanitarian law to combat situations, thereby giving way to human rights law in all other situations. However, subsequent jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) has not confirmed this approach, in which some parts of humanitarian law would be applied to the entire conflict and not others. In the *Kunarac* case, the Appeals Chamber made it clear that the decisive criterion for the application of humanitarian law is whether there is an armed conflict and whether the act in question occurs in relation to the armed conflict.¹⁷⁹ To explain the relationship between humanitarian law and the laws applicable in peacetime, the Chamber held that “[t]he laws of war do not necessarily displace the laws regulating a peacetime situation; the former may add elements requisite to the protection which needs to be afforded to victims in a wartime situation.”¹⁸⁰ Transposed to the relationship between humanitarian law and human rights law, this means that while humanitarian law applies throughout the territory of the country in a situation of armed conflict, it is not the only relevant body of law, and human rights law may come to add requirements to be observed by the state authorities. This is a convincing approach: indeed, if there is a nexus to the conflict, for instance if the security forces are pursuing a member of an armed group, it would be contrary to the object and purpose of humanitarian law to discard it entirely. It would lead to a splitting of humanitarian law whereby some rules (e.g. on detention) always apply and others (on the conduct of hostilities) do not.

Retaining the undivided application of humanitarian law and human rights law to the entire territory, the better approach is therefore to apply the *lex specialis* rule. As regards the substantive right to life – that is whether a killing is

178 *Prosecutor v. Dusko Tadić*, Case IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 68.

179 *Prosecutor v. Kunarac et al*, IT-96-23&23/1, Appeals Chamber, 12 June 2002, paras. 55–60.

180 *Prosecutor v. Kunarac et al.*, IT-96-23&23/1, Appeals Chamber, 12 June 2002, para. 60.

lawful or not –the question of which body of law constitutes the *lex specialis* must be resolved by reference to their underlying object and purpose: human rights law is premised on the use of law-enforcement powers, whereas humanitarian law, in general, is centred on the battlefield (with the exception of occupation, which will be dealt with below). To apply human rights law is therefore only realistic if it is feasible to use the means of law enforcement, thus only in operations conducted by security forces (whether military or police) with some effective control over the situation. In those cases, human rights law constitutes the *lex specialis*. In combat situations, on the other hand, humanitarian law constitutes the *lex specialis*.¹⁸¹

For the conduct of hostilities, human rights law is generally flexible enough to accommodate the *lex specialis* of humanitarian law. This is where the statement of the International Court of Justice comes into play: “The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities”.¹⁸² The only exception to this would be in Article 2 of the European Convention on Human Rights, which does not speak of “arbitrary deprivation of life” but, while containing much stricter requirements, is derogable under Article 15 of the ECHR “in respect of deaths resulting from lawful acts of war”. In the absence of derogations, the Court has nonetheless tacitly resorted to the rules of humanitarian law in situations which were characterized as battlefield situations, and indeed humanitarian law does constitute the *lex specialis* there.

Outside conduct of hostility situations, humanitarian law can usually either be interpreted in the light of¹⁸³ or be complemented by human rights law. Only where the two are incompatible will human rights law prevail.

What is effective control? It will not be possible to answer this question in an entirely satisfactory manner, but guidance can be found in some useful criteria. The geographical criterion, although not the exclusive one, is the main one. Areas are characterized as being under greater or less control of the government forces. If the latter go out to apprehend a rebel in areas far away from the combat zone, they can do so by law-enforcement means. In other words, the closer the situation is to the battlefield, the more humanitarian law will prevail, and vice versa. Other

181 In this sense see also Marco Sassòli, “La Cour Européenne des Droits de L’homme et les Conflits Armés”, in Stephan Breitenmoser, Bernhard Ehrenzeller, Marco Sassòli, Walter Stoffel and Beatrice Wagner Pfeifer (eds.), *Droits de L’homme, Democratie et Etat De Droit, Liber Amicorum Luzius Wilhaber*, Dike, Zürich, 2007, pp. 709, 721; Marco Sassòli, “Le Droit International Humanitaire, une Lex Specialis par Rapport aux Droits Humains?”, in Andreas Auer, Alexandre Flückiger and Michel Hottelier (eds.), *Etudes en l’honneur du Professeur Giorgio Malinverni: Les Droits Humains et la Constitution*, 2007, p. 394.

182 *Nuclear Weapons* case, above note 46, para. 25; however, the dictum of the International Court of Justice does not make any differentiation between situations or types of armed conflict and was probably meant, without further thought, to imply that humanitarian law is always the *lex specialis* in armed conflict; see, e.g., Leslie Green, “The ‘unified use of force rule’ and the law of armed conflict: a reply to Professor Martin”, *Saskatchewan Law Review*, Vol. 65 (2002), p. 427.

183 Gaggioli and Kolb, above note 119, pp. 141, 148f. These authors consider, for instance, that the jurisprudence of the ECtHR provides interpretation for the principle of precaution.

relevant criteria can be, for instance, the amount of armed resistance met by the security forces, the duration of combats as opposed to isolated or sporadic acts, or the type of weaponry used. In practice, the lines will not always be easy to define. But a coherent interpretation of these existing bodies of law must attempt to provide a framework which gives some direction while at the same time remaining flexible in order to accommodate a large number of possible situations.

One objection to applying human rights law to situations of conflict between the government and armed groups is that it restricts the government without restricting armed opposition groups. Indeed, human rights law traditionally only applies to state authorities. While this is controversial in doctrine, the fact remains that even if armed opposition groups were held to be bound by human rights, only actions by governments will be controlled by international human rights bodies, such as the Human Rights Committee, the European Court of Human Rights or the Inter-American Court and Commission of Human Rights. Is the state then “being required to fight with one hand tied behind its back”?¹⁸⁴ Arguably, no such imbalance between government forces and armed opposition groups is created by the additional restrictions of human rights law. This would be the case only if there were an equality of permissible use of force in place, which the additional requirement for the government would upset. But this is not the case, since any non-governmental group that attacks the government remains criminal under domestic law, and humanitarian law in non-international armed conflict does not shield members of the group from criminalization under domestic law as it shields combatants in international armed conflict.¹⁸⁵

Occupation

Unlike non-international armed conflict, the use of force in international armed conflict is generally characterized by more battlefield-like operations, especially military operations from the air, as in the conflicts between the United States and Afghanistan in 2001, between the Coalition and Iraq in spring 2003, or between Israel and Lebanon in summer 2006. In such situations human rights law would generally not be applicable for lack of effective control.¹⁸⁶ Occupation is different. It raises the question of the relationship between human rights and humanitarian law in a manner much more similar to that of non-international armed conflict.

One of the main obligations of the occupying power according to Article 43 of the 1907 Hague Regulations is to “take all the measures in his power to restore, and ensure, as far as possible, public order and safety”. This provision

184 Françoise Hampson, “Human rights and humanitarian law in internal conflicts”, in Michael Meyer (ed.) *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, British Institute of International and Comparative Law, London, 1989, p. 60.

185 Doswald-Beck, above note 147, p. 890.

186 As was the case in ECtHR, *Banković and others v. Belgium and others*, above note 67.

imposes a law enforcement obligation on the occupying authorities: public order is generally restored through police, not military, operations.¹⁸⁷ The particular feature of humanitarian law applicable to situations of occupation is that it presupposes effective authority and control,¹⁸⁸ which are not usually found on the battlefield. The 1907 Hague Regulations also clearly separate the sections on “Hostilities” (Section II) and on “Military authority over the territory of the hostile state” (Section III). In the same spirit, the Fourth Geneva Convention clearly indicates that the normal procedure to ensure public order and safety is through penal legislation, not through combat.¹⁸⁹

Which situations, then, require the occupying power to respect human rights law because it is performing its law-enforcement obligations, and in which situations do ongoing hostilities call for the use of force under humanitarian law? In abstract legal terms, the answer must be the same as proposed above: where the occupying power has effective control, is in a law-enforcement situation and capable of making arrests, it should act in compliance with the requirements of human rights law.¹⁹⁰

The concrete question facing the occupying power will be whether members of the enemy forces or of organized resistance movements can be targeted to be killed (in accordance with the rules governing the conduct of hostilities in international armed conflict) or whether the occupying power’s forces must arrest them because they have sufficient effective control over the situation to do so.

In practice it is therefore necessary to differentiate between various situations of occupation, for while the very definition of “occupation” in humanitarian law presupposes control, there are in reality situations of occupation where control of the territory is only partial. Where hostilities continue or break out anew, humanitarian law on the conduct of hostilities must prevail over human rights law, which presupposes control for its enforcement. The question is, of course, when can hostilities be said to have broken out anew? Not all criminal activity, even if violent, can be treated like an armed attack. What about military resistance by groups that are not formal members of the occupied state’s armed forces? As was suggested at a meeting on the right to life in armed conflict, held by the University Centre for International Humanitarian Law in Geneva in 2005,¹⁹¹ the test for assuming a situation of hostilities could be based on the test used by the ICTY to establish the existence of a non-international armed conflict – that is, a certain

187 Marco Sassòli, “Legislation and maintenance of public order and civil life by occupying powers”, *European Journal of International Law*, Vol. 16 (2005), p. 665.

188 1907 Hague Regulations, Article 42.

189 Fourth Geneva Convention, Articles 64 and 65.

190 In this sense, see Lubell, above note 134, pp. 52–3; see also Melzer, above note 103, pp. 224–30 on the basis that humanitarian law itself leads to this result.

191 University Centre for International Humanitarian Law, Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation, 1–2 September 2005 (hereinafter UCJHL Meeting Report), available at www.adh-geneva.ch/events/expert_meetings.php (last visited 23 July 2008).

minimum intensity and duration of the violence.¹⁹² Such situations would require a military response, whereas isolated or sporadic attacks¹⁹³ by resistance movements could be met by law-enforcement means.¹⁹⁴

The *Al-Skeini* case, although it was not decided in this particular respect, illustrates how complicated the choice between the application of human rights or humanitarian law can become in a situation of occupation – or rather how difficult it is to apply the theory in practice. One of the questions was whether the killing of five persons in security operations by British troops during the occupation of the city of Basra in Iraq in 2003 was lawful under the European Convention on Human Rights. It was undisputed that while there was occupation by British troops in the Al Basra and Maysan provinces of Iraq at the time in question,¹⁹⁵ the United Kingdom possessed no executive, legislative or judicial authority in Basra city. It was there to maintain order in a situation verging on anarchy. The majority in the Court of Appeals found that there was no effective control for the purpose of application of the European Convention on Human Rights.¹⁹⁶

The decision shows that there can be two approaches to the application of human rights in situations of occupation. The majority found that there was not enough effective control even to *apply* the European Convention on Human Rights extraterritorially. Another way of arriving at the same result would be to hold that even though human rights law applies, the question of whether there is a violation of the right to life must be assessed by resort to the rules of international humanitarian law, which prevail as the *lex specialis*.

It is clear that this problem and shift in applicable rules on the use of force is not only of critical importance for the protection of civilians on the ground, but also has major impacts on the soldiers. To avoid violations, soldiers must be given clear rules of engagement and trained accordingly. In practice, this can best be achieved by separating police and military functions.¹⁹⁷ Even then, the distinction between a common criminal and a combatant will sometimes be extremely difficult to make, as has been acknowledged, for instance, in an After Action Report of American forces in Iraq.¹⁹⁸

192 *Prosecutor v. Dusko Tadić*, Case IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70: “protracted violence between governmental authorities and organized armed groups or between such groups within a State”.

193 See also Additional Protocol II, Article 1(2), according to which “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence” do not amount to an armed conflict.

194 UCIHL Meeting Report, Section D4.

195 *Al-Skeini* case (CA), above note 78, para. 119.

196 *Ibid.*, para. 124. The House of Lords arrived at the same result as the majority in the Court of Appeals, but on the basis that the Human Rights Act had no extraterritorial application. *Al-Skeini* case [UKHL], above note 78, esp. paras. 26 and 109–132.

197 See also Watkin, above note 129, p. 24; Sassòli, above note 187, p. 668.

198 “Transitioning from combat to SASO requires a substantial and fundamental shift in attitude. The soldiers have been asked to go from killing the enemy to protecting and interacting, and back to killing again. The constant shift in mental posture greatly complicates things for the average soldier. The soldiers are blurred and confused about the rules of engagement, which continues to raise questions, and issues about force protection while at checkpoints and conducting patrols.” After Action Report, “SUBJECT: Operation Iraqi Freedom After Action Review Comments,” 24 April 2003, conducted by

Investigations, remedies, reparation

Human rights law and humanitarian law differ fundamentally in a number of procedural aspects which have to do with the right to a remedy and to individual standing in human rights law. They also differ, originally, in terms of an individual right to reparation. While humanitarian law does not know such individual standing at international level, the main human rights treaties have a form of individual complaint mechanism that has led to case law on the right to a remedy, the right to an investigation and the right to reparation. Such case law has already started to influence the understanding of humanitarian law and could continue to do so in the future.

Investigations

Humanitarian law has a number of requirements for investigations, primarily for war crimes¹⁹⁹ but also, for instance, for deaths of prisoners of war²⁰⁰ or civilian internees.²⁰¹ Investigatory obligations have also been developed in treaty law, soft law and jurisprudence in human rights law and are now rather more detailed than in international humanitarian law.²⁰² In human rights law, allegations of serious human rights violations, especially allegations of ill-treatment or unlawful killing, must be subject to a prompt, impartial, thorough and independent official investigation. The persons responsible for and carrying out the investigation must be independent from those implicated in the events. The investigation must be capable of leading to a determination not only of the facts, but also of the lawfulness of the acts and the persons responsible. The authorities must have taken reasonable steps available to them to secure evidence concerning the incident, including, *inter*

TCM C/3-15 Infantry, Task Force 1-64 (declassified), cited in Human Rights Watch, *Hearts and Minds*, Annex II, available at www.hrw.org/reports/2003/iraq1003/10.htm (last visited 23 August 2007).

199 This is implicit in the obligation to search for persons alleged to have committed grave breaches and to bring them to justice. Articles 49/50/129/146 respectively of the four Geneva Conventions; Additional Protocol I, Article 85.

200 Third Geneva Convention, Article 121.

201 Fourth Geneva Convention, Article 131.

202 See the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; among the vast body of jurisprudence, see Human Rights Committee: Concluding Observations: Serbia and Montenegro, para. 9, UN Doc. CCPR/CO/81/SEMO, 12 August 2004; Concluding Observations: Brazil, para. 20, UN Doc. CCPR/C/79/Add.66, 24 July 1996; Concluding Observations: Colombia, para. 32 and 34, UN Doc. CCPR/C/79/Add. 76, 5 May 1997; Committee against Torture: Conclusions and Recommendations: Colombia, para. 10(f), UN Doc. CAT/C/CR/31/1, 4 February 1997; I/A Court H R, *Myrna Mack-Chang v. Guatemala*, Judgment of 25 November 2003, Series C No. 101; *Caracazo v. Venezuela (Reparation)*, Judgment of 29 August 2002, Series C No. 95; *Juan Humberto Sánchez v. Honduras*, Judgment of 26 November 2003, Series C No. 99, para. 186; African Commission on Human and Peoples' Rights, *Amnesty International et al. v. Sudan*, 26th and 27th Ordinary Sessions, May 2000, para. 51; Eur Court HR, *Isayeva, Yusupova and Bazayeva v. Russia*, above note 43, paras. 208–213 (summary of constant jurisprudence of the Court).

alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings. In order to ensure public confidence in the investigation, there must be a sufficient element of public scrutiny of it. While the degree of public scrutiny may vary from case to case, the victim's relatives must in all cases be involved in the procedure to the extent necessary to safeguard their legitimate interests, and must be protected from any form of intimidation. The result of the investigation must be made public. The European Court has even gone so far as to establish a presumption of responsibility of the state where individuals are killed in an area within the exclusive control of the authorities,²⁰³ since the events lie within the exclusive knowledge of the authorities.²⁰⁴

Human rights bodies have not hesitated to apply these requirements to investigations in situations of armed conflict.²⁰⁵ Recently, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions lamented the fact that investigations are less frequent and often more lenient in armed conflict situations than in times of peace.²⁰⁶

In this area there is scope for human rights to complement humanitarian law, especially with regard to the use of force or allegations of ill-treatment. Indeed, it is important to distinguish between the substantive law justifying the use of force, which differs in human rights law from that in humanitarian law, and the question of investigation, which in the first place requires a gathering of facts. In the latter respect, there is no contradiction between human rights and humanitarian law. Humanitarian law does not provide for a duty to investigate in such detail, but there is no reason to understand this as a qualified silence in the sense that it would preclude application of the duty under human rights law.

Evidently, it would not be realistic to require an investigation after every single use of force in a combat operation.²⁰⁷ But there is a middle way between reviewing every single shot in an armed conflict and not reviewing any alleged violation at all of the right to life. The reality, in particular of counter-insurgency contexts, is that often the facts are not clear. If there are no investigations, security personnel can all too easily allege that they were acting on the assumption that lethal force was necessary because they were facing imminent attack²⁰⁸ or that the rebels died in crossfire.²⁰⁹ In many such circumstances the only way to achieve

203 *Akkum v. Turkey*, Judgment of 24 March 2005, paras. 208–211.

204 *Ibid.*, para. 211.

205 ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, above note 43, paras. 208–213; I/A Court H R, *Myrna Mack-Chang v. Guatemala*, above note 202; Human Rights Committee: Concluding Observations: Colombia, UN Doc. CCPR/C/79/Add. 76, 5 May 1997, para. 32.

206 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/2006/53m, 8 March 2006, paras. 33–38.

207 Melzer, above note 103, pp. 526 f.

208 As happened in *Gül v. Turkey*, above note 152, paras. 81, 89, or in *Oğur v. Turkey*, above note 157, para. 80.

209 As happened in I/A Court H R, *Escuê-Zapata v. Colombia*, Merits, Reparations and Costs, Judgment of July 4, 2007, Series C No. 165, para. 39.

a result is through an independent investigation in which not only the security personnel can be heard but also witnesses supporting the victims' or their families' view.

There are elements in human rights jurisprudence that are certainly new to situations of armed conflict. Not all requirements of an investigation in peacetime may be directly transposable to situations of armed conflict. Also, investigations can only be conducted if practicable in the prevailing security situation and will have to take the reality of armed conflict into account,²¹⁰ such as problems in gathering evidence in some combat situations, lack of access for the investigating personnel, or the witnesses' need for security. On the other hand, it cannot be said that investigations are per se impossible to conduct in times of armed conflict.²¹¹ In circumstances giving rise to concern as to the legality of the act, especially in cases of targeted killing of individuals, an investigation should at least be conducted when there is reasonable doubt whether the killing was lawful.²¹² While the procedures for investigations in situations of armed conflict will have to be developed further, it is clear that they must comply with the requirements of independence and impartiality. In this respect, military investigations have been found to pose particular challenges in terms of independence.²¹³ Military investigations would have to be particularly analysed to assess their independence and impartiality and the role they allow for victims and their families.

Court scrutiny

Whereas humanitarian law focuses on “the parties to a conflict”, human rights are entirely built around the individual and are formulated as individual entitlements.²¹⁴ This does not imply that there are no rights in humanitarian law. On the contrary, the Geneva Conventions were deliberately formulated to enshrine personal and intangible rights.²¹⁵ But at the international level, human rights law, at least for civil and political rights,²¹⁶ recognizes a right to a remedy – that is, a right

210 Watkin, above note 129, p. 34.

211 Gaggioli and Kolb, above note 119, p. 126.

212 Kretzmer, above note 103, pp. 201, 204.

213 Report of the Special Rapporteur, above note 206, para. 37; see more generally, Federico Andreu, *Fuero military y derecho internacional*, *International Commission of Jurists*, 2003, pp. 112–26; I/A Commission H R, Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102, Doc. 9 rev 1, 26 February 1999, Ch. V, paras. 17–60; Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, on the Issue of the administration of justice through military tribunals, UN Doc. E/CN.4/2006/58, 13 January 2006, paras. 32–35.

214 Ben Naftali and Shany, above note 103, pp. 17, 31.

215 Jean Pictet (ed.), *Commentary to the First Geneva Convention*, 1960, pp. 82, 83; see in particular the discussion on Common Article 6/6/6/7 to the four Geneva Conventions; Yoram Dinstein, “The international law of inter-state wars and human rights”, *Israel Yearbook of Human Rights*, Vol. 1 (1971), pp. 139, 147.

216 And see now the newly adopted Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc. A/HRC/8/L.2, 9 June 2008.

to lodge an individual complaint against alleged violations.²¹⁷ Such a right does not exist in humanitarian law.²¹⁸ Most of the case law involving the interplay between human rights and humanitarian law has been decided on the basis of human rights law, because victims could only bring cases to human rights bodies. This is why, seemingly, one of the most dramatic effects of the application of human rights law to situations of armed conflict is that it leads to court scrutiny. Never before have situations of international armed conflict or of military operations abroad been scrutinized as much as in the cases concerning Kosovo, Iraq or Afghanistan. It is sometimes contended that such court scrutiny is inappropriate for military action, but is this really the case?²¹⁹

The necessity to have not only an international criminal court, but also a better supervisory mechanism for humanitarian law or even “a body or tribunal whose function it would be to receive complaints against Governments that flout the provisions of the [Hague and Geneva] Conventions”,²²⁰ has been discussed for many decades.²²¹ At international level such a court or tribunal has never met with the approval of states. Could there be a reason, then, for restricting access to courts, at least at national level? Is it that humanitarian law is not justiciable because of the exceptional nature of military action? Practice shows that this argument does not hold sway, for there is a long history of interpretation of humanitarian law in courts.

Indeed, international courts such as the International Court of Justice, international and hybrid criminal tribunals, and national courts have interpreted international humanitarian law. As indeed have national courts, be they in Israel, Colombia or elsewhere, often with human rights or domestic fundamental rights as the basis for the victim’s complaint and standing. The Supreme Court of

217 See ICCPR, Article 2(3); ECHR, Article 13; ACHR, Article 25; African Charter on Human and Peoples’ Rights, Article 7(1)(a); UN Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Human Rights Law, adopted by GA Res. 60/147 of 16 December 2005, UN Doc. A/RES/60/147, 21 March 2006.

218 Liesbeth Zegveld, “Remedies for victims of violations of international humanitarian law”, *International Review of the Red Cross*, Vol. 84 (851) (September 2003), pp. 497–528.

219 This was, for instance, the argument by the State Attorney’s Office in the *Targeted Killings* case, above note 144, para. 47.

220 Sean MacBride, “Human rights in armed conflict, the inter-relationship between the humanitarian law and the law of human rights”, *IX Revue de Droit Pénal Militaire et de Droit de la Guerre*, 1970, p. 388.

221 See A. H. Robertson, “Humanitarian Law and Human Rights”, in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles, in Honour of Jean Pictet*, 1984, pp. 793, 799; Sandoz, Swinarski and Zimmermann, above note 23, paras. 3600–3602; Report of the Secretary General on Respect for Human Rights in Armed Conflict, UN Doc. A/7720, 20 November 1969, para. 230; Hampson, above note 184, p. 71; Dietrich Schindler, “Human rights and humanitarian law: interrelationship of the laws”, *American University Law Review*, Vol. 31 (1982), p. 941. At the 1949 Geneva Conference, not quite with the same idea but in the same direction, France proposed the establishment of a “High International Committee” to “supervise the application of and ensure respect for the Convention[s]”. *Final Record of the Diplomatic Conference of Geneva of 1949*, 1963, vol. 3 annex No. 21 and vol. 2, sec. B, p. 61.

Israel has often had to address the question of justiciability and has stated in this respect:

The Court does not refrain from judicial review merely because the military commander acts outside of Israel, or because his actions have political and military ramifications. When the decisions or acts of the military commander impinge upon human rights, they are justiciable. The door of the Court is open. The argument that the impingement upon human rights is due to security considerations does not rule out judicial review. “Security considerations” or “military necessity” are not magic words ...²²²

Thus there is no reason why actions in armed conflict should not be justiciable. But in the absence of other avenues, most cases have come before criminal courts or human rights bodies.

Clearly courts must take into account the specific nature of war. They have, in practice, referred the discretion of the military commander or the soldier in the midst of an operation. One example of court supervision which leaves discretion to the military commander, taking into account his or her position and point of view, is provided by the cases of the International Military Tribunal at Nuremberg:

We are not called upon to determine whether urgent military necessity for the devastation and destruction of Finmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time ... It is our considered opinion that the conditions as they appeared to the defendant at the time were sufficient, upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment, but he was guilty of no criminal act.²²³

It is sometimes criticized that human rights bodies and courts do not have the required expertise to deal with armed conflict situations.²²⁴ But from the point of view of victims of violations it is difficult to argue that, in the absence of any independent international remedy specifically foreseen for international humanitarian law, recourse to the regional human rights courts and other human rights bodies is not a valid path. Rather, “[t]he fact that an individual has a remedy under

222 *Mara'abe v. The Prime Minister of Israel*, HCJ 7957/04, The Supreme Court Sitting as the High Court of Justice, 15 September 2005, para. 31; See also *Beit Sourik Village Council v. The Government of Israel and the Commander of the IDF Forces in the West Bank*, HCJ 2056/04, The Supreme Court Sitting as the High Court of Justice, 30 June 2004, para. 46f.

223 *Wilhelm List case (Hostages Trial)*, United Nations War Crimes Commission. Law Reports of Trials of War Criminals, Volume VIII, 1949, p. 69, available at www.ess.uwe.ac.uk/WCC/List4.htm (last visited 4 August 2008).

224 UN Sub-Commission on the Promotion and Protection of Human Rights, Working paper by Ms. Hampson and Mr. Salama on the Relationship between Human Rights Law and International Humanitarian Law, UN Doc. E/CN.4/Sub.2/2005/14, 21 June 2005, paras. 9–37.

human rights law gives additional strength to the rules of international humanitarian law corresponding to the human rights norm alleged to be violated".²²⁵ Such independent scrutiny can provide greater protection for the victims or reinforce the protection by other mechanisms and institutions.²²⁶

Another criticism is that persons protected by humanitarian law are usually not in a position to resort to any legal process, and that it is better to have an impartial body which acts on its own initiative rather than judicial mechanisms.²²⁷ It is true that people will often not have access to any judicial protection. The plethora of existing cases, however, is proof in itself that the argument is too short-sighted. It proposes a choice between either a judicial protection mechanism or legal protection, but these are not exclusive alternatives. There are many ways to provide protection to persons in armed conflict, be it through the activities of humanitarian organizations such as the ICRC, political mechanisms such as certain UN fora, legal proceedings, pressure exerted through advocacy groups or decisions by international criminal bodies.²²⁸ Court scrutiny, including through human rights courts or domestic courts giving standing to victims of fundamental rights violations can be a forceful method of protection.

In fact human rights law is not necessarily more protective in terms of substantive rights.²²⁹ One only has to bear in mind two critical restrictions on human rights law: its dependence on some jurisdiction or effective control by the state; and the fact that it is not binding on non-state parties.²³⁰

Also, if human rights bodies completely disregard humanitarian law, especially in a situation where it is the *lex specialis*, or distort human rights by implicitly but not openly employing humanitarian law language, this could lead to a weakening of both bodies of law. It also "precludes a coherent construction of the protective rules in times of armed conflict while favouring fragmentation".²³¹ Clarity as to which norms are being applied to a certain situation would be a preferable manner of protecting victims of armed conflict in the long term. While most international human rights bodies have not applied international humanitarian law directly, as their mandate only encompassed the respective applicable

225 Bothe, above note 4, p. 45; see also Meron, above note 9, p. 247, who writes that "their very idealism and naïveté are their greatest strength"; Reidy, above note 44, p. 529.

226 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 (2005), p. 741; see also Bothe, above note 4, p. 90.

227 Schindler, above note 221, p. 941.

228 An interesting assessment of different mechanisms can be found in Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, pp. 232–77.

229 Aeyal M. Gross, "Human proportions: are human rights the emperor's new clothes of the international law of occupation?", *European Journal of International Law*, Vol. 18 (2007), p. 35. On the more protective aspect of some humanitarian law provisions see Cordula Droegge, "The interplay between international humanitarian law and international human rights law in situations of armed conflict", *Israel Law Review*, Vol. 40 (2007), p. 350.

230 Even if one takes the view that human rights bind non-state armed groups, cases can only be brought to international bodies and courts against states.

231 Gaggioli and Kolb, above note 119, p. 126 (2007).

human rights treaties²³², the Inter-American Court has applied humanitarian law by interpreting the American Convention on Human Rights in the light of the Geneva Conventions because of their overlapping content.²³³ The Inter-American Commission is the only body that has expressly assigned to itself the competence to apply humanitarian law.²³⁴

In sum, there is no conflict between human rights law and humanitarian law in respect of legal remedies. Humanitarian law is simply silent on the question of an individual right to a remedy; it does not preclude individual remedies where they exist under other international law or domestic law. Human rights law has reinforced the possibility of alleged victims of violations of human rights and humanitarian law bringing cases before courts and other human rights bodies. This is not in conflict with humanitarian law, but can indeed strengthen compliance with it, albeit through the lens of human rights law.

Reparations

While human rights violations entail an individual right to reparation,²³⁵ the equivalent norms on reparation in the law of international armed conflict only recognise this right, or at least the right to claim it, to the state.²³⁶ The humanitarian law of non-international armed conflict is silent on reparation.

Nothing in international humanitarian law, however, precludes the right to reparation.²³⁷ Many serious violations of humanitarian law simultaneously constitute serious violations of human rights. For the same act – for example, torture – a person can have a right to full reparation because it constitutes a human rights violation, even if no such right exists under humanitarian law. There is an increasing tendency to recognize that states should afford full reparation for violations of humanitarian law as well. The Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law, adopted by the General

232 In two recent cases, the European Court of Human Rights has had to grapple with quite complex questions of international criminal law and IHL but seems to have sought to avoid venturing too much on IHL territory: *Korbely v. Hungary*, Judgment of 19 September 2008, *Koronov v. Latvia*, Judgment of 24 July 2008, para. 122.

233 *Bámaca Velázquez v. Guatemala*, above note 45, paras. 207–209. The Human Rights Committee has stated that it can take other branches of law into account to consider the lawfulness of derogations. Human Rights Committee, General Comment No. 29: States of Emergency (article 4), UN Doc. CCPR/C/21/Rev1/Add.11, 24 July 2001, para. 10.

234 *Abella v. Argentina*, Case 11.137, I/A Cm HR Report No. 55/97, OEA/Ser.L/V/II.98, doc 6 rev, 1997, paras. 157–171.

235 See the UN Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law. In different treaties, this right is derived from norms with varying wordings but essentially the same content; see, e.g., ICCPR, Article 2(3); ECHR, Article 41; CAT, Article 14; ACHR, Article 63.

236 1907 Hague Regulations, Article 3; Additional Protocol I, Article 91; see Emanuela-Chiara Gillard, “Reparation for violations of international humanitarian law”, *International Review of the Red Cross*, Vol. 85 (851) (September 2003), pp. 529–54.

237 Hampson/Salama, above note 224, paras. 20, 49.

Assembly in 2005,²³⁸ are a step in this direction. Similarly, in its Advisory Opinion on the *Wall*, the International Court of Justice held that Israel was under an obligation to make reparation for the damage caused to all natural or legal persons affected by the wall's construction.²³⁹ Also, there is some practice of reparation mechanisms, such as the UN Claims Commission or the Eritrea–Ethiopia Claims Commission, in which individuals can file claims directly, participate to varying degrees in the claims review process and receive compensation directly.²⁴⁰ There is furthermore a wealth of practice in national law concerning reparation after armed conflict.²⁴¹ Article 75 of the Rome Statute of the International Criminal Court marks an important development in that it recognizes the right of victims of international crimes to reparation (but with a margin of discretion for the Court).

Without going into the details of this complex discussion, the main argument against an individual right to reparation is that in times of armed conflict violations can be so massive and widespread and the damage done so overwhelming that it defies the capacity of states, both financial and logistical, to ensure adequate reparation to all victims.²⁴² From the point of view of justice this argument is flawed, because its consequence is that the more widespread and massive the violation, the less right there is to reparation for the victims. On the other hand, admitting an individual claim to reparation for victims of violations of humanitarian law committed on a large scale does bring with it real problems of implementation and the risk of false promises to victims. It will be interesting to follow the case law of the International Criminal Court in this regard, which can rely on an explicit provision on reparation in the Rome Statute (Article 75) and is currently developing an approach to victims' rights. It will probably have to take some more lump-sum-type compensation measures or community-based reparation measures to reach the widest possible number of victims. In any event, it is clear that while the simple statement that there is no individual right to reparation for violations of international humanitarian law is no longer adequate in the light of evolving law and practice, there remain many uncertainties as to the way in which widespread reparations resulting from armed conflict can be adequately ensured.

238 GA Res. 60/147 of 16 December 2005.

239 *Wall* case, above note 47, para. 106. One can speculate whether it held so in the absence of another state to which Israel could have paid compensation. See Pierre d'Argent, "Compliance, cessation, reparation and restitution in the *Wall* Advisory Opinion", in Pierre-Marie Dupuy et al. (eds.), *Völkerrecht Als Wertordnung – Common Values In International Law, Festschrift For Christian Tomuschat*, 2006, pp. 463, 475.

240 See Gillard, above note 236, p. 540.

241 On Germany, see Roland Bank, "The new programs for payments to victims of National Socialist injustice", *German Yearbook of International Law*, Vol. 44 (2001), pp. 307–52; the most comprehensive description of national reparations programmes can be found in Pablo de Greiff (ed.), *The Handbook on Reparations*, Oxford University Press, Oxford, 2006.

242 On this discussion see Elke Schwager and Roland Bank, "An individual right to compensation for victims of armed conflicts?", paper submitted to the ILA Committee on Compensation for Victims of War, pp. 45–8; Pierre d'Argent, "Wrongs of the past, history of the future", *European Journal of International Law*, Vol. 17 (2006), pp. 279, 286.

Conclusion

To sum up, the nature of international humanitarian law, which is not conceived around individual rights, makes it difficult to imagine that it could incorporate all procedural rights that have developed in human rights law. However, increasing awareness of the application of human rights in armed conflict, and also an increasing call for transparency and accountability in military operations, can promote stronger protection of certain rights under international humanitarian law.

How these two bodies of law, which were not originally meant to come into such close contact, will live in harmony in the broader framework of international law remains to be seen over time. But one thing is clear: there is no going back to a complete separation of the two realms. Potentially, a coherent approach to the interpretation of human rights and humanitarian law – maintaining their distinct features – can only contribute to greater protection of individuals in armed conflict.

The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body

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Abstract

The debate about the simultaneous applicability of international humanitarian law and human rights law also affects human rights treaty bodies. The article first considers the difficulty for a human rights body in determining whether international humanitarian law is applicable; second, it examines the problems in practice in applying the lex specialis doctrine and the question of derogation in this particular context. The author finally outlines the impact of the debate as to the extent of extraterritorial applicability of human rights law.



The debate as to the simultaneous applicability of international humanitarian law and human rights law

More than twenty years ago the relationship between the law of armed conflict or international humanitarian law (IHL) and human rights law was a matter of academic debate.¹ Since then non-governmental human rights organizations have reported on situations in which IHL was undoubtedly applicable and in some cases

have used an analysis based on it.² More recently the International Court of Justice (ICJ) has made three pronouncements on the relationship between the two bodies of rules from which three interrelated propositions emerge.³ First, human rights law remains applicable even during armed conflict. Second, it is applicable in situations of conflict, subject only to derogation. Third, when both IHL and human rights law are applicable, IHL is the *lex specialis*. It might be thought that these pronouncements resolve the question of the relationship between the two bodies of international law rules. But far from it, even with regard to those states which have not expressed any objection in principle to the three propositions.

Human rights are applicable during armed conflict

Two states have a long-standing objection to the first proposition and also to the other two. Israel⁴ and the United States⁵ maintain that when IHL is applicable, human rights law is automatically not applicable. Both states also maintain that human rights law is not applicable extraterritorially, an argument that will be addressed below.⁶ Given the position taken by other states, every relevant UN human rights special procedure and every relevant human rights treaty body, internationally and regionally, and given the text of General Assembly and Security Council resolutions referring to both IHL and human rights law, the ICJ's first

- 1 For example, K. D. Suter, 'An enquiry into the meaning of the phrase "human rights in armed conflicts"', *Revue de Droit Pénal Militaire et de Droit de la Guerre*, Vol. 15 (3–4) (1976), p. 393; Henry Meyrowitz, 'Le Droit de la Guerre et les droits de l'homme', *Revue du Droit Public et de la Science Politique en France et à l'Étranger*, Vol. 5 (1972), p. 1059; G. I. A. D. Draper, 'The relationship between the human rights regime and the law of armed conflict', *Israel Yearbook on Human Rights*, Vol.1 (1971), p. 191. It is noteworthy that all these authors would have seen themselves as experts in IHL and not in human rights law. See also Dietrich Schindler, 'Human rights and humanitarian law: interrelationships of the law', *American University Law Review*, Vol. 31 (1982), p. 935, and, more recently, Jochen Frowein, 'The relationship between human rights regimes and regimes of belligerent occupation', *Israël Yearbook on Human Rights*, 1 (1998); Theodor Meron, 'The humanization of humanitarian law', *American Journal of International Law*, Vol. 94 (2000), 239; Heinz-Jochen Heintze, 'On the relationship between human rights law protection and international humanitarian law', *International Review of the Red Cross*, Vol. 86 (865) (2004), p. 789; Ken Watkin, 'Controlling the use of force: a role for human rights norms in contemporary armed conflict', *American Journal of International Law*, Vol. 98 (2004), p. 1, and the special issue on parallel applicability of HR and IHL, *Israel Law Review*, Vol. 40 (2) (2007), especially the contributions by David Kretzmer, Rotem Giladi and Yuval Shany; Cordula Droeger; and Noam Lubell.
- 2 A notable early example was the report by Human Rights Watch (HRW) on the Gulf War 1990–1. Human Rights Watch, *Needless Deaths in the Gulf War*, 1991.
- 3 ICJ, *Legality or Threat of Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 25; ICJ, *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106; ICJ, *Case concerning armed activity on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, paras. 216–220.
- 4 Human Rights Committee, CCPR/CO/78/ISR; CCPR/CO/79/Add.93; CCPR/CO/78/ISR, para. 11.
- 5 Michael J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', *American Journal of International Law*, Vol. 99 (2005), p. 119; Human Rights Committee, CCPR/C/USA/3, Annex 1; CCPR/C/USA/CO/3, para. 3. It should be noted that, at the time the United States ratified the ICCPR, it was clear that the HRC regarded the Covenant as applicable even during situations of conflict, but the United States did not enter a reservation to such applicability.
- 6 The two arguments are separate but interrelated in their practical effect. See section 5 below.

proposition is supported by the overwhelming weight of international legal opinion and state practice. The only question would appear to be whether those two states could claim to be ‘persistent objectors’ to the simultaneous applicability of the two bodies of rules. The first difficulty is whether it is possible to be a ‘persistent objector’ to this type of rule – a rule about the relationship between two sets of rules, rather than a substantive norm regulating behaviour. A more serious difficulty is the basis of the doctrine. Any expression of the principle is usually based on the statement of the ICJ in the *Fisheries* case.⁷ In that case, the Court did not take as its sole reference the objection of Norway to the usual practice for the delimitation of baselines, but, on the contrary, emphasized the importance of the reaction of other states.⁸ It was the acceptance of the divergent behaviour by other states and specifically the applicant state that prevented the latter from being able to rely on the normal rule. International law has not yet fully adapted its rules to the existence of independent mechanisms, but it is clear that if the treaty bodies play a role equivalent to that of states, they have certainly not accepted the denial by Israel and the United States of simultaneous applicability.⁹ For the purposes of this essay, it will be assumed that the ICJ’s first proposition is an accurate reflection of international law.

The perspective of human rights treaty bodies

The perspective chosen here is that of a human rights treaty body. Others are also affected by the debate as to the simultaneous applicability of IHL and human rights law. They include armed forces, ministries of defence and ministries of foreign affairs. In the human rights field specifically, they include non-treaty mechanisms such as the UN Special Procedures and the Council of Europe’s Commissioner for Human Rights.¹⁰ Among the human rights treaty bodies, the Committee against Torture is dealing with a form of conduct prohibited under both IHL and human rights law;¹¹ it therefore does not appear to need to take account of the source of the rule. The Committee on the Elimination of Racial Discrimination and the

7 ICJ, *Fisheries Case (United Kingdom v. Norway)*, Judgment of 18 December 1951.

8 *Ibid.*, pp. 138–9.

9 See generally Françoise J. Hampson, ‘Other areas of customary law in relation to the Study’, in E. Wilmshurst and S. Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, pp. 68–72, and references in notes 4 and 5 above.

10 The most relevant of the Special Procedures in this context are the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, the Working Group on Enforced or Involuntary Disappearances and the Working Group on Arbitrary Detention. Others may occasionally have to deal with the issue. The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is not included, since such treatment is prohibited under both IHL and human rights law. On the Commissioner for Human Rights, see www.coe.int/t/commissioner/default_en.asp (last visited 21 October 2008).

11 Torture or other ill-treatment of detainees is prohibited in the case of prisoners of war (Geneva Convention III, Art. 17), civilian detainees or internees (Geneva Convention IV, Art. 32), detainees not

Committee on the Rights of the Child may occasionally have to deal with issues arising out of situations of conflict, but they are relatively unaffected by the potential overlap. The treaty bodies most affected at the global level are the Human Rights Committee and the Committee on Economic, Social and Cultural Rights and, at the regional level, the African Commission and Court on Human and Peoples' Rights, the Inter-American Commission and Court of Human Rights and the European Court of Human Rights.¹² Those bodies which engage in monitoring a state's compliance with its human rights obligations may make general pronouncements, but they are not required to make a specific finding of violation, which requires a precise analysis of the relationship between IHL and human rights law. For that reason, the focus will be on the most affected treaty bodies, not including the Committee on Economic, Social and Cultural Rights.¹³

The first aspect to be considered will be the difficulty for a human rights body in determining whether IHL is applicable; second, the problems in practice in applying the *lex specialis* doctrine; third, the question of derogation in this particular context; and, finally, in brief, the impact on the first two of the debate as to the extent of extraterritorial applicability of human rights law.

Determining the applicability of international humanitarian law

If a human rights body is to take account of IHL in some way, it must first determine its applicability. Unfortunately, in many cases that is far from obvious.

Conflict between two states

In the event of an alleged armed conflict between two states it may, comparatively speaking, be sometimes – but not always – fairly straightforward to determine the

otherwise protected (Additional Protocol I of 1977, Art. 75) and all those detained in non-international armed conflict (Common Art. 3 of the Geneva Conventions and Protocol II of 1977, Art. 4).

- 12 On the Human Rights Committee, see www2.ohchr.org/english/bodies/hrc/index.htm (last visited 21 October 2008); the Committee on Economic, Social and Cultural Rights, available at www2.ohchr.org/english/bodies/cescr/index.htm; the African Commission, available at www.achpr.org/english/_info/news_en.html; the African Court does not yet appear to have made any pronouncements, see www.aicthia.org/courts_conti/achpr/achpr_home.html; the Inter-American Commission, available at <http://cidh.oas.org/DefaultE.htm>; the Inter-American Court, available at www.corteidh.or.cr/index.cfm?CFID=367321&CFTOKEN=81159529; and the European Court of Human Rights, available at www.echr.coe.int/echr (all sites last visited 20 October 2008).
- 13 Bodies with a monitoring function usually issue General Comments, setting out their interpretation of a right or concept in the treaty in question, and will also provide Concluding Observations following the scrutiny of a state's report and the dialogue with state representatives. Generally speaking, although there are exceptions, only if a human rights body has to deal with individual applications does it have to reach a determination as to whether the treaty has been violated. An Optional Protocol to the ICESCR was adopted without a vote on 18 June 2008, annexed to a resolution of the Human Rights Council (A/HRC/8/L.2/Rev.1/Corr.1). If the General Assembly adopts the text, it will provide for the right of individual petition when it enters into force.

applicability of IHL. Article 2 common to the four Geneva Conventions of 1949 stipulates that the Conventions shall apply

to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

No declaration of war or recognition of the state of war between the two states is required,¹⁴ and no minimum threshold for the amount or quality of force used is specified. Clearly, this suggests that any use of armed force *against* a state triggers an armed conflict.¹⁵ This still leaves open the question of whether every use of armed force *in* the territory of another state, including its territorial waters and airspace, is necessarily *against* the state. The ICRC *Commentary* suggests,

A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression ‘armed conflict’ makes such arguments less easy.¹⁶

Whilst a state clearly cannot, simply by manipulating terminology, avoid the applicability of IHL, there have to be objective reasons for believing that the party in question is in fact engaged in an armed conflict. This is usually manifested by evidence of an *animus belligerendi*,¹⁷ which in turn suggests that it is possible to have an alternative *animus*. The obvious possibility is a form of extraterritorial law enforcement, for instance hot pursuit, which starts in the national territory and continues into the territory of another state. Extraterritorial law enforcement could also include action by armed forces against persons or entities in another state which have engaged and continue to engage in international crimes against the first state and where the other state is unwilling or unable to take action against them. In this context, the question is not whether such action is lawful or unlawful or whether the first state could invoke self-defence. Just because the state is presumably acting in self-defence does not necessarily make the action an armed conflict. One example of such a situation would have been the military strike by Predator drone in Yemen, at least if it had been conducted without the consent of the

14 ICRC, Commentaries to the Geneva Conventions of 1949, common Art. 2, available at www.icrc.org/ihl.nsf/COM/365-570005?OpenDocument (last visited 20 October 2008). This was important in the case of the Falklands/Malvinas conflict, to which Margaret Thatcher, the UK Prime Minister, initially stated that the Geneva Conventions were not applicable as there had been no declaration of war. This view was rapidly corrected.

15 E.g. the border clash between Ecuador and Peru in 1997; see John R. Groves, ‘Effective engagement; the case of Ecuador’, *Joint Force Quarterly*, Autumn 2000, p. 46, available at www.dtic.mil/doctrine/jel/jfq_pubs/1026.pdf (last visited 21 October 2008).

16 See above note 14, Art. 2(1).

17 Yoram Dinstein, *War, Aggression and Self-Defence*, Cambridge University Press, Cambridge, 4th edn, 2005, pp. 14–15.

Yemeni authorities.¹⁸ Another example would be the recent use of force by members of the Colombian army against members of the Revolutionary Armed Forces of Colombia (FARC) in Ecuador.¹⁹ Given the incidence of transnational terrorist attacks, such situations may become increasingly common. Whilst the characterization of the use of force between two states as an armed conflict is generally uncontroversial, it seems clear that it is not always without difficulty.

A second and more unusual type of example is where violence occurs in occupied territory. At what point does that change from being a law and order problem, in relation to which the occupying power has an obligation to restore order,²⁰ and become an armed conflict? Does such a decision have any effect on the status of a territory as being occupied?²¹ Is a conflict within occupied territory international or non-international?

Non-international armed conflict

Far more difficult in practice is a determination that a situation within a state constitutes an armed conflict. The boundary in this case lies between disorder and/or organized political violence and armed conflict, giving rise to three difficulties. First, at what point does the law deem that the violence has crossed that threshold? Second, how are the facts to be accurately determined? Third, of what relevance, if any, is the state's refusal to accept that what is occurring is an armed conflict?

Article 3 common to the 1949 Geneva Conventions just refers to an 'armed conflict not of an international character', thus implying that any armed conflict which does not come within Common Article 2 comes within Article 3. That is consistent with the wording, but it appears that at the time of its negotiation Common Article 3 was intended to apply to internal conflicts.²² Thus the question of what is an armed conflict remains unresolved, for again there is no minimum threshold. Protocol II of 1977 gives some clarification in its Article 1, which claims to 'develop and supplement' Common Article 3 'without modifying

18 It is not clear whether the issue of consent is relevant to the characterization of the attack as constituting an armed conflict although, if the attack does constitute an armed conflict, consent would be likely to affect the characterization of the conflict; see further below.

19 1 March 2008; see 'Colombia's cross-border strike on FARC irks neighbors', *Christian Science Monitor*, 3 March 2008, available at www.csmonitor.com/2008/0303/p04s02-woam.html (last visited 21 October 2008). A statement of the Colombian Foreign Ministry said that 'Colombia did not violate sovereignty but acted according to the principle of legitimate defense'.

20 E.g. the situation which has arisen in the Israeli-occupied Palestinian Territories since 2000 during the second intifada.

21 In order for territory to be occupied, it must be under the 'authority' of the occupier. 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Annex, Art. 42. It could be argued that a decision that there is an armed conflict necessarily means that the occupier does not exercise the requisite control. It is submitted that this is an oversimplification. In many internal armed conflicts, the state continues to exercise the control necessary, for example, to provide basic services to the population. It is suggested that, where conflict breaks out in occupied territory, it should be a matter of fact and not of law whether the occupier remains in control of the territory as a whole.

22 ICRC Commentaries, above note 14, common Art. 3, pp. 49–50.

its existing conditions of application'. This suggests that the applicability of Common Article 3 is unaffected, but does not preclude the possibility that Protocol II applies only to some of the armed conflicts that come within Common Article 3. The provision that

This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, *as not being* armed conflicts²³

appears to clarify the situations in which Common Article 3 is applicable. However, the first paragraph of the said Article 1, which creates new requirements with regard to the parties and the degree of control exercised over territory, is clearly only applicable in the context of Protocol II itself. The sole guidance found in the treaty law is therefore that riots and isolated and sporadic acts of violence do not constitute armed conflict. That does not establish what *does* constitute armed conflict.

Further clarification has been provided by the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY). The Court has held that

An 'armed conflict' is said to exist 'whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'.²⁴

This suggests that there is a temporal element to an armed conflict which may not be present in other violent activity. It also requires that there be some degree of organization of the group or party. Individuals acting individually cannot transform violence into an armed conflict. It is probably unrealistic to expect the law to clarify the applicability of Article 3 further. The difficulty does not usually lie with the law, but with the facts.

Where there are organized groups and where at least some of the members of such groups are armed and engage in acts of violence, there may be – but there is not necessarily – an armed conflict. To cite but one example, it was difficult to characterize the situation during the 'Troubles' in Northern Ireland.²⁵ There were certainly organized armed groups which were able to engage in terrorist attacks. But were the attacks sporadic, and therefore outside Common Article 3, or do sporadic attacks over a long period constitute protracted armed violence? In many such situations, significant numbers may support the armed groups politically and/or emotionally, but there may well be only a limited number of actual fighters.

23 Protocol II of 1977, Art. 1(2) (emphasis added).

24 ICTY, *Prosecutor v. Kunarac, Kovac and Vokovic*, Case No. IT-96-23 and IT-96-23/1 (Appeals Chamber), 12 June 2002, para. 56, citing *Prosecutor v. Tadic*, Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

25 The UK Foreign and Commonwealth Office maintained that at no time did the situation cross the threshold of common Art. 3. Other authorities have suggested, off the record, that at certain times and in certain places, the situation may have crossed the threshold.

There are circumstances in which people may, objectively and in good faith, reach different conclusions on the same set of facts.

A human rights body will have to address such issues in order to determine whether IHL is or is not applicable. It could consult the state in question, but that is likely to be highly problematic. First, IHL is, or is not, applicable as a matter of law, and not because a state recognizes its applicability.²⁶ Second, states have political reasons for denying internationally that the situation has in fact crossed the threshold set by Common Article 3. Such an admission would invite international attention. It might appear to suggest that the state was losing control of the situation. A state might also be concerned that such an admission would confer some type of legitimacy on the armed group(s), notwithstanding explicit provisions to the contrary.²⁷ The state is not bound to take the same position internationally with regard to the conflict as do its domestic courts.²⁸

Classification of the conflict

It is not enough for the human rights body to determine that it is dealing with an armed conflict. It then has to determine which set of IHL rules apply to the situation. As already suggested, the applicability of IHL is affected by whether the conflict is international (i.e. between two states) or non-international. There are a wide variety of situations in which the classification of a conflict as international or non-international may give rise to difficulties. Was the war in Lebanon in 2006 two conflicts, one international against Lebanon and the other non-international against Hezbollah, or was it one conflict? If it was the latter, was it international or non-international?²⁹ Similar but not identical issues arise in relation to the Colombian operation in Ecuador during which certain members of the FARC were killed and others captured.³⁰ Or again, how should the conflict(s) in Afghanistan be classified? Is there a continuing conflict in the border area between Afghanistan and Pakistan and, if so, is it against the Taliban or al Qaeda? Is the International Security Assistance Force (ISAF), which is present on the basis of the Afghan

26 See, e.g., Article 2 of the Geneva Conventions of 1949.

27 Common Article 3 of the Geneva Conventions of 1949, and Article 3 of Protocol II of 1977.

28 For example, the Russian Constitutional Court characterized the first Chechen war as coming within not merely common Article 3, but Protocol II. It also pointed out that the Russian Federation had adopted no domestic legislation enabling it to give effect to Protocol II. See Judgment of the Constitutional Court of the Russian Federation of 31 July 1995 on the constitutionality of the Presidential Decrees and the Resolutions of the Federal Government concerning the situation in Chechnya, European Commission for Democracy through Law of the Council of Europe, CDL-INF (96) 1.

29 Human Rights Watch set out the arguments on both sides in *Why They Died: Civilian Casualties in Lebanon during the 2006 War*, Vol. 19 (5) (E), September 2007. Amnesty International cited provisions only applicable in international conflicts, without providing an explanation. Amnesty International, *Israel and Hizbullah Must Spare Civilians: Obligations under International Humanitarian Law of the Parties to the Conflict in Israel and Lebanon*, MDE 15/070/2006, 26 July 2006. The Commission of Inquiry on Lebanon, established by the Human Rights Council, characterized the conflict as international, without explanation or discussion. Human Rights Council, Commission of Inquiry on Lebanon, A/HRC/3/2, 23 November 2006, para. 12.

30 Above note 19.

government's consent, fighting a non-international armed conflict? Are the two conflicts separate or one and the same?³¹ Similar issues arose in Iraq after the transfer of authority from the Coalition Provisional Authority to the Iraqi Interim Government. If the consent of the territorial state is decisive, then presumably it is only valid where the consent is given prior to the operation and is genuinely free and informed.³² Where a peace support operation (PSO) is present without the consent of the sovereign, is any conflict between the PSO forces and local forces international or non-international? This is not an exhaustive list of situations in which classification of the conflict may be problematic.

The importance of classifying a conflict depends on the significance the distinction would have in terms of the substantive law applicable to the two types of conflict. If the rules were 90 per cent the same in the two situations, the importance to a human rights body of correctly classifying the conflict would diminish. There is detailed treaty regulation of international armed conflicts, but only limited regulation in treaty law of non-international armed conflicts. That is particularly true of rules on the means and methods of combat. Over the past fifteen years it has become clear that there is a significant body of customary law relevant to non-international armed conflicts. The ICTY has suggested that many of the rules applicable in international conflicts are applicable in non-international conflicts and has made findings regarding specific rules.³³ But this does not necessarily represent the accepted view amongst the community of states. A better guide may be the Statute of the International Criminal Court (ICC), which includes a list of war crimes in non-international armed conflicts.³⁴ That list is, however, significantly shorter than the list which would be derived from the case law of the ICTY. Most notably, according to the ICC Statute, engaging in indiscriminate attacks is a war crime in international but not in non-international conflicts. It might be argued that the ICC Statute only defines crimes within the jurisdiction of the Court. That would not prevent an activity not included in the Statute from being regarded as a crime under customary international law. If one departs from the list in the Statute, however, how is one to establish whether states accept that act is an international crime?

Another source of guidance is the ICRC study on customary international humanitarian law.³⁵ The materials contained in Volume II, on actual practice, are a

31 In the case of coalition operations (e.g., ISAF), a further question is whether the members of the coalition agree between themselves as to the characterization of the conflict.

32 If the attack in Yemen (see 'CIA 'killed al-Qaeda suspects' in Yemen', BBC, 5 November 2002, available at http://news.bbc.co.uk/1/hi/world/middle_east/2402479.stm (last visited 21 October 2008)) was an armed conflict, it would be important to know whether the consent of the Yemeni government was obtained prior to the operation and whether it was freely given. See Human Rights Committee, CCPR/C/SR.2282, para. 43.

33 *Tadic*, above note 22, and Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005, I, ch. 44.

34 Statute of the International Criminal Court, Art. 8(2)(e).

35 Henckaerts and Doswald-Beck, above note 33.

useful basis for constructing an argument. The conclusions reached in Volume I's analysis of customary law, however, have not been without controversy.³⁶

When a human rights body has determined that IHL is applicable, is it to use customary law to determine what rules thereof are to be applied? If not, there is a significant difference in the degree of regulation of international and non-international conflicts. If it can use customary IHL, there is allegedly a much greater degree of similarity in the two sets of rules, but the conclusions of the treaty body are more likely to be controversial.

The relationship between the two bodies of rules – the *lex specialis*

As noted above, the ICJ has suggested that where both human rights law and IHL are applicable, IHL is the *lex specialis*. The first issue concerns the meaning of this phrase, and the second relates to how a human rights body is to translate the ICJ's formulation into practice.

The full expression is *lex specialis derogat legi generali*.³⁷ It is not clear whether this means only that the special prevails over the general, or whether it means that the former actually displaces the latter. There are certain situations in which the law may deal both with the general and the specific. One example would be the case of tenancies. A legal system may contain general rules relating to tenancies generally. It may contain specific rules concerning particular types of tenancies, such as commercial or agricultural tenancies. If there are gaps in the latter regimes, they will be filled in with the generally applicable tenancy rule relating to the matter at issue. That suggests that there is a vertical relationship between the general and the special. The general is at the bottom and is the default position. The special is a subdivision of the general and is above it. One general regime may give rise to several special regimes.³⁸

Different, but overlapping areas of law

The relationship between human rights law and IHL, however, involves a different problem. It concerns different areas of law whose boundaries may, over time, come into collision with one another. Within English law, the obvious example is the law of contract and the law of tort, or civil wrong. Where harm is inflicted on a person allegedly as a result of inadequate performance of a contract, should the action be

36 John B. Bellinger III and William J. Haynes II, 'A US government response to the ICRC study *Customary International Humanitarian Law*', *International Review of the Red Cross*, Vol. 89 (866) (2007), pp. 443–71.

37 Trans: 'the more specific law has precedence over the more general law'. It is not clear whether this principle only applies where there is a conflict between the two rules.

38 See generally, Nancie Prud'homme, '*Lex specialis*: oversimplifying a more complex and multifaceted relationship?' *Israel Law Review*, Vol. 40 (2) (2007), pp. 355–95.

for breach of contract or for negligence, a tort? The problem involves a horizontal relationship and not a vertical one. It is a normal feature of any legal order, where fields of law evolve over time and where the subject matter with which the rules have to deal itself evolves. Examples exist in international law. Naval forces are used to dealing with the relationship between the law of the sea and IHL; the relatively settled relationship between the two is simply a reflection of the fact that the question of the boundaries between the two arose earlier and has, for the most part, been resolved. There is no reason to believe that, in fifty years' time, the same will not be true of the relationship between human rights law and IHL. There is, however, one important difference. States worked out the relationship between the law of the sea and IHL through state practice and through negotiations such as those preceding the adoption of the United Nations Convention on the Law of the Sea.³⁹ Conversely, the relationship between human rights law and IHL is not exclusively an inter-state affair. First, human rights law concerns the relationship between the state and those within that state's jurisdiction. Second, the relationship will be worked out by, amongst others, human rights monitoring mechanisms, in part through binding legal judgments. Litigation may be an acceptable way of working out specific answers to specific questions. It is, however, at least at the international level, a remarkably arbitrary and haphazard way of working out a general issue, such as the relationship between two bodies of rules.

Priority to international humanitarian law?

Whilst the ICJ may not have used the most appropriate formulation, it is clear in general terms what the Court meant. It appears to have meant, first, that where both IHL and human rights law are applicable, priority should be given to IHL. Second, given the ICJ's view that human rights law remains applicable at all times,⁴⁰ by necessary implication the ICJ also meant that the human rights body should make a finding based on IHL and expressed in the language of human rights law.

This sounds straightforward, but it does not in fact explain how the *lex specialis* doctrine should work in practice. There are various possibilities.⁴¹ It could be that once IHL is applicable, it is the sole legal basis on which a human rights body can base its decision. Human rights law contains provisions on the right to marry and the right to education, whereas IHL contains no provisions on marriage and very limited provisions on education. Does this mean that when IHL is applicable, there can be no violation of the human rights standards provided there is no violation of the IHL rules? That would, in effect, mean that IHL displaces the

39 It was a striking feature of those negotiations that often the disagreement was within delegations rather than between them. The naval elements in delegations tended to be in basic agreement with one another but disagreed with those representing fishing interests or attempting to enlarge the areas of water over which coastal states could exercise jurisdiction.

40 Above note 3, and see further below.

41 Roberta Arnold and Noëlle Quéniévet (eds.), *International Humanitarian Law and Human Rights Law*, Brill/Martinus Nijhoff, Leiden, 2008.

applicability of human rights law, which is contrary to the express ruling of the ICJ that human rights law remains applicable.

Express provision ?

Another possibility is that IHL prevails where it contains an express provision which addresses a similar field to that of a human rights norm. For example, IHL, at least in the case of international armed conflicts, contains express rules about targeting and precautions in attack. Under the foregoing hypothesis a killing would be an arbitrary killing under human rights law only if it violated the IHL rules. Whilst superficially both plausible and attractive, there are two difficulties with this solution. First, while some rules of human rights law would be significantly affected by IHL, notably the prohibition of arbitrary killing and the prohibition of arbitrary detention, others would be totally, or almost totally, unaffected. There is virtually nothing in IHL, at least not in treaty law, on the right to demonstrate or on freedom of expression. Both, however, may be significantly affected during conflict. Similarly, access to education may be affected, for practical rather than legal reasons, by conflict.

To what extent would the conflict context affect the applicability of human rights law in the absence of specific IHL treaty rules? It would be possible for human rights bodies to take the conflict into account by the way in which they chose to apply the limitation clauses.⁴² Are they, however, required to do so? That solution, superficially at least, would be available only where the right in question contains such a clause.

The second difficulty to which this solution gives rise is that referred to above – the role of customary law. In determining whether IHL contains a relevant rule, should the human rights body confine itself to treaty law or should it also consider customary law? This is an absolutely vital question in the field of the most prevalent – the non-international – type of conflict. According to the treaty rules applicable in such conflicts, the law is silent with regard to the permissible grounds for detention and does not contain detailed rules on the precautions to be taken in attack. If the monitoring bodies should only consult treaty rules, that would enable them to apply human rights law to detention and certain killings but would require them to apply IHL to the displacement of the population and to the protection of objects essential to its survival, such as foodstuffs. Such a result would seem surprising, not to say bizarre.

If, however, customary IHL were taken into account, the grounds for opening fire at least would appear to be subject to IHL. The implications of such a

42 Many human rights treaty provisions set out the interest protected and then provide that any limitations must be justified by reference to a list of purposes or goals, which list varies between different articles and different treaties, necessary to the pursuit of the goal in question and proportionate to its pursuit. In this way, human rights law provides a mechanism to establish a balance between the claims of individuals and those of others or the community itself. Limitation clauses must be distinguished from the derogation clause, as to which see further below.

position should be noted. Human rights bodies have been applying human rights law to killings during non-international conflicts and have met with no apparent protest,⁴³ perhaps partly because in many cases the states in question have denied at international level, however implausibly, that an armed conflict is taking place. If the human rights body were to apply customary IHL, that would frequently entail a reduction in current protection in what is surely one of the most important issues to arise, the protection of the right to life.⁴⁴

According to the issue?

A possible third solution is that the *lex specialis* would depend upon the precise issue at stake. For example, IHL would be regarded as the *lex specialis*, but where it provided for a fair trial without specifying what that entailed, human rights law would be the law applied to determine the prerequisites of a fair trial. It is one thing for human rights law to be used as guidance, but quite another for it to be regarded as the legally binding rule to which precedence should be given. Another example would be the right to education, which is most likely to be at issue during belligerent occupation. IHL contains little on the actual content of the occupying power's obligation to provide education; moreover, under IHL it is framed in terms of that power's obligation, and not in terms of the right of the occupied population. The suggestion is that, with regard to those aspects of the right not otherwise covered by IHL, human rights law would prevail.

Under the latter, the right contains matters of immediate obligation and others of progressive realization. Human rights law also contains detailed provisions regarding access to education for various types of minorities. This is usually addressed in the Concluding Observations of relevant treaty bodies and in their General Comments. Are these part of human rights law, or are only the treaty provisions part thereof? The third solution implies a list of ever more specific issues until the precise question is reached, the answers to which would be found sometimes in human rights law and sometimes in IHL. Human rights law is capable of working in this way, since it is principally designed to be applied after the event and has the tools within it to be situation-specific.⁴⁵ IHL, on the other hand, is principally designed to be applied at the time a decision is taken and has to provide a

43 See, e.g., Human Rights Committee, *Suarez de Guerrero v. Colombia* (45/79), Communication No. R.11/45, 5 February 1979, UN Doc. Supp. No. 40 (A/37/40) at 137 (1982); ECtHR, *Ergi v. Turkey*, 23818/94, Judgment of 28/7/98; ECtHR, *Gulec v. Turkey*, 21593/93, Judgment of 27 July 1998; ECtHR, *Isayeva and others v. Russia*, 57947-9/00, Judgment of 24 February 2005; Inter-Am.Ct.H.R. (Ser. C), *Case of Plan de Sánchez Massacre v. Guatemala*, Judgment of 29 April 2004.

44 See generally CUDIH, 'Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation', 1–2 September 2005, available at www.adh-geneve.ch/recherche/pdf/travaux/5/rapport_droit_vie.pdf (last visited 20 October 2008).

45 It is not being denied that knowledge of human rights law may enable a state to act so as to avoid a subsequent finding of violation of human rights law. The state can generally predict the elements which will be considered relevant but it may not always be able to evaluate those elements in such a way as to reach the same conclusion as a human rights body.

general rule applicable in a type of situation.⁴⁶ It cannot be as fine-tuned to the particular situation as can human rights law. The third solution is, quite simply, impractical. It is also inconsistent with the ICJ statements which identify only IHL as the *lex specialis*.

The solution to the *lex specialis* problem in practice has to be capable of being applied by those involved at the time they act or take decisions. It cannot be determined after the event, even if that is when it is enforced. It is probable that the military would prefer the first solution and human rights activists the third. This may suggest that the second solution is a suitable compromise but, as was shown, it is not without difficulties. It is important that there should be agreement both by states and by human rights bodies. Some way needs to be found to develop a coherent approach to the problem.

Application of international humanitarian law by a human rights body

The ICJ has stated that in situations of conflict human rights law remains applicable, subject only to derogation.⁴⁷ Derogation is a means by which a state may modify, but not extinguish, the scope of certain of its human rights obligations.⁴⁸ In other words, it is possible that when called upon to apply IHL, the human rights body will not be applying human rights law in its entirety. The subject under consideration here is not derogation in general, but rather the implications of derogation for the relationship between human rights law and IHL.

Derogation

In a situation of ‘public emergency which threatens the life of the nation’, the state is free under certain human rights treaties to derogate.⁴⁹ It is up to the human rights body to determine whether, in the given circumstances, the state can invoke such a provision.⁵⁰ In order to do so the state must indicate, through a prescribed channel, that it is seeking to derogate, from which provisions it is seeking to derogate, the measures it has adopted in derogation of its human rights commitments and the necessity for those measures. The state will be afforded a certain

46 Similarly, it is not being denied that IHL is also enforced after the event, as when a state carries out an investigation to determine whether a violation of IHL has been committed and, where necessary, institutes criminal proceedings. The determination that a violation of IHL has occurred will be based on what was known or ought to have been known to the relevant person at the time the decision was taken.

47 Above note 3.

48 See generally Human Rights Committee, General Comment No. 29, CCPR/C/21/Rev.1/Add.11.

49 ICCPR, Art. 4(1). The ECHR derogation clause applies to ‘war or other public emergency threatening the life of the nation’. ECHR, Art. 15(1). The analogous clause in the IACHR provides ‘In time of war, public danger, or other emergency that threatens the independence or security of a State Party’. IACHR, Art. 27(1).

50 ECommHR, *Greek Colonels’ Case*, Ybk 12 bis, 1970.

‘margin of appreciation’ – a wider one for its characterization of the situation and a narrower one in relation to the necessity for the measure.⁵¹ There are precedents both for the state’s characterization of the situation not being accepted⁵² and for the necessity of the measure in question being rejected.⁵³

Any human rights treaty which provides for derogation also stipulates that some rights are non-derogable. The list varies in different treaties.⁵⁴ In addition, the Human Rights Committee stated, in General Comment No. 29, that potentially derogable rights have a non-derogable core.⁵⁵ So, for example, whilst the prohibition of arbitrary detention is potentially derogable, it is likely that human rights bodies will treat the provision concerning the right to challenge the lawfulness of detention (*habeas corpus/amparo*) contained within the general prohibition as non-derogable.⁵⁶ Those provisions which have a close relationship in practice to a non-derogable principle are likely to be found, in fact, non-derogable.⁵⁷ For example, long periods of detention before being brought before a judicial officer facilitate torture or other ill-treatment. That is likely to be taken into account when evaluating the period in question.

State practice with regard to derogation is anything but consistent. Some states have invoked emergency legislation at the domestic level, often for long periods of time, but without derogating at the international level.⁵⁸ Some are clearly involved in an armed conflict but have not derogated.⁵⁹ Derogation is a facility, not an obligation. Unlike IHL, a derogation is not automatically applicable by virtue of the situation; it has to be invoked.

In non-international armed conflicts

Two separate situations need to be considered in this context: non-international and international armed conflicts. In practice, when a human rights body is dealing with a situation which arises out of non-international armed conflict and there is no derogation, it uses human rights law in its entirety.⁶⁰ If the human rights body fails to take account of IHL, there is a real risk that the state will be found responsible for a killing in breach of human rights law which would not have been

51 Rosalyn Higgins, ‘Derogations under Human Rights Treaties’, *British Yearbook of International Law*, Vol. 48 (1976–7), p. 281.

52 *Greek Colonels’ Case*, above note 50.

53 ECtHR, *Aksoy v. Turkey*, 21987/93, Judgment of 18 December 1996.

54 ICCPR, Art. 4(2); ECHR, Art. 15(2); IACHR, Art. 27(2). There is no equivalent provision in the African Charter of Human and Peoples’ Rights.

55 Above note 48.

56 See note 48, para. 16; see also Inter-Am.Ct.H.R., *Habeas Corpus in Emergency Situations* (American Convention on Human Rights, Arts. 27(2), 25(1) and 7(6)), Advisory Opinion OC-8/87, 30 January 1987, (Ser. A) No. 8 (1987).

57 *Ibid.*

58 Human Rights Committee, Concluding Observations, CCPR/CO/76/EGY, para. 6.

59 Russia has derogated from neither the ECHR nor the ICCPR with regard to the situation in Chechnya.

60 E.g., *Isayeva*, above note 43.

unlawful under IHL.⁶¹ This is less of a problem for the Human Rights Committee and the Inter-American Commission/Court of Human Rights than for the European Court of Human Rights. The rules applied by the first three bodies prohibit arbitrary killings and arbitrary detention, but do not define arbitrary. Whilst no derogation is possible from the prohibition of arbitrary killing, the meaning of arbitrary may be affected by the existence of an armed conflict. In other words, it would be possible for those bodies to use IHL to determine whether there was a violation of human rights law, without regard to the question of derogation.⁶² If, however, they take account of IHL, they will weaken current levels of protection.

The position is more complicated under the European Convention on Human Rights (ECHR). Article 2 thereof lists the only permitted grounds for opening fire. They are suited to a law and order paradigm, but not to an armed conflict paradigm. In order to bring into play the additional circumstances in which it is lawful to open fire in time of conflict, it would be necessary to derogate. Article 15 expressly envisages that possibility. It provides that there can be no derogation in relation to Article 2 'except in respect of deaths resulting from lawful acts of war'.⁶³ Article 5 of the Convention similarly lists the only permitted grounds of detention, rather than prohibiting arbitrary detention. If it is sought to introduce a new ground related to a conflict, such as internment or administrative detention, it would be necessary to derogate.⁶⁴ Article 5 is potentially derogable, and states bound by the ECHR have in practice derogated from Article 5 when a domestic emergency allegedly necessitated internment or unusually long periods of detention prior to being brought before a judicial officer. No state has ever derogated from Article 2.

The European Court of Human Rights (ECtHR), in other words, cannot use IHL as the framework of analysis for finding a violation of human rights law in the same way as other human rights bodies. It could only do so overtly if the state had derogated, or by saying that IHL was relevant as a matter of law.

61 That does not appear to have happened yet in the Chechen cases before the ECtHR, in that the facts suggest that there has been a violation of both human rights law and IHL.

62 Examples of the constructive use of IHL can be found in the case-law of the Inter-American Commission and Court of Human Rights, such as IACHR, *Abella v. Argentina*, Case 11.137, Report No. 55/97, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997), and IACtHR, *Bámaca Velásquez* Case, Judgment of 25 November 2000, (Ser. C) No. 70 (2000).

63 ECHR, Art. 15(2).

64 ECtHR, *Lawless v. Ireland*, 332/57, Judgment of 1 July 1961. It is clear from the reasoning of the Court in *Ireland v. UK*, 5310/71, ECtHR, Judgment of 18 January 1978, that internment in Northern Ireland would have been unlawful but for the notice of derogation. In *Brogan & others v. UK*, 11209/84, Judgment of 29 November 1988, the ECtHR found a violation of Article 5 of the Convention on account of the length of detention (rather than the ground). The United Kingdom then submitted a notice of derogation and detention under the same legislation was subsequently found not to violate the Convention, taking account of the derogation, in *Brannigan & McBride v. UK*, 14553-4/89, ECtHR, Judgment of 24 May 1993. Perhaps the most dramatic example is the Commission decision in *Cyprus v. Turkey*, 6780/74 & 6950/75, ECtHR, Report of the Commission, adopted on 10 July 1976, in which the Commission determined that, in the absence of a notice of derogation, detention of POWs during an international armed conflict was a violation of the Convention.

In non-international armed conflict, however, the state is likely to be denying the applicability of IHL. Furthermore, the need to apply uncertain customary IHL may act as a disincentive. Given that the state is accepting to be judged by a higher standard (human rights law), it might be thought unobjectionable simply to apply human rights law in its entirety. The problem is that that denies the applicability of IHL as a matter of law. It is not a matter of choice.⁶⁵

In international armed conflicts

The position in international armed conflict is more dramatic. In the overwhelming majority of cases there is no doubt as to the applicability of IHL and, more often than not, that means that a significant body of treaty law does apply. At this point the question of derogation and the *lex specialis* interact with another issue, to be considered briefly below – the extraterritorial applicability of human rights law. If human rights law is not applicable extraterritorially, it will still be applicable to the measures taken by a state within its own territory, such as evacuation and measures of civil defence. To the extent that human rights law is applicable extraterritorially, the same questions with regard to derogation arise as in the case of non-international armed conflict.

The case law from human rights bodies addressing international armed conflicts is limited.⁶⁶ The Inter-American Commission on Human Rights has only dealt with such situations under the Inter-American Declaration of Human Rights, under which it does not deliver binding legal judgments.⁶⁷ There is no provision for derogation from the declaration and no jurisdictional clause. The European Commission of Human Rights has also had to address such a situation. The first and second cases brought by Cyprus against Turkey arose out of the Turkish invasion and occupation of northern Cyprus. Turkey had neither derogated nor declared a state of emergency in relation to Cyprus. The Commission applied Article 5 of the ECHR as it stands and, on that basis, found the detention of prisoners of war to be unlawful.⁶⁸ It is submitted that such a result is absurd.

65 Two dissenting members of the Commission in *Cyprus v. Turkey*, *ibid.*

66 In addition to the case law of the Inter-American Commission on Human Rights, acting under the ADHR, see note 67 below, the former European Commission and the European Court of Human Rights have dealt with a number of individual applications against Turkey arising out of the invasion and subsequent occupation of northern Cyprus, most notably *Loizidou v. Turkey*, 15318/89, ECtHR, Judgment of 18 December 1996. Other situations arguably in the international armed conflict category include the position of Russian forces in Transdniestra, ECtHR, *Ilascu & others v. Moldova & the Russian Federation, with Romania intervening*, 48787/99, Judgment of 8 July 2004; and Turkish forces in northern Iraq, ECtHR, *Issa & others v. Turkey*, 31821/96, Admissibility Decision of 30 May 2000, Decision of Second Chamber, 16 November 2004.

67 US operations in Grenada were at issue in IACHR, Disabled Peoples' International, Case 9213, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987) (Annual Report 1986–1987); IACHR, *Coard and others v. the United States*, Report No. 109/99, Case No. 10,951, 29 September 1999, Ann. Rep. IACHR 1999; and the invasion of Panama in IACHR, *Salas and others v. the United States*, Report No. 31/93, Case No. 10,573, 14 October 1993, Ann. Rep. IACHR 1993, 312. The United States disputed the jurisdiction of the Inter-American Commission.

68 Above note 64.

A dissenting minority held that IHL was applicable as a matter of law and had the effect of adding additional permitted grounds of detention, as established under IHL. The only way to avoid an absurd result would be by applying IHL, but under the ECHR that would require states to derogate.

The solution apparently preferred by the Court and, less surprisingly, by member states, is to avoid altogether the applicability of human rights law in international armed conflicts, other than in the context of occupation or extra-territorial detention.⁶⁹ This, it is submitted, is even more objectionable. First, it ignores the express finding by the ICJ that human rights law remains applicable even during conflict. Second, it gives rise to an extraordinary result. In non-international armed conflict, where there is no derogation, human rights law will be applied in its entirety, which could result in acts lawful under the applicable rules of IHL being found unlawful under human rights law. In international armed conflict, on the other hand, the conduct of security forces will be exempt from virtually any human rights law controls, including an interpretation of human rights law requirements that takes account of IHL, except in cases of occupation or detention. This difficulty only arises under the ECHR – which does not mean that there are no problems with other human rights treaties. The drafting of the latter, however, does make it easier to take account of IHL, with or without derogation.

The extraterritorial applicability of human rights law

The question as to how far human rights law is applicable extraterritorially arises purely within that law itself and is not confined to situations of conflict. It may do so, for instance, with regard to acts by consular officials from one state within the territory of another state.⁷⁰ However, the only aspect considered here concerns the extraterritorial acts and omissions of a state's armed forces. This issue arises mainly in international armed conflicts, but trans-border activities which are part of a non-international armed conflict may raise a similar issue. Clearly, the importance of the relationship between IHL and human rights law is very significantly reduced if the latter is not applicable extraterritorially. The scope of the extraterritorial applicability of human rights law has consequently received considerable attention in recent years.⁷¹ Whilst certain matters appear to have been resolved, others are

69 See the next section.

70 E.g., ECommHR, *X v. FRG*, 1611/62, 6 Ybk ECHR 158, p. 169; ECommHR, *W. M. v. Denmark*, 17392/90, admissibility decision of 14 October 1992. For a comprehensive review of the ECHR case law on the extraterritorial applicability of the Convention, see *Al-Skeini & others v. Secretary of State for Defence*, [2004] EWHC 2911 (High Court), and [2005] EWCA Civ 1609 (Court of Appeal).

71 See generally, Fons Coomans and Menno T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp 2004. This paper does not consider the extraterritorial applicability of human rights law to UN forces or UN-authorized forces. In addition to the issues discussed here, those situations raise the question of who is responsible for the acts of national contingent or a force commander, as to which see ECtHR, *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, 71412/01 and 78166/01, Admissibility decision of 2 May 2007.

still hotly contested. Even those areas where there seems to be some measure of agreement are not unproblematic.

In *DRC v. Uganda*, the ICJ found the same acts to be a violation of both IHL and human rights law.⁷² Those acts occurred both in Uganda-occupied territory (Ituri) of the Democratic Republic of the Congo and in territory thereof not occupied by Uganda. The majority judgment does not explain how the Court analysed the scope of the extraterritorial applicability of human rights law.

In situations of occupation

The ICJ, the Human Rights Committee⁷³ and the European Court of Human Rights⁷⁴ appear to think that human rights law applies in occupied territory in the same way as it applies to the state's own territory. This means that the state has both negative and positive human rights obligations. 'Negative obligations' refers to the obligation of a state not to violate human rights norms itself, also known as the obligation to respect. 'Positive obligations' refers to the state's obligation to protect the individual from foreseeable harm at the hands of third parties, also known as the obligation to protect. Whilst the position appears to be settled, it is not without difficulty. Is the test for occupation the same under IHL and human rights law? It might be argued that, in some respects, IHL fudges the question of when the full range of IHL obligations in occupied territory becomes applicable. Yet the test is clear: effective control is required for a territory to be regarded as occupied.⁷⁵ An area may be under the general control of occupying forces, but the position of the occupying power may be challenged to such an extent or in such a way as to make it impossible, in practice, for that power to discharge some of its responsibilities under the Fourth Geneva Convention. A good example would be the status of UK forces in Basra when President Bush announced the end of active hostilities in Iraq.⁷⁶ Partly to keep civilian casualties and destruction in the city as

⁷² Above note 3.

⁷³ Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10. When examining some State reports, the HRC has expressly referred to occupation; in other cases, it has described a form of control that amounts to occupation, e.g., areas in Lebanon over which Israel exercised effective control, Concluding Observations, initial report of Israel, CCPR/C/79/Add.93, 18 August 1998, para. 10; contrast, Concluding observations – Lebanon, UN Doc.CCPR/C/79/Add.78, paras. 4–5 (1977), which refers to occupation; and, alleged violations in Lebanon at the hands of Syrian security forces, Concluding Observations, Second report of Syria, CCPR/CO/71/SYR, 24 April 2001, para. 10. The issue of Moroccan control over Western Sahara has been raised principally in the context of the exercise of the right to self-determination. See Concluding Observations, Fourth periodic report of Morocco, CCPR/C/79/Add.113, 1 November 1999, para. 9 and Fifth periodic report, CCPR/CO/82/MAR, 1 December 2004, paras. 8 and 18.

⁷⁴ *Loizidou*, above note 66.

⁷⁵ Hague Convention IV Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, Art. 42.

⁷⁶ In the *Al-Skeini* case, above note 70, certain judges reached the conclusion that Basra was not under the effective control of the British forces for the purposes of the applicability of the European Convention on Human Rights, even though it was probably occupied territory for the purposes of IHL. See also *Al-Skeini*, [2007] UKHL 26, opinion of Lord Rodger of Earlsferry, para. 83.

low as possible, the British forces proceeded cautiously. They were the only force that could be said to be in control. Nevertheless, they were simply not in a position at that time to assume responsibilities for health care, education and so on.

It may be that IHL tacitly recognizes occupation as consisting of different stages and accepts that the scope of the obligations will vary. A state in the process of establishing itself as an occupying power will be described as such, but will not be expected to deliver some of the services which, at a later period, it will be legally required to deliver. The danger is that a human rights body will apply too rigid a test. If human rights law is applicable only to cases of occupation but not otherwise, this appears to necessitate the application of a black and white rule. It does not allow for the possibility that human rights law could be applicable to the extent that the state is able to exercise control over an activity, rather than over the territory as a whole. This is somewhat paradoxical, since in other contexts human rights law is capable of much greater fine-tuning than IHL. It also suggests that human rights bodies may be tempted to describe a situation as occupation when it would not be described as such under IHL, on account of the dramatic consequences of reaching a different conclusion.

It should be remembered that under the hypothesis being examined here, if the state is not in occupation of another state, human rights law is not applicable. The European Court of Human Rights, for example, has suggested in an *obiter dictum* that there may be temporary, and presumably geographically limited, occupation in an application arising out of Turkey's operations in northern Iraq.⁷⁷ In its judgment in *Ilascu and others v. Russia, Moldova*, the Court did not expressly find Russia to be in occupation of Transdnistria, but that appears to be the model of responsibility it had in mind when it found Russia responsible for the detention of the applicants.⁷⁸ There were particular factual reasons why it was not inappropriate to find Russia responsible.⁷⁹ The problem concerns rather the basis for the finding. Now that Georgia, Azerbaijan and Armenia are parties to the European Convention, it is likely that similar issues will arise in relation to areas in the first two states not under their respective control.⁸⁰ It is also likely that the European Court of Human Rights will receive applications against the United Kingdom concerning its operations in Iraq, including issues which arose during the period of belligerent occupation.⁸¹ If IHL is the *lex specialis* but human rights law remains applicable, a human rights body should presumably apply IHL to determine whether the situation is one of occupation.

77 *Issa*, note 66 above.

78 ECtHR, *Ilascu and others v. Russia, Moldova*, 48787/99, Judgment of 8 July 2004.

79 Russian personnel had effected the initial detention, even though the applicants were subsequently transferred to Transdnistrian authorities.

80 Georgia has submitted an inter-state application against Russia arising out of the recent conflict between the two states. Individual applications may well be brought against both Georgia and Russia.

81 *Al-Skeini*, above notes 70 and 76. See also UK House of Lords, *Al Jeddah v. Secretary of State for Defence*, [2007] UKHL 58, but it should be noted that he was detained after the passage of SC Res. 1546, 8 June 2004, which suggested that the Security Council, at least, thought that Iraq was no longer occupied, legally speaking.

The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have only had to address the issue more generally in monitoring state reports on implementation. In diverse situations, they have asserted that the human rights obligations of a state also apply in territory under its occupation. That approach has been expressly endorsed by the ICJ. Those bodies have not, however, had to define occupation or to determine whether the definition under human rights law is the same as that under IHL. The drafting of the relevant treaties makes it possible for those bodies, should the need arise, to interpret human rights law in the light of IHL, particularly the Fourth Geneva Convention.

Detention outside national territory

There also appears to be general acceptance of the proposition that when a state detains a person outside national territory, it is thereby subjecting that individual to an exercise of its jurisdiction.⁸² This means that human rights law is applicable, but it is not clear whether it is applicable only to treatment in detention or whether it also applies to the grounds for detention and the circumstances of the detention regime, such as prompt access to a judicial officer to confirm the detention and the ability to challenge the lawfulness of detention. It is striking that both in Iraq and in Afghanistan, states bound by the European Convention have acted as though that treaty is of at least some relevance in those conflicts.⁸³ In practice, fewer problems appear to arise with regard to detention than to occupation generally. It is evident that the detaining authority exercises whatever the requisite control may be, although that may be shared between different states⁸⁴ and may involve UN authorization to detain.⁸⁵ Nevertheless, the applicability of the ECHR, in particular, is not without difficulty. As indicated above, it will be necessary for the state to derogate if it wishes to introduce additional grounds for detention that are permitted under IHL, unless the European Court of Human Rights were to invoke IHL as a matter of law. For reasons discussed above, that is less problematic for the other human rights bodies.

Some elements of the circumstances of detention are addressed in general terms by IHL. The texts do not, however, define terms such as ‘court’ or ‘judge’. These terms are not defined in human rights treaty law either, but case law has clarified them. If human rights law is applicable to extraterritorial detention but IHL is the *lex specialis*, what is the status of human rights case law? It is submitted that human rights case law offers useful guidance in such a situation, but that to

82 E.g., Human Rights Commission, *Lopez Burgos v. Uruguay*, UN Doc. A/36/40, 176; Communication No.52/1979, CCPR/C/13/D/52/1979, 29 July 1981; IACHR, *Coard and others*, Report No. 109/99, Case No. 10,951, 29 September 1999, Ann. Rep. IACHR 1999; ECtHR, *Öcalan v. Turkey*, 46221/99, Judgment of 12 May 2005.

83 Above note 81. In Afghanistan, systems have been put in place to provide review of detention.

84 E.g., see *Lopez Burgos*, above note 82.

85 ECtHR, *Behrami and Behrami v. France*, 71412/01, and *Saramati v. France, Germany and Norway*, 78166/01, Grand Chamber, Admissibility decision of 2 May 2007.

regard it as legally binding may be inappropriate.⁸⁶ Particularly difficult questions are likely to arise with respect to the end of detention.

Uncertainty in other fields

In all other areas there is no agreement as to the extraterritorial application of human rights law. Where a person is foreseeably affected by the intentional targeting of a building, is that person within the jurisdiction of the attacking state? Although the latter does not control the territory, it does control the commission of the alleged violation. The test for the extraterritorial applicability of human rights law is that the *victim*, rather than the perpetrator, comes within the jurisdiction in question. Insofar as the victim is foreseeably affected by the act, he or she could be said to be within the jurisdiction of the state responsible for the attack.

The ICJ found that Article 6 of the Covenant on Civil and Political Rights – that is, the prohibition of arbitrary killing – had been violated by Uganda in areas of the DRC over which it did not exercise control. This is inconsistent with the notorious admissibility decision of the European Court of Human Rights in the case of *Bankovic and others v. Belgium and 16 other NATO States*.⁸⁷ The approach of the European Court gives rise to apparently arbitrary results. If a person is surrounded by armed forces of a foreign state (de facto detention) and shot dead, the victim is within its jurisdiction. If a person is shot at a distance of fifty metres, when no other forces are in the vicinity, the victim is again presumably under the control of the forces in question and therefore within the attacking state's jurisdiction. How many metres away must the person be to cease to be under the control of the attacking state? It seems surprising that if an aircraft drops two bombs close to but inside the border of an attacked state, those killed within the state will be 'within the jurisdiction'⁸⁸ but those killed on the other side of the border will not.⁸⁹

It is submitted that the appropriate test is not control over territory but control over the effects said to constitute a violation, subject to a foreseeable victim being foreseeably affected by the act. It should be remembered that this concerns only the admissibility of an application and not whether a violation will ultimately be found to have been committed. If IHL is applied as the *lex specialis*, there will be a violation of human rights law only if the act would also constitute a violation of IHL. Whilst the general pronouncements of the ICJ and the Human Rights Committee are clear, their practical application is not. The case law of the European Court of Human Rights, which has to address the practical application of any principle, has been said to be inconsistent by the English High Court and

86 See generally, Jelena Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence', *International Review of the Red Cross*, Vol. 87 (858) (2005), p. 375; see also Henckaerts and Doswald-Beck, above note 33.

87 ECtHR, *Bankovic and others v. Belgium and 16 other NATO States*, 52207/99, Grand Chamber Admissibility Decision of 12 December 2001.

88 ECommHR, *Isiyok v. Turkey*, 22309/93, Admissibility decision of 3 April 1995; Friendly settlement of 31 October 1997.

89 *Bankovic*, above note 87.

Court of Appeal.⁹⁰ The European Court is likely to have the opportunity to revisit the issue if applications arising out of British operations in Iraq are submitted.

Speculating as to the cause of the inconsistency of the European case law, it is possible that one or more of at least three elements may be present. First, the judges appear to be fearful of having to come to terms with IHL as a basis for analysis, even if the judgment is expressed solely in terms of human rights law.⁹¹ Second, judges appear to think that were they to hold extraterritorial cases admissible, states would refuse to engage in such operations, even where they are thought to benefit the affected population.⁹² In fact, if the Court only found a violation of human rights law in extraterritorial situations where there was a violation of IHL, law-abiding states would have nothing to fear. Third, they probably fear an increase in their already impossible caseload. It is submitted that the solution to the problem of caseload is not to exclude otherwise meritorious cases. The Inter-American Court of Human Rights has shown that it is possible to take a principled approach to these questions.⁹³ There is an urgent need for discussions between the members of treaty bodies and states to develop coherent principles to determine the scope of the extraterritorial applicability of human rights law in practice.

Conclusion

Whilst the three propositions that emerge from the advisory opinions and judgment of the ICJ appear straightforward, their application in practice is likely to present real problems for human rights bodies. As a concrete example, it is enough to consider the challenges the European Court of Human Rights will face in addressing the case recently submitted by Georgia against Russia concerning the military operations of August 2008.⁹⁴ At the very least, the members or secretariats of the bodies in question will need to be trained in IHL or to use IHL specialists. For a variety of reasons the European Court of Human Rights is likely to come up against particular problems. First, the wording of the provisions on protection of the right to life and detention are only suited to a law and order paradigm. Derogation may be necessary to enable the Court to give effect to IHL as the

90 EWCA, *The Queen on the Application of 'B' & Ors v. Secretary of State for the Foreign and Commonwealth Office*, [2004] EWCA Civ 1344, para. 59; *Al-Skeini*, above note 70, High Court.

91 ECommHR, *Cyprus v. Turkey*, 6780/74 and 6950/75, Report of the Commission, Adopted on 10 July 1976; *Ergi*, above note 43.

92 *Bankovic*, above note 87; *Behrami & Behrami and Saramati*, above note 71.

93 Above note 67.

94 Interim measures were granted on 12 August 2008 under Rule 39 of the Rules of the Court, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=839100&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (last visited 21 October 2008). It should also be noted that the European Court of Human Rights has announced that it has received 2,729 applications from South Ossetians against Georgia; <http://cmiskp.echr.coe.int/tkp197/view.asp?item=13&portal=hbk&action=html&highlight=&sessionId=15237971&skin=hudoc-pr-en> (last visited 27 October 2008).

lex specialis, in which case the practice of member states with regard to derogation will need to change. Second, the Court does not have a general monitoring function, but only deals with individual cases. Rather than making general pronouncements, it is obliged to determine the application of any such principle in practice. Establishing the scope of the extraterritorial applicability of human rights law is consequently particularly difficult. That said, it must be emphasized that *all* human rights bodies will encounter some difficulties.

It might be tempting to propose a radical solution: the creation of a right of individual petition for violations of IHL which would be submitted to a new dispute settlement mechanism, and the exclusion of such cases from human rights bodies. This would only work if the ICJ accepted that a rigid distinction had been created between IHL and human rights law. A new problem would then emerge, namely the extent to which the new IHL body could take account of human rights law in determining whether there had been a breach of IHL.

Rather than creating new problems, it might be preferable to attempt to solve the difficulties that arise for existing institutions. The Inter-American Court of Human Rights has shown the way, at least as regards the manner in which IHL can be taken into account. What is needed is a series of meetings bringing together members of the ICJ and of human rights treaty bodies, representatives of states with relevant experience and independent experts to provide solutions to the problems identified. The three propositions of the ICJ would be the starting point and should not be called into question. The meetings should not focus on a particular institution, but rather on a particular issue across all relevant institutions. The test for any solution is that it must be both coherent and practical and should seek to avoid diminishing existing protection. It ought to be possible to achieve a consensus on the implications in practice of the simultaneous applicability of IHL and human rights law.

Human rights litigation and the ‘war on terror’

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Abstract

The ‘war on terror’ has led to grave human rights violations and, in response, to a growing volume of human rights litigation. This article provides an overview of litigation that has unfolded in recent years in relation to issues such as arbitrary detention, torture and ill-treatment, extraordinary rendition, extraterritorial application of human rights norms and the creeping reach of the ‘terrorism’ label. These cases provide a prism through which are displayed key characteristics of the war on terror as it affects human rights, and enables us to begin to ask questions regarding the role of the courts and the impact of human rights litigation in this area.



On 12 June 2008 the Supreme Court of the United States decided that persons detained by the United States in Guantánamo Bay have the constitutional privilege of habeas corpus. The recognition that all detainees are entitled to this basic right, irrespective of their nationality, their designation as ‘enemy combatants’ or their offshore location, has been hailed as a victory for the rule of law. Jubilation is somewhat tempered by the fact that it took six years to decide that detainees are entitled to a protection that would normally guarantee judicial access within hours, days or maybe weeks.

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Whether you see the *Boumediene* judgment as a historic victory for justice or a reminder of its woeful failure, it tells a story. It provides a graphic illustration of how far executive violations of human rights have gone in the name of security, and of the nature of the judicial response: deferential and perhaps faltering at first, gradually ceding to a more invigorated role as a matter of last resort.

This judgment is only one part of a burgeoning mass of litigation, each component of which tells its own story. Cases vary as vastly in their goals – gaining access to information, challenging the legality of detention, preventing expulsion or deportation, securing acknowledgement of and compensation for wrongs, for example – as they do in their processes and outcomes. This article will present a necessarily brief survey of some of this practice of human rights litigation to date at the national, regional and international levels.¹

An enquiry into current litigation practice can serve several purposes. First, it provides an insight into key human rights issues arising in the so-called ‘global war on terror’. Looking at issues through cases necessarily gives a limited perspective: a case concerns a particular individual and particular sets of facts as assessed against the particular legal issues within the jurisdiction of the particular court. The number of affected individuals that make it to court is a tiny minority. But, taken together, the practice of litigation in relation to international terrorism over the past few years provides a prism through which, I believe, are displayed quite vividly some of the key characteristics of the global war on terror, its objective and *modus operandi*.

Second, the brief survey of litigation practice may provide a comparative framework for assessing the impact and limitations of that litigation itself, and the role of the courts in responding to the human rights challenges posed by the war on terror. It remains early days for any such assessment. The cycle of litigation takes time, particularly in the light of the challenges to bringing litigation in this field in the first place, some of which will be explored below, and relatively few cases have run their course. Certainly any assessment of the *impact* of litigation has to be seen through a long-term lens and anything like a meaningful audit of impact would have to wait perhaps another ten years. But the extent of recent developments suggests that it is timely to at least begin to enquire into practice to date and to ask questions regarding the role of the courts in this context.

I shall therefore look first at cases that have arisen post-9/11 addressing five groups of issues (which I believe are illustrative of key characteristics of the ‘war on terror’ as it affects human rights). These issues are arbitrary detention, extraterritorial application of human rights obligations, torture and related

1 This note focuses on select human rights cases against state violations brought before national or, to a lesser extent, regional and international human rights bodies. In many of the cases cited in this survey, INTERIGHTS was involved as representative or third party/*amicus curiae* intervener. It is noted that cases that serve human rights ends can take many other forms, from civil cases against corporations to criminal cases against individual members of intelligence agencies or – on the basis of universal jurisdiction – against high government officials. There are examples of such cases being brought in the relation to the GWOT but these are not addressed here.

safeguards, extraordinary rendition, and the spreading reach of the ‘terrorist’ label and notions of guilt by association. In the conclusion I shall return to the question of the role of the courts and the impact of human rights litigation.

Issue 1: Arbitrary detention

Guantánamo

Probably the most notorious issue, and certainly the one giving rise to the most voluminous litigation, is the Guantánamo anomaly. The facts related to the detention of hundreds of enemy aliens by US personnel in Guantánamo Bay need no introduction.

Detentions at Guantánamo have spurred a litany of litigation in US courts (as well as beyond),² focusing mainly on two issues: the right to habeas corpus and the lawfulness of trial by military commission. It is worth sketching out the development of these cases in US courts and the curious game of legal ping-pong that has been played out between the judicial and political branches in the past couple of years, culminating in the 2008 *Boumediene* judgment referred to above.

Round 1: in 2004 a series of cases made their way through US courts challenging the denial of the right of access of detainees to a court to challenge the designation of the individuals in question as ‘enemy combatants’ and the lawfulness of their detention.³ This led to two judgments handed down in June 2004. In *Hamdi v. Rumsfeld*,⁴ the Supreme Court held that US nationals had certain constitutional rights, including having ‘a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker’. Justice Sandra Day O’Connor famously cautioned on the behalf of the Court that ‘We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens’.⁵ This 2004 case was seen to represent an important marker of executive accountability, albeit in the limited cases where the detainees are US nationals.

2 As regards US responsibility under the American Declaration of the Rights and Duties of Man, see Inter-American Commission on Human Rights, Precautionary Measures in Guantánamo Bay, 13 March 2002. Another line of litigation has concerned the role of other states in transferring or failing to support nationals detained in Guantánamo: see, e.g., ECtHR, *Boumediene and others v. Bosnia and Herzegovina*, Application Nos. 38703/06, 40123/06, 43301/06, 43302/06, 2131/07 and 2141/07 found inadmissible by the ECtHR on 18 November 2008 before the European Court of Human Rights (ECHR = Convention), or England and Wales Court of Appeal, *R (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ 1598.

3 Two of the three groups of cases concerned US nationals detained in the United States or outside, and the third (affecting the vast majority of detainees) concerned non-nationals detained beyond US soil. The first of these cases – *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) – is less relevant, as it concerned a US citizen who was ultimately transferred to the regular criminal justice system within the United States, charged with conspiracy and found guilty before a federal court.

4 US Supreme Court, *Yaser Esam Hamdi and Esam Fouad Hamdi as next friend of Yaser Esam Hamdi, Petitioners v. Donald H. Rumsfeld, Secretary of Defense, et al.*, 542 US 507 (2004) decided June 28 2004.

5 *Ibid.*, 536.

In respect of the right of habeas corpus of the vast majority of detainees who were non-nationals detained outside the United States, in *Rasul & Ors v. Bush*⁶ the Supreme Court took a far more cautious approach. It refrained from addressing the issue as a constitutional rights issue. But the Court found, by reference to a statute conferring jurisdiction on courts, that there was nothing to prevent the courts from exercising jurisdiction in these cases.

The government’s response to these judgments is well known. As regards US nationals, one had already been released and the other was transferred to regular courts.⁷ As regards the hundreds of non-nationals detained at Guantánamo, the response was quite different. First, the executive introduced the Combatant Status Review Tribunals and Administrative Review Boards in an apparent attempt to provide a habeas corpus substitute, despite these being non-judicial mechanisms that lacked basic procedural rights associated with the right of habeas corpus.⁸ This provided cover for congressional follow-up with the Detainee Treatment Act 2005 (DTA), which, in addition to some positive provisions on treatment of detainees, responded to the judgment by making it explicit that there is *no* right of habeas corpus for Guantánamo detainees.

Round 2: this led to a second round at the Supreme Court in the form of *Hamdan v. Rumsfeld*.⁹ The US government claimed that the DTA had stripped Hamdan of his right to habeas corpus. In its June 2006 judgment, the Court again refrained from addressing the question whether there was a constitutional right to habeas corpus that rendered the DTA’s purported habeas corpus stripping unconstitutional. It found instead that the Act did not apply to Hamdan anyway, as his case was ongoing at the time the DTA was adopted.

Having determined that it had jurisdiction, the Court went on to find that basic due process guarantees contained in Common Article 3 of the Geneva Conventions, incorporated into US law by the Uniform Code of Military Justice (UCMJ)¹⁰ statute, applied to all detainees. The decision that the military commissions were unlawful because they violated these basic provisions was an important and positive decision in terms of rights protection. It is noteworthy, though, that *Hamdan* is not framed in terms of ‘individual rights’, but as a separation of powers issue, addressing whether ‘the President has acted in a way that exceeded [congressional] limits’.

6 US Supreme Court, *Shafiq Rasul, et al., Petitioners v. George W. Bush, President of the United States, et al.; Fawzi Khalid Abdullah Fahad al Odah, et al., Petitioners v. United States, et al.*, 542 US 466, decided June 28 2004.

7 See notes on *Padilla* and *Hamdi*, above notes 3 and 4.

8 For an analysis of the operation of the Combatant Status Review Tribunals, where detainees lack access to the evidence against them, see Mark Denbeaux et al., *No-Hearing Hearings: CSRT: The Modern Habeas Corpus?*, available at http://law.shu.edu/news/final_no_hearing_hearings_report.pdf (last visited 15 October 2008).

9 US Supreme Court, *Salim Ahmed Hamdan, Petitioner v. Donald H. Rumsfeld & Others*, 548 US 557 (2006).

10 Uniform Code of Military Justice, UCMJ, 64 Stat. 109, 10 USC ch.47.

Nonetheless, there had been a finding by the Supreme Court that the executive's conduct violated international and domestic law. The US government again faced the quandary of how to respond to this judicial slight. With the 2006 Military Commission Act, Congress responded in two ways. First, it determined that the relevant international law – the Geneva Conventions – could no longer be relied upon as a source of rights in habeas corpus or other civil proceedings against US personnel. Second, it provided that courts would not have jurisdiction to hear habeas corpus applications (or any other action) by any person determined to be an enemy combatant or awaiting such determination, thus extending the jurisdiction-stripping provisions of the DTA beyond Guantánamo to detentions anywhere.¹¹ Rather than a response that would seek to deal with the problem by bringing policy in line with law, the law was identified as the problem, and international sources of law and judicial oversight of them were removed.

Despite several Supreme Court judgments, the basic question of whether constitutional due process and habeas corpus protections apply to non-nationals detained outside US territory remained unanswered until June 2008.¹² With no further possibility of constitutional avoidance, in *Boumediene v. Bush*¹³ the issue was finally resolved in the affirmative. The US Supreme Court ruled that 'enemy combatants' held by the United States at Guantánamo Bay have the right under the US Constitution to challenge their detention before regular courts. The Court also ruled that the procedures for review of the detainees' status under the 2005 Detainee Treatment Act were not an adequate and effective substitute for habeas corpus. It therefore declared unconstitutional section 7 of the 2006 Military Commissions Act, which denied habeas corpus to any detained foreign 'enemy combatant'.

The importance of this ruling should not be underestimated. Ultimately, the Supreme Court has addressed the issue of habeas corpus as the fundamental rights issue it is. It rejects artificial distinctions based on nationality or geographical location as relevant to determining the existence of rights and obligations.

11 MCA, s.7(1)(e):

- (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
- (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 USC 801 note), no 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.

12 Little clarity was provided by lower courts. In two cases – *Al Odah* and *Boumediene* – the district courts reached completely different outcomes and, on 20 February 2007, the DC Circuit Court of Appeals ruled 2–1 that the Guantánamo detainees have no constitutional right to habeas corpus review of their detentions in federal court.

13 US Supreme Court, *Lakhdar Boumediene, et al., Petitioners v. George W. Bush, President of the United States, et al.*, 553 US.

It represents the willingness of the judiciary to engage and fulfil their democratic mandate and reinforce the legal and constitutional limits on executive action. How the executive responds to those decisions will also be an important measure of the state of health of the rule of law and the separation of powers.¹⁴ It will also determine what the ruling means in practice for the approximately 270 detainees remaining in Guantánamo Bay.

At the same time, the judgment itself was a close 5:4 decision, with some strident dissents that graphically demonstrate the extent of the antipathy of certain judges to step into what they see as issues of security properly for executive determination.¹⁵ Of most concern, of course, is simply the time it has taken to reach this decision. Litigation is a time-consuming business, and due process of law and respect for the judicial function require that it be allowed to run its course. Undoubtedly, some gains have been made at each stage of this judicial marathon (as I shall return to when looking at the question of impact later). But one has to ask whether the judicial process has not been characterized by undue constitutional avoidance, as well as excessive judicial deference to the executive and congressional decision-making role, in the refusal to address the constitutional question at an earlier stage. Unfortunately, the political organs did not repay the democratic compliment and react to judicial suggestions about the need to bring policy into line with law.¹⁶ Whether this was a miscalculation as to how the political branches would respond, or a strict approach to the judicial doctrine of constitutional avoidance, is open to question. But the somewhat anomalous result is a decision six years down the line that the right to habeas corpus applies, theoretically guaranteeing access to a court within hours or days of arrest and detention. One must question the extent to which this constitutes a meaningful a judicial response for this sort of emergency remedy.

The same day that the US Supreme Court handed down its judgment in *Boumediene* it also handed down *Munaf v. Geren*,¹⁷ in which it acknowledged that persons detained in Iraq also have the right to habeas corpus. It found that in the Iraqi context it was Iraqi courts that should exercise jurisdiction, and it therefore denied the jurisdiction of US courts on that basis. But the case is significant in reinforcing the principle that the right of habeas corpus applies to persons detained by US personnel beyond US jurisdiction. This may become particularly important

14 While President Bush’s immediate response to the judgment was equivocal, US President Barak Obama indicated shortly upon taking office that the Guantanamo facility would be closed. ‘Obama plans executive order to close Guantanamo Bay’ CNN on-line, 22 January 2009, <http://edition.cnn.com/2009/POLITICS/01/21/guantanamo.hearings/index.html>.

15 This was graphically demonstrated by the tone and content of some of the dissents, notably Scalia J’s assertion of the ‘disastrous consequences’ of the majority judgment which he claimed ‘will almost certainly cause more Americans to be killed’. *Boumediene*, above note 13, Dissenting Judgment of Scalia J, p. 2.

16 E.g., as noted above, Congress reacted to the *Hamdan* judgment by divesting the courts of jurisdiction and of ‘inconvenient’ sources of law, rather than taking the judicial lead and bringing policy into line with law.

17 *Munaf et al. v. Geren, Secretary of the Army, et al.*, Certiorari to the United States Court of Appeals for the District of Columbia circuit, No. 06–1666. Argued March 25, 2008 – Decided 12 June 2008.

in a context of increasing resort to Guantánamo ‘alternatives’ in the form of detention abroad.

Belmarsh

In 2004, parallel cases made their way through the English courts, resulting in the famous *A & Ors* derogation case before the House of Lords (Belmarsh judgment).¹⁸ The case concerned the detention of non-UK nationals in Belmarsh prison on the basis of their suspected involvement in international terrorism, pursuant to the 2001 Anti-Terrorism, Crime and Security Act.¹⁹ In order to allow such a measure, the United Kingdom had derogated from its obligations in respect of the right to liberty under Article 5 of the European Convention on Human Rights (ECHR).

The case raised different issues from those before US courts. The UK Act itself provided for regular independent review by the Special Immigration Appeals Commission, which is a court of law, albeit in the context of limited and controversial rules and procedures.²⁰ The right of habeas corpus was not, as such, in dispute in the United Kingdom, and the case that made its way to the House of Lords concerned the lawfulness of the derogation and of the detention itself.

When the matter went before the House of Lords – the supreme court of appeal in the United Kingdom – the court found that the United Kingdom’s derogation from the European Convention on Human Rights to enable it to detain people on national security grounds, potentially indefinitely, was not valid. The majority deferred to the government’s assessment of the existence of an ‘emergency’ justifying derogation. However, they found that the detention of non-nationals could not be justified as strictly required by that emergency. The judgment notes that ‘If derogation is not strictly required in the case of one group [nationals], it cannot be strictly required in the case of the other group [non-nationals] that presents the same threat.’²¹ The court therefore found a violation of

18 UK House of Lords Appellate Committee, *A and Others v. Secretary of State for the Home Department, X and another v. Secretary of State for the Home Department* [2004] UKHL 56 (A & Ors (Derogation)).

19 See sections 21–32 of the United Kingdom’s Anti-terrorism, Crime and Security Act, 2001, which ‘allow[s] the detention of those the Secretary of State has certified as threats to national security and who are suspected of being international terrorists where their removal is not possible at the present time. These provisions change the current law, which allows detention with a view to removal only where removal is a realistic option within a reasonable period of time ...’.

20 Controversial rules related to, for example, access to counsel and to evidence. See, e.g., the report of the United Kingdom’s Parliamentary Constitutional Affairs Committee ‘The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates’, report of session 2004/5, HC 323-II, available at www.parliament.the-stationery-office.co.uk/pa/cm200405/cmselect/cmconst/323/323ii.pdf (last visited 15 October 2008). See also, e.g., ‘Ian Macdonald QC resigns from SIAC’, 1 November 2004, available at www.gardencourtchambers.co.uk/news/news_detail.cfm?iNewsID=268 (last visited 20 April 2008).

21 *A & Ors (Derogation)*, above note 17, Lord Bingham, para. 132: ‘I would hold that the indefinite detention of foreign nationals without trial has not been shown to be strictly required, as the same threat from British nationals whom the government is unable or unwilling to prosecute is being met by other measures which do not require them to be detained indefinitely without trial. The distinction which the government seeks to draw between these two groups – British nationals and foreign nationals – raises an issue of discrimination. But, as the distinction is irrational, it goes to the heart of the issue about

the rights to liberty and to non-discrimination, provided for in law in the United Kingdom via Articles 5 and 14 of the ECHR.

The positive significance of this decision lies on many different levels. The first relates to the obvious importance of the strict approach to the protection of the right to liberty and the need for careful but challenging judicial oversight. Beyond that, the case did what much of debate and indeed litigation elsewhere – including the US litigation referred to above – had neglected to do, in signalling the centrality of the equality issue. This is particularly significant in a context of frequent reliance on divisions and distinctions based on nationality as well as other grounds as a basis for inferior treatment. While nationality does have some significance in the context of the application of certain aspects of international humanitarian law (IHL), it is a critical manifestation of the universality that underpins human rights law that nationals and non-nationals alike are protected.²² The onus is on the state to demonstrate that discrimination is justified, which it was unable to do in this case.

The case is also constitutionally significant in its assessment of the proper judicial role and the limits of due judicial deference. In a powerful passage Lord Bingham famously rejects the Attorney General’s submissions in this respect, noting,

“I do not in particular accept the distinction which he drew between democratic institutions and the courts ... the function of independent judges ... [is] a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.”

Significant too was the executive’s response. The UK government changed its law and practice in the light of the Belmarsh judgment. The derogation and offending legislation were withdrawn, and new legislation was adopted, providing, *inter alia*, for ‘control orders’ rather than imprisonment for persons suspected of involvement in international terrorism.²³

proportionality also. It proceeds on the misconception that it is a sufficient answer to the question whether the derogation is strictly required that the two groups have different rights in the immigration context. So they do. But the derogation is from the right to liberty. The right to liberty is the same for each group. If derogation is not strictly required in the case of one group, it cannot be strictly required in the case of the other group that presents the same threat.’

22 Only in relation to certain rights in limited circumstances – notably relating to political life – are rights enjoyed only or to a greater degree by a state’s own citizens. See, e.g., UN Human Rights Committee General Comment No. 15, The position of aliens under the Covenant [1986], in UN Doc. HRI/GEN/1/Rev.6 (2003), p. 140. Also note the IACHR comment in relation to Guantánamo detainees: ‘[t]he determination of a state’s responsibility for violations of the international human rights of a particular individual turns not on the individual’s nationality ...’. Inter-American Commission on Human Rights, Precautionary Measures in Guantánamo Bay, Cuba, 13 March 2002.

23 On control orders authorized by the Prevention of Terrorism Act 2005 and their operation, see the statement made by Tony McNulty, Minister for Security, Counter-Terrorism, Crime and Policing (The Rt Hon Tony McNulty) to Parliament: ‘Control Orders Update (11 March 2008–10 June 2008)’, 12 June 2008, available at <http://security.homeoffice.gov.uk/news-publications/news-speeches/control-orders-update-0608> (last visited 15 October 2008). The Act authorized both derogating control orders,

These orders spurred their own controversy and their own litigation. The judgments handed down provide, among other things, an interesting analysis of what constitutes ‘detention’ as opposed to limits on freedom of movement, and the stage at which not only physical limits but also the degree of control over aspects of daily life might amount to unlawful detention.²⁴ The House of Lords found in one case that those orders that allowed for persons to be confined to specified areas for up to 18 hours a day and cut off from contact with the outside world amounted to detention by any other name, and required derogation from Article 5 of the ECHR. These cases also demonstrated the willingness of the courts to engage in and seek to grapple with the difficult issue of what balance is an acceptable one in a democratic society facing the challenge of international terrorism.

Issue 2: Limiting the applicability of treaty obligations: extraterritorial application and action pursuant to Security Council authorization

Extraterritoriality

The rationale behind the Guantánamo anomaly referred to above was that, due to its offshore location, the constitutional human rights obligations that normally apply on US soil would not apply there. As a constitutional matter, the fallacy of such a distinction has been clarified by the *Boumediene* and *Munaf* cases discussed above. As a matter of international human rights law, the proposition was always straightforwardly wrong. The complete control exercised by the United States over the part of Cuba where Guantánamo lies, as well as over the detainees themselves, meant that the United States exercised jurisdiction and control to satisfy the criteria for applicability of human rights treaties.²⁵ As the Inter-American

where the government recognized that derogation from the ECHR would be required, and non-derogating orders, where, in the government’s view, it would not.

- 24 UK House of Lords, *Secretary of State for the Home Department (Appellant) v. JJ and others (FC) (Respondents)*, [2007] UKHL 45, decided 31 October 2007. On control order litigation in Australian courts, see High Court of Australia, *Thomas v. Mowbray* [2007] HCA 33, 2 August 2007, available at www.austlii.edu.au/au/cases/cth/HCA/2007/33.html (last visited 15 October 2008), where, in a 5:2 decision, the High Court of Australia upheld the constitutionality of a criminal anti-terror law under which a federal magistrate issued an interim control order.
- 25 Human rights bodies have long considered the extraterritorial application to depend on whether the state exercised ‘effective control’ abroad. See, e.g., International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, which, following earlier Human Rights Committee decisions, noted that it is unconscionable to permit states to do abroad what they are prohibited from doing at home. A stricter approach, at least as regards the ECHR, was apparent when the European Court of Human Rights suggested in the *Bankovic v. Belgium* case that control over territory, and not just control over individuals or situations by agents acting abroad, may be required for the Convention obligations to apply. See, e.g., Helen Duffy, *The War on Terror and the Framework of International Law*, Cambridge University Press, Cambridge, 2005, pp. 282–9, 332–7.

Commission on Human Rights observed when requesting that the United States adopt precautionary measures to protect the detainees (a request ultimately unheeded), '[t]he determination of a state's responsibility [for human rights violations] turns not on the individual's nationality or presence within a particular geographic area, but rather on whether, under the specific circumstances, that person fell within the state's authority and control.'²⁶

While the Guantánamo anomaly is so stark as to provide an easy target, a narrow view of extraterritorial application is mirrored elsewhere, albeit in slightly less caricatured form. In a judgment of June 2007, in *Al-Skeini v. Secretary of State for Defence*,²⁷ the House of Lords ruled on the application of the ECHR to the conduct of British troops in Iraq. The case concerned six appellants, the first five of whom had been killed by UK 'patrols' in occupied Basra, for example while eating a family evening meal, during a raid on a family member's house or while driving a minibus. The sixth, Baha Mousa Baha, was tortured while in UK custody in Iraq. The object of the litigation was to compel the government to carry out an investigation into these violations as required by the ECHR, incorporated via the UK Human Rights Act.

At first the government argued that the ECHR did not apply to its actions in Iraq. In the course of litigation the government's position changed (providing an example of how the process of litigation can itself quite directly shape policy), and it argued that the ECHR did apply to persons in UK custody in Iraq but not to persons killed or injured on the streets of Basra.²⁸

When the case made its way to the highest UK court, the House of Lords, the court accepted the government's view as regards the scope of application of the Convention. It found that while individuals killed or mistreated within UK 'custody' are entitled to the protection of the ECHR, those on the streets of Basra – including those directly shot or mistreated by UK soldiers patrolling streets – are not.

The strength of the *Al-Skeini* case lies in its confirmation that for individuals detained by UK authorities anywhere in the world, the ECHR, and the Human Rights Act giving effect to it in the United Kingdom, apply. Although the issues were somewhat different, this sentiment is replicated and reinforced by the recent finding, in *Munafv. Geren*, of the US Supreme Court concerning due process rights applicable to US detainees in Iraq. This rejects the more restrictive approach argued by the authorities of the United States, and at an earlier stage, the United Kingdom, as to the non-applicability of international human rights treaties.

However, on this occasion the House of Lords may have adopted an unduly restrictive approach to human rights protection in rejecting the applicability

26 See IACHR Guantanamo Bay Precautionary Measures, above note 21.

27 UK House of Lords, *Al-Skeini v. Secretary of State for Defence*, [2007] UKHL 26, 13 June 2007.

28 At all stages the government denied the extraterritorial applicability of the Human Rights Act (as opposed to the ECHR). The government did not challenge the fact that, provided that the Convention and the UK Act were applicable, there existed an obligation to carry out an investigation and the case should go back to the divisional court for assessment of the facts.

of the European Convention beyond situations of detention. It rejected arguments that the relevant question related to the degree of control the state exercised over the situation, and whether there was in all the circumstances a sufficiently ‘direct or immediate’ link between the extraterritorial conduct and the alleged violation of individual rights.²⁹ It focused instead on what might be described as formalistic distinctions based on custody or not. The somewhat anomalous result is that an individual’s ability to achieve redress depends on whether his abusers were courteous enough to arrest him beforehand, or whether his abuse occurred inside or outside prison walls. While the implications of this judgment remain to be seen, in *Al-Skeini* the House of Lords may have contributed to confusion in an already murky field.

A restrictive approach to extraterritoriality, and growing confusion in this area, has potentially important implications for accountability in the war on terror, a large part of which is being executed extraterritorially. Of course, states continue to be bound normatively by customary law and IHL. But, as this case shows, the extraterritorial application of human rights treaties is critically important in practice in a context where the application of human rights law in fact amounts to the only way of accessing a court of law and ultimately of securing a remedy.³⁰

It remains to be seen whether this somewhat novel approach by the UK courts will be adopted elsewhere.³¹ The Committee against Torture (CAT) has certainly made it clear that the Convention against Torture and Cruel, Inhuman and Degrading Treatment does apply extraterritorially, and has been implicitly critical of both the United Kingdom and United States for taking an approach limiting the Convention’s applicability in Iraq or Afghanistan.³² The CAT has stated, for example, that ‘[t]he State party should recognize and ensure that the provisions of the Convention expressed as applicable to “territory under the State party’s jurisdiction” apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.’

29 For the NGO third-party intervention, including support for the ‘direct or immediate’ link, see www.interights.org.

30 As in the United Kingdom, human rights protections are often incorporated into domestic law. However, IHL violations lack an enforcement mechanism and, under CAT, neither the United States nor the United Kingdom has made the declaration required under Art. 22 to allow for individual petitions.

31 The *Al Skeini* case, above note 26, has been presented to the ECtHR.

32 See, e.g., Conclusions and recommendations of the Committee against Torture; United States of America, UN Doc. CAT/C/USA/CO/2, 25 July 2006: ‘The State party should recognize and ensure that the provisions of the Convention expressed as applicable to “territory under the State party’s jurisdiction” apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.’ See also Conclusions and recommendations of the Committee against Torture; United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories, UN Doc. CAT/C/CR/33/3, 10 December 2004: ‘The Committee expresses its concern at ... the State party’s limited acceptance of the applicability of the Convention to the actions of its forces abroad, in particular its explanation that “those parts of the Convention which are applicable only in respect of territory under the jurisdiction of a State party cannot be applicable in relation to actions of the United Kingdom in Afghanistan and Iraq”; the Committee observes that the Convention protections extend to all territories under the jurisdiction of a State party and considers that this principle includes all areas under the de facto effective control of the State party’s authorities.’

Just as *Al-Skeini* raised questions about the applicability of human rights treaty obligations extraterritorially, a more recent House of Lords case provoked questions about the impact of such obligations where the state acts under the apparent authority of a Security Council resolution. This issue arose in the case of *R (on the application of Al-Jedda) v. Secretary of State for Defence*, decided on 12 December 2007.³³ A cautious and arguably restrictive approach to human rights protection was again apparent.

The case concerned Iraqis detained by UK soldiers (acting as part of a UN force in Iraq) on terrorism charges. The first question the House of Lords addressed on appeal was whether the government was liable for the appellant’s allegedly wrongful detention, as opposed to the United Nations being responsible on the basis that the impugned acts were attributable to the United Nations as a result of Security Council resolutions authorizing the Multinational Force in Iraq. The Lords found the question of fact to be whether the United Nations exercised effective control over UK actions, which it found not to be the case.³⁴ The court had no difficulty in distinguishing this mission from the Kosovo Force (KFOR), where more difficult issues of attribution arise.³⁵ Thus the allegedly wrongful conduct was attributable to the United Kingdom, not the United Nations.

The second question proved more problematic. The court asked itself whether the United Kingdom’s obligations under the European Convention on Human Rights were qualified by those that arise under the UN Charter, particularly under relevant Security Council resolutions. All five Lords of Appeal found that the United Kingdom’s obligations under the European Convention had to be limited by those due under the Charter. They therefore upheld the authority to detain individuals in Iraq on this basis. However, Lord Bingham found that while the United Kingdom had the authority to detain the appellant pursuant to Security Council resolutions, it must still ‘ensure that the detainee’s rights under Article 5 [of the European Convention] are not infringed to any greater extent than is inherent in such detention’.

The Court did not find, as the applicants had argued, that a distinction should be drawn between clear *obligations* under Security Council resolutions, and other activities that might be authorized by, or indeed broadly carried out pursuant to, such resolutions. Article 103 of the Charter undoubtedly provides that where there is a conflict between obligations under the Charter and treaty obligations, the former prevail. But if the judgment were to be understood as exempting the whole range of actions taken under Security Council resolutions from human rights obligations (or indeed those under IHL), the result could be a serious

33 UK House of Lords, *R (on the application of Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL 58, Judgment of 12 December 2007.

34 As the Lords noted, the United Kingdom had never claimed before the case that the UN did exercise control over these operations.

35 The majority distinguished the admissibility decision of the Grand Chamber of the European Court of Human Rights in *Behrami v. France, Saramati v. France, Germany and Norway*, Application Nos. 71412/01 and 78166/01, May 2, 2007, which attributed the acts of KFOR to the United Nations and not to the individual countries that contributed forces to that mission.

protection gap. This is particularly so in the ‘war against terrorism’ context, where wide-ranging resolutions have called on far-reaching action against terrorism, but without clear definition as to either the action required or the nature of the terrorism against which it is directed.

Issue 3: Torture

Practices of torture and cruel, inhuman or degrading treatment have come to light in recent years with increasing regularity, as epitomized by (though far from limited to) scandals such as Abu Ghraib or Baghram. This has regrettably been coupled with attempts to redefine torture according to obscenely high thresholds of barbarity, to ‘justify’ it, *inter alia*, as a matter of ‘executive privilege’, or to undermine procedural safeguards associated with it. I shall highlight a couple of cases from the other side of the Atlantic that fall into the last category and illustrate attempts to erode, indirectly, the prohibition.

Deportation to torture or ill-treatment

The first set of cases, *Saadi v. Italy*³⁶ and *Ramzy v. Netherlands*³⁷ before the European Court of Human Rights (ECtHR), relate to the deportation of individuals to states where, the applicants allege, there is a real risk of their being subject to torture and ill-treatment. When the *Ramzy* case appeared before the Court, the Dutch government’s case related, as many in Strasbourg do, to the difficult and not uncontroversial question of whether there was a real and personal risk to Mr Ramzy in Algeria. But several other governments, led by the United Kingdom, changed the face of the case by taking the unusual step of presenting a third-party intervention.³⁸ They argued that in the light of the growth of ‘Islamist extremist terrorism’ the Court should re-examine the relationship between protection from ill-treatment and ‘national security’ interests. In effect, they argued that, through introducing a ‘balancing’ test, national security could justify exposing persons to real and imminent risk of torture if those individuals were deemed by the government to represent a risk. Numerous international NGOs intervened, based on the absolute nature of the *non-refoulement* rule (the ban on forcible return), and the standard for assessing risk.³⁹

36 ECtHR, *Saadi v. Italy*, Appl. No. 37201/06, Judgment of 28 February 2008.

37 ECtHR, *Ramzy v. the Netherlands*, Appl. No. 25424/05, pending, available at www.echr.coe.int/eng/press/2005/oct/applicationlodgedramzyvtheNetherlands.htm (last visited 16 October 2008).

38 The intervention was presented by the governments of Lithuania, Latvia, Portugal and the United Kingdom. See the ‘refining’ and limiting of the UK government position to cruel and inhuman treatment in the Parliamentary Joint Committee on Human Rights Thirty Second report, Session 2005-6, available at www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/27808.htm (last visited 15 October 2008).

39 For the intervention in the *Ramzy* case submitted on behalf of several international NGOs, see www.interights.org.

When the *Saadi* case then came before the court addressing similar issues – Mr Saadi claimed that he would be at risk of torture and ill-treatment in Tunisia, where mistreatment of alleged terrorists is well documented – the UK government again seized its opportunity to argue in favour of the ‘balancing’ test on the same terms as it had in *Ramzy*. The *Saadi* case leapfrogged the *Ramzy* case, which is still pending at the time of writing, and the Grand Chamber of the Court handed down judgment on 28 February 2008.

In a unanimous judgment the European Court remained resolute in upholding the approach established by its earlier decisions and followed by other international courts and bodies. The judgment reaffirmed that the prohibition on transfer of individuals to countries where they face a real risk of torture or other ill-treatment is part of the absolute prohibition on torture. The Court was emphatic in recognizing the difficulties states face in countering terrorism, but categorical in its rebuke of the notion that there are exceptions to the absolute nature of the prohibition of torture or ill-treatment or any room for balancing:

States face immense difficulties in modern times in protecting their communities from terrorist violence. It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3 [of the European Convention, prohibiting torture and other ill-treatment].

Although they were unsuccessful, the very fact that governments made these interventions, despite the odds of success being seriously stacked against them (in the light of clear and on-point jurisprudence from the Court itself,⁴⁰ quite apart from any of the principles at stake), is telling. It arguably reveals a shift in the approach to rights protection by certain states at least, and a questioning and undermining of even the most sacrosanct human rights protections. The resolute rejection of this approach by the European Court is an example of the important role of the courts in reaffirming fundamental principles.

A & Ors: admissibility of torture evidence

A second issue related to safeguards against torture, which has arisen in several states in the context of the fight against international terrorism in recent years, is the reliance on, and admissibility of, evidence obtained through torture and ill-treatment.

Again in the United Kingdom, the issue played out in the case of *A and Others v. Secretary of State for the Home Department (No. 2)*.⁴¹ The case concerned the admissibility, before the UK Special Immigration Appeals Commission, of

40 See, most notably, ECtHR, *Chahal v. United Kingdom*, ECtHR Reports 1996-V, no. 22, Judgment of 15 November 1996.

41 UK House of Lords, *A v. Secretary of State for the Home Department (SSHD) (No. 2)* [2005] UKHL 71, Judgment of 9 December 2005.

evidence that may have been obtained through torture by foreign states. The UK government advanced the argument – anomalous perhaps, yet accepted by the Court of Appeal – that evidence obtained through torture at the hand of a UK official is inadmissible, whereas evidence obtained through torture at the hand of foreign officials, for whom the United Kingdom is not responsible, is admissible.

In its judgment of 8 December 2005, the House of Lords rejected this rationale, finding that torture is torture no matter who does it, and that such evidence can never be admitted in legal proceedings. It also noted the link between the safeguards against torture and the incidence of torture, finding that the state ‘cannot condemn torture while making use of the mute confession obtained through torture, because the effect is to encourage torture’.⁴²

The judgment is a strong reassertion of principle, seeing the admissibility of evidence not only as linked to fair trial issues but also as an inherent aspect of the positive obligations around the torture prohibition itself. It is worth flagging, however, that the judgment is somewhat more limited in other respects. First, while clear on the principle of inadmissibility, it is less clear – and the court was more cautious – on how the rule would operate in practice. The court found that evidence is inadmissible where the tribunal had ‘established’ on balance of probabilities that it had been obtained under torture. If that is not ‘established’ – as presumably happens not infrequently in view of the opacity and uncertainty surrounding intelligence – but there remained a real risk that such was the case, the court found that evidence could be admitted but afforded less weight.⁴³

Second, the court focused on the issue of admissibility in ‘proceedings’, but indicated what may be an overly sweeping inclination to accept the lawfulness of the use of torture evidence for other purposes, such as arrest, search or detention. The difficult and sensitive issue of the extent of obligations, if any, of states not to rely on, solicit or trade in evidence obtained through torture outside the courtroom remains unclear.

Issue 4: Extraordinary rendition

Among the most innovative and the most shocking of the many violations to which the war on terror has given rise is the practice of ‘extraordinary rendition’. Reliable reports are increasing of the kidnapping and secret transfer of individuals without any process of law to various locations and/or to third states for what has been referred to as detention or torture by proxy.⁴⁴ This is straightforwardly a violation

42 *Ibid.*, p. 30 citing McNally JA.

43 In contrast to the majority finding, compare the test proposed by Lord Bingham, according to which evidence should be regarded as inadmissible if the executive had been unable to show that it was not obtained by torture. *Ibid.*, paras. 54–56.

44 See, e.g., Council of Europe Committee on Legal Affairs and Human Rights, Rapporteur Mr Dick Marty, Alleged secret detentions in Council of Europe member states, Information Memorandum II, AS/Jur (2006) 03 rev, 22 January 2006, available at http://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf (last visited 15 October 2008).

of many human rights, on account not only of its eventual purpose – torture, arbitrary detention or other serious violation – but also due to the procedural arbitrariness that attends it and, most insidiously, the effect of removing the person from the protection of law and withholding information from that person and his or her family. The latter characteristic has led to this practice being described as enforced disappearance.⁴⁵

As is perhaps obvious, rendition litigation poses particular challenges for litigators, which can euphemistically be grouped as ‘access’ issues of various types: access to victims, to evidence and to courts. First and most obviously, the cases often concern disappeared persons. Despite the excellent monitoring work done by NGOs, journalists and investigators, for the most part we do not know who or where the victims are, at least not at the point when they most need protection. While jurisdictions vary, the ability to bring ‘public interest’ cases without identified victims is extremely limited. Access to information or evidence is inevitably extremely challenging, given the clandestine nature of operations, but made even harder by what has been described as a systematic cover-up to preclude such access.⁴⁶ The third group of access issues relates to effective access to courts. In the rare situation where a person emerges and is willing to put his or her head above the parapet again despite past abuses, the state secrets’ doctrine is liable to have the case thrown out.

This was the experience of Khalid el-Masri, whose case provides graphic insight into both the practice of extraordinary rendition and the extent of the secrecy and challenges to litigation in this area.⁴⁷ El-Masri is a German citizen who was arrested by Macedonian border officials in December 2003, apparently because he has the same name as the alleged mentor of the al-Qaeda Hamburg cell and on suspicion that his passport was a forgery. After three weeks he was handed over to the US Central Intelligence Agency (CIA) and flown to Baghdad and then to ‘the salt pit’, a covert CIA interrogation centre in Afghanistan. He was held for 14 months, allegedly mistreated and prevented from communicating with anyone outside the detention facility, including his family and the German government. Along the way it became apparent to his captors that his passport was genuine and that he had nothing to do with the other el-Masri, so he was finally set free in May 2004. Instead of the grovelling apology and help in re-establishing his life one might expect in such circumstances, he was released at night on a desolate road in Albania.

When questioned in Germany over the el-Masri affair, the US Defence Secretary Condoleezza Rice stated, ‘I believe this will be handled in the proper

45 See, e.g., Elaine Sciolino, ‘Spanish judge tells US Guantánamo is an insult’, *International Herald Tribune*, 4 June 2006, available at www.ihf.com/articles/2006/06/04/news/gitmo.php (last visited 16 October 2008).

46 See Committee on Legal Affairs and Human Rights, Information Memorandum II, above note 43.

47 Information on the case is available at www.aclu.org/safefree/torture/29868res20070524.html (last visited 15 October 2008).

courts here in Germany and if necessary in American courts as well'. In fact, when a lawsuit was brought before a US court, the government invoked the so-called 'state secrets' privilege, arguing that the 'entire aim of the case is to establish state secrets'. The case was dismissed in its entirety by the US District Court, upheld by the US Court of Appeals. In October 2007, the Supreme Court decided, without giving reasons, to refuse to review the case.⁴⁸ This is not a case in which courts settled on (or even considered) excluding particular documents, evidence or sources, holding parts of the hearing in camera, or taking other special measures. It is simply the end of the line for justice in US courts for el-Masri. The wholesale vacation of proceedings alleging government misconduct, on the basis of the government's own assessment that those proceedings might per se damage national security, is anathema to justice and a striking illustration of the extent of secrecy in this area.

The *el-Masri* case and others like it⁴⁹ have been taken up elsewhere, but attempts to secure justice continue to falter. Arrest warrants were issued by a German court in January 2007. But the German Justice Minister subsequently announced that, as the United States had made it clear that it would not cooperate, the German authorities would therefore not be pursuing a formal request for the extradition of the 13 CIA agents involved in el-Masri's abduction.⁵⁰ In a parallel development, Italian courts too have issued arrest warrants in respect of another CIA rendition, Abu Omar, who was kidnapped by the CIA while living in Italy, taken to Egypt and allegedly tortured there. Interestingly, however, the Italian government has also raised state secrets concerns before the Constitutional Court, and criminal proceedings have been suspended pending the decision.⁵¹

One of the striking characteristics of rendition is its transnational nature, involving multiple state agents who together share direct and indirect responsibility. It is therefore important that, through litigation and other measures, attempts are underway to hold a range of states to account separately for assisting rendition or facilitating or failing to prevent it on their own territory.⁵²

48 In the US Supreme Court, *El-Masri v. United States*, Case No. 06-1613, petition for a writ of certiorari denied 9 October 2007. In the US District Court for the Eastern District of Virginia, *El-Masri v. Tenet*, Case 1:05-cv-01417-TSE-TRJ, order granting US motion to dismiss granted May 12, 2006. For details of the petition lodged before the Inter-American Commission on Human Rights, see www.aclu.org/pdfs/safefree/elmasri_iachr_20080409.pdf (last visited 15 October 2008).

49 See also, e.g., the case of Maher Arar, a Syrian-born Canadian detained in the United States and transferred to torture in Syria. 'Torture and accountability', *International Herald Tribune*, 19 November 2007.

50 See, e.g., Jeannie Shawl, 'US rejects German bid for extraction of CIA agents in el-Masri rendition', Associated Press via Jurist Legal News & Research, 22 September 2007, available at <http://jurist.law.pitt.edu/paperchase/2007/09/us-rejects-germany-bid-for-extradition.php> (last visited 16 October 2008).

51 'Italy indicts 31 linked to CIA rendition case', *International Herald Tribune*, 15 February 2007, available at www.iht.com/articles/ap/2007/02/16/europe/EU-GEN-Italy-CIA-Kidnap.php (last visited 16 October 2008).

52 As regards the *el-Masri* case specifically, calls for an effective investigation into the involvement of Macedonian officials have been reiterated. See, e.g., ICJ E-Bulletin on Counterterrorism & Human Rights, 'FYR Macedonia: UN experts call for Macedonian investigation in El-Masri case', No. 24, June 2008, available at www.icj.org/IMG/E-Bulletin_June08.pdf (last visited 15 October 2008): 'In April and

One such example is the case of *Boumediene and Ors v. Bosnia* before the European Court of Human Rights. The case concerns Bosnians of Algerian descent held in Bosnia after 9/11 at the behest of the United States, eventually released by Bosnian courts for lack of evidence against them, and immediately then arrested by US authorities (apparently with some collusion from their Bosnian Counterparts) and transferred to Guantanamo Bay. In addition to the now famous proceedings in US courts,⁵³ this case has also gone before the ECtHR in a challenge against the Bosnian state for its part in the process.⁵⁴

One of the questions arising is the nature and content of a state’s ongoing obligations when it transfers or facilitates the transfer of an individual to a situation where there is a real risk of serious human rights violations. One of the issues that the Court itself has highlighted as a key consideration in the case is the extent to which Bosnia is obliged to make diplomatic representations on behalf of individuals to ensure their rights are not violated following transfer.⁵⁵

Rendition cases are also beginning to unfold in Africa.⁵⁶ Reports allege, for example, the involvement of Kenyan authorities, at US behest, in the rendition of Somali and Kenyan nationals to Somalia and, in some cases, to Guantánamo Bay. It will be important to see what measure of justice is afforded in fora outside the United States. Clearly, rendition litigation promises to be a growth area, as cases seek to play their role in prising open the facts and pursuing justice against a range of international players in this most challenging of areas.

May, the UN Committee against Torture and the Human Rights Committee expressed concerns about the investigations carried out by the Former Republic of Macedonia in the abduction and ill-treatment of Mr Khaled El-Masri when held by CIA agents in secret detention. The Committees advised the Macedonian government to undertake a new and thorough investigation and the Human Rights Committee recommended that it should consider awarding him compensation’. Human Rights Committee, Ninety-second session, Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant: Concluding Observations Of The Human Committee: The Former Yugoslav Republic Of Macedonia, 17 April 2008, available at www.icj.org/IMG/HRC_Macedonia.pdf (last visited 15 October 2008).

53 When these individuals took proceedings in US courts challenging the lawfulness of their transfer and detention, it was at first held that the Military Commission Act prevented them from raising any claim in a US court, until this was overturned by the Supreme Court’s June 2008 judgment.

54 Wilmer Hale, ‘Guantanamo claims before EU Court of Human Rights’, 14 March 2008, available at www.haledorr.com/about/news/newsDetail.aspx?news=1134 (last visited 15 October 2008). For the third-party intervention by INTERIGHTS and the ICJ, see www.interights.org. *Boumediene and Others v. Bosnia and Herzegovina*, Applications nos. 38703/06 et al, decided 18 November 2008. One of the questions arising was the nature and content of a state’s ongoing obligations following transfer of an individual to a situation where there is a real risk of serious human rights violations. However, the Court found the case manifestly ill-founded and inadmissible on the grounds that, on the facts, Bosnia and Herzegovina was taking all possible steps to the present date to protect the basic rights of the applicants.

55 See Applications 38703/06 et al, supra n.54, para 67.

56 See, e.g., Daniel Auma, ‘US rendition on trial in Africa’, Spero News, 25 September 2007, available at www.speroforum.com/site/article.asp?id=11196 (last visited 15 October 2008); see also Human Rights Watch, ‘Why Am I Still Here?: The Horn of Africa Renditions and the Fate of the Missing’, September 2008, available at <http://hrw.org/reports/2008/estafrica1008/> (last visited 15 October 2008). A case on rendition of Kenyan nationals, for instance, is at the time of writing, before Kenyan courts.

Issue 5: The ‘terrorism’ label and its implications for alleged terrorists and others associated with them

The ‘terrorism’ label has been applied liberally since 9/11, without clarity as to its scope (the term being undefined or ill-defined), often without due process, and with serious consequences for those thus branded or others associated with them.

Perhaps the most obvious manifestation of this phenomenon are the various terrorism ‘lists’ established at national, regional and (under the Security Council’s watchful eye) international level. While systems and safeguards vary, the problem with these lists is often the lack of transparency around the reasons for inclusion in them, and the lack of meaningful opportunity to challenge such inclusion. Little by little, litigation is seeking to call governments to account for decisions made in this respect, and to provide a degree of judicial oversight at least to temper an otherwise opaque and arbitrary practice.

Some success has been had by litigants before the European Court of Justice (ECJ). In 2006 the Court held that individuals associated with a banned organization had the right to reasons for their listing, to effective judicial protection and to be heard.⁵⁷ Although disputed by the respondent state, the ECJ confirmed that while the common EU position that led to the listing in the first place could not be reviewed by the Court, the decision to include a particular organization on the list could. This robust approach was recently maintained by the Grand Chamber of the ECJ in respect of listings authorized by the Security Council.⁵⁸ Similar issues are currently pending before the European Court of Human Rights, which might be expected to follow the human rights-friendly approach of the ECJ.

In 2008 a parallel case, challenging domestic listing procedures, made its way through UK courts. On 7 May, the UK Court of Appeal upheld a decision of the Proscribed Organisations Appeal Commission requiring the removal of an Iranian opposition group from its blacklist of terror organizations.⁵⁹ The case illustrates the willingness of the courts, assessing in detail the facts and evidence available, to challenge the Secretary of State’s determination that the organization was concerned in terrorism. The Court was satisfied that the organization was no longer engaged in violence, and it confirmed that proscription could not be justified on the basis that an organization had been engaged in violence and might at a future date reacquire the capacity and intent to so engage.

57 European Court of Justice, *Organisation des Modjahedines du peuple d’Iran v. Council of the European Union, United Kingdom of Great Britain and Northern Ireland*, Case T-228/02, Judgment of The Court of First Instance (Second Chamber), 12 December 2006.

58 Kadi and Yusef were unsuccessful in challenges at first instance: European Court of Justice, Case T-306/01 *Yusuf and Al Barakaat International Foundation v. Council and Commission*, [2005] ECR II-3533, 21 September 2005, para. 73 (*Yusuf*); and Case T-315/01, *Kadi v. Council and Commission*, [2005] ECR II-3649, 21 September 2005 (*Kadi*). However, the challenges were won on appeal: Cases C-402/05 P and C-415/05 P, Judgment of Grand Chamber on 3 September 2008, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-402/05> (last visited 15 October 2008). OMIC case distinguished them because they involved the direct imposition of Security Council resolutions.

59 England and Wales Court of Appeal, *Secretary of State for the Home Department v. Lord Alton of Liverpool and Others*, [2008] EWCA Civ 443, Judgment of 7 May 2008.

The terrorism label can have far-reaching consequences not only for the alleged terrorists themselves, but for others associated with them. One illustration is found in a case currently being litigated in the ECtHR on behalf of the family of the killed Chechen leader Aslan Maskhadov.⁶⁰ Laws in the Russian Federation that were applied in this case stipulate that if persons deemed to be terrorists are killed by the state in the course of counter-terrorist operations, their bodies will not be returned to their families. This draconian measure targets families who are deeply affected by being unable to duly observe a mourning period, pay their last respects and bury their family member in accordance with Islamic religious requirements, which according to their religious tradition may ultimately lead to the deceased being denied access to heaven. While there is no meaningful relationship between the prevention of terrorism and such a measure, it is justified by reference to the deterrence of terrorism. This case, which has been declared admissible by the ECtHR, provides an example of the blanket use of the ‘terrorist’ label to justify otherwise unacceptable special forms of treatment, and to punish those ‘associated’ with persons accused of ill-defined acts of terrorism.

A positive example of courts curbing the creeping effect of the notion of guilt by association arose in an Australian case of 2007 – *Haneef v. Minister for Immigration and Citizenship (Federal Court of Australia)*.⁶¹ The case concerned Mohamed Haneef, whose visa was revoked by Australian authorities on the grounds that he was the second cousin of one of the men who had crashed a car into Glasgow airport’s terminal building, had stayed in the same hostel and, on leaving the country, had left him his mobile phone.

In the Australian courts the authorities argued that any form of ‘association’ (family or other) with persons accused of this sort of criminal activity was enough to fail the ‘character test’ laid down in Australian immigration law. The judgment rejected this contention and provided a fitting rebuke to the spreading notion of guilt by association and the dangers of it. The judge questioned whether he might also fall within the category of person having associated with terrorists, given former professional association as a barrister. He held that, for the law to apply, the ‘association’ must itself be of a criminal rather than of a family or innocent nature.

I shall end this survey of cases by citing the observations of the government of Botswana in a case pending before the African Commission on Human and Peoples Rights:

We wish to recall here the bombings that occurred in London, Madrid and the 2001 events in NY and more recently Egypt. It is against this background that

60 ECtHR, *Kusama Yazedovna Maskhadova and Others v. Russia*, Application No. 18071/05, Decision as to Admissibility, 8 July 2008. INTERIGHTS represents the applicants, the family of deceased Chechen leader Aslan Maskhadov. The case has been declared admissible. INTERIGHTS, Maskhadov Press Release, 1 October 2007, available at www.interights.org/view-document/index.htm?id=209 (last visited 15 October 2008).

61 Federal Court of Australia, *Haneef v. Minister for Immigration and Citizenship*, [2007] FCA 1273, 21 August 2007.

Botswana reminds the Commission that the declaration of Mr Good as a prohibited immigrant was made ‘in the interests of peace, stability and national security’ ... We have given examples of traumatic results that occur once there is a lapse in dealing with national security issues ... If the President visualizes a threat to national security, it is wrong for him to wait for the threat to materialize into a national disaster. It is right to state that decisions whether something is or is not in the interest of national security are not a matter for any organ other than the executive.⁶²

One might assume that this case concerned terrorism. In fact it concerns a professor deported for criticizing presidential succession in Botswana. The facts could not be much further removed from the terrorism context. Yet this case exemplifies the extent to which national security, the global terrorist threat and the exceptionalism of the war on terror are being relied upon to set aside human rights in contexts that have nothing conceivably to do with international terrorism.

Concluding observations

The human rights picture

I said at the beginning of this article that litigation can serve to highlight key human rights issues. The case developments described above illustrate, in my view, some of these key characteristics of the war on terror as it impacts on human rights.

An overarching point is that, leaving aside military aspirations, the main policy aim being pursued after 9/11 was intelligence gathering. It was not and is not about justice in the legal sense, certainly not about criminal responsibility. While there may be many reasons contributing to this, it is suggested that this is consistent with and borne out by the dearth of criminal prosecutions of high-level al-Qaeda terrorist suspects. There have been more Supreme Court judgments on whether Guantánamo detainees have rights than there have been trials by military commission or otherwise. The first military commission judgment handed down, on 6 August 2008, convicts Osama Bin Laden’s driver for providing support for known terrorists and sentences him to 66 months’ imprisonment, of which he has already served 61.⁶³ Seven years on, experience does not point to a massive

62 The government cites the decision of the Supreme Court of Botswana, the highest judicial authority in Botswana, in *Kenneth Good v. Attorney General*, Civil Appeal No. 28/2005. An application to the African Commission on Human and Peoples’ Rights was submitted by Interights on 10 October 2007 and was pending at the time of writing. The brief for the applicant is obtainable from www.interights.org.

63 ‘Bin Laden Driver Sentenced to a Short Term’, William Glaberson, *New York Times*, 8 August 2008.

global criminal justice campaign resulting in the investigation and prosecution of high-level suspects, although undoubtedly many have been either killed or detained and interrogated without charge.

Second, the cases illustrate that the means to achieve that intelligence has involved violations of the most sacred human rights norms, notably torture and arbitrary detention.

Third, to the extent that states may not themselves have engaged in torture, there has been widespread practice of playing fast and loose with safeguards *against* torture that are part of the prohibition thereof and essential to give it meaningful effect. The decision by some states to challenge the basic rules on *non-refoulement* before the European Court of Human Rights illustrates this point.

Fourth, unprincipled distinctions have emerged recurrently. This may be between nationals and non-nationals, as illustrated by widespread justification of arbitrary detention of non-nationals. It may be between standards that officials are expected to meet at home, and those considered applicable abroad, as highlighted by the approach of certain states, and the restrictive judgment referred to on the extra-territoriality issue. Or it may be evident in a ‘hands off’ approach to torture whereby distinctions are drawn between what states themselves do, and what they facilitate or encourage at the hand of others, as noted in the case concerning torture evidence, for example.

Fifth, and most insidious perhaps, has been the move from illegality to extra-legality – the practice of removing individuals from the protection of the law altogether, epitomized by rendition and disappearance that have been the subject of various litigation initiatives.

Finally, there is the ‘creeping reach’ of measures and approaches that are originally justified exceptionally in the context of international terrorism and national security. The ‘terrorism’ and ‘national security’ labels have been relied upon to erode standards beyond those exceptional circumstances, to affect persons loosely associated with persons loosely implicated in loosely defined acts of terrorism. The result is that genuine exigencies of the global fight against international terrorism are being brought to bear as a pretext for violations far beyond the terrorism context.

The role of the courts and the impact of human rights litigation

It is clear that in recent years, across diverse systems, there has been a burgeoning of human rights litigation. That has reinforced the critical role for the courts in human rights protection. Caution is due in trying to draw conclusions from such wide-ranging practice, addressing different issues in diverse systems. But I will offer a few tentative observations on how we might begin to think about the practice of human rights litigation in this field to date and its potential impact.

In many cases the judiciary has shown its reluctance to make determinations that may impact on security, refusing, for example, to question executive assessments of the existence of an emergency. But when particular practices

have come under scrutiny, the courts in diverse systems have often and increasingly proved themselves willing – in some cases promptly, in other cases after painstaking process and only as a matter of genuine last resort – to criticize the legitimacy, necessity or proportionality of particular measures.

While experience has been both positive and negative, I shall suggest the following ways in which litigation may have had, or in some cases may yet have, a positive effect.

First, simply taking a human rights violation to court frames the issue as a matter of law, not only of politics. As such it reasserts the principle of legality and the rule of law in the highly politicized discourse around terrorism and security. Critically, these cases indicate, to varying degrees, the existence of a check on executive action. This is seen in reminders that ‘a state of war is not a blank check for the President’ or by the willingness of courts in cases such as *Belmarsh* or *Haneef* to subject to close scrutiny the determination of what was necessary for national security. As a rebuke to the executive when it has failed in its role as primary protector of rights, this can be critical in reasserting the democratic credentials of the system, which are often lost through the illegitimacy of the conduct impugned.

Judgments have often, to quite varying degrees, been conservative and characterized by judicial deference to political branches. One may ask whether the US Supreme Court could and should have decided whether detainees have the basic right to habeas corpus when the matter first came before it in 2004. At what price in terms of judicial efficiency in the administration of justice – and protection of individuals – came the virtue of judicial restraint? But so far as jurisprudence reflects and deliberates on the thorny issue of the role of courts in determining such matters, and on the relationship between political branches and the judiciary, it may ultimately contribute to and enrich our understanding of the separation of powers and the democratic judicial function.

Second, litigation can also serve as a catalyst to change law or practice. In some cases, such as the changes in law and policy following the *Belmarsh* judgment, the causal effect is fairly clear. In others, it is difficult to tell to what extent, if at all, the irritant effect of litigation contributed to shifts in practice, such as the return of UK nationals from Guantánamo following unsuccessful litigation seeking to obligate the state to intervene on their behalf.⁶⁴ The course of litigation often itself exposes particular policies and practices, and may lead states to clarify their own policies or articulation of them.⁶⁵

Judgments may themselves develop or clarify the law through jurisprudence or, as is often the case in the context of the war on terror, they may simply serve to reinforce established principles that have increasingly been cast in doubt,

64 *Abbasi* case, above note 2.

65 See, e.g., the *Al-Skeini* case, above note 26, in which the UK government shifted its position as regards the applicability of the ECHR to individuals detained by UK officials in Iraq and allegedly tortured in detention.

as in the *Saadi* judgment.⁶⁶ The challenge in many of the cases highlighted has been to hold ground rather than to advance the protection of human rights as such, in other words to win back and keep winning gains that were made years ago, that were thought secure but rendered vulnerable in the course of the war on terror.

Sometimes courts serve as democracy alerters whereby the interplay between judicial and political branches is such that a signal from the former can be a catalyst to a more proactive approach by the latter. Persuasive judicial messages can also be sent transnationally, as seen, for example, in the unusually robust judicial rebuke of the system of Guantánamo Bay detentions by the English Court of Appeals in the *Abbasi* case.⁶⁷

Cases can themselves play an important role in securing access to information and in prising open facts, sometimes in face of a wall of state secrecy. Litigation may have this as its goal – such as cases in the United Kingdom pursuing access to military files,⁶⁸ FOIA (Freedom of Information Act) litigation in the United States which has had a measure of success⁶⁹ and Canadian litigation where the government was compelled to produce information or evidence in relation to proceedings in another state⁷⁰ – or this may be a by-product of the process. This unearthing of information is particularly critical in areas such as rendition, characterized by a concerted cover-up. At a minimum litigation draws out government positions – as seen, for example, in the shift in positions of the UK government in the course of the *al Skeini* case – as they engage as parties and clarify or adjust their positions in the course of litigation.

Litigation of the sort referred to also opens legal systems to the cross-fertilization of ideas from other systems as international and comparative perspectives are brought to bear, notably through *amicus* interventions. Guantánamo litigation in the United States has been perhaps the most massive piece of international human rights litigation ever, if judged at least by the unprecedented level and nature of interventions before the Supreme Court.⁷¹

Ultimately, the impact of litigation on human rights issues generally lies in its gradual contribution to social change. There has, for example, been a shift in

66 This works both ways and can also weaken or confuse the framework of rights protection, as is suggested may have been the outcome of the *Al-Skeini* case, for example.

67 *R (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs*, [2003] UKHRR 76, where the English Court of Appeal criticized the system of Guantanamo detentions in unusually strident terms.

68 John Aston, ‘Lawyers in Basra death case win access to files’, *Independent*, 4 October 2007.

69 See, e.g., US District Court for the Southern District of New York, *Associated Press v. United States Department of Defense*, 498 F. Supp. 2d 707 (SDNY, 2007), and US Court of Appeals, DC Circuit, *Center for National Security Studies v. Dep’t of Justice*, 331 F.3d 918 (DC Cir. 2003) (cert denied, 540 US 1104 (2004)).

70 Supreme Court of Canada, *Canada (Justice) v. Khadr*, 2008 SCC 28, 23 May 2008. On 23 May 2008, the Canadian Supreme Court ruled that the government had violated Canada’s Constitution and its international human rights obligations by transmitting to US official information resulting from Canadian officials’ interviews of Omar Kadhr at the Guantánamo Bay detention centre. The Court took the unusual step of ordering Canadian officials to allow Mr Kadhr access to records of his interrogations with Canadian agents, for use in preparing his defence before the Guantánamo Military Commission.

71 *Amicus* interventions appeared from such diverse quarters as British Lords as well as Israeli military lawyers.

public opinion (national and international) on Guantánamo, and arguably litigation may have been an important contributor. What is undoubtedly true is that litigation has to be understood not in isolation but as one small piece of a much bigger and more complex puzzle.

Finally, and perhaps most importantly, real cases serve to tell the victims' stories. They provide often graphic illustrations of what euphemisms such as 'extraordinary rendition' and 'enhanced interrogation techniques' mean to human beings like you or me. Judgments validate those stories and experiences. One of the essential characteristics of the 'war on terror' has been the attempt to put certain people beyond the reach of the law. Litigation can be a tool, as one English judge put it, not for transferring power from the executive to the judiciary, but for transferring power from the executive to the individual.⁷² If any particular case can bring an individual back into the legal framework, and reassert the individual as a rights-bearer and human being, then perhaps that is impact enough.

72 Dame Mary Arden has stated that 'the decision in the A case should not be misinterpreted as a transfer of power from the executive to the judiciary. The position is that the judiciary now has the important task of reviewing executive action against the benchmark of human rights. Thus, the transfer of power is not to the judiciary but to the individual'. (2005) 121 LQR at pp. 623–4, in A. T. H. Smith, 'Balancing liberty and security? A legal analysis of United Kingdom anti-terrorist legislation', *European Journal on Criminal Policy and Research*, 13 (2007), pp. 73–83, DOI 10.1007/s10610-007-9035-6.

The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts

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Abstract

This article explores the relationship between international humanitarian and human rights law during non-international armed conflict. It seeks to answer two questions which are crucial in practice, but where the relationship between the two branches and the answers of humanitarian law alone are unclear. First, according to which branch of law may a member of an armed group be attacked and killed? Second, may a captured member of an armed force or group be detained similarly to a prisoner of war in

* I would like to thank my research assistant, Lindsey Cameron, for her thorough research and useful comments on many issues dealt with in this article.

international armed conflicts or as prescribed by human rights? Through application of the lex specialis principle, this article discusses possible answers to these questions.



Much has been written about the relationship between international humanitarian law (humanitarian law or IHL) and international human rights law (human rights or IHRL), their separate origins, and their convergence and mutual influence. Their fields of application, the rights protected and the respective implementation mechanisms have been compared. The International Court of Justice (ICJ) and various human rights bodies have explored the extent to which humanitarian law is the *lex specialis* compared with human rights. What has provoked less jurisprudence is that on some issues human rights constitute the *lex specialis*. The meaning of the *lex specialis* concept and how the *lex specialis* can be identified has been studied by the International Law Commission (ILC)¹ and scholars in general, as has specifically the relationship between the two branches.² A systematic analysis to determine which of the two branches constitutes the *lex specialis* on issues covered by both is still lacking, but can certainly not be the aim of this article.

In practice, the aforementioned theoretical questions do not matter for most problems actually affecting victims of armed conflicts. This is particularly true in international armed conflicts, for which humanitarian law treaties are best developed. First, the rules of both branches have the same addressees: states. Second, for many situations it is difficult to argue that human rights apply at all, because the victims cannot be considered as being in the territory or under the jurisdiction of the state attacking them. Third, with regard to many issues, one or other of the two branches simply contains no rules. There is nothing in humanitarian law about the freedom of the press in occupied territories, and human rights law says nothing about whether and how combatants have to distinguish themselves from the civilian population. Fourth, on most other issues the two branches lead to the same results, one or the other providing more details.

In non-international armed conflicts, too, both branches mostly lead to the same results. The treatment of persons detained or otherwise in the power of a state is prescribed in a very similar way. The judicial guarantees for persons undergoing trial are likewise very similar, but they are better developed in human rights. The jurisprudence of the European Court of Human Rights (ECtHR) – which never explicitly refers to humanitarian law – concerning deliberate or

1 Martti Koskenniemi, 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission', UN Doc A/CN.4/L.682, 13 April 2006; Report of the International Law Commission (ILC), Fifty-sixth session, UN Doc A/59/10, paras. 304 ff.

2 See Marco Sassòli, 'Le droit international humanitaire: Une *lex specialis* par rapport aux droits humains?' in Andreas Auer, Alexandre Flückiger, Michel Hottelier (eds.), *Les droits de l'homme et la constitution: Etudes en l'honneur du Professeur Giorgio Malinverni*, Schulthess, Geneva, 2007, pp. 375–95, with further references.

indiscriminate attacks against civilians in Chechnya and eastern Turkey shows that even on such a typical humanitarian law subject as precautionary measures, which have to be taken for the benefit of the civilian population when attacking military objectives, human rights can lead to the same result as humanitarian law.³

However, on two questions which are crucial in practice, not only is the relationship between the two branches unclear but also the answer of humanitarian law alone. First, may a member of an armed group, as according to humanitarian law applicable to international armed conflict, be attacked (and therefore be killed) as long as he or she does not surrender or is not otherwise *hors de combat*, or is this, as in human rights, admissible only exceptionally and when an arrest is not feasible? Second, may a captured member of an armed force or group be detained similarly to a prisoner of war in international armed conflicts, until the end of active hostilities, and without any individual decision, or must the captured person, as prescribed by human rights, have an opportunity to challenge his or her detention before a judge?

These two questions have gained prominence in recent years in relation to some components of the ‘war on terror’, which have been classified by the US Supreme Court as non-international armed conflict.⁴ Since 11 September 2001 the answer of the US administration has been that it may kill (e.g. in Yemen) and detain (e.g. in Guantánamo) ‘unlawful enemy combatants’ according to the same standards as the humanitarian law of international armed conflict prescribes for combatants (but without their benefiting from the protection offered to ‘lawful’ combatants). Critics object that most of these persons may be killed or detained only in accordance with the much more restrictive human rights rules. We shall try to provide answers independently of the particular nature of the ‘war on terror’, which would add two problems already discussed sufficiently elsewhere: the extraterritorial application of human rights; and whether all, some or any components of the ‘war on terror’ are armed conflicts at all and, if so, whether they are international in character or not.

While we shall deal with these questions in terms of traditional non-international armed conflicts between a government and rebel forces, we think that our answers constitute a starting point for replies to the same questions in ‘transnational armed conflicts’. The answers are made more difficult by several factors that sometimes point in different directions.

First, the treaty rules of the humanitarian law of non-international armed conflicts are more rudimentary than those applicable to international armed conflicts. Under the *lex specialis* principle, this would normally allow greater scope for human rights. In the last twenty years, however, the jurisprudence of international criminal tribunals, the influence of human rights and even some treaty rules adopted by states have instead brought the law of non-international armed

3 See Marco Sassòli, ‘La Cour européenne des droits de l’homme et les conflits armés’, in Stephan Breitenmoser et al. (eds.), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber*, Dike, Zurich, 2007, pp. 724–5.

4 United States Supreme Court, *Hamdan v. Rumsfeld* (29 June 2006) 548 U.S. 557, 126 S. Ct. 2749.

conflicts closer to the law of international armed conflicts, and some even suggest eliminating the difference altogether. In the many fields where the treaty rules still differ, the convergence has been rationalized by the claim that under customary international law the differences between the two categories of conflicts have gradually disappeared. This development reached its provisional peak with the publication of the ICRC study *Customary International Humanitarian Law* (ICRC Study) which claims, after ten years of research on ‘state practice’ (in the form of official declarations rather than actual behaviour), that 136 (and arguably even 141) of 161 rules of customary humanitarian law, many of which parallel rules of Protocol I applicable as treaty law to international armed conflicts, apply equally to non-international armed conflicts.⁵ Our discussion is further complicated by the fact that some of the practice upon which those customary rules are based is that of human rights bodies applying human rights law.

Second, even if the *lex specialis* principle were to provide clear answers for cases in which the two branches of law respond to the same question with different rules (and it does not), it could only operate if the answer provided by each of the branches were clear. We shall show that, at least in humanitarian law, such clarity is not found in response to the two questions under discussion here. As for human rights, the answers are frequently based on general treaties without universal ratification or on regional treaties – while the exact substance of customary human rights is at least as controversial as that of customary humanitarian law. Often those answers are also based on the practice of bodies which cannot take binding decisions and sometimes on soft-law instruments whose binding character is controversial. In addition, human rights limitations are often very flexible, *inter alia* because of vague limitation clauses which allow them to take the specific nature of each case into account. As there are only very few cases in which human rights mechanisms have resolved our questions in actual non-international armed conflicts, we must often base our answers on precedents arising outside armed conflicts, without any certainty that the relevant mechanism would have reached a similar decision if the case had arisen in an armed conflict.

Third, another factor in non-international armed conflicts which renders our discussion particularly complex (and is very neglected in scholarly writings⁶ and even in the ICRC Study) is that the humanitarian law of non-international armed conflict is, as Article 3 common to the Geneva Conventions points out, equally binding for ‘each party to the conflict’ – that is, for the non-state armed group just as much as the government side.⁷ This raises the question whether

5 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005.

6 Laura M. Olson, ‘Practical challenges of implementing the complementarity between international humanitarian and human rights law – demonstrated by the procedural regulation of internment in non-international armed conflict’, *Case Western International Law Journal*, Vol. 40 (2009) (forthcoming, manuscript on file with authors).

7 Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, pp. 9–38, with further references.

human rights are equally addressed to armed groups or whether, by virtue of the operation of the *lex specialis* principle, the answer to our questions is not the same for the government and for its opponent.

Fourth, while state practice concerning our two questions in international armed conflicts is fairly uniform (though sometimes blurred by controversies about how a certain conflict should be classified), it is clearly contradictory in non-international armed conflicts. In confrontations with rebel groups, some states let human rights prevail, some apply by analogy the rules of humanitarian law governing international armed conflicts and some a mix of the two. As for the international supervisory mechanisms, their solutions also differ and it is not always clear whether their answer is based on an appreciation of the law in its entirety or limited, due to the subject matter of their jurisdiction, to the application of only one of the two branches under discussion here.

The *lex specialis* principle and its meaning

In this article it is assumed that human rights apply in armed conflicts. Some states disagree, but they have never specifically done so with regard to non-international armed conflicts on their own territory. As for humanitarian law, it is designed specifically to regulate armed conflicts.

The problems arising from this simultaneous applicability of the said two branches of law must be solved by reference to the principle '*lex specialis derogat legi generali*'.⁸ This principle seeks to establish, through an objective standard corresponding to the regulated subject matter, a preferential order for two rules that apply to the same problem but regulate it differently. The reasons for preferring the more special rule⁹ are that it is closer to the particular subject matter and takes better account of the uniqueness of the context. It also better represents states' intentions on how to regulate the given problem. Theoretically, a situation should be regulated by applying the most just rule, but in order to avoid evaluations that are too subjective, it is preferable to refer to a more objective standard that still reflects justice.¹⁰ The principle does not indicate an inherent quality in one branch of law, such as humanitarian law, or of one of its rules. Rather, it

8 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 106; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment of 19 December 2005, paras. 216–220.

9 Koskenniemi, above note 1, para. 60; Report of the ILC, above note 1, para. 305; Joost Pauwelyn, *Conflict of Norms in Public International Law: How the WTO Law Relates to Other Rules of International Law*, Cambridge University Press, Cambridge, 2003, p. 387.

10 Norberto Bobbio, 'Des critères pour résoudre les antinomies', in Chaïm Perelman (ed.), *Les antinomies en droit: Etudes*, Bruylant, Brussels, 1965, pp. 237–41.

determines which rule prevails over another in a particular situation.¹¹ Each case must be analysed individually.¹²

Several factors must be weighed to determine which rule, in relation to a certain problem, is special. When the legal consequences of two norms regulating the same situation are mutually exclusive, speciality in the sense of logic implies that the norm that applies to certain facts must give way to the norm that applies to those same facts *as well as* to an additional fact present in that situation. Between two applicable rules, the one which has the larger ‘common contact surface area’¹³ with the situation applies. The norm with the scope of application that enters completely into that of the other norm must prevail, otherwise it would never apply.¹⁴ It is the norm with the more precise or narrower material and/or personal scope of application that prevails.¹⁵ Precision requires that the norm explicitly addressing a problem prevails over the one that addresses it implicitly, the one providing the advantage of detail prevails over the other’s generality,¹⁶ and the more restrictive norm over the one covering the entire problem but in a less exacting manner.¹⁷

A less formal – and also less objective – factor for determining which of two rules applies is the conformity of the solution to the systemic objectives of the law.¹⁸ To characterize this solution as ‘*lex specialis*’ is perhaps a misuse of language. The systemic order of international law is a normative postulate founded on value judgements.¹⁹ Some consider that in reality the decision-maker first determines which rule is more just and then characterizes it as *lex specialis*.²⁰ In particular, when formal standards do not indicate a clear result, the teleological criterion must weigh in, even though it allows for personal preferences.²¹

11 Koskeniemi, above note 1, para. 112; Heike Krieger, ‘A conflict of norms: the relationship between humanitarian law and human rights law in the ICRC Customary Law Study’, *Journal of Conflict & Security Law*, Vol. 11 (Summer 2006), pp. 269, 271; Philip Alston et al., ‘The competence of the UN Human Rights Council and its special procedures in relation to armed conflicts: extrajudicial executions in the “war on terror”’, *European Journal of International Law*, Vol. 19 (2008), p. 192; Report of the ILC, above note 1, para. 304.

12 Anja Lindroos, ‘Addressing norm conflicts in a fragmented system: the doctrine of *lex specialis*’, *Nordic Journal of International Law*, Vol. 74 (1) (2005), p. 42.

13 This term was first used by Mary Ellen Walker, LL.M. student at the Geneva Academy of International Humanitarian Law and Human Rights in Marco Sassòli’s 2008 international humanitarian law course.

14 Karl Larenz, *Methodenlehre der Rechtswissenschaft*, 6th edn, Springer Verlag, Berlin, 1991, pp. 267–8.

15 Bobbio, above note 10, p. 244.

16 See for examples Seyed Ali Sadat-Akha, *Methods of Resolving Conflicts between Treaties*, Nijhoff, Leyden, 2003, p. 124.

17 See, e.g., the European Court of Human Rights concerning the relationship between Articles 13 and 5(4) of the European Convention on Human Rights 1950 (hereinafter ECHR), ECtHR, *Brannigan and McBride v. UK*, Judgment, 26 May 1993, ECtHR, Series A, No. 258, p. 57, para. 76.

18 Koskeniemi, above note 1, para. 107.

19 Krieger, above note 11, p. 280.

20 Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. 1, Stevens, London, 1969, p. 474; Bruno Simma and Dirk Pulkovski, ‘Of planets and the universe: self-contained regimes in international law’, *European Journal of International Law*, Vol. 17 (2006), p. 490.

21 Bobbio, above note 10, pp. 240–1. See also Wilfred Jenks, ‘The conflict of law-making treaties’, *British Yearbook of International Law*, Vol. 30 (1953), p. 450.

In our opinion, the more the formal standard points to a clear conclusion in relation to a certain problem the less necessary it becomes to assess the systemic objective. The inverse is also true – the more clearly the objective can be seen, the easier it is to distance oneself from the formal standard.

Once the *lex specialis* is determined, the *lex generalis* still remains present in the background. It must be taken into account when interpreting the *lex specialis*;²² an interpretation of the *lex specialis* that creates a conflict with the *lex generalis* must be avoided as far as possible and an attempt made instead to harmonize the two norms.²³

According to doctrine, the principle appears to refer implicitly to the antinomies between conventional – that is, treaty-based – rules. Whether the principle also applies to the relationship between two customary rules is less clear. In a traditional understanding of customary law this is theoretically not the case. The customary rule applicable to a certain problem derives from the practice and *opinio juris* of states in relation to that problem. In relation to the same problem, there cannot be a customary ‘human right’ and a different customary ‘humanitarian rule’. The focus is always placed on the practice and the *opinio juris* manifested in relation to problems as similar as possible to the one to be resolved. This appears to be the approach adopted by the ICRC, which refers in its Study to a vast array of practice in human rights, both within and outside armed conflicts.²⁴ In practice, however, when looking for a customary rule one generally consults a text, be it a treaty or other instrument codifying customary law, a text that instigated the development of a customary rule²⁵ or even a doctrinal text. It may then be found that one specific problem is covered by two contradictory texts, both deduced from state practice. The choice between these two texts is, in our opinion, governed by the same principles as the choice between two treaty-based rules. If the state practice clarifying which of the two rules prevails in the given situation is not dense enough to be conclusive, the usual methods must be used to discover which of the two rules, derived from the practice analysed from different perspectives, constitutes the *lex specialis*.

When may an enemy fighter be killed?

The traditional answer of the humanitarian law of international armed conflicts

In international armed conflicts, members of armed forces belonging to a party to the conflict are qualified as ‘combatants’. Combatants may be attacked at any

22 The *lex generalis* consists of other rules of international law to be taken into account under Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

23 See Koskeniemi, above note 1, paras. 31, 37; Report of the ILC, above note 1, paras. 308, 311.

24 Henckaerts and Doswald-Beck, above note 5, Vol. I, pp. 299–383.

25 Marco Sassöli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht – mit besonderer Betrachtung der Regeln zum Schutze der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten*, Helbing & Lichtenhahn, Basel, 1990.

time until they surrender or are otherwise *hors de combat*, and not only while actually threatening the enemy. Combatants are part of the military potential of the enemy and it is therefore always lawful to attack them for the purpose of weakening that potential. The traditional understanding is that no rule restricts the use of force against combatants only to those circumstances in which they cannot be captured. Within humanitarian law this view has been challenged, citing both the principle of military necessity as a restriction on all violence²⁶ and the prohibition of treacherous killings.²⁷ However, neither of these views has been translated into actual battlefield instructions, even less into actual battlefield behaviour.²⁸

As for the proportionality requirement, it applies to attacks directed at legitimate targets, but only to protect civilians from their possible incidental effects.²⁹ Attacks against combatants are not subject to a proportionality evaluation of the harm inflicted on the combatant and the military advantage derived from the attack.

The unclear answer of the treaty rules of humanitarian law applicable to non-international armed conflicts

In contradistinction to international armed conflicts, it is not clear under the treaty law of non-international armed conflicts when an enemy fighter may be killed (we use the term ‘fighter’ in this article for a member of an armed group with a fighting function and for members of government armed forces). Neither Article 3 common to the Geneva Conventions nor their Protocol II refers to ‘combatants’, because states did not wish to confer the right to participate in hostilities and its corresponding combatant immunity on anyone in non-international armed conflicts. The relevant provisions prohibit ‘violence to life and person, in particular murder’ directed against ‘persons taking no active part in hostilities’, including those who have ceased to take part in hostilities.³⁰ Specifically addressing the conduct of hostilities, Article 13 of Protocol II prohibits attacks against civilians ‘unless and for such time as they take a direct part in hostilities’.³¹

26 Jean S. Pictet, *Development and Principles of International Humanitarian Law*, Nijhoff, Dordrecht, 1985, pp. 75–6.

27 See *Manual on Military Law*, Part III, *The Law of War on Land*, UK War Office, London, 1958, para. 115.

28 See the divergences of opinion in the ICRC expert consultations on the notion of direct participation in hostilities, DPH 2005 (note 31 below) at pp. 45–6; Louise Doswald-Beck, ‘The right to life in armed conflict: does international humanitarian law provide all the answers?’, *International Review of the Red Cross*, Vol. 88 (864) (2006), pp. 881–904, at p. 902; Vincent-Joël Proulx, ‘If the hat fits, wear it, if the turban fits, run for your life: reflections on the indefinite detention and targeted killing of suspected terrorists’, *Hastings Law Journal*, Vol. 56 (2005), pp. 801–900, at pp. 882–3.

29 Protocol Additional to the Geneva Conventions (Protocol I), Article 51(5)(b).

30 See Article 3 common to the Geneva Conventions I–IV; and the Protocol II, Article 4.

31 The ICRC, in consultation with experts, was recently engaged in a process of researching, examining and clarifying the notion of ‘direct participation in hostilities’ under IHL. This process has not yet shown definitive results, but it has clearly demonstrated deep divisions of opinion on the question of when enemy fighters may be killed in a non-international armed conflict. See reports of the 2003 meeting (hereinafter DPH 2003 Report), the 2004 meeting (DPH 2004 Report) and the 2005 meeting (DPH 2005 Report), available at www.icrc.org/web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205?

It may be deduced from these rules and from the absence of any mention of ‘combatants’ that in a non-international armed conflict everyone is a civilian, and that no one may be attacked unless he or she directly participates in hostilities. However, the ICRC *Commentary* on Protocol II states that ‘[t]hose belonging to armed forces or armed groups may be attacked at any time.’³² Otherwise it would, first of all, indeed be astonishing that Article 13 uses the term ‘civilian’ instead of a broader term such as ‘person’.³³ Second, if everyone is a civilian, the fundamental principle of distinction becomes meaningless and impossible to apply.³⁴ Third, Common Article 3 confers its protection on ‘[p]ersons taking no active part in hostilities, including members of armed forces who have laid down their arms and those [otherwise] placed *hors de combat*’. The latter phrase suggests that the mere fact of no longer taking active part in hostilities is not enough per se for such members of armed forces³⁵ to be immune from attack: they must take additional steps and actively disengage. Fourth, on a more practical level, to prohibit attacks by government forces on clearly identified fighters unless engaged by those fighters is militarily unrealistic, as it would oblige the government forces to act purely reactively while facilitating hit-and-run operations by the rebel group. The objection that such rebels may be arrested anyway (and their resistance, if any, to arrest would be direct participation in hostilities) is convincing only if the rebels do not control territory.

There are two ways to conceptualize the conclusion that fighters may be attacked at any time until they disengage from the armed group. First, ‘direct participation in hostilities’ can be understood as encompassing the mere fact of remaining a member of the group³⁶ or of retaining a fighting function.³⁷ Second, fighters can be considered not to be ‘civilians’ (who are entitled to protection against attacks unless and for such time as they directly participate in hostilities).³⁸ However, both interpretations raise difficult questions in practice. How are government forces to determine membership of an armed group so long as the individual in question commits no hostile acts? How can membership of the armed group be distinguished from simple affiliation with a party to conflict for

opendocument (last visited 21 May 2008). On the basis of those discussions, the ICRC is currently preparing a reference text, ‘Interpretative guidance on the notion of direct participation in hostilities’.

32 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 4789.

33 Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation, 1–2 September 2005, University Centre for International Humanitarian Law, available at www.adh-geneva.ch/events/expert-meetings.php (last visited 21 May 2008) (hereinafter UCIHL Report), p. 34.

34 DPH 2005 Report, above note 31, p. 64; David Kretzmer, ‘Targeted killing of suspected terrorists: extrajudicial executions or legitimate means of defence?’, *European Journal of International Law*, Vol. 16 (2) (2005), pp. 197–8.

35 Under Common Article 3, the term armed forces includes rebel armed groups (see Marco Sassòli, ‘Terrorism and war’, *Journal of International Criminal Justice*, Vol. 4 (2006), p. 977).

36 DPH 2005 Report, above note 31, pp. 48–9.

37 Israeli Supreme Court sitting as the High Court of Justice, *Public Committee against Torture in Israel v. Government of Israel et al.*, HCJ 769/02, 11 December 2005, para. 39 (hereinafter *Public Committee against Torture*).

38 DPH 2005 Report, above note 31, pp. 43–4.

which the group is fighting – in other words, membership in the political, educational or humanitarian wing of a rebel movement? One of the most convincing avenues envisaged is to allow attacks only against a person who either actually directly participates in hostilities or has a function within the armed groups to commit acts that constitute direct participation in the hostilities.³⁹

Customary humanitarian law provides no answer

According to the ICRC Study, in both international and non-international armed conflicts '[a]ttacks may only be directed against combatants',⁴⁰ while 'civilians are protected against attack unless and for such time as they take a direct part in hostilities'.⁴¹ 'Civilians are persons who are not members of the armed forces.'⁴² The commentary clarifies, however, that the term 'combatant' in non-international armed conflicts simply 'indicat[es] persons who do not enjoy the protection against attacks accorded to civilians'.⁴³ 'While State armed forces may be considered combatants ... practice is not clear as to the situation of members of armed opposition groups'.⁴⁴ Furthermore, the authors add, '[p]ractice is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians'.⁴⁵ If they are the latter, an imbalance between such groups and government armed forces could be avoided by considering them to take a direct part in hostilities continuously.⁴⁶ Customary law is therefore as ambiguous as the treaty provisions on the crucial question of whether fighters in non-international armed conflicts may be attacked in the same way as combatants in international armed conflicts.

Arguments for and against an analogous application of the rule applicable in international armed conflicts

As mentioned above, the general tendency is to bring the law of non-international armed conflicts closer to that of international armed conflicts; this also has the positive side effect that controversies on whether a given conflict is international or non-international, and on what law to apply in conflicts of a mixed nature, are rendered moot. Even those who remain sceptical as to whether state practice has truly eliminated the difference to the extent claimed in the ICRC Study suggest that questions not answered by the law of non-international armed conflicts must be dealt with by analogy to the law of international armed conflicts, except in cases where the very nature of non-international armed conflicts does not allow for such

39 *Ibid.*, p. 64; Kretzmer, above note 34, pp. 198–9, takes a similar line.

40 Henckaerts and Doswald-Beck, above note 5, Rule 1, p. 3.

41 *Ibid.*, Rule 6, p. 19.

42 *Ibid.*, Rule 5, p. 17.

43 *Ibid.*, p. 3.

44 *Ibid.*, p. 12.

45 *Ibid.*, p. 17.

46 *Ibid.*, p. 21.

an analogy (e.g. concerning combatant immunity from prosecution and the concept of occupied territories).⁴⁷ There is, moreover, no real difference between a non-international armed conflict such as the fighting between Sri Lankan government forces and the LTTE in northern Sri Lanka in 2008 and the international armed conflict between Eritrea and Ethiopia. To require soldiers in non-international (but not in international) conflicts to capture enemies whenever feasible rather than kill them is unrealistic on the battlefield. In addition, the decision when an enemy may be shot at must be taken in a split second by every soldier on the ground, and cannot be left to commanders and courts (as can the decision, discussed later, to intern a person). Clear instructions must exist. Whenever possible, the training of soldiers must be the same for both international and non-international armed conflicts in order to create reflexes that work in the stress of battle.

On the other hand, strong arguments question the appropriateness of applying the same rules as in international armed conflicts. Many non-international armed conflicts are fought against or between groups that are not well structured. It is much more difficult to determine who belongs to an armed group than who belongs to government armed forces. The positive humanitarian law of non-international armed conflicts does not even explicitly prescribe, as does the law of international armed conflicts, that fighters must distinguish themselves from the civilian population. Individuals join and quit armed groups in an informal way, whereas members of government armed forces are formally incorporated and formally dismissed. As armed groups are inevitably illegal, they will do their best not to be recognized as such and to conceal their militant nature. Claiming that fighters may be shot at on sight may therefore put many civilians in danger,⁴⁸ whether they are sympathizers of the group, members of the 'political wing', belong to the same ethnic group or simply happen to be in the wrong place at the wrong time. And while a clear distinction exists, in international armed conflicts, between the conduct of hostilities by combatants against combatants and law enforcement vis-à-vis civilians by the police, there is no equivalent clear distinction in non-international armed conflicts. Indeed, in a non-international armed conflict, insurgency always constitutes a crime under domestic law. Criminals should be dealt with by courts and may not be 'punished' by instant extrajudicial execution.

The arguments in favour of a different rule for non-international armed conflicts obviously apply mainly to armed groups and could therefore be seen as requiring a distinction between government forces and armed groups rather than between international and non-international armed conflicts. The problem is that to have the slightest chance of being respected, humanitarian law must be the same

47 Marco Sassòli and Antoine Bouvier, *How Does Law Protect in War?* 2nd edn, ICRC, Geneva, 2006, p. 251.

48 Alexander Orakhelashvili, 'The interaction between human rights and humanitarian law: fragmentation, conflict, parallelism, or convergence?', *European Journal of International Law*, Vol. 19 (1) (2008), p. 167.

for both sides. The principle of the equality of the belligerents before humanitarian law also applies in non-international armed conflicts.⁴⁹

Rules on the peacetime use of force under human rights law

Human rights treaties prohibit the arbitrary deprivation of life. Most instruments, however, do not specify when a killing is arbitrary. Only the European Convention on Human Rights specifies that the deprivation of life will not be deemed arbitrary when it results from the use of force ‘absolutely necessary’:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection’.⁵⁰

In its case law outside armed conflicts, the European Court of Human Rights has admitted the lawfulness of killing a person the authorities genuinely thought was about to detonate a bomb, but found that the insufficient planning of the operation violated the right to life.⁵¹ With regard to arrest, the Court has found that the life of a fugitive may not be put at risk for the purpose of arresting him if he poses no threat to life and is not suspected of a violent offence, even if he cannot be arrested otherwise.⁵²

By and large, other universal and regional human rights bodies take the same approach.⁵³ The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide an authoritative interpretation of the principles that authorities must respect when using force, so as not to infringe the right to life. Those principles limit the use of firearms to cases of

self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.

49 François Bugnion, ‘*Jus ad bellum, jus in bello* and non-international armed conflict’, *Yearbook of International Humanitarian Law*, Vol. 6 (2003), pp. 167–98; Marco Sassòli, ‘*Jus ad bellum* and *ius in bello*: the separation between the legality of the use of force and humanitarian rules to be respected in warfare – crucial or outdated?’, in Michael Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein*, Nijhoff, Leiden/Boston, 2007, pp. 254–7.

50 ECHR, Article 2(2).

51 ECtHR, *McCann v. United Kingdom*, Application No. 18984/91, Judgment, 5 September 1995, Series A No. 324, paras. 200–205.

52 ECtHR, *Nachova v. Bulgaria*, Application No. 43577/98, Judgment, 6 July 2005, Reports 2005-VII, para. 95.

53 See e.g. Inter-American Court of Human Rights, *Las Palmeras Case*, Judgment, 26 November 2002, Series C No. 96 (2002).

The intentional lethal use of firearms is only admissible ‘when strictly unavoidable in order to protect life’. In addition, law enforcement officials

shall ... give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.⁵⁴

It must, however, be stressed that the Basic Principles are addressed to officers ‘who exercise police powers, especially the powers of arrest or detention’. Military authorities are included, but only if they exercise police powers,⁵⁵ which could be interpreted as meaning *e contrario* that the rules are not binding for military authorities engaged in the conduct of hostilities. If human rights are to provide an answer as to when a fighter may be killed, it would thus be imperative to know when military authorities, in a situation of armed conflict, are or should be exercising police powers.

The few precedents of human rights bodies in armed conflicts

Theoretically, human rights are the same in international and non-international armed conflicts and outside armed conflicts. The right to life is furthermore not subject to derogations except, under the European Convention, in respect of ‘lawful acts of war’.⁵⁶ The classic instance in which a human rights body has assessed the right to life in the context of an armed conflict is the *Tablada* case, concerning a group of fighters who attacked an army base in Argentina. The Inter-American Commission on Human Rights held that ‘civilians ... who attacked the Tablada base ... whether singly or as a member of a group thereby ... are subject to direct individualized attack to the same extent as combatants’ and lose the benefit of the proportionality principle and of precautionary measures.⁵⁷ It then exclusively applied humanitarian law (applicable to international armed conflicts) to those attackers. Only civilian bystanders and attackers who surrendered were considered to be entitled to benefit from the right to life. The Commission did not raise the issue whether the fighters should have been arrested whenever possible, rather than killed.

54 See Articles 9 and 10 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the 9th UN Congress on the Prevention of Crime and Treatment of Offenders, Havana, 27 August–7 September 1990, UN Doc. A/CONF.144/28/Rev.1 at 112 (1990) (hereinafter Basic Principles).

55 In the Basic Principles a footnote added to the term ‘law enforcement officials’ clarifies this by referring to the commentary on Article 1 of the Code of Conduct for Law Enforcement Officials.

56 ECHR, Article 15(2). It has been argued that this refers only to international armed conflicts (see Doswald-Beck, above note 28, p. 883). In any case, no state has ever tried to derogate on the basis of this exception.

57 Inter-American Commission on Human Rights, *Abella v. Argentina (Tablada)*, Case No. 11.137, Report No. 55/97, 18 November 1997, para. 178.

In the *Guerrero* case, the Human Rights Committee found Colombia to have arbitrarily deprived persons of their right to life who were suspected – but not proved, even by the subsequent inquiry – to be kidnappers and members of a ‘guerrilla organization’. The police waited for the suspected kidnappers in the house where they had believed the victim of a kidnapping to be held, but which they found empty. When the suspected kidnappers arrived, they were shot without warning, without being given an opportunity to surrender and despite the fact that none of the kidnappers had fired a shot, but simply tried to flee.⁵⁸

A national human rights body, the Nepali Human Rights Commission, deemed that the Nepali security forces had seriously violated ‘humanitarian law’ when they shot at a group of armed Maoists forcing students and teachers at a local school to follow a ‘cultural programme’. Six Maoists and four students were killed and five students were injured. The Commission stressed that there was no firing by the Maoists when the army encircled them and that the Maoists were only lightly armed. In the Commission’s view, after giving them a warning the army could easily have arrested them. It is not clear whether the Commission found a violation only because of the killed and injured students, or whether it considered that shooting at the armed Maoists without an attempt to arrest them also constituted a violation of ‘humanitarian law’.⁵⁹

The jurisprudence of the European Court of Human Rights in cases involving the right to life in the non-international armed conflict in Chechnya includes statements which appear to require that in the planning and execution even of a lawful action against fighters, any risk to life and the use of lethal force must be minimized.⁶⁰ While these statements were not limited to protection of the lives of civilians, the actual victims in the case were civilians. In all other cases in which human rights bodies and the ICJ applied the right to life to armed conflicts not of an international character, the persons killed were either *hors de combat* or not alleged to have been fighters.⁶¹ Although fighters are very often killed, for example bombed, while they are not *hors de combat*, no such case has been brought before an international human rights monitoring body. Some observers have deduced from the absence of any such case law that such killings do not violate the right to life, it being ‘unthinkable’ that a case would be brought before the Inter-American system by a surviving relative of an FARC member.⁶²

The limited body of case law thus gives no conclusive answer as to what human rights law requires of government authorities using force against fighters.

58 Human Rights Committee, *Suarez de Guerrero v. Colombia*, Communication No. R.11/45, 31 March 1982, UN Doc. Supp. No. 40 (A37/40) (hereinafter *Guerrero* case).

59 Kedar Prasad Poudyal, ‘The role of national human rights institutions in armed conflict situations, with special reference to NHRC–Nepal’, Danish Institute for Human Rights, 2006, pp. 87–8.

60 ECtHR, *Isayeva v. Russia*, Application No. 57950/00, Judgment 24 February 2005, paras. 175–176.

61 See an overview by Nils Melzer, *Targeted Killing under International Normative Paradigms of Law Enforcement and Hostilities*, Oxford University Press, Oxford, 2008, pp. 169–73 and pp. 384–92.

62 UCIHL Report, above note 33, p. 36.

Possible solutions under the *lex specialis* principle

First, we would like to emphasize that there is a good deal of common ground between the two branches of law. In a ‘battlefield-like’ situation, arrest is virtually always impossible without exposing the government forces to disproportionate danger. A fighter presents a great threat to life, even if that threat consists of attacks against armed forces. The immediacy of that threat might be based not only on what the targeted fighter is expected to do, but also on his or her previous behaviour.⁶³ In such situations lethal force could therefore be used, even under human rights law. On the other hand, the life of a fighter who is *hors de combat* is equally protected by both branches.

It is where the solutions found in the two branches actually contradict each other that the need to determine the applicable rule by reference to the *lex specialis* principle arises. The quintessential example of such a contradiction is that of a guerrilla leader shopping in a supermarket in the government-controlled capital of the country. Many interpret humanitarian law as permitting authorities to shoot to kill, since he is a fighter, but this is controversial. Human rights law would clearly say that he must be arrested and a graduated use of force must be employed, but this conclusion is based on precedents which arose in peacetime and human rights are always more flexible according to the situation.

In our view, some situations are more characteristic of those for which the humanitarian law rule was established, and others are characterized more by facts for which human rights were typically established. There is a sliding scale⁶⁴ between the lone FARC member in a supermarket in Bogotá and the soldier in Franco’s forces during the Battle of the Ebro. It is impossible and unnecessary to provide a ‘one size fits all’ answer; as shown above, the *lex specialis* principle does not determine priorities between two rules in the abstract, but offers a solution to a concrete case in which competing rules lead to different results. The famous ICJ dictum that ‘[t]he test of what constitutes an arbitrary deprivation of life ... must be determined by the applicable *lex specialis*, namely the law applicable in armed conflicts’⁶⁵ should not be misunderstood. It has to be read in the context of the opinion⁶⁶ in which the ICJ had to determine the legality *in abstracto* of the use of a certain weapon.

Such a flexible solution, in which the actual behaviour required depends upon the situation, is dangerous – especially in our context, where it has to be applied by every soldier and leads to irreversible results. It is therefore indispensable to determine factors which give precedence either to the rule derived from the humanitarian law of international armed conflicts or to human rights.

63 DPH 2005 Report, above note 31, p. 52.

64 UCIHL Report, above note 33, p. 38; according to several experts in DPH 2005 Report, above note 31, pp. 51–2.

65 *Nuclear Weapons*, above note 8, para. 25.

66 Alston, above note 11, pp. 183–209, 192–3.

The existence and extent of government control over the place⁶⁷ where the killing occurs points to human rights as the *lex specialis*.⁶⁸ For government forces acting on their own territory, control over the place where the attack takes place is not a requirement for human rights to apply,⁶⁹ but simply a factor causing human rights to prevail over humanitarian law. The latter was designed to regulate hostilities against forces on or beyond the front line – that is, in a place not under the control of those who attack them, whereas law enforcement concerns persons under the jurisdiction of the enforcers. In traditional conflict situations the question here would be how far away the situation is from the battlefield,⁷⁰ although fewer and fewer contemporary conflicts are characterized by front lines and battlefields. What, then, constitutes sufficient control to warrant human rights predominating as the *lex specialis*? A government cannot simply argue that the presence of a solitary rebel or even a group of rebels on a stable part of its territory indicates that in fact it is not fully in control of the place, and therefore act under humanitarian law as *lex specialis*. The question is rather one of degree. If a government could effect an arrest (of individuals or groups) without being overly concerned about interference by other rebels in that operation, then it has sufficient control over the place to make human rights prevail as *lex specialis*.

This criterion of government control leaves the solution slightly more open in an area within the territory of the state whose government is fighting the rebels,⁷¹ but which is neither under firm rebel nor under firm government control (such as regions of central Peru at the time of the Sendero Luminoso insurgency).⁷² Even where the strict requirements of necessity under human rights law are not fulfilled (if they are, both branches of law lead to the same result), the impossibility of arresting the fighter,⁷³ the danger inherent in an attempt to do so,⁷⁴ the danger the fighter represents for government forces and civilians and the immediacy of this danger⁷⁵ may cause the conclusion to be reached that humanitarian law is the *lex specialis* in that situation. These factors are interlinked with the elements of control described above. In addition, where neither party has clear geographical control, the higher the degree of certainty that the target is actually a fighter, the easier it is in our view for the humanitarian law approach to be regarded as

67 If the very person targeted is under government control, both branches of law prohibit any summary execution.

68 Doswald-Beck, above note 28, p. 897; UCIHL Report, above note 33, p. 36; Kretzmer, above note 34, p. 203; Cordula Droeger, 'The interplay between international humanitarian law and international human rights law in situations of armed conflict', *Israel Law Review*, Vol. 40 (2007), p. 347.

69 For the responsibility of a state for human rights violations committed on a part of the territory of a state that is not under government control, see ECtHR, *Ilascu and others v. Moldova and Russian Federation*, Application No. 48787/99, Judgment, 8 July 2004, para. 333.

70 Droeger, above note 68, p. 347.

71 We do not deal in this article with the law applicable to extraterritorial action.

72 UCIHL Report, above note 33, p. 37.

73 *Public Committee against Torture*, above note 37, para. 40; Doswald-Beck, above note 28, p. 891.

74 *Public Committee against Torture*, above note 37, para. 40.

75 Kretzmer, above note 34, p. 203.

lex specialis.⁷⁶ Attacks are lawful against persons who are actually fighters, while law enforcement is by definition directed against suspects.

Even where human rights prevail as the *lex specialis* in the context of armed conflict, humanitarian law remains present in the background and relaxes the human rights requirements of proportionality and warning once an attempt to arrest has been made unsuccessfully or is not feasible. By the same token, where humanitarian law prevails, human rights likewise remain present and require that an inquiry be conducted whenever a person has been deliberately killed.⁷⁷

If such a flexible approach to determining the *lex specialis* is accepted, the question arises whether it is valid for members of both armed groups and government forces. The applicable humanitarian law stipulates the equality of both parties, but they are not equal in terms of human rights obligations.⁷⁸ Indeed, it is controversial whether the latter apply to non-state actors.⁷⁹ Even if they are, they can only require from them certain conduct towards persons in an area under their control, since such actors have no jurisdiction over a territory.⁸⁰ In practice, government soldiers do not shop in supermarkets in rebel-controlled areas. Moreover, a government has the alternative of law enforcement and of applying domestic criminal law and is therefore able to plan an operation that maximizes the possibility of arresting persons.⁸¹ Conversely, the question whether armed groups may enforce government legislation or legislate to make government action illegal is controversial. Requiring rebels to detain rather than kill could in some respects increase the asymmetry of conflicts, since detention by rebels is often seen as

76 *Guerrero* case, above note 58, para. 13.1–13.3; *Public Committee against Torture*, above note 37, para. 40; Orna Ben-Naftali and Keren R. Michaeli, ‘“We must not make a scarecrow of the law”: A legal analysis of the Israeli policy of targeted killings’, *Cornell Journal of International Law*, Vol. 36 (2) (2003–4), p. 290.

77 Thus, for the killing of what it terms civilians directly participating in hostilities, see *Public Committee against Torture*, above note 37, para. 40. For human rights law, precisely in situations of non-international armed conflict, see ECtHR, *Kaya v. Turkey*, Application No. 22729/93, Judgment, 19 February 1998, Reports 1998-I, paras 86–91 (where it was controversial whether the killed person was or was not an armed rebel and the Court criticized the enquiry for not determining this issue); ECtHR, *Ergi v. Turkey*, Application No. 23818/94, Judgment, 28 July 1998, Reports 1998-IV, p. 1778, para. 85; ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Application Nos. 57947–57949/00, 24 February 2005, paras. 209–213. Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ‘Report to the Human Rights Commission’, 8 March 2006, UN Doc. E/CN.4/2006/53, paras. 25–26, even argues that such an obligation exists under humanitarian law. We would limit that obligation to possible violations. To require that an enquiry be conducted every time an enemy soldier is killed on the battlefield is unrealistic.

78 Doswald-Beck, above note 28, p. 890.

79 For an affirmative view see Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, and for a more sceptical view see Nigel S. Rodley, ‘Can armed opposition groups violate human rights standards?’, in Kathleen E. Mahoney and Paul Mahoney (eds.), *Human Rights in the Twenty-First Century*, Nijhoff, The Hague, 1993, p. 297. See also para. 47 of the ‘Report of the consultative meeting on the draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law’, UN ESCOR, 59th Sess., UN Doc E/CN.4/2003/63 (27 December 2002).

80 Even Clapham, above note 79, p. 284, considers that human rights obligations apply to them only ‘to the extent appropriate to the context’.

81 Doswald-Beck, above note 28, p. 890; UCIHL Report, above note 33, p. 35.

‘hostage taking’ and demands are frequently made of them to release government forces they have captured.

It is therefore not unreasonable to consider armed groups as bound only by humanitarian law and domestic law (which in any case renders any killing by them unlawful), whereas government forces are bound by both humanitarian law and human rights, the latter prevailing in some situations and to a certain extent as *lex specialis*. The fact that rebels do not have human rights obligations limiting attacks on security forces does not mean that there are no humanitarian law limits on such attacks. While police forces cannot be considered to be civilians (as in international armed conflicts) if engaged in law enforcement operations to search for and arrest rebels,⁸² attacks on police units not involved in a non-international armed conflict but performing normal peacetime police activities would violate the prohibition on attacking civilians.⁸³

The main problem with our solution is whether it is practicable in actual armed conflicts. If the permissible conduct varies, depending on the specific situation, how can a soldier know which rules to apply? This problem can be solved only by precise instructions and rules of engagement for each and every operation and sortie. In addition, guidelines might be developed at international level in discussions between humanitarian law experts, human rights experts, law enforcement practitioners and military representatives. Logically, (former) fighters should also be involved – especially if the guidelines also cover the conduct of such groups – to ensure that they can be applied in practice.

On which basis and following which procedures may a member of armed forces or groups be interned in non-international armed conflict?

In peacetime and during armed conflict, persons may be detained pending trial or after conviction for a crime. For the individual non-state actor, participation in a conflict constitutes a crime under the domestic law of the state affected by that conflict. A more specific feature of armed conflicts is that enemies may also be interned without criminal charge as a preventive security measure. In international armed conflicts this is the essence of prisoner-of-war status for combatants and internment for civilians.

However, the lack of clarity, particularly as to the legal safeguards to be applied by non-state actors in non-international armed conflict, gives cause for concern. The present section focuses on procedural regulation of this particular

82 See also ‘Report of the International Commission of Enquiry on Darfur to the UN Secretary-General’, 25 January 2005, para. 422, available at www.un.org/news/dh/sudan/com_inq_darfur.pdf (last visited 21 May 2008).

83 Nepal Human Rights Commission, ‘Minimum immediate steps for CPN-(Maoist) to respect international humanitarian law and human rights principles’, in *Annual Report 2004* (ch. 8, Section 8.3), pp. 99–100.

form of deprivation of liberty – internment.⁸⁴ By analysing the two branches of law and their complementary relationship, an attempt will be made to work out the basis and procedures for possible internment of a member of government armed forces or a member of an armed group (hereinafter: participant in hostilities) in relation to a non-international armed conflict.

The traditional answer of humanitarian law applicable to international armed conflict

Treaty-based humanitarian law applicable to international armed conflict provides rules procedurally regulating internment. The Third Geneva Convention permits the detaining power to ‘subject prisoners of war to internment’,⁸⁵ and the Fourth Geneva Convention allows for internment of a person ‘if the security of the Detaining Power makes it absolutely necessary’⁸⁶ or ‘for imperative reasons of security’.⁸⁷

Having stipulated when internment may occur, humanitarian law also indicates when it must cease. Some prisoners of war must be repatriated during armed conflict for medical reasons,⁸⁸ and all must be released and repatriated, without delay, after the cessation of active hostilities.⁸⁹ A civilian must be released ‘as soon as the reasons which necessitated his internment no longer exist’.⁹⁰ For those civilians not released during the armed conflict, it states that their ‘[i]nternment shall cease as soon as possible after the close of hostilities’.⁹¹

Treaty-based humanitarian law applicable to international armed conflict recognizes that in the case of civilians, who, unlike prisoners of war, cannot be automatically interned for the duration of an armed conflict, compliance with the legal basis for internment requires an assessment to determine whether an individual continues to pose a threat to security and may remain interned, or no longer poses a threat and must be released. Accordingly the Fourth Convention lays down procedures for reviewing the internment of civilians, whether they are aliens in the territory of a party to the conflict or interned in occupied territory, designating the type of review body – either a court or administrative board – and providing for appeal and periodic review.⁹² Protocol I introduces an additional safeguard into the process: the person interned is to ‘be informed promptly, in a language he understands, of the reasons why these measures were taken’.⁹³ Finally, it

84 The terms ‘internment’ and ‘security detention’ are used interchangeably in this article.

85 GC III, Article 21.

86 GC IV, Article 42 (for an alien in the territory of a party).

87 *Ibid.*, Article 78(1) (in occupied territory).

88 GC III, Articles 109–117.

89 *Ibid.*, Articles 118–119.

90 GC IV, Article 132(1). See also P I, Article 75(3).

91 GC IV, Article 133(1).

92 *Ibid.*, Articles 43 and 78(2).

93 P I, Article 75(3).

should be noted that unlawful confinement is a grave breach of the Fourth Convention.⁹⁴

The uncertain answer of treaty-based humanitarian law applicable to non-international armed conflict

In non-international armed conflict, treaty-based humanitarian law prescribes how persons deprived of their liberty for reasons related to the armed conflict must be treated, and lays down judicial guarantees for those undergoing prosecution for offences also related thereto, but it does not clarify for which reasons and by which procedures a person may be interned. Yet the drafters of Protocol II recognized the possibility of internment in non-international armed conflicts, as shown by the specific reference to internment in Articles 5 and 6 thereof.⁹⁵

Customary humanitarian law

Customary humanitarian law prohibits the arbitrary deprivation of liberty in both international and non-international armed conflicts.⁹⁶ But how is this prohibition to be understood with regard to internment in non-international armed conflicts – that is, what is the basis for it and with which procedures must there be compliance so that such internment does not amount to arbitrary deprivation of liberty? The non-binding commentary⁹⁷ in the ICRC Study interprets this rule by significant reference to human rights. Applying the two criteria of the principle of legality, it states that the basis for internment must be previously established by law and stipulates two procedural requirements: (i) an ‘obligation to inform a person who is arrested of the reasons for arrest’; and (ii) an ‘obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention’, described as the ‘so-called writ of *habeas corpus*’.⁹⁸

Human rights rules on the procedural regulation of security detention

Human rights provisions regulating the deprivation of liberty can be found in a variety of different treaties. Treaty-based human rights stipulate that a person may be deprived of liberty only ‘on such grounds and in accordance with such

94 GC IV, Article 147. See also Article 8(2)(a)(vii) of the Statute of the International Criminal Court and Article 2(g) of the Statute of the International Criminal Tribunal for the former Yugoslavia.

95 Protocol II, Articles 5 and 6(5).

96 Henckaerts and Doswald-Beck, above note 5, pp. 344–52.

97 Henckaerts and Doswald-Beck, above note 5, Vol. I, 2007 reprint (with corrections), p. li, cited in Jean-Marie Henckaerts, ‘Customary international humanitarian law: a response to US comments’, *International Review of the Red Cross*, Vol. 89 (866) (2007), p. 484.

98 Henckaerts and Doswald-Beck, above note 5, pp. 348–51.

procedure as are established by law'.⁹⁹ All treaties prohibit arbitrary arrest or detention,¹⁰⁰ but only the European Convention specifically lists the bases for depriving a person of his or her liberty.¹⁰¹ Treaty-based law articulates two procedures with which compliance is obligatory for a person to be lawfully deprived of his or her liberty when not specifically charged with a crime. First, an arrested person must be promptly informed of the reasons for arrest.¹⁰² Second, any person deprived of liberty 'shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.¹⁰³

Unlike the four Geneva Conventions, however, none of these treaties is universally ratified, most are regional instruments, and in certain circumstances derogations from the provisions relevant to security detention are possible.¹⁰⁴ It would therefore be helpful to have an assessment of the status of universally applicable customary human rights, as well as whether and to what extent such rules are derogable. The same applies to the judicial review requirement, the so-called writ of *habeas corpus*, because even though it or at least some of its aspects are widely claimed, by among others the Human Rights Committee, to be non-derogable, this is not stipulated in treaty-based human rights law.¹⁰⁵

99 International Covenant on Civil and Political Rights (ICCPR), Article 9(1). See also ECHR, Article 5(1); American Convention on Human Rights (ACHR), Article 7; and African Charter on Human and Peoples' Rights (ACHPR), Article 6.

100 ICCPR, Article 9(1); ECHR, Article 5; ACHR, Article 7(3); and ACHPR, Article 6.

101 ECHR, Article 5(1). Of these provisions, Article 5(1)(b) and (c) appears to authorize security detention; neither provision has, however, been interpreted to do so. See D. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, Butterworth, London, 1995, pp. 113, 117 (citing ECtHR, *Lawless v. Ireland*, Application No. 332/57, Judgment, 1 July 1961, Series A No. 3, section on 'The law', paras. 8–15; and ECtHR, *Guzzardi v. Italy*, Application No. 7367/76, Judgment, 6 November 1980, Series A No. 39, paras. 101–102).

102 ICCPR, Article 9(2); ECHR, Article 5(2); ACHR, Article 7(4).

103 ICCPR, Article 9(4); ECHR, Article 5(4); ACHR, Article 7(6); and ACHPR, Article 7(1)(a).

104 Of course, such derogation must only be 'to the extent strictly required by the exigencies of the situation' – ICCPR, Article 4(1). See also ECHR, Article 15(1), and ACHR, Article 27(1). The ACHPR contains no derogation clause.

105 For a list of practice pointing to the non-derogability of *habeas corpus*, see Henckaerts and Doswald-Beck, above note 5, pp. 350–1 and accompanying footnotes (including UN Human Rights Committee General Comment 29, para. 16, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001)). See also Doug Cassel, 'Pretrial and preventative detention of suspected terrorists: options and constraints under international law', *Journal of Criminal Law and Criminology*, Vol. 98 (3) (2008), pp. 811–52, at p. 829 and nn. 130–132; 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence', Annex 1 to 'International humanitarian law and the challenges of contemporary armed conflicts' (ICRC document prepared for the 30th International Conference of the Red Cross and Red Crescent, 30IC/07/8.4, at 11), available at [www.icrc.org/web/eng/siteeng0.nsf/htmlall/30-international-conference-working-documents-121007/\\$File/30IC_IHLchallenges_Annex1_Detention_FINAL_EN.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/30-international-conference-working-documents-121007/$File/30IC_IHLchallenges_Annex1_Detention_FINAL_EN.pdf) (last visited 29 May 2008) (originally published as Jelena Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence', *International Review of the Red Cross*, Vol. 87 (858) (2005), p. 387 (2005)) (hereinafter ICRC Guidelines).

The few precedents of human rights bodies in armed conflicts

Human rights bodies have elaborated upon the content of human rights through their jurisprudence, which does not exist to the same extent for humanitarian law as there are fewer expert bodies mandated to apply it.¹⁰⁶ Thus recourse to human rights is appealing when interpreting humanitarian law, but it must be borne in mind that such jurisprudence is often not binding or not binding universally. In addition, precedents of human rights bodies specifically addressing both aspects, the procedural regulation of security detention and in relation to armed conflict, are rare.

The European Court of Human Rights has upheld state security detention during situations described as ‘terrorist campaign[s]’;¹⁰⁷ it remains to be seen how the Court would assess whether the measures adopted by the state – after derogation – do or do not go beyond ‘the extent strictly required by the exigencies’¹⁰⁸ of a situation characterized as armed conflict. In relation to the ‘war on terror’ and detention at Guantánamo Bay, the Human Rights Chamber for Bosnia and Herzegovina found that the state had breached the European Convention ‘by handing over [persons] into illegal detention by US forces’, as information on the basis for their detention was neither sought nor received.¹⁰⁹

Human rights bodies of the Inter-American system have addressed issues relating to armed conflict, but few refer to security detention. In *Coard v. US*, the Inter-American Commission found detention without any review, during an international armed conflict, ‘incompatible with the terms of the Declaration as understood with reference to art. 78 of Geneva Convention IV’.¹¹⁰ The Commission stated that,

pursuant to the terms of Geneva Convention IV and the Declaration, [the necessary review of detention] could have been accomplished through the establishment of an expeditious judicial or board (quasi-judicial) review process carried out by US agents with the power to order the production of the person concerned, and release in event the detention contravened applicable norms or was otherwise unjustified.¹¹¹

106 Theodor Meron, ‘The humanization of humanitarian law’, *American Journal of International Law*, Vol. 94 (2000), p. 247. See also Christine Byron, ‘A blurring of the boundaries: the application of international humanitarian law by human rights bodies’, *Virginia Journal of International Law*, Vol. 47 (2007), pp. 839–96.

107 ECtHR, *Ireland v. United Kingdom*, Application No. 5310/71, Judgment, 18 January 1978, [1978] ECHR 5310/71, para. 11. See also e.g. *Lawless v. Ireland*, above note 101.

108 ECHR, Article 15(1).

109 Human Rights Chamber for Bosnia and Herzegovina, *Boudellaa and others v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina* (Case nos. CH/02/8679, CH/02/8689, CH/02/8690, CH/02/8691), 13 BHRC 297 (2002), paras. 233 and 237.

110 Inter-Am. C.H.R., *Coard et al. v. US*, Case No. 10.951, Report No. 109/99, 9 BHRC 150 (29 Sept. 1999), para. 57.

111 *Ibid.*, para. 58.

In the said case there was no discussion, however, of applicable rules for non-international armed conflict. In 2002 the Commission – in the context of the United States considering ‘itself to be at war with an international network of terrorists’ – adopted precautionary measures requesting the United States ‘to take urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal’ rather than by a political authority, in order to ensure that the detainees ‘are afforded the legal protections commensurate with the status that they are found to possess, which may in no case fall below the minimum standards of non-derogable rights’.¹¹²

Application of human rights as *lex specialis*

When comparing the treaty-based provisions regulating internment in both branches of law, human rights are more elaborate than the sparse treaty-based humanitarian law rules applicable to non-international armed conflict. However, this is not the case when comparing human rights law with humanitarian law applicable to civilians in international armed conflict.¹¹³ For example, humanitarian law explicitly guarantees, for civilian internees, a right to appeal and a time frame for periodic review if not released; treaty-based human rights do not specify this with regard to security detention. Moreover, the relevant human rights provisions are derogable, at least under the formal terms of the treaties; these provisions of humanitarian law, at least in occupied territories, are not derogable.¹¹⁴ But human rights law does stipulate that the body reviewing the deprivation of liberty must be judicial, whereas humanitarian law provides for either a court or an administrative board in the case of civilians but grants no review at all for prisoners of war, except in determining prisoner-of-war status.¹¹⁵

As humanitarian law applicable to non-international armed conflict is silent on the procedural regulation of internment, it would seem clear that in accordance with the *lex specialis* principle as a maxim of logic, human rights should step in to fill the gap. The ICRC Study appears to adopt this approach when it interprets the humanitarian law rule prohibiting the arbitrary deprivation of liberty through the lens of human rights.¹¹⁶ The fact that internees – unlike persons to be attacked – are always under the control of those who detain them, reinforces the human rights approach. In this formalistic application of the *lex specialis* principle, the only exception where humanitarian law would take precedence is when the

112 Inter-American Commission on Human Rights, *Detainees in Guantanamo Bay, Cuba, Request for Precautionary Measures* (13 March 2002).

113 Droege, above note 68, p. 350.

114 Article 5(2) of GC IV allows for derogations in occupied territories from the communication rights of a person ‘under definite suspicion of activity hostile to the security of the Occupying Power’, while paragraph 1 of that article allows for derogations from ‘rights and privileges’ of enemy civilians on the own territory of a party to the conflict who are ‘definitely suspected of or engaged in activities hostile to the security of the State’.

115 GC III, Article 5.

116 See Henckaerts and Doswald-Beck, above note 5, pp. 344–52.

parties to a non-international armed conflict agree thereto¹¹⁷ or when the government unilaterally concedes prisoner-of-war status to captured fighters. Despite the appeal of this formal *lex specialis* approach, difficulties remain.

Difficulties involved in applying human rights

The human rights requirement that internment be subject to judicial review – if no derogation is made, or cannot be made as the rule is found to be customarily non-derogable – demonstrates some of these difficulties. One is whether it is realistic to expect states and non-state actors, possibly interning thousands of people, to bring all internees before a judge without delay during armed conflict. If it is not, such an obligation risks severely hampering the effective conduct of war and could thus lead to less compliance with the rules in the long term – for example, summary executions disguised as battlefield killings.

A second concern stems from the differences between state and non-state actors, which have equal obligations under humanitarian law but not under human rights. Even if the question of whether non-state actors are bound by human rights were settled, how is the non-state actor to meet the obligation of judicial review? The question of whether a non-state actor may establish a court remains controversial.¹¹⁸ The requirements that there be a legal basis and procedures established by law for internment give rise to the same concern. While human rights themselves set at least two procedural requirements, neither they nor humanitarian law applicable to non-international armed conflict provide a specific legal basis for internment. A state can do so in its domestic law, but how is the non-state actor to establish that legal basis?

Even if human rights are found to be binding on some non-state actors – that is, those ‘capable of fulfilling the conditions to exercise those rights’,¹¹⁹ the difficulties may not be fully resolved and additional ones may arise. For example, could a non-state actor derogate from human rights? What is the standard to determine which non-state actor qualifies to do so and which does not? And this approach would not, of course, resolve the difficulties remaining with regard to those non-state actors which do not ‘qualify’.

Application of human rights seems to make it impossible for one party to an armed conflict – the non-state actor – to intern legally. Parties to armed conflicts intern persons, hindering them from continuing to bear arms, so as to gain the military advantage. If the non-state actor cannot legally intern, it is left with little option – for it is a serious violation of humanitarian law to deny quarter¹²⁰ – but to release the captured enemy fighters. However, if rules applicable

117 As encouraged by Article 3(3) common to GC I–IV.

118 Jonathan Somer, ‘Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict’, *International Review of the Red Cross*, Vol. 89 (867) (2007), pp. 655–90.

119 *Ibid.*, p. 687.

120 Article 8(2)(e)(x) of the Statute of the International Criminal Court. See also Henckaerts and Doswald-Beck, above note 5, p. 161.

to armed conflict make efficient fighting impossible, they will not be respected, undermining any protection the law provides.¹²¹

Apply the humanitarian law of international armed conflicts by analogy?

In view of the complications generated by applying human rights, perhaps the correct solution requires applying the humanitarian law of international armed conflict to non-international armed conflicts by analogy.¹²² The humanitarian law applicable to non-international armed conflict indicates that internment occurs in such conflicts, but contains no indication of how it is to be regulated. Such regulation is necessary so that internment can take place in practice. While the provisions regulating internment in international armed conflict are set out according to protected person categories, 'no fundamental difference between the regimes applicable to the two situations prohibits the application of those same' provisions, as long as the rules are applied according to the person's function rather than status.¹²³ Such a legal analogy is also consistent with the noted gradual erosion of the distinction between the law applicable in international and non-international armed conflicts.

Applied by analogy, the humanitarian law of international armed conflict allows for internment and provides for review procedures. It leaves open the option for the internment review to be carried out by an administrative board or a court. Given the organizational criteria a non-state actor must meet to be considered a party to an armed conflict,¹²⁴ any non-state actor should be able to fulfil these obligations, particularly as it can opt for an administrative review procedure rather than review by a court.

The humanitarian law of international armed conflict applies if 'the government of the State affected by the non-international armed conflict [has] claimed for itself belligerent rights'.¹²⁵ While 'the recognition of belligerency has fallen into disuse as a legal concept',¹²⁶ application by analogy appears to continue to make sense; Common Article 3 moreover urges parties to non-international armed conflicts to agree on such application. The ICRC Study in fact indicates application by analogy in such conflicts of the standards of the Fourth Geneva Convention to civilians and those of the Third Geneva Convention to persons designated as 'combatants'.¹²⁷ Making this distinction between 'combatants' and

121 Daniel O'Donnell, 'International treaties against terrorism and the use of terrorism during armed conflict and by armed forces', *International Review of the Red Cross*, Vol. 88 (864) (2006), p. 876 (explaining similar reasoning for proposals to exclude acts legal under IHL from the acts prohibited in the draft comprehensive convention against terrorism).

122 See ICRC Guidelines, above note 105, p. 377.

123 Sassöli and Bouvier, above note 47, p. 258: '[T]he law of non-international armed conflict does not protect according to the status of a person but according to his or her actual activities.'

124 See e.g. ICTY decision in *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgment, April 3, 2008, Case No. IT-04-84-T, paras. 60 and 89.

125 Henckaerts and Doswald-Beck, above note 5, p. 352.

126 Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p. 41.

127 Henckaerts and Doswald-Beck, above note 5, p. 352.

civilians in non-international armed conflict would also be consistent with current discussions by experts on use of the ‘membership approach’ to interpret ‘direct participation in hostilities’ in such conflict.¹²⁸ As analogous application does not confer any status, there would still, for example, be no combatant immunity. The Geneva Conventions, while allowing for internment, would therefore not prevent the repression of acts prohibited by domestic law. Nor would application by analogy of the Third Convention to members of armed forces and groups, as suggested by the ICRC Study, entitle them to any review procedure; such procedural regulation could only be found in the Fourth Convention.

Does the analogous application of the law of international armed conflicts sufficiently consider, however, the fundamental distinction between that law and the law of non-international armed conflict – that is, that the rules applicable to international armed conflict generally¹²⁹ apply only to protected person categories, such as prisoners of war or enemy civilians, and that no such categories exist in non-international armed conflict? Even if the distinction in non-international armed conflict could be made by function rather than status, on which criteria should the assessment of a civilian or ‘combatant’ be based? Should ‘combatants’ be measured against the criteria in Article 4 of the Third Convention or Article 44 of Protocol I, or perhaps through the ‘membership approach’?¹³⁰ Would Article 5-type tribunals¹³¹ need to be instituted in non-international armed conflicts to make the determination?

Apply the Fourth Convention rather than the Third Convention?

If the Third Geneva Convention is applied by analogy, a participant in hostilities could be detained without any individual determination for the whole duration of the conflict.¹³² However, as seen above, it is much more difficult in non-international than in international armed conflicts to determine who is actually a fighter. Such a determination must therefore be made on an individual basis. It is also much harder to determine the actual end of hostilities than in an international armed conflict between states that may conclude a ceasefire or surrender. All this may support application, if at all, of the law of international armed conflict to non-international armed conflict by analogy to the Fourth Convention alone, as there are no combatants and hence no concomitant prisoner-of-war status in

128 See notes 36–39 above, and in particular DPH 2005 Report, above note 31, p. 43.

129 Except e.g. Article 75 of P I.

130 DPH 2005 Report, above note 31, pp. 41–58.

131 GC III, Article 5.

132 For a standpoint rejecting such an analogy, see UN Commission on Human Rights, ‘Situation of the detainees at Guantánamo’, report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, UN Doc E/CN.4/2006/120 (27 February 2006), para. 24.

non-international armed conflict. Analogy with the Fourth Convention could be founded on a determination of the *lex specialis* according to the overall systemic purposes of the international legal order. In non-international armed conflict it would avoid internment of persons without review for the duration of the conflict.

Apply both branches of law in parallel?

Can an analogy legally be made to humanitarian law applicable to international armed conflict when doing so displaces specific human rights rules and thus directly overrides the formal *lex specialis* maxim? As human rights addressing security detention do exist, such an analogy on this issue may be unlike analogies made, for example, to the definition of ‘military objectives’, a term unique to humanitarian law. Furthermore, analogy to the humanitarian law of international armed conflict may not avoid the difficulties raised by human rights, as these may still apply. For example, if humanitarian law procedures applicable to international armed conflict that regulate internment of civilians are inadequate, human rights may be required to fill the gap.¹³³

Consideration of the manner in which human rights complement humanitarian law may help to find a solution for some of the difficulties encountered when applying human rights in non-international armed conflicts, particularly to non-state actors.

[I]f IHRL is not used to *interpret* an IHL rule, but instead IHRL [is applied] ... ‘[parallel] to’ IHL ... IHL would apply to parties to the conflict, State and non-State actors, and IHRL would continue to apply to State actors, as it was traditionally designed to do. This avoids the problematic application to non-State actors, and, yet, mandates States to continue to meet their international legal obligations. One may claim this is unfair, as States would need to abide by additional obligations than non-State actors in a non-international armed conflict. This is true at the international law level, where States are traditionally the legal actors, but it would only be true of the rules to which the States obligated themselves. Also, it must not be forgotten that non-State actors remain bound by domestic law.¹³⁴

This approach remains consistent with the understanding that both bodies of law are complementary and implemented through the maxim of *lex specialis*, and it respects the maxim of *lex posterior*, as most human rights developed after the main humanitarian law provisions discussed here. Also, the concern about impracticable obligations arising, such as a judicial review of internment without delay in all cases, remains limited, as human rights treaties include derogation clauses providing states with a regulated ‘way out’ in such situations.

133 ICRC Guidelines, above note 105, pp. 377–8.

134 Olson, above note 6 (citation omitted).

However, reliance solely on human rights to compensate for the lack of procedural regulation of internment in non-international armed conflict may offer only a minimal solution, for unless supplemented by customary law¹³⁵ it clarifies the obligations of states only if the state is party to the human rights treaty, and it is limited by any derogation made. In addition (but this issue is not covered in the present article) the extent to which human rights apply extraterritorially is controversial, which weakens the solution relying on the application of human rights law to non-international armed conflicts abroad. Thus human rights may provide no regulation of state internment. As for the non-state actors – *if* they are bound at all, they will face conceptual difficulties in complying.

So perhaps the solution is not *either* to apply human rights *or* to draw an analogy with the humanitarian law of international armed conflict, but to harmonize appropriately both approaches. The recognized relationship between the two branches of law, the objectives of both, as well as the differences between states and non-state actors, may in fact call for this complementary approach.

Application to non-international armed conflicts of the rules of the humanitarian law of international armed conflicts on civilians provides procedures for internment that are binding on both the state and the non-state actor, as well as places a constraint on the basis for internment. These obligations apply equally to all parties to the conflict. Such application does not preclude the corresponding parallel application of human rights. Thus, if application of the latter is required to provide further details about the regulation, for example of civilian internment,¹³⁶ consistent with the maxim of *lex specialis*, human rights may step in and clarify state obligations, particularly with regard to judicial review. While derogation from human rights may still occur, analogous application of the humanitarian law of international armed conflicts – from which no derogation is possible¹³⁷ – would set a baseline below which no derogation from the human rights rules could go, as humanitarian law provisions already apply in situations most threatening to a nation. This complementary approach would ensure procedural protection for interned non-state actors and would bring much needed clarity to the non-state actor's obligations, thus also procedurally protecting members of the state's armed forces captured in non-international armed conflict. The practicality of this approach, however, does not make it legally binding and the concerns mentioned above remain, particularly as to the appropriateness of drawing an analogy to the humanitarian law of international armed conflict and – within that law – to the Fourth Convention rather than the Third Convention.

To sum up, unfortunately no ideal, straightforward solution exists. While the application of human rights is more satisfactory under the formal *lex specialis*

135 As the prohibition of arbitrary deprivation of liberty is a customary IHL rule applicable during armed conflict (Henckaerts and Doswald-Beck, above note 5, p. 344), it seems logical that it would also be a customary rule in less exigent peacetime situations; however, disagreement may remain as to the rule's content.

136 ICRC Guidelines, above note 105, p. 377.

137 Except under Article 5 of GC IV (see note 114).

principle, it is unrealistic, particularly for the non-state armed group. Moreover, the content of the applicable human rights is controversial. To apply by analogy the regulation provided for civilians by the humanitarian law of international armed conflicts may therefore correspond better to the overall systemic purposes of both branches. In practice, the only difference between the two approaches is that the humanitarian law approach is satisfied by an administrative review, while the human rights approach stipulates judicial review. Most people detained in relation to a non-international armed conflict would already greatly appreciate having any opportunity at all for an independent and impartial review of their internment. The establishment of guidelines to assess the relationship between humanitarian law and human rights law in a given situation could be helpful, particularly for the practitioner. Such guidelines would help to ensure consistent solutions that do not compromise the two branches' specific objectives and purposes.¹³⁸

Conclusion

On both issues discussed in this article, the result of a formal application of the *lex specialis* principle is not entirely satisfactory. The sliding scale for the respective application of human rights and international humanitarian law to attacks against fighters in non-international armed conflicts leads to much uncertainty in borderline situations and establishes different obligations for the government and the rebels. To give captured fighters the benefit of *habeas corpus* as defined by human rights may be unrealistic and even counterproductive in many conflicts and raises serious conceptual problems when required from armed groups. While these limits have to be accepted with regard to the use of force and must be mitigated by instructions and guidelines, they may be overcome in the procedural regulation of internment by applying by analogy the regime foreseen in the humanitarian law of international armed conflicts for civilians. In both cases, humanitarian law applies as a minimum whenever human rights, for whatever reason, do not apply.

138 Olson, above note 6.

The interrelation of the law of occupation and economic, social and cultural rights: the examples of food, health and property

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Abstract

The current legal regime relative to occupation is no longer based solely on the contributions made by customary law and treaty-based law as set forth in the law of The Hague and the law of Geneva. It has undergone a thorough change with the progressive recognition of the applicability of human rights law to the situations which it governs, and their complementarity has been highlighted on several occasions. The question of the interrelation of international humanitarian law and human rights is not resolved merely by analysing their respective areas of application. The author examines the issue at the level of their individual rules. He considers whether the rules of international humanitarian law are confirmed, complemented, relativized or even contradicted by those deriving from human rights. The analysis focuses more particularly on the interrelation of the law of occupation and economic, social and

* This article suggests some conclusions to a more extensive research project on protecting civilians during military occupation (Geneva Academy of International Humanitarian Law and Human Rights, 2008). The author would like to express his sincere gratitude to the Swiss National Science Foundation for having borne most of the cost of this project. The author would also like to thank Nathalie Mivelaz, Office of the High Commissioner for Human Rights, and Professor Robert Kolb, University of Geneva, for their valuable suggestions regarding the contents of this article. This text is, however, the sole responsibility of its author. The opinions expressed in it do not necessarily reflect the position of the ICRC.

cultural rights by concentrating on the promotion of adequate standards of living (right to food, right to health) and respect for property.



Even if the issue is still a source of controversy,¹ today there is little question that international human rights law is applicable to situations covered by international humanitarian law – that is, armed conflicts and military occupations.² This position has since been confirmed by a wealth of international practice, particularly that of the International Court of Justice, which has confirmed this trend on three occasions.³ It is therefore appropriate to go beyond that preliminary stage to examine the interrelation of the rules of international humanitarian law and human rights in the areas which are common to them both. In the words of the Court itself, there are three facets to that interrelation: ‘some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law’.⁴ However, the Court has not specified which rules are characteristic of one or other category.

The aim of this article is to define those rules by focusing on one of the branches of international humanitarian law, namely that which applies to military occupation.⁵ In international law, ‘territory is considered occupied when it is actually placed under the authority of the hostile army’.⁶ Two conditions are required to satisfy that definition: (i) the occupier is in a position to exert effective control over a territory which does not belong to it; (ii) its intervention has not been approved by the legitimate sovereign. However, power does not need to have been seized as the result of an armed conflict involving hostilities. The relevant rules

- 1 Michael J. Dennis, ‘Application of human rights treaties extraterritorially in times of armed conflict and military occupation’, *American Journal of International Law*, 99 (1) (2005), pp. 119–41.
- 2 See, in particular, W. Kälin, Special Rapporteur, *Report on the situation of human rights in Kuwait under Iraqi occupation*, UN Doc. E/CN.4/1992/26, 16 January 1992; Robert Kolb and Sylvain Vité, *La protection des populations civiles soumises au pouvoir d’une armée étrangère*, Bruylant, Brussels (2009, forthcoming).
- 3 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, General List No. 95, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, General List No. 131, para. 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, General List No. 116, 19 December 2005, para. 216. See also Permanent Court of Arbitration: *Partial Award, Civilians Claim, Ethiopia’s Claim 5*, 17 December 2004, para. 26.
- 4 ICJ, *Legal Consequences*, above note 3, para. 106; ICJ, *Armed Activities*, above note 3, para. 216.
- 5 On the law of military occupation in general see Jean Pictet (ed.), *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War: Commentary*, ICRC, Geneva, 1958; Adam Roberts, ‘What is a military occupation?’, *British Yearbook of International Law*, 55 (1984), pp. 249–305; Eyal Benvenisti, *The International Law of Occupation*, 2nd edn, Princeton University Press, Princeton etc., 2004; Kolb and Vité, above note 2.
- 6 ‘Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907’, in Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed Conflict*, Nijhoff, Dordrecht, 1988, pp. 69–93 (hereinafter Hague Regulations).

apply even if the occupation meets with no armed resistance.⁷ Those rules are set forth primarily in three treaties: the Hague Regulations of 1907, the Fourth Geneva Convention of 1949 and Additional Protocol I of 1977.⁸ Most of those rules are also customary in nature.

From the perspective of human rights, the focus is on economic, social and cultural rights. These correspond to a specific mode of operation which distinguishes them from civil and political rights.⁹ The main treaty source which is relevant to the subject, at least at the global level, is the International Covenant on Economic, Social and Cultural Rights (the Covenant), which was adopted by the United Nations in 1966.¹⁰

This article will first review broadly the general principles of application of economic, social and cultural rights during a period of occupation (A). It will then go on to examine how the two legal regimes under review actually interact in two specific areas: people's living conditions – particularly as regards food and health – and property (B).

The general principles governing the application of economic, social and cultural rights during a period of occupation

The application of economic, social and cultural rights is a subtle matter. It varies according to the circumstances of each individual case and is required to evolve over time. The nature of those rights is partly programmatic, in the sense that they set objectives that states are obliged to achieve in stages. Their full realization is therefore achieved progressively. However, that flexibility is not such that it deprives the Covenant of all constraining power. The system of economic, social and cultural rights provides for some minimum obligations of immediate effect that states cannot avoid. In addition to the functioning pertaining to the economy of human rights, there are some principles of application which derive from the law of occupation.

7 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (hereinafter Fourth Geneva Convention), ICRC, Geneva, 1949: Article 2(2).

8 Hague Regulations, above note 6; Fourth Geneva Convention, above note 7; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of International Armed Conflicts, 8 June 1977, *Protocols additional to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1977, pp. 3–89.

9 See in particular Philip Alston and Gerald Quinn, 'The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, 9 (3) (May 1987), pp. 156–229; Absjorn Eide, 'Economic, social and cultural rights as human rights', in A. Eide (ed.), *Economic, Social and Cultural Rights, A Textbook*, 2nd edn, Kluwer, Dordrecht etc., 2001, pp. 9–28.

10 *International Covenant on Economic, Social and Cultural Rights*, New York, 16 December 1966, *UNTS*, 993, p. 3.

The progressive realization of economic, social and cultural rights

Article 2(1) of the Covenant stipulates that each state party ‘undertakes to take steps ... to the maximum of its available resources, with a view to achieving *progressively* the full realization of the rights recognized in the present Covenant’ (emphasis added). That instrument recognizes that its rules are to be applied over time and that their application may go through different stages by virtue of the very nature of the prescribed obligations.¹¹ Some provisions actually set the objectives while leaving states parties a margin of discretion in terms of the means that they will adopt to fulfil them. Depending on the case, that implies the adoption of new legal texts. The realization of economic, social and cultural rights must therefore be viewed as taking place over time.

That flexibility is particularly important during a period of occupation. When hostilities have just ceased, a large number of infrastructures have been destroyed by war and the country is very often still suffering from considerable instability, the occupying power is not in a position to meet all its obligations. First of all, it has to deal with urgent needs. Then, when it has had the opportunity to strengthen its control over the territory in question, the normative content of its obligations becomes more extensive. Once the emergency period is over, minimum measures are no longer sufficient. The realization of economic, social and cultural rights requires a strategy to be established in order to achieve the set objectives.

That room for manoeuvre is, however, not without restrictions. The progressive realization of economic, social and cultural rights does not mean that states have a right to wait for the most favourable circumstances before meeting their obligations. Such an interpretation would deprive the Covenant of its normative content, as each state would be free to decide the extent of its undertakings. That instrument would consequently lose its constraining powers. The jurisprudence of the UN Committee on Social, Economic and Cultural Rights – the body which supervises the Covenant – shows that states must adhere to a basic normative threshold, whatever the circumstances.

The obligations which are of immediate effect

The Committee first recalled that ‘while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various *obligations which are of immediate effect*’.¹² It distinguishes between two normative levels: (i) provisions establishing obligations

11 Committee on Social, Economic and Cultural Rights, The Nature of States Parties’ Obligations (Art. 2, para. 1, of the Covenant), General Comment No. 3, 14 December 1990, para. 9. See also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/13, 2 October 2000, No. 8.

12 General Comment No. 3, above note 11, para. 1 (emphasis added). See also The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/13, 2 October 2000, No. 8.

which are of immediate effect; (ii) provisions establishing obligations which are to be realized progressively. The states bound by that instrument would then not be able to refer to its programmatic nature in order to delay its application as a whole. It is incumbent on them to respect the rules requiring immediate application – that is, the obligations which are ‘inherently self-executing’.¹³ During periods of occupation, these rules form a normative circle which the authorities in place must take into account as soon as they have effective control of the territory. Respect for those rules cannot be postponed or limited in the light of the circumstances of the occupation.

Some of those obligations which are of immediate effect are referred to explicitly in the Covenant. That is the case, for example, for the principle of non-discrimination¹⁴ or for special measures of protection and assistance taken on behalf of children and young persons.¹⁵ Others need to be identified by means of interpretation. By virtue of Article 2(1) states parties are ‘to take steps’ (emphasis added), that is, to adopt specific measures to promote the full application of that instrument, whatever the nature of the obligations concerned. Adopting a passive attitude in that respect would therefore be contrary to their commitments. Although, in some cases, the realization of economic, social and cultural rights may take place over time, states are still obliged to take steps without delay to allow them to achieve the set objectives.¹⁶ In other words, although certain rights may be realized progressively, states remain bound by the duty to adopt immediate measures. ‘Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.’¹⁷

During periods of occupation, the authorities in place may therefore not refer to the temporary nature of their presence on foreign territory in order to evade these obligations. It is revelatory in that respect to recall that the administration of the occupation forces in Iraq justified redrafting the labour code of that country by recalling that, as a state party to International Labour Organization (ILO) Conventions 138 and 182, Iraq was obliged to ‘take affirmative steps towards eliminating child labor’.¹⁸ Order No. 89 adopted by the Coalition Administrator on 5 May 2004 meets that obligation by setting, in particular, a minimum age for employment and by regulating the conditions of work for people under the age of 18.

13 General Comment No. 3, above note 11, para. 5: ‘Any suggestion that the provisions indicated are *inherently non-self-executing* would seem to be difficult to sustain’ (emphasis added).

14 Article 2(1). See General Comment No. 3, above note 11, para. 1; General Comment No. 12, The Right to Adequate Food (Art. 11 of the Convention), UN Doc. E/C.12/1999/5, 12 May 1999, para. 18. See also Limburg Principles, above note 12, Nos. 22 and 35.

15 Article 10(3).

16 Committee on Social, Economic and Cultural Rights, General Comment No. 3, above note 11, paras. 2, 9. See also Alston and Quinn, above note 9, p. 166.

17 General Comment No. 3, above note 11, para. 2.

18 Coalition Provisional Authority, Order No. 89, Amendments to the Labor Code – Law No. 71 of 1987, CPA/ORD/05 May 2004/89 (emphasis added).

The core contents of economic, social and cultural rights

The Committee also recognized that, despite their inherent flexibility, each of the economic, social and cultural rights has an irreducible normative content. Even if the Covenant proves flexible when it recognizes that some provisions may be implemented progressively, it considers that states parties nonetheless have ‘a *minimum core obligation* to ensure the satisfaction of, at the very least, *minimum essential levels of each of the rights*’.¹⁹ For example, the Committee points out that ‘a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant’.²⁰ Each of the Covenant provisions thus has a basic normative content which must be guaranteed in all circumstances, irrespective of the country’s economic level, its political situation or its institutional structure.²¹ That applies both in periods of military occupation and in times of peace. This core establishes in a sense the starting point from which states parties can plan how to fulfil their obligations progressively. It thus sets a limit to the flexibility allowed by virtue of Article 2(1).

The principle of continuity of the legal system in the law of occupation

The application of economic, social and cultural rights during periods of occupation must also take account of the laws governing that kind of situation. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (2004), the International Court of Justice had occasion to recall that Israel, as the occupying power, is obliged to uphold the provisions of the Covenant ‘in the exercise of the powers available to it on this basis’.²² Yet the content and scope of those powers can only be determined with reference to the law of occupation. The occupier is only authorized to make use of the room for manoeuvre allowed with regard to economic, social and cultural rights within the limits set by this legal regime.

In some respects, the application of the Covenant implies a long-term perspective and the ability of the sovereign power to effect far-reaching transformations of societies. The realization of the right to work, for example, obliges states to work out development strategies which commit their national economies for a good number of years.²³ By contrast, the law of occupation offers resistance to changes of that kind. Its aim is to maintain the institutional and legal structures

19 General Comment No. 3, above note 11, para. 10 (emphasis added). See also Maastricht Guidelines, above note 11, No. 9.

20 General Comment No. 3, above note 11, para. 10.

21 See, in particular, Audrey Chapman and Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, Antwerp etc., 2002.

22 ICJ, *Legal Consequences*, above note 3, para. 112.

23 Article 6(2).

pending a decision on the future status of the territory concerned. Article 43 of the Hague Regulations of 1907 stipulates that the occupier is obliged to ‘restore, and ensure, as far as possible, public order and safety, *while respecting, unless absolutely prevented, the laws in force in the country*’ (emphasis added). This rule prescribing the continuity of the internal legal system thus sets an upper limit to the realization of economic, social and cultural rights. It prohibits structural reforms which would affect the long-term future of the occupied territory.

This principle is, however, not rigid. As stipulated in Article 43 of the Hague Regulations, the occupying powers may depart from it if they are ‘absolutely prevented’ from complying with it. Article 64 of the Fourth Geneva Convention, which takes up and clarifies the rule given in Article 43 of the Hague Regulations, adds that legal amendments can be made when they are ‘essential’ to the realization of three objectives: (i) to implement international humanitarian law; (ii) to maintain the orderly government of the territory and (iii) to ensure the security of the occupying power and the local administration.²⁴ The obligation to respect human rights must be added to these three objectives.²⁵ The immediate consequences of the Second World War showed that the occupier is entitled to abrogate oppressive or discriminatory national legislation such as the National Socialist Nuremberg laws.²⁶ In some cases the occupier may also be required to adopt new legal texts in order to comply with its commitments. Order No. 7 of 9 June 2003, adopted by the occupation administration in Iraq to reform the Iraqi penal code, suspended capital punishment, for example, and prohibited torture and cruel, degrading or inhuman treatment or punishment as well as discrimination.²⁷

The question which then arises is how to reconcile the occupier’s obligation to apply human rights – which may at times imply legal reforms – with the principle of the continuity of the internal legal system which is at the heart of the law of occupation. To what extent are the reforms carried out compatible with the rule set forth in Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention?²⁸ The reply to that question calls for the greatest caution and gives an indication of the slippage which could result from adopting

24 Despite the heading of Article 64, which refers to ‘penal legislation’, this applies to the entire domestic legal system. Jean Pictet emphasizes in that respect that ‘the reason for the Diplomatic Conference making express reference only to respect for penal law was that it had not been sufficiently observed during past conflicts; there is no reason to infer *a contrario* that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution’. Pictet, above note 6, p. 360. See Benvenisti, above note 5, pp. 100 ff.

25 Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’, *European Journal of International Law*, 16 (2005), p. 676.

26 See, in particular, Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, Minneapolis, 1957, pp. 95, 107; Morris Greenspan, *The Modern Law of Land Warfare*, University of California Press, Berkeley etc., 1959, p. 245.

27 Coalition Provisional Authority, Order No. 7, Penal Code, 9 June 2003, Sections 3 and 4.

28 For a more detailed evaluation of the scope of these two provisions see Sylvain Vité, ‘Applicability of the international law of military occupation to the activities of international organizations’, *International Review of the Red Cross*, 86 (853) (2004), pp. 14 ff. (full text in French only).

too lax a position on this matter. Under cover of fulfilling its international obligations, an occupier could carry out structural transformations in the occupied country without conducting a democratic consultation of the people concerned. That risk is even greater with regard to economic, social and cultural rights, as the rules stipulated in that area are sometimes imprecise and open to irregular interpretations.

The interrelation of the law of occupation and economic, social and cultural rights in their common normative areas

That risk may nonetheless be reduced if a varied approach is pursued. The response actually needs to be adapted in accordance with the rules envisaged. In many ways the realization of economic, social and cultural rights does not imply reforms that are so radical that they run counter to the law of occupation. That normative balance cannot therefore be found by studying only the general principles of the application of economic, social and cultural rights during periods of occupation. It needs to be sought on a case-by-case basis by analysing specific rules. That is what will now be attempted by taking two examples, that of the living conditions of the civilian population, with particular regard to food and health, and that of property.

Food and health

The legal regime of occupation is mainly emergency law. Its aim is to respond to the immediate needs of civilians who are in the power of a foreign army. It sets out to protect their living conditions, essentially from the perspective of humanitarian assistance. Without neglecting concerns that are linked to the survival of the population, the system of economic, social and cultural rights is geared to the long term. While it establishes obligations which must be fulfilled in all circumstances and thus overlaps with the law of occupation, it also provides for obligations to be realized progressively as the situation in the territory stabilizes. As far as food and health are concerned, it thus complements the minimum rules of occupation.

The law of occupation

The law of occupation contains several provisions which deal with the living conditions of civilians. Generally, it requires the occupier to take ‘all the measures in his power to restore, and ensure, as far as possible, public order and safety’.²⁹ More particularly, the Fourth Geneva Convention stipulates that ‘the Occupying Power has the duty of ensuring the food and medical supplies of the population’.³⁰ Additional Protocol I extends the range of that provision by adding that that

29 Hague Regulations, Article 43.

30 Fourth Geneva Convention, Article 55(1).

obligation also covers ‘the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship’.³¹ To that end, account is taken of the possible material difficulties encountered by the occupying power as it is bound only ‘[t]o the fullest extent of the means available to it’.³² It nonetheless has the duty to use all the resources available to it to meet those responsibilities.³³ If the occupying power is not able to fulfil that obligation, it must draw on external support. It must agree to and facilitate relief work for people in distress.³⁴ That obligation is unconditional.³⁵

With regard to health, the occupying power is also responsible for ensuring the proper functioning of the medical and hospital establishments and services and for guaranteeing health and public hygiene. In particular, it must take all measures necessary to combat contagious diseases and epidemics.³⁶ Here, too, the binding nature of this obligation must be adapted in line with the available means.³⁷

Lastly, the law of occupation deals with minimum living conditions in connection with evacuations. Those evacuations are allowed only ‘if the security of the population or imperative military reasons so demand’ and solely within the occupied territory, ‘except when for material reasons it is impossible to avoid such displacement’.³⁸ In that case the occupying power must take care to ensure that some essential needs are provided and, in particular, that people are evacuated in ‘satisfactory conditions of hygiene, health, safety and nutrition’ and that they are given ‘proper accommodation’.³⁹

Those rules relative to living conditions during periods of occupation are general and confer discretionary powers on the authorities responsible for enforcing them. While they set certain requirements in terms of food, health, clothing and housing, they do not give precise indications about the objectives which have to be achieved. The very concepts of ‘satisfactory conditions’ or ‘supplies’ can be understood in very different ways. Moreover, conceived as a short-term transitional legal regime, the law of occupation focuses primarily on the duty to assist

31 Additional Protocol I, Article 69(1).

32 Fourth Geneva Convention, Article 55(1); Additional Protocol I, Article 69(1).

33 Pictet, above note 5, p. 310.

34 Fourth Geneva Convention, Article 59(1). For further details, see Fourth Geneva Convention, Articles 30 and 59 ff. See also Robert Kolb, ‘De l’assistance humanitaire – La Résolution sur l’assistance humanitaire adoptée par l’Institut de droit international lors de sa Session de Bruges en 2003’, *International Review of the Red Cross*, 86 (856) (2004), pp. 853 ff.

35 Pictet, above note 5, p. 320.

36 Fourth Geneva Convention, Article 56(1); Additional Protocol I, Article 14(1).

37 Fourth Geneva Convention, Article 56(1), points out that the occupying power is bound ‘to the fullest extent of the means available to it’. Some provisions are also devoted to the living conditions of particularly vulnerable categories of people, especially detainees and internees (Fourth Geneva Convention, Arts. 76, 85, 89–90, 91–92, 108, 125).

38 *Ibid.*, Article 49(1) and (2).

39 *Ibid.*, Article 49(2) and (3). For an application of these rules, see the case law of the Eritrea–Ethiopia Claims Commission, *Civilian Claims, Ethiopia’s Claim 5*, Partial Award of 17 December 2004, paras. 116 ff; *Civilian Claims, Eritrea’s Claims 15, 16, 23 & 27–32*, Partial Award of 17 December 2004, paras. 66 ff., 79 ff.

people in difficulty. When the situation persists, that obligation may well cease to be in line with the needs of the civilian population. In that case, it then ceases to be solely a matter of guaranteeing their survival but, as stipulated in Article 43 of the Hague Regulations of 1907, of ‘restoring and ensuring public order and safety’. However, the rules of occupation are not of great use when the implications of that provision need to be understood more precisely.

Given those uncertainties, some clarification can be found in the complementary contribution made by the international law of human rights, and in particular the right to adequate food and the right to health.⁴⁰ The economic, social and cultural rights are the subject of a growing number and range of jurisprudential developments. Over time they have thus taken on a new consistency, opening up new perspectives with regard to the protection of civilians during periods of occupation. That contribution is made, on the one hand, by the concretization of minimum rules applicable at all times (core) and, on the other, by the identification of rules which have to be enforced progressively as the occupied territory stabilizes.

The core of the right to adequate food and the right to health

From the perspective of human rights, the right to an adequate standard of living implies that each person has access to the conditions necessary for his or her individual livelihood. According to the terms of the Covenant, that essential minimum includes, in particular, adequate food, clothing and housing as well as the continuous improvement of living conditions.⁴¹ The Covenant also recognizes ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.⁴² The definition of the core of each of those rights establishes their minimum applicable content under all circumstances and consequently clarifies the rules applicable during periods of occupation.

The right to adequate food – with all that it implies – includes as an essential requirement the ‘fundamental right of everyone to be free from hunger’.⁴³ That rule constitutes its core. The Committee on Social, Economic and Cultural Rights thus confirms that states parties have ‘a core obligation to take the necessary action to mitigate and alleviate hunger ..., even in times of natural or other disasters’.⁴⁴ More precisely, it adds that the core content of the right to adequate food is respected when two conditions are met: (i) ‘the availability of food in a

40 Universal Declaration of Human Rights, Article 25(1); International Covenant on Economic, Social and Cultural Rights, Article 11; Convention on the Rights of the Child, Article 27.

41 International Covenant on Economic, Social and Cultural Rights, Article 11. See Eide, above note 9, p. 133. For an example of the application of the law at an adequate standard of living in periods of occupation, see Report of the Special Committee to Investigate Israeli Practices affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, UN Doc. A/58/311, 22 August 2003, paras. 44 ff.

42 International Covenant on Economic, Social and Cultural Rights, Article 12.

43 Ibid., Article 11(2).

44 Committee on Social, Economic and Cultural Rights, General Comment No. 12, above note 14, para. 6.

quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture'; and (ii) 'the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights'.⁴⁵ The right to adequate food thus goes far beyond the simple matter of the quantity of food available. That food must also meet certain quality criteria.⁴⁶

During periods of occupation, that obligation finds its concrete expression in the duty either to ensure that the territory is supplied, or to accept and facilitate the deployment of relief operations. Economic, social and cultural rights are thus at one with the approach of international humanitarian law, in that they impose an obligation to act or, at least, not to create obstacles. The Committee on Social, Economic and Cultural Rights has pointed to that duality in recalling that the right to adequate food incorporates, on the one hand, the obligation to *fulfil* – that is, 'to *facilitate* and ... to *provide*', and, on the other, that of *not preventing* 'access to humanitarian food aid in internal conflicts or other emergency situations'.⁴⁷

The core of the right to adequate food may be violated, for example, when the occupation forces destroy the civilian population's food stocks, when they affect the means of production, especially by placing mines in agricultural areas, by displacing farming or fishing communities, by immobilizing the transport network which allows supplies to be distributed or by blocking access to certain basic services (obligation to respect).⁴⁸ The same applies when the occupying power fails to adopt the measures needed to prevent possible third parties from carrying out similar practices (obligation to protect). Finally, that fundamental obligation may require the occupier to adopt certain positive measures (obligation to fulfil). The occupier is, in particular, to set up an effective relief distribution system and to take account of the needs of the most vulnerable persons, particularly children, the elderly and the handicapped.⁴⁹

With regard to health, the minimum normative content consists of elements from the area of health care and prevention measures. It implies, for example, the obligations to guarantee access without discrimination to medical equipment, products and services, an adequate supply of safe drinking water and

45 Ibid., para. 8. On this particular point, see Rolf Künnean, 'The right to adequate food: violations related to its minimum core content', in Chapman and Russell, above note 21, pp. 161–83.

46 On this point see General Comment No. 12, above note 14, para. 7.

47 Committee on Social, Economic and Cultural Rights, General Comment No. 12, above note 14, paras. 15 and 19. Following the invasion of Kuwait in August 1990, 22,000 people took refuge in the Philippines embassy. The Iraqi troops had prohibited supplying those people, thus violating the right to food, as was subsequently confirmed by the UN Special Rapporteur called to report on these events; see Report on the Situation of Human Rights in Kuwait under Iraqi Occupation, above note 2, para. 222. In its Concluding Observations of 2001 addressed to Israel, the Committee had, for example, criticized the government for having turned back international missions to supply civilians living in the occupied territories, particularly those of the International Committee of the Red Cross: Concluding Observations, Israel, UN Doc. E/C.12/1/Add.69, 31 August 2001, para. 13.

48 See, for example, Committee on Social, Economic and Cultural Rights, Concluding Observations, Israel, E/C.12/1/Add.90, 26 June 2003.

49 For greater detail, see Künnean, above note 45, pp. 177 ff.

the possibility of obtaining essential medicines as defined by the World Health Organization.⁵⁰ Non-compliance with those obligations cannot be justified ‘under any circumstances whatsoever’. These are consequently obligations ‘which are non-derogable’.⁵¹ In the words of the Committee on Social, Economic and Cultural Rights, other rules must also be considered ‘of comparable priority’.⁵² Those rules include, in particular, the obligation to provide immunization against the major infectious diseases, to take measures to prevent, treat and control epidemic and endemic diseases and to provide education and access to information concerning the main health problems.⁵³ Those rules also form part of the core right to health.

In the area of health, as in that of food, any reference to matters that are merely touched on by the law of occupation therefore tends to be made explicit by economic, social and cultural rights.⁵⁴ The UN Special Rapporteur on the human rights situation in Kuwait under Iraqi occupation thus recalled that the assessment of the occupier’s behaviour in the light of Articles 55 and 56 of the Fourth Geneva Convention alone did not expose the full dimension and seriousness of the violations committed. In his view, ‘[t]he true significance of these events was only elucidated by recourse to the concept of the right to health as guaranteed by the Covenant on Economic, Social and Cultural Rights’.⁵⁵

Progressive realization of the right to adequate food and the right to health

The contribution made by human rights is nonetheless not merely to provide normative clarification. Apart from those minimum obligations, other obligations call for progressive realization in terms of food and health. On this point the economic, social and cultural rights complement the law of occupation, which remains general when it comes to defining a long-term normative framework. That contribution is all the more helpful when the occupation tends to stabilize and to persist. The right to adequate food is not merely the minimum obligation to combat hunger. As the Committee on Social, Economic and Cultural Rights recalls,

50 Committee on Social, Economic and Cultural Rights, General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, 11 August 2000, para. 43. See also Report on the International Conference on Primary Health Care, Alma-Ata, 6–12 September 1978, Health for All Series, No. 1, WHO, Geneva, 1978, Ch. 3, para. 50. On this subject, see Audrey R. Chapman, ‘Core obligations related to the right to health’, in Chapman and Russell, above note 21, pp. 185–215.

51 Committee on Social, Economic and Cultural Rights, General Comment No. 14, above note 50, para. 47.

52 Ibid., para. 44.

53 Ibid., para. 44.

54 Noam Lubell suggests that human rights therefore constitute a *lex specialis* with regard to health: Noam Lubell, ‘Challenges in applying human rights law to armed conflict’, *International Review of the Red Cross*, 87 (860) 2005, p. 751. See also Hans-Joachim Heintze, ‘On the relationship between human rights law protection and international humanitarian law’, *International Review of the Red Cross*, 86 (856) 2004, p. 795.

55 Walter Kälin, *Human rights in Times of Occupation: The Case of Kuwait*, LBE, Berne, 1994, p. 28.

that right 'shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients'.⁵⁶ While assuming that certain immediate measures are adopted to cover the essential content of that right, the Committee also calls for a long-term approach to achieve its full realization progressively.⁵⁷ Once the emergency period is over, it is no longer sufficient for the occupier to distribute food to the civilian population. The system of human rights provides for civilians to have access to the resources and means to enable them to ensure their own livelihood.⁵⁸ To that end, the occupier must establish 'measures in regard to *all* aspects of the food system, including the production, processing, distribution, marketing and consumption of safe food, as well as parallel measures in the fields of health, education, employment and social security'.⁵⁹ In particular, that means that it is obliged to ensure the sustainable management of the natural resources used to produce food.⁶⁰

Also with regard to health, human rights require the authorities to look to the future if the occupation persists. For example, these authorities need to devise a 'public health strategy and plan of action'.⁶¹ Those instruments are to be based on statistical data describing the needs of the local people and on a periodic evaluation and readjustment of the work carried out. The view of the Committee on Social, Economic and Cultural Rights is that planning the health policy forms part of the essential obligations of the right to health.⁶²

The reforms intended to ensure adequate living conditions in occupied territories must not, however, go beyond the restraints imposed by the law of occupation. The principle of the continuity of the legal system imposes certain limits in that respect which do not apply to measures adopted by a state on its own territory in peacetime. With regard to food, for example, it is appropriate to carry out a separate examination of the various obligations imposed on states. Some Covenant prescriptions are admissible with regard to the law of occupation, such as that which consists of 'improv[ing] methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition'.⁶³ Their implementation does not imply far-reaching changes to the legal and institutional structure of the country. By contrast, other prescriptions, such as those which imply 'developing or reforming agrarian systems',⁶⁴ risk being problematic in that respect. As far as

56 General Comment No. 12, above note 14, para. 6.

57 *Ibid.*, paras. 6 and 16.

58 *Ibid.*, para. 15.

59 *Ibid.*, para. 25.

60 *Ibid.* On this point, human rights overlap with the law of occupation. See the Hague Regulations of 1907, Article 55. That provision stipulates that the occupier may only manage property (including the natural resources) and agricultural estates belonging to the occupied state as 'administrator and usufructuary'. It must therefore 'safeguard the capital of these properties'.

61 Committee on Social, Economic and Cultural Rights, General Comment No. 14, above note 50, para. 43.

62 *Ibid.* For a more detailed analysis of the obligations to respect, protect and implement the hard core of the right to health, see Chapman, above note 50, pp. 205 ff.

63 Article 11(2)(a).

64 *Ibid.*

health is concerned, the obligations provided for by the Covenant do not seem to contravene the principle of the continuity of the legal system. Without making far-reaching changes to the structures of a society, it is possible to guarantee, for example, ‘the prevention, treatment and control of epidemic, endemic, occupational and other diseases’ or ‘the creation of conditions which would assure to all medical service and medical attention in the event of sickness’.⁶⁵

The examples of food and of health thus show that the occupier’s obligations are not limited to the minimum defined by international humanitarian law. They must be viewed from a perspective which encompasses the complementary contribution made by human rights.

Property

With regard to property, economic, social and cultural rights and the law of occupation are interrelated in a different manner. With a few exceptions, human rights are not sufficiently developed in that area to make it possible to derive from them a normative content that is both universal and precise. Contrary to what occurs in the areas of food and health, the law of occupation provides the most specific ruling in this case. The core guarantee of property thus merges with the prescriptions of humanitarian law. Respect for those prescriptions must be immediate. In that case there is no room for progressive fulfilment of the occupier’s obligations.

Human rights

Article 17(2) of the Universal Declaration of Human Rights stipulates that ‘no one shall be arbitrarily deprived of his property’. However, that principle was not reiterated in either of the covenants of 1966 which set out to give treaty-based form to the provisions of the Declaration. The preparatory work for those two instruments shows that the participating delegations failed to agree on the scope of the principle in Article 17(2), as well as on the restrictions to be applied to it.⁶⁶ At the universal level there is therefore no basis in treaty law which allows the various dimensions of a property guarantee to be considered from the human rights perspective.⁶⁷ As we shall see, however, some jurisprudential developments enable that deficiency to be partly offset.

At the regional level, each of the European, American and African human rights protection systems proposes a treaty-based provision which recognizes the existence and defines the outline of the right to property. Under

65 Convention, Article 12(2).

66 Catarina Krause, ‘The right to property’, in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights, A Textbook*, 2nd edn, Nijhoff, Dordrecht (etc.), 2001, p. 194.

67 On the legal bases of the right to property, see *ibid.*, pp. 194 ff.

certain conditions those rules authorize restrictions to the enjoyment of property.⁶⁸ Article 1 of Protocol I additional to the European Convention on Human Rights stipulates, for example, that '[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions'. It adds that any restriction to that rule is acceptable only if it is in the public interest, is in line with national and international law and upholds the principle of proportionality.⁶⁹ However, states have particularly broad discretionary powers in evaluating those conditions. Article 1 of the Additional Protocol makes it clear that the guarantee to property does not impair the right of a state to 'enforce such laws as *it deems necessary* to control the use of property in accordance with the general interest ...' (emphasis added). Placing so much emphasis on the freedom of the contracting parties to use their discretion has the effect of considerably weakening the binding force of this provision. One observer has even referred to the 'soft' nature of Article 1.⁷⁰ The American and African texts do not provide further clarification in the matter. It is therefore on a case-by-case basis and in the light of the jurisprudence of the bodies responsible for applying regional treaties that an attempt may be made to understand what the actual implications of the right to property are. However, with regard to the particular case of the protection of property during periods of occupation, international practice in this field is limited or even non-existent.

Human rights thus seem to provide little support on this issue.⁷¹ One therefore needs to refer to international humanitarian law. In this case, the latter provides a more detailed normative system comprising rules on the treatment of public or private property. Those rules, on the one hand, prohibit, subject to certain exceptions, the destruction of that property and, on the other hand, establish limits to its appropriation or requisition by the occupation forces.

The destruction of property in the law of occupation

Article 53 of the Fourth Geneva Convention prohibits the destruction by the occupying power of any kind of publicly or privately owned real or personal property, 'except where such destruction is rendered absolutely necessary by military

68 Protocol Additional to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, as amended by Protocol No. 11 of 11 May 1994, entered into force 1 November 1998, Article 1; American Convention on Human Rights, entered into force 18 July 1978, OAS Treaty Series No. 36, 1144, Article 21; African Charter on Human and Peoples' Rights, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, Article 14.

69 For an analysis of this provision see Luigi Condorelli, 'Premier Protocole additionnel, article 1', in L. E. Pettiti, E. Decaux and P. H. Imbert (eds.), *La Convention européenne des human rights, Commentaire article par article*, Economica, Paris, 1995, pp. 972–97.

70 *Ibid.*, p. 972.

71 However, the UN General Assembly has referred to the Universal Declaration of Human Rights to recall the rights of the Palestinian refugees to reclaim the goods taken from them during the Israeli occupation. See, in particular, Palestinian Refugees' Properties and Their Revenues, UN Doc. A/Res/61/115, 14 December 2006.

operations'.⁷² The expected military advantages therefore need to be weighed against the damage done on a case-by-case basis.⁷³ The occupying power is required to carry out that review from the perspective of strict necessity.⁷⁴ To that end, it also has to take account of other rules of international humanitarian law relative to respect for certain items of property. Under no circumstances, for instance, may it destroy cultural property or private property by way of reprisals.⁷⁵ If acts of resistance to the occupation take the form of genuine military combat, the rules relative to the protection of civilian property during hostilities apply.⁷⁶

Furthermore, some property enjoys absolute protection. It may not be destroyed deliberately on the basis of the exception given in Article 53. This property includes, in particular, the buildings, materials and stores of fixed medical establishments of the armed forces,⁷⁷ military or civilian medical units,⁷⁸ the property of municipalities, that of 'institutions dedicated to religion, charity and education, the arts and sciences' and 'historic monuments, works of art and science'.⁷⁹ Cultural property is also the subject of greater protection. The Hague Regulations of 1907 prohibit its deliberate seizure, destruction or wilful damage without exception, and even require states to prosecute anyone who fails to comply with that obligation.⁸⁰ The Hague Convention of 1954, which deals specifically with that problem, adds that its contracting parties are also duty-bound to contribute to safeguarding and preserving that property in the territories under their authority by virtue of occupation, in particular by taking control measures or by transferring the items in danger.⁸¹

72 In this regard, albeit less explicit, see also Articles 46–56 of the Hague Regulations of 1907. On the prohibition of destruction see Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2002, p. 518.

73 See Pictet, above note 5, p. 302. See also Greenspan, above note 26, pp. 278 ff. When the destruction is 'extensive ... and carried out unlawfully and wantonly', it also constitutes a grave breach of the Fourth Geneva Convention and, as such, must be subject to criminal proceedings. Fourth Geneva Convention, Articles 146 and 147; see, in particular, in ICTY case law, the *Naletilic Case*, Judgment of 31 March 2003, paras. 574 ff.; *Kordić case*, Judgment of 26 February 2001, para. 341.

74 On the idea of necessity in Article 53, see von Glahn, above note 26, pp. 224 ff.

75 *Fourth Geneva Convention*, Article 33(3). C. Rousseau cites the case of a German soldier sentenced in 1949 by the Netherlands Special Court of Cassation for having set fire to several civilian houses in reprisal for acts of sabotage committed by unknown persons (judgement *Wintgen*, No. 178, 6 July 1949, in Charles Rousseau, *Le droit des conflits armés*, Pedone, Paris, 1983, p. 165).

76 Additional Protocol I, Articles 52 et seq.

77 First Geneva Convention, Article 33(2) and (3).

78 Additional Protocol I, Article 12(1).

79 Hague Regulations of 1907, Article 56. See von Glahn, above note 26, p. 191.

80 Article 56(2).

81 See Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 5, and the Regulations for the Execution of the Convention, in particular Articles 2(a), and 19. See also the Protocol for the Protection of Cultural Property in the Event of Armed Conflict (1954), which prohibits exporting cultural property from the occupied territories. The Eritrea–Ethiopia Claims Commission, for example, considered that the Stela of Matara (which was approximately 2,500 years old) had been deliberately destroyed by the Ethiopian forces in violation of customary law (since the two states were not party to the 1954 Convention), in particular the law which is reflected in Article 56 of the Hague Regulations of 1907, Article 53 of the Fourth Geneva Convention and Article 52 of Additional Protocol I. However, according to the Commission, it is not clear whether Article 53 of Additional Protocol I applies, given the type of historic monuments covered by that provision. See *Central Front, Eritrea's Claims* 2, 4, 6, 7, 8, 22

While the prohibition of destroying property in occupied territory is worded fairly precisely in international humanitarian law, it is not entirely foreign to the system of human rights. It has been studied primarily in relation to the right to housing. In its Concluding Observations of 2003 relative to Israel, the UN Human Rights Committee expressed its disapproval of what, for example, it considered to be ‘the partly punitive nature of the demolition of property and homes in the Occupied Territories’.⁸² In the Committee’s opinion, those practices were in contravention of several provisions of the International Covenant on Civil and Political Rights of 1966 – that is, the right not to be subjected to arbitrary interference with one’s home, freedom to choose one’s residence, equality of all persons before the law and equal protection of the law, and the right not to be subjected to torture or to cruel or inhuman treatment.⁸³ International humanitarian law and human rights concur on that point, although the former is more complete and more detailed than the latter.

The appropriation of property in the law of occupation

The law of occupation also establishes precise rules regarding the appropriation of property. While it prohibits without exception all forms of pillage, it allows for some property to be requisitioned by the occupation forces. A distinction needs to be made between public property and private property.

Pillage – that is, the unjustified, violent appropriation of valuable enemy property⁸⁴ – is prohibited by both the Hague Regulations of 1907 (Art. 47) and the Fourth Geneva Convention (Art. 33).⁸⁵ That rule is also customary in nature.⁸⁶ The scope of that protection is extensive. It includes ‘both widespread and systematized

(2004), paras. 107 ff. See also *ibid.*, paras. 58 ff and 85 ff. *Central Front, Ethiopia’s Claims 2* (2004), paras. 43 and 75; *Civilian Claims, Ethiopia’s Claims 5* (2004), paras. 133 and 135.

82 Human Rights Committee, Concluding Observations, Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 16.

83 Articles 17, 12, 26 and 7 respectively. Similarly, the United Nations Committee against Torture considered that ‘Israeli policies on house demolitions may, in certain instances, amount to cruel, inhuman or degrading treatment or punishment’; Conclusions and recommendations: Israel, UN Doc. A/57/44(SUPP), 25 September 2002, para. 6(j). For other examples see David, above note 72, p. 519; Krause, above note 66, pp. 207–8.

84 For a review of the concept of pillage and its implications in international humanitarian law, see ICTY, Trial Chamber, *Prosecutor v. Zejnir Delalic et al.*, IT-96-21-T, paras. 584–92. The chamber also recalls that, according to the texts, the same behaviour has variously been termed ‘pillage’, ‘plunder’ and ‘spoliation’, para. 591. See also von Glahn, above note 26, pp. 228 ff.; Alwyn V. Freeman, ‘Responsibility of States for Unlawful Acts of their Armed Forces’, *Collected Courses of the Hague Academy of International Law*, (2) (1955), pp. 325–43. There are countless examples. See, *inter alia*, Commission on Human Rights, Report on the Situation of Human Rights in Kuwait under Iraqi Occupation, above note 2, paras. 224 ff.; Eritrea–Ethiopia Claims Commission, *Partial Award, Central Front, Ethiopia’s Claim 2*, April 28, 2004, paras. 71 ff.

85 Hague Regulations of 1907, Article 47; Fourth Geneva Convention, Article 33(2). See Pictet, above note 5, p. 226.

86 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, Vol. 1: *Rules*, ICRC/Cambridge University Press, Geneva and Cambridge 2005: Rule 52 (and appended practice). See, in particular, *Kordić Case*, above note 73, para. 351.

acts of dispossession and acquisition of property in violation of the rights of the owners and isolated acts of theft or plunder by individuals for their private gain'.⁸⁷ It also extends to all categories of public or private property. It is sufficient for the deeds committed to target property with 'sufficient monetary value ... as to involve grave consequences for the victims'.⁸⁸

In the *Case Concerning Armed Activities on the Territory of the Congo* (2005), the International Court of Justice established, for example, that Uganda had not taken the necessary measures to prevent the exploitation of certain natural resources, in particular the gold and diamond mines, in the Democratic Republic of the Congo. As the occupying power, Uganda should have taken action to stop the illegal trade carried out not only by members of its armed forces, but also by private persons in the region.⁸⁹ The Court found that the behaviour constituted a violation of Article 47 of the Hague Regulations of 1907 and Article 33 of the Fourth Geneva Convention of 1949.⁹⁰ The Court also pointed out in the same judgment that international humanitarian law and human rights partly overlap on the issue of pillage. The African Charter on Human and Peoples' Rights, which is applicable in this case, prohibits 'spoliation' and stipulates that the dispossessed people shall have the right to adequate compensation.⁹¹ However, the protection given by the African Charter is less extensive than that provided by humanitarian law. That instrument considers the prohibition of spoliation only as a collective right belonging to the 'people' and not as an individual right.⁹²

While entirely prohibiting pillage, the law of occupation authorizes the appropriation or use of property in the occupied territory in a number of limited cases.⁹³ The occupier is first entitled to seize public movable property 'which may be used for military operations'.⁹⁴ It may be seized if three conditions are met: (i) the

87 *Kordić Case*, above note 73, para. 352.

88 *Ibid.*

89 ICJ, *Armed Activities*, above note 3, para. 248. In the 1958 Commentary on the Fourth Geneva Convention, the ICRC had already acknowledged this duality. On the subject of Article 33, it considered that '[t]he High Contracting Parties prohibit the ordering as well as the authorization of pillage' and that they 'pledge themselves furthermore to prevent or, if it has commenced, to stop individual pillage' (Pictet, above note 5, p. 226).

90 ICJ, *Armed Activities*, above note 3, paras. 327 ff.

91 African Charter on Human and Peoples' Rights, above note 68, Article 21(2); ICJ, *Armed Activities*, above note 3, para. 245.

92 The Eritrea–Ethiopia Claims Commission also draws attention to the vast amount of pillage carried out in the case submitted to it. It underlines the fact that the occupying power is responsible for maintaining public order in the occupied territory and that it is obliged to prevent pillage (Articles 43, 46–47 of the Hague Regulations of 1907). In the case in question, Ethiopia is responsible for having allowed this pillaging without trying to stop it as required by law. However, the Commission also admits that any violation in this area could not reasonably have been prevented by the authorities of the occupying force. It therefore decided to hold Ethiopia responsible for 75 per cent of the acts of pillage committed in the area (*Central Front, Eritrea's Claims* 2, 4, 6, 7, 8, 22 (2004), paras. 67 ff).

93 On this point see von Glahn, above note 26, pp. 176 ff.; Myres S. McDougal and Florentino P. Feliciano, *The International Law of War, Transnational Coercion and World Public Order*, Nijhoff, Dordrecht etc., 1994, pp. 809 ff.

94 Hague Regulations of 1907, Article 53(1). On this provision see von Glahn, above note 26, pp. 180–81. On public property in occupied territories see Greenspan, above note 26, pp. 287 ff.; Rousseau, above note 75, pp. 159 ff.; David, above note 72, pp. 521 ff.

property in question belongs to the state; (ii) it is movable; and (iii) it is able to contribute to the needs of the army. In a non-exhaustive list, the Hague Regulations authorize the occupier to appropriate 'cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies'.⁹⁵ Conversely, that category does not include public property that is used for civilian purpose only, such as 'that of institutions dedicated to religion, charity and education, the arts and sciences' or historic monuments.⁹⁶ Finally, the property of municipalities is to be treated as private property and is consequently not covered by the right of seizure.⁹⁷

As for publicly owned immovable property, it is subject to the system of usufruct.⁹⁸ The occupier is entitled to benefit from what it produces but must safeguard its capital. It may, for example, consume or sell the produce of land belonging to the state or appropriate the revenue from road or river tolls. By contrast, it does not have the right to dispose of that property in any way whatsoever. Similarly, the use that it makes of the property must remain 'normal', that is, it must be in line with what was done with it before the occupation.⁹⁹ Over-exploitation of public immovable property is contrary to the law of occupation. The rule of usufruct applies, for example, to all buildings, forests and agricultural estates belonging to the occupied state.¹⁰⁰ As recalled by the International Court of Justice in its judgment on the *Armed Activities on the Territory of the Congo* (2005), any other type of appropriation of natural resources by the occupying power must be placed on a par with pillage.¹⁰¹

During the occupation of Timor-Leste by Indonesia, it was evident that the forests in that country were largely exploited beyond the limit set by the rule of usufruct. In 1999, that is, at the end of that occupation, the state of most of those forests was such that they were no longer able to supply the basic needs of the local people. Those people were thus deprived of an environment that was essential for gathering food, medicinal plants, firewood and fodder. Similarly, the erosion of the soil threatened to have a serious effect on agricultural production and water resources.¹⁰² Lack of respect for Article 55 of the Hague Regulations of 1907 thus leads, in extreme cases, to simultaneous violations of certain economic,

95 Article 53(1). G. von Glahn considers that the number of items which could be included in this category is extremely large. He states that 'in view of the increasing technological character of modern war, ... few articles and commodities owned by the enemy state escape seizure by an occupant by reason of their lack of adaptability to war use', von Glahn, above note 26, p. 181.

96 Hague Regulations of 1907, Article 56.

97 Ibid.

98 Ibid., Article 55. On this matter see in particular Julius Stone, *Legal Controls of International Conflicts*, 2nd edn, Rinehart, New York, 1959, pp. 714–15.

99 Von Glahn, above note 26, p. 177.

100 Hague Regulations of 1907, Article 55.

101 ICJ, *Armed activities*, above note 3, para. 245.

102 Commission for Reception, Truth and Reconciliation in East-Timor, Final Report, January 2006, paras. 48–49. The production of sandalwood was, moreover, virtually eradicated during the occupation because of over-exploitation; *ibid.*, paras. 46–47.

social and cultural rights, in particular the right to adequate food and the right to health.

Finally, even if treaty-based law does not state it explicitly, practice shows that the revenues thus acquired have to be used solely to finance the expenses connected with the occupation. It would indeed be paradoxical for the use of the income from immovable property not to be subject to restrictions while monetary contributions or requisitions may only be exacted for certain specific objectives – that is, the needs of the army of occupation or the territorial administration.¹⁰³ The Nuremberg International Military Tribunal considered that the provisions of the Hague Regulations relative to public property ‘make it clear that under the rules of war, the economy of an occupied country can only be required to bear the expenses of the occupation’.¹⁰⁴

In practice, the application of the rule of usufruct to public property does, however, give rise to a number of questions. What about property such as oil or gas reserves, for instance, which, strictly speaking, do not produce a yield, but rather non-renewable products? Can the rule of usufruct be applied in that case, given that any form of exploitation automatically affects the basis of production and threatens, in the long run, the very capacity to derive revenue from it? If it can, what is the limit of ‘normality’ beyond which exploitation must be considered excessive and hence in contravention of Article 55 of the Hague Regulations? Does the occupier have the right to improve the means and techniques of production with a view to increasing the quality and/or the quantity of the resources harvested? Can it create new extraction units on deposits that are considered insufficiently productive?¹⁰⁵

103 Hague Regulations of 1907, Articles 48, 49, 52. See Antonio Cassese, ‘Powers and duties of an occupant in relation to land and natural resources’, in E. Playfair (ed.), *International Law and the Administration of Occupied Territories, Two Decades of Israeli Occupation of the West Bank and the Gaza Strip*, Clarendon Press, Oxford, 1992, pp. 428–9. The question is certainly debated in the doctrine. Some authors consider that, since no mention is made in Article 55, the occupier would be entitled to exploit immovable property belonging to the occupied state in order to achieve the objectives that it has freely set, including that of developing its own national economy (see in particular von Glahn, above note 26, p. 177; McDougal and Feliciano, above note 93, pp. 812–13). However, that position is not in keeping with the spirit of the law of occupation, whose aim, we recall, is to organize the temporary management of a territory until a global permanent solution is found.

104 *Trial of the Major War Criminals before the International Military Tribunal*, I, Nuremberg, International Military Tribunal, 1947, p. 239. See also *Flick and others*, US Military Tribunal at Nuremberg, Law Reports of Trials of War Criminals, IX, 1949, pp. 21–4; *The Law of Land Warfare – Field Manual*, Department of the Army, FM 27-10, 1956, para. 363. See also Stone, above note 98, p. 697. For other examples see R. Dobie Langenkamp and Rex J. Zedalis, ‘What happens to the Iraqi oil? Thoughts on some significant unexamined international legal questions regarding occupation of oil fields’, *European Journal of International Law*, 14 (3) (2003), pp. 430 ff.

105 An analysis of these questions is beyond the scope of this article. The reader seeking further information will find parts of the answer in Cassese, above note 103, pp. 419–42; Iain Scobbie, ‘Natural resources and belligerent occupation: mutation through permanent sovereignty’, in S. Bowen (ed.), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories*, Nijhoff, The Hague etc., 1997, pp. 221–90; Kolb and Vité, above note 2.

Finally, property belonging to private persons is covered by relatively strict protection.¹⁰⁶ The Hague Regulations of 1907 stipulate that ‘private property ... must be respected’ and that it ‘cannot be confiscated’.¹⁰⁷ That principle – which states did not incorporate into the universal system designed to protect human rights – is an integral part of the law of occupation. It is nonetheless subject to restrictions.

Some categories of property associated with communications, transport and military operations, especially any kind of munitions, may be ‘seized’ temporarily, even if they belong to private individuals and not to the state. They are to be restored and compensation paid once peace has been made.¹⁰⁸ Apart from property which is used in the war effort, private property must be respected, regardless of whether it is immovable. The occupier is prohibited from confiscating food stocks, from appropriating securities or from selling buildings belonging to individuals. This applies even if the property in question is operated by virtue of a concession granted by the occupied state to a private person or a commercial company. In the *Lighthouses* case (1956), recourse had been made to an arbitral tribunal to pronounce judgment on the seizure of the revenue of the French lighthouse company in Salonica (Thessaloniki) by the Greek armed forces in 1912. The tribunal found that those revenues were to be considered private property and, as such, could not be seized by the occupying state. It would have been different if that service had been operated directly by the occupied state.¹⁰⁹

Moreover, the occupier is entitled to collect taxes, dues and tolls imposed for the benefit of the state. In that case it must respect the rules of assessment and incidence in force. If appropriate, it may levy other financial contributions but only to the extent justified by the needs of the army or the territorial administration.¹¹⁰

Finally, by virtue of Article 52 of the Hague Regulations of 1907, requisitions in kind and the compulsory provision of services are authorized in some conditions.¹¹¹ That category covers all ‘acts of constraint imposed on the civilian population by the occupying authority in order to meet the needs arising from the warfare’.¹¹² Such acts must have the sole aim of meeting the needs of the army of

106 Hague Regulations of 1907, Article 46. On private property in occupied territories, see von Glahn, above note 26, pp. 185 ff; Greenspan, above note 26, pp. 293 ff; Stone, above note 98, pp. 708 ff; Rousseau, above note 75, p. 162; David, above note 72, pp. 527 ff.

107 Hague Regulations of 1907, Article 46.

108 *Ibid.*, Article 53(2).

109 Franco-Greek Arbitral Tribunal, *Lighthouses Case*, Sentence of 24 July 1956, *Reports of International Arbitral Awards*, XII, pp. 200 ff. On this matter see Rousseau, above note 75, pp. 160–161.

110 Hague Regulations of 1907, Articles 48 and 49. See also Article 51. For a review of these contributions see Greenspan, above note 26, pp. 227 ff.; von Glahn, above note 26, pp. 161 ff.; Stone, above note 98, pp. 712–13.

111 See Gerhard von Glahn, above note 26, pp. 165 ff.; Greenspan, above note 26, pp. 300 ff.; Rousseau, above note 75, p. 166.

112 Rousseau, above note 75, p. 166 (translation ICRC).

occupation.¹¹³ Their ultimate aim may not be to support military operations outside the occupied territory or the occupier's economic growth.¹¹⁴ Similarly, ornamental property may not be requisitioned.¹¹⁵

Requisitions must be 'in proportion to the resources of the country'.¹¹⁶ The Hague Regulations thus apply the principle of proportionality to the occupied territory. Total requisitions may not constitute an excessive burden on the latter's resources. As pointed out in the Fourth Geneva Convention, the occupier has, in particular, the duty not to undermine the fundamental needs of the civilian population. The powers conferred by Article 52 could not overrule its obligation to ensure that civilians are supplied with food and medicines.¹¹⁷ Similarly, the stores of civilian hospitals may not be requisitioned so long as they are necessary for the needs of the civilian population.¹¹⁸ Finally, the people concerned must receive adequate compensation.¹¹⁹ The amount paid must be in line with the 'fair value'¹²⁰ of the property taken. Contributions in kind are in principle to be paid in cash. If not, the dispossessed owner will be given a receipt and will be paid as soon as possible.¹²¹

Conclusion

The legal regime of occupation has experienced far-reaching changes since its foundations were established by treaty in 1907 and in 1949. The interaction of international humanitarian law and human rights has resulted in that normative system being broadened and enriched. It has been broadened as human rights sometimes institute new types of protection compared with those under humanitarian law. It has been deepened when their content is sufficiently detailed to concretize certain provisions of the Hague Regulations or the Fourth Geneva Convention.

113 Hague Regulations of 1907, Article 52(1).

114 For case law on the admissibility of the objectives of the requisitions, see McDougal and Feliciano, above note 93, pp. 817 ff.; Rousseau, above note 75, p. 167.

115 G. von Glahn has drawn up a fairly long list of goods which may be requisitioned. It includes, in particular, animals, vehicles, homes, factories, machines and food. In the author's view, even luxury consumer goods, such as cigars and alcoholic beverages, may be requisitioned, 'if they are in sufficient supply'. Money is the only item which does not clearly feature on that list, since it can only be obtained by means of taxes, tolls or other forms of taxation; von Glahn, above note 26, p. 167. See also Greenspan, above note 26, p. 305.

116 Hague Regulations of 1907, Article 52.

117 Fourth Geneva Convention, Article 55(2).

118 *Ibid.*, Article 57.

119 Several judgments have obliged former occupiers to pay compensation to owners dispossessed of their property by means of requisitioning. For a review of that case law see, in particular, Rousseau, above note 75, p. 168.

120 Fourth Geneva Convention, Article 55(2).

121 Hague Regulations of 1907, Article 52(3). See also Fourth Geneva Convention, Article 55(2); McDougal and Feliciano, above note 93, pp. 821–2.

These developments have nonetheless not been uniform. They need to be analysed on a case-by-case basis – that is, by studying each of the areas governed by those laws during periods of occupation. That analysis first implies a differentiated approach depending on whether the economic, social and cultural rights or civilian and political rights are under scrutiny. Each of those two areas involves distinct implementation principles.¹²² Moreover, even if the focus is solely on economic, social and cultural rights, differences remain.

As far as food or health is concerned, international humanitarian law and human rights largely overlap when the issue in question is meeting the immediate needs of the civilian population. Conversely, when the occupation persists and the situation stabilizes, economic, social and cultural rights prove to be vital to a better understanding of the scope of the obligations of the foreign power. They give concrete form to the general obligation to ensure public life as in Article 43 of the Hague Regulations of 1907. Their relation to the law of occupation is one of complementarity.

With regard to property, the relation between the two legal regimes is very different. International humanitarian law proves to be more complete and more detailed than the law of human rights. There is no complementarity, as the latter is superseded by the former by virtue of the principle of speciality. Irrespective of whether it applies to the short term or to the long term, the prevailing legal regime is the law of occupation.

The interrelation of the two bodies of laws during periods of occupation cannot therefore be constructed by resorting to a sole principle which could be applied systematically. It is the outcome of a process of adaptation dictated by the different legal contents of the rules studied. Two specific categories have been chosen here to illustrate that delicate search for balance. The work could be appropriately continued in the future by applying the analysis to other areas such as housing, work or education.¹²³

122 For a comparative analysis of the two areas during periods of occupation, see Kolb and Vité, above note 2.

123 See Jonathan Thompson Horowitz, 'The right to education in occupied territories: making more room for human rights in occupation law', *Yearbook of International Humanitarian Law*, 7 (2004), pp. 233–77.

The law of military occupation put to the test of human rights law

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Abstract

This article outlines the debate on the general relationship between the law of armed conflicts and human rights and examines particularly the applicability of human rights during military occupation. Complementarity and compatibility should be evaluated case by case, on the basis of the rules making up each of these regimes and any exceptions that these rules contain. The different interests and values at stake – the interests of the occupying forces and those of the civilian population, the protection of human rights and the derogations necessary to maintain order – reveal many grey areas that still exist in the interaction between human rights law and the law of military occupation.



Traditionally the law of war was considered not only as *lex specialis* in relation to the law applicable in time of peace, but also as being the body of rules *exclusively* applicable during armed conflicts,¹ all other rules being considered as automatically suspended.

As Jean Pictet pointed out in 1975, ‘humanitarian law is valid only in the case of armed conflict while human rights are essentially applicable in peacetime’.² This separation between the law of war and the law of peace – and hence

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between the law of armed conflicts and human rights law – is based on the *lex specialis–lex generalis* dynamic, according to which the two are mutually exclusive depending on whether or not an armed conflict exists. This separation is also seen at the institutional level, with the United Nations and a number of regional organizations specializing in human rights, whereas the International Committee of the Red Cross specializes in humanitarian law.³

The impressive development of human rights law in recent decades, with its panoply of both universal and regional treaty instruments and the appearance of a ‘hard core’ of rights of a customary or *jus cogens* nature, could not fail to have an influence on the law of armed conflict in general and the law of military occupation in particular. These are legal regimes that are concerned with the protection of the human being.

The question of redefining the relationship between the law of war and human rights has thus been raised at last, albeit somewhat belatedly and rather tentatively. As recently as 2005, Ian Brownlie, Special Rapporteur of the International Law Commission on the effects of armed conflicts on treaties, observed in his first report that ‘The literature makes very few references to the status for present purposes of treaties for the protection of human rights.’⁴ Fortunately, the interest of legal experts in this crucial matter is growing.

The general debate on the relationship between human rights and armed conflicts has given rise to the question of the applicability of human rights during military occupation. This is a particularly interesting question because of the special nature of military occupation, which lies midway between war and peace and is characterized by the resumption of civilian life and the establishment of a particular legal relationship between the occupying army and the civilian population of the occupied country. This article will therefore tentatively outline the debate on the general relationship between the law of armed conflicts and human rights, before examining more closely the applicability of human rights during military occupation.

Compatible and incompatible aspects of the law of armed conflicts and human rights law

The law of armed conflicts and human rights law were not formed *ex nihilo*. They both sprang from the same meta-juridical requirements: the need to promote respect for human beings and their dignity in order to shield them from abuse by

1 See Adam Roberts, ‘Transformative military occupation: applying the laws of war and human rights’, *American Journal of International Law* (2006), p. 589.

2 Jean Pictet, *Humanitarian Law and the Protection of War Victims*, Sijthoff/Henry Dunant Institute, Leyden/Geneva, 1975, p. 15.

3 Ibid.

4 First report on the effects of armed conflicts on treaties (report by Mr Ian Brownlie, Special Rapporteur of the International Law Commission), UN Doc. A/CN.4/552, 21 April 2005, para. 84.

states. In addition, the codification processes applied to these two branches of international law in the late 1940s were motivated by the same desire to overcome the fascist experiments of the first half of the twentieth century that had flouted the rights of several categories of people before and during the Second World War.⁵

The efforts of the international community thus led, on the one hand, to the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948 and now regarded as a text codifying fundamental human rights, and, on the other hand, to the four Geneva Conventions of 1949,⁶ dedicated to protecting certain categories of people during armed conflicts.

While the Universal Declaration is not concerned with building a bridge between human rights and the law of war, the *travaux préparatoires* for the four Geneva Conventions of 1949 show that the negotiators were aware of the problem of the relationship between these two legal regimes. A number of delegates had put forward proposals to clarify the relationship between the Universal Declaration and the Geneva Conventions, but these proposals were not adopted.⁷ The result was that the two bodies of rules continued to grow along parallel tracks that were not destined to meet. For several decades most legal scholars who expressed their views on the applicability of human rights in time of war took the separation between the two regimes for granted, and hence generally the inapplicability of human rights in time of conflict.⁸ It is therefore interesting to note what might almost appear to be a paradox: despite having the same origins, human rights and the law of war could not be harmonized during that period.

Nowadays it is accepted in legal doctrine that because of its *lex generalis* nature, human rights law is applicable at all times, both in peacetime and in time of war. It is a relatively recent body of rules, which aims to be general and universal and has an important specific characteristic, namely the 'vertical' nature of the legal relationships, with the state on the one hand and the people under its jurisdiction on the other. This is a unique phenomenon in an international system governed by rules that are quintessentially intergovernmental (and therefore 'horizontal'). Thus a human rights norm generally cannot take precedence over a special rule aiming at regulating the same situation, as for instance in the case of the treatment of civilians in armed conflicts.

For its part, the law of armed conflicts, because of its nature as 'specialized' law, cannot easily be harmonized with human rights law. First, it should be

5 As the International Committee of the Red Cross writes, 'The year 1945 marked the close of a war waged on an unprecedented scale; the task had to be faced of developing and adapting the humanitarian elements of International Law in the light of the experience gained'. The Geneva Conventions of 12 August 1949, ICRC, Geneva, 1989, preliminary remarks, p. 2. See also Roberts, above note 1, p. 590.

6 Geneva Convention relative to the protection of civilian persons in time of war, 12 August 1949.

7 On this point see Robert Kolb, 'The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions', *International Review of the Red Cross*, No. 324 (1998) (special issue), pp. 409–19.

8 See, for example, Yoram Dinstein, 'Human rights in armed conflict: international humanitarian law', in Theodor Meron (ed.), *Human Rights in International Law*, Oxford University Press, Oxford, 1985, p. 345 ff.; Pictet, above note 2.

noted that, in parallel with the emergence of international human rights law, the law of armed conflicts equipped itself, through the Geneva Conventions of 1949, with an ample series of rules on the protection of certain categories of persons. The fact that the law of war went through several phases of codification (The Hague in 1907 and Geneva in 1949 and 1977) specially devoted to this subject is further evidence that states have always wanted a separate body of rules to regulate armed conflicts, as regards both relations between states party to conflict and the protection of victims of conflict.⁹ In other words, the law of war traditionally took the form of a legal regime that sought to encompass the whole range of situations conceivable during an armed conflict, including some that could be regulated through human rights standards.

Thus the law of armed conflicts, as *lex specialis*, contains rules which take precedence over some protective human rights norms. Indeed, where the law of war deals with civilians by regulating the situation in a manner incompatible with the regime established for the same situations by human rights law, this conflict of rules is generally resolved in favour of the special rule of the law of armed conflicts. The special nature of the law of armed conflicts therefore allows it to derogate from general rules, such as those of human rights law.

Nevertheless, while it is true that the law of armed conflicts takes priority during conflicts because of its *lex specialis* nature, it is also true that the rules protecting human rights – *leges generales* – can continue to be applied during a conflict, on certain conditions: first, their application must be possible *ratione personae* and, if treaty-based rules are involved, *ratione loci*; second, they must not conflict with a special rule of the law of armed conflicts; and, third, they must not be derogated in case of war, public emergency or a similar scenario that would limit or preclude their applicability during an armed conflict.

What is more, the principle of the universality of human rights, coupled with the principle of humanity – which in international humanitarian law takes the form of the Martens Clause – encourage an interpretation according to which humanitarian law, rather than being an alternative to the law of peace, should henceforth be seen as a mere exception to a full application of that law.¹⁰

The European Convention on Human Rights (ECHR) and the American Convention on Human Rights provide expressly for the possibility of derogations in the event of war.¹¹ The International Covenant on Civil and Political Rights expresses this in the words ‘public emergency which threatens the life of the nation’,¹² which, according to jurisprudence and legal doctrine, also covers the context of war and military occupation.¹³ All these provisions allowing for the

9 Dietrich Schindler, ‘The International Committee of the Red Cross and human rights’, *International Review of the Red Cross*, No. 208 (1979), p. 14.

10 Orna Ben-Naftali and Yuval Shany, ‘Living in denial: the application of human rights in the Occupied Territories’, *Israel Law Review*, (2003–4), p. 42.

11 European Convention, Art. 15(1), and the American Convention, Art. 27.

12 Art. 4(1).

13 Ben-Naftali and Shany, above note 10, p. 50. See, in particular, the Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/CO/78/ISR (2003), 5 August 2003, para. 11.

restriction of some human rights in time of war or public emergency must be seen as mechanisms for adapting each of these texts to emergency situations such as war or military occupation. Such adaptation mechanisms would indeed be pointless if these conventions were assumed to be inapplicable in armed conflicts.¹⁴ On the contrary, the fact that some instruments for the protection of human rights do not contain derogation clauses – such as the Universal Declaration of Human Rights and the 1966 International Covenant on Economic, Social and Cultural Rights – should not necessarily be interpreted as implying the treaties' automatic suspension in the event of armed conflict because the absence of such clauses shows precisely the will to render these instruments applicable during warfare.¹⁵ Generally speaking, by applying the provisions governing conflicts between special and general rules, it should be possible to determine to what extent those instruments are then applicable.

As for Protocol I of 1977 additional to the four Geneva Conventions, Article 72 thereof specifies that the provisions of Section III of the Protocol (entitled 'Treatment of persons in the power of a party to the conflict') supplement not only the Fourth Geneva Convention but also 'other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict'.¹⁶

Starting from these observations, it is important to stress that as a legal regime, human rights law is not a priori incompatible with the law of armed conflicts. There is no absolute principle whereby all the rules which together constitute human rights law are prohibited, without exception and regardless of their content, from taking legal effect during armed conflicts merely because they belong to that legal regime. Conversely, as it will be shown below, there are cases in which *certain* rules of human rights law are inapplicable during an armed conflict because they conflict with *special* rules of humanitarian law. It follows that, contrary to the positions taken by some authors, the question of compatibility between human rights law and the law of war should not be put in terms of compatibility between legal regimes, but should be evaluated case by case, on the basis of the rules making up each of these regimes and any exceptions that these rules contain.¹⁷

14 Eyal Benvenisti, 'The applicability of human rights conventions to Israel and to the Occupied Territories', *Israel Law Review* (1992), p. 29.

15 Ben-Naftali and Shany, above note 10, p. 49.

16 Roberts, above note 1, p. 591.

17 For further developments on the relationship between human rights and humanitarian law, which cannot be addressed in the present writing, see Marco Sassòli, 'Le droit international humanitaire, une *lex specialis* par rapport aux droits humains?', in Andreas Auer, Alexandre Flückiger and Michel Hottelier (eds.), *Les droits de l'homme et la constitution – Etudes en l'honneur du Professeur Giorgio Malinverni*, Schulthess, Geneva, 2007, pp. 375–95; 'La Cour européenne des droits de l'homme et les conflits armés', in Stephan Breitenmoser et al. (eds.), *Droits de l'homme, démocratie et Etat de droit – Liber amicorum Luzius Wildhaber*, Nomos Publishers, Baden-Baden, 2007, pp. 709–31; Cordula Droeger, 'The interplay between international humanitarian law and international human rights law in situations of armed conflict', *Israel Law Review* (2007), pp. 310–55.

Practice with regard to the applicability of human rights law during armed conflicts

The idea that human rights are generally applicable during conflicts has gained ground mainly because of the standpoints adopted by the United Nations in this regard. The constant practice of the UN has confirmed over and over again the applicability of human rights in time of armed conflicts and military occupation.¹⁸ The UN General Assembly, in particular, placed the question of ‘respect for human rights in armed conflicts’ on its agenda for several years in succession, namely from 1968 to 1977. The close relationship between human rights and humanitarian law was highlighted by the Assembly, which stated, in its Resolution 2853 (XXVI) that ‘effective protection for human rights in situations of armed conflict depends primarily on universal respect for humanitarian rules’.¹⁹

Nevertheless, the General Assembly was concerned chiefly about the inadequacy of humanitarian rules when it came to protecting human rights.²⁰ This prompted it to emphasize the need for ‘a reaffirmation and development of relevant rules, as well as other measures to improve the protection of the civilian population during armed conflicts’,²¹ and to call upon all states to ‘disseminate widely information and to provide instruction concerning human rights in armed conflicts and to take all the necessary measures to ensure full observance by their armed forces of humanitarian rules applicable in armed conflicts’.²²

After 1977 the subject was no longer included in the Assembly’s agenda. At that time, the adoption of Protocols I and II additional to the Geneva Conventions was deemed by the Assembly to be sufficient to resolve the problems relating to the protection of human rights during armed conflicts.

Since 1999 the UN Security Council has adopted a number of resolutions that no longer refer to ‘respect for human rights in armed conflicts’, but rather to the ‘protection of civilians in armed conflict’. The Council’s approach, while differing terminologically from that of the Assembly, seems to follow the same line as the resolutions of the plenary body, except that the Council focused its attention on the suffering of the civilian population. In its resolutions the Council urges

18 See, in this regard, General Assembly Resolutions 2444 (XXIII) of 19 December 1968, 2674 (XXV) of 9 December 1970, 2852 (XXVI) of 20 December 1971, 2853 (XXVI) of 20 December 1971, 3032 (XXVII) of 18 December 1972, 3102 (XXVIII) of 11 December 1973, 3319 (XXIX) of 14 December 1974, 3500 (XXX) of 15 December 1975, 31/19 of 24 November 1976, and 32/44, of 8 December 1977; Security Council Resolutions 1265 (1999) and 1296 (2000); and reports of the Secretary-General, UN Docs. S/1999/957 and S/2005/740.

19 UN General Assembly Resolution 2853 (XXVI) of 29 December 1971, fourth preambular paragraph.

20 ‘Recognizing that existing humanitarian rules relating to armed conflicts do not in all respects meet the need of contemporary situations and that it is therefore necessary to strengthen the procedure for implementing these rules and to develop their substance.’ *Ibid.*, fifth preambular paragraph. See also the third preambular paragraph of General Assembly Resolution 3032 (XXVII) of 18 December 1972, and the first preambular paragraph of General Assembly Resolutions 3319 (XXIX) of 14 December 1974, 3500 (XXX) of 15 December 1975, and 31/19 of 24 November 1976.

21 UN General Assembly Resolution 2852 (XXVI) of 20 December 1971, para. 3(b).

22 *Ibid.*, para. 6.

‘all parties concerned to comply strictly with their obligations under international humanitarian, human rights and refugee law’²³ and reiterates ‘the importance of compliance with relevant provisions of international humanitarian, human rights and refugee law’.²⁴ Moreover, from the beginning of the US–UK occupation of Iraq in 2003–4, the Council has stressed the importance of international humanitarian and human rights law.²⁵

The UN Secretary-General has produced several reports on the protection of civilians in armed conflicts. In the report of 8 September 1999, it is stated that

International humanitarian law sets standards for parties to an armed conflict on the treatment of civilians and other protected persons. ... There are also legal norms in international human rights law from which there can be no derogation or suspension in time of public emergency.²⁶

The Secretary-General considered respect for humanitarian law, human rights law and refugee law to be one of the most effective means of ensuring better protection of civilians during armed conflicts.²⁷

Lastly, the International Court of Justice has recognized the applicability of human rights law in armed conflict, even in an extreme situation involving the use of a nuclear weapon. In particular, according to the Court, ‘the protection of the International Covenant of [sic] Civil and Political Rights does not cease in times of war’.²⁸ The Court also reiterated and specified this assertion in the advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, and confirmed it more recently in the case of the *Armed Activities on the Territory of the Congo*.²⁹

The law of military occupation and human rights law

Turning now to military occupation, a distinction should be made at the outset between it and a situation of armed conflict. Military occupation is a different situation from that of armed conflict in various respects: the occupier controls the occupied territory, there are no major military operations in the occupied zone and a minimum of order and security have been restored, enabling civilian life to resume to some degree. The fact that the occupier has sufficient control over the

23 UN Security Council Resolution 1265 (1999), para. 4.

24 UN Security Council Resolution 1296 (2000), para. 19.

25 See UN Security Council Resolutions 1483 (2003) and 1546 (2004).

26 Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, UN Doc. S/1999/957, 8 September 1999, para. 6.

27 *Ibid.*, para. 35.

28 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 240, para. 25.

29 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 9 July 2004, para. 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, para. 216.

occupied territory to assert itself – the *condicio sine qua non* for the existence of an occupation and a typical element of the definition found in Article 42 of the Hague Regulations – facilitates its task of stabilizing the occupied territory, a task it can accomplish through the administrative and governmental powers that occupation law confers on it. In other words, occupation law requires the occupier to take into account certain requirements of the population living under occupation, and provides the occupier with the necessary legal tools to do so.³⁰

In this regard occupation law somewhat resembles the law of peace, while remaining a branch of the law of war. After all, the armed conflict between the occupier and the occupied has not truly ended, which means that military occupation is indeed an intermediate situation between war and peace.³¹ The law of military occupation reflects this dual nature of occupation, consisting as it does of rules drawn both from the rules of war and from the rules of peace. Indeed, the rules making up the law of military occupation were dictated by the need to regulate two types of relationship: the relationship between the occupying state and the occupied state – that is, a horizontal inter-state relationship characterized by the existence of a state of war and therefore still governed by typical rules of the law of war – and the relationship between the occupying state and the civilian population of the occupied state – that is, a vertical intra-state relationship less marked by the ongoing armed conflict and therefore characterized by rules drawn from principles valid in time of peace. This second aspect of the law of military occupation constitutes a point of contact between this legal regime and human rights law. The two bodies of law have another point in common: the goal of protecting human dignity. In view of these simple facts they appear, at least on paper, to be compatible in nature and capable of being co-ordinated to ensure that the rights of the population living under occupation are better protected. Let us therefore examine how far this compatibility will go, taking into account the *sui generis* nature and structure of each of the two legal regimes, as well as their incompatibilities.

The applicability of human rights law during military occupation

In general terms, the applicability of human rights law during military occupation has been affirmed repeatedly in case law and in practice.³² As one author observes,

30 On this point see Yoram Dinstein, 'The international law of belligerent occupation and human rights', *Israel Yearbook on Human Rights*, 1978, p. 112.

31 Philippe Burrin, 'Entre guerre et paix: l'occupation militaire', in Michel Porret, Jean-François Fayet and Carine Fluckiger (eds.), *Guerres et paix: Mélanges offerts à Jean-Claude Favez*, Georg, Geneva, 2000, pp. 257–66.

32 The European Court of Human Rights did so on two occasions: in *Loizidou v. Turkey* (1996) and *Cyprus v. Turkey* (2001). Likewise, the International Court of Justice, in its advisory opinion of 9 July 2004 (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 29, paras. 107–112), affirmed the applicability of the International Covenant on Civil and Political Rights to

‘there is no *a priori* reason why multilateral conventions on matters [other than occupation] should not be applicable to occupied territories’,³³ a consideration that applies as well to conventions for the protection of human rights. Nevertheless, it is not a question of substituting human rights law for occupation law. Given that the law of military occupation is specialized law, it is understandably often better adapted to the particular situation of military occupation.³⁴ This is true, for example, with respect to the protection of private property, a human right from which derogation is normally possible under human rights law and for which the special regime applicable in time of occupation is defined by occupation law.³⁵

It was mentioned above that because some conventions for the protection of human rights, such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights, provide for the possibility of restricting certain human rights in time of war and/or public emergency, they are applicable during an armed conflict or a military occupation.³⁶ It was also pointed out that the extent of applicability of certain instruments not providing for derogation in the event of conflict or any other public emergency – such as the International Covenant on Economic, Social and Cultural Rights – will be determined according to whether there are special rules of the law of war or the law of military occupation that may conflict with their provisions and thus prevail as *lex specialis*.

For its part, the Universal Declaration of Human Rights merits a separate discussion, since in the first place it does not provide for the possibility of derogation in emergencies, and secondly it adds, in its Article 2(2), an element that is relevant to the situation of military occupation:

2. ... no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.³⁷

the occupied Palestinian territory. See also Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add.93, 18 August 1998, para. 10, available at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.79.Add.93.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.93.En?OpenDocument) (last visited 21 October 2008), and Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11, available at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.78.ISR.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?OpenDocument) (last visited 21 October 2008). Lastly, it should be noted that a number of recent military manuals – including the United Kingdom military manual of 2004 – contain references concerning respect for human rights during military occupation (see *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford University Press, Oxford 2004, p. 282, para 11.19).

33 Roberts, above note 1, p. 589.

34 Michael Dennis, ‘Application of human rights treaties extraterritorially in times of armed conflict and military occupation’, *American Journal of International Law* (2005), p. 139; Roberts, above note 1, p. 600.

35 See, in this regard, Arts. 46, 47 and 52 of the Hague Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.

36 See the text accompanying notes 11–13 above.

37 Universal Declaration of Human Rights, 1948; General Assembly Resolution 217 A (III) of 10 December 1948, Art. 2 (emphasis added).

The reference to ‘any other limitation of sovereignty’ could be interpreted as taking into account the situation of military occupation. In that case the Universal Declaration would be applicable to military occupation, a situation specifically characterized by a major limitation of the sovereignty of the occupied state.

Be that as it may, the existence of a hard core of human rights that are considered non-derogable both in peace and war is undeniable. Besides the Universal Declaration there are, for instance, the rules from which Article 4(2) of the International Covenant on Civil and Political Rights stipulates that no derogation may be made under any circumstances.³⁸ It is interesting to note an almost perfect correspondence between the core human rights and the core rights of persons protected by humanitarian law. Pictet identified at least three fundamental principles common to human rights law and humanitarian law, namely, inviolability, non-discrimination and security of person.³⁹ These three fundamental principles are the basis of a number of human rights – the right to life, right to a fair trial, protection from arbitrary arrest or detention, prohibition of torture and any other inhuman or degrading treatment, prohibition of discrimination, protection of the family, prohibition of slavery, freedom of thought, conscience and religion and so on – which exist, with a few very minor variations, in both bodies of law.⁴⁰

While the body of rules that constitute the law of military occupation is henceforth considered to be of a customary nature – and must therefore be observed by all states in the international community – it is not uncommon for some human rights to be included in treaty instruments, often regional ones, that are binding only on the states parties *vis-à-vis* any person within their jurisdiction. There may be important differences between the protection regime established by customary human rights law and the one contained, for example, in regional instruments such as the European Convention on Human Rights or the American Convention on Human Rights. It is therefore necessary for the occupier to ascertain, at the beginning of its military operations, exactly which rules of human rights law it must observe.

Next, from a *ratione loci* standpoint, we must not overlook the reluctance of some states to recognize that a militarily occupied territory comes under the jurisdiction of the occupying power,⁴¹ even though recent legal doctrine and case law recognize, on the contrary, that it does. Thus the Human Rights Committee stated that

[T]he applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including

38 Namely, the right to life (Art. 6), the prohibition of torture and other cruel, inhuman or degrading treatment (Art. 7), the prohibition of slavery and servitude (Art. 8, paras 1 and 2), the prohibition of arrest on the ground of inability to fulfil a contractual obligation (Art. 11), the principle *nulla poena sine lege* (Art. 15), the right to recognition as a person before the law (Art. 16) and the right to freedom of thought, conscience and religion (Art. 18).

39 Pictet, above note 2, pp. 34 ff.

40 Ben-Naftali and Shany, above note 10, pp. 52–3.

41 See, in particular, the position of Israel and the United States, *ibid.*, p. 17 ff.

article 4 which covers situations of public emergency which threaten the life of the nation. Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories.⁴²

This position is shared by a number of international organizations active in the protection of human rights.⁴³ In terms of case law, the International Court of Justice, in its advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, stated clearly that the International Covenant on Civil and Political Rights must be applied to the occupied territories:

In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.⁴⁴

With regard to the extraterritorial applicability of conventions for the protection of human rights, the *Al-Skeini* case seems particularly interesting. It was brought before the UK Court of Appeal in 2005 by Iraqi civilians who had been subjected to human rights violations in Iraq by British soldiers during their country's occupation in 2003–4. The Court discussed the concept of the United Kingdom's extraterritorial jurisdiction in Iraq for purposes of implementation of the European Convention on Human Rights and the 1998 Human Rights Act, while recognizing that at least one of those civilians (namely Mr Mousa) had been under the effective control of the UK armed forces. This meant that the European Convention on Human Rights and the Human Rights Act were applicable in the UK occupation zone in Iraq and that the British judge had jurisdiction to hear the case.⁴⁵ However, the extraterritoriality of the European Convention and of the

42 Concluding Observations: Israel, above note 32, para. 11.

43 As an example, see Concluding Observations of the Committee on the Rights of the Child: Israel, UN Doc. CRC/C/15/Add.195, 9 October 2002, in which the Committee affirms that the Convention on the Rights of the Child is applicable to the occupied Palestinian territories (para. 2); see also Concluding Observations of the Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/30/4/Add.45, 30 March 1998, in which the Committee invites Israel to report on the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination 'in all areas over which it exercises effective control' (para. 12); lastly see Concluding Observations of the Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/1/Add.69, 31 August 2001, in which the Committee, after affirming the applicability of the International Covenant on Economic, Social and Cultural Rights in times of military occupation (para. 11), points out that 'even during armed conflict, fundamental human rights must be respected and ... basic economic, social and cultural rights as part of the minimum standards of human rights are guaranteed under customary international law and are also prescribed by international humanitarian law' (para. 12).

44 Above note 32, para. 111.

45 *The Queen ex parte Al-Skeini and Others v. Secretary of State for Defence*, England and Wales Court of Appeal [2005] EWCA Civ 1609, 21 December 2005, available at www.bailii.org/ew/cases/EWCA/Civ/2005/1609.html (last visited 21 October 2008).

Human Rights Act was limited by the Court of Appeal to cases in which the occupying power exercised effective control over the person concerned:

It is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time ... The UK possessed no executive, legislative or judicial authority in Basrah City other than the limited authority given to its military forces, and as an occupying power it was bound to respect the laws in force in Iraq unless absolutely prevented ... It could not be equated with a civil power: it was simply there to maintain security, and to support the civil administration in Iraq in a number of different ways.⁴⁶

The Court of Appeal limited its reasoning to the applicability of the human rights legislation binding upon the United Kingdom. In effect, the Court of Appeal lacked the necessary competence to extend its reasoning to humanitarian law issues. However, it could not avoid some references to the law of military occupation, because the facts of the case at stake took place during the British military occupation of the city of Basrah. The Court explicitly admitted the existence of a military occupation and drew a distinction between the applicability of humanitarian law and of human rights law in Iraq, concluding that the United Kingdom did not have jurisdiction within the meaning of Article 1 of the ECHR in relation to five of the six victims – that is, those killed as a result of incidents that took place during the activities of the British Army. As to the sixth victim, Mr Mousa, the Court concluded that he was under the control of the British army for the purposes of the ECHR and that the Human Rights Act applied to him because at the time of his death he was in the custody of the British forces.⁴⁷

As a result, the English Court of Appeal seems to introduce two distinct definitions of occupation: one characterized by the occupying power's effective control over the places and people under occupation, allowing the application of the ECHR and all related municipal human rights norms; and another kind of occupation characterized by the lack of such control and thus not allowing the application of the ECHR and all related municipal human rights norms. This result does not seem consistent with the definition of occupation stemming from Articles 42 and 43 of the 1907 Hague Regulations. According to these articles, the key element of the definition of a military occupation is precisely the *effectiveness* of the occupation army's control, which corresponds to the factual exercise of governmental authority by the occupant.⁴⁸

46 Ibid., para. 124.

47 Roberts, above note 1, p. 598–9.

48 Art. 42(2) of the Hague Regulations, in the authentic French version, states, 'L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer', while Art. 43 states, 'L'autorité de pouvoir légal ayant passé de fait entre les mains de l'occupant'. For a study of the effectiveness criterion in the law of occupation, see Roberto Ago, *Il requisito dell'effettività dell'occupazione in diritto internazionale*, ARE, Roma, 1934, p. 125.

This being said, there is no denying the utility of the criterion of territorial effective control to determine the extraterritorial applicability of the ECHR, since there may be situations in which a state exercises effective control outside its territory without doing so in the form of a military occupation. The European Court of Human Rights has already dealt with such situations.⁴⁹ However, the reverse is not true: a situation of military occupation without effective control of the occupied territory is inconceivable, since military occupation is by definition a *de facto* situation characterized by effective control of the occupying power over the occupied territory. In other words, the Hague Regulations did not envisage the possibility of evaluating the degree of effectiveness of the territorial control in order to establish what duties are to be imposed upon the occupier – an evaluation which, on the contrary, has to be made when determining the applicability of the ECHR. As a result, admitting the existence of a military occupation is tantamount to admitting a degree of territorial control by the occupant, which, by virtue of the definition of military occupation, satisfies the conditions of Article 1 of the ECHR. To rule out the United Kingdom's responsibility for human rights violations suffered by certain of the said Iraqi civilians on the grounds that the British army did not have effective control of Basrah City, while admitting at the same time that Britain was the occupying power of this city, is thus contradictory from the point of view of the law of military occupation.

The 'human rightist' nature of the law of military occupation

While it is true that the great texts codifying human rights law rarely contain guiding principles concerning their applicability in armed conflicts, and while neither the 'the Hague law' nor the 'law of Geneva' is expressed in terms of 'human rights', it is also undeniable that in both cases international law endeavours to guarantee the individual at least a minimum of protection against the activities of states. As noted earlier, the law of armed conflicts and the rules of human rights law stem from the same underlying consideration, namely the state's relationship to the individual and the need to protect the latter owing to his or her vulnerability *vis-à-vis* the state. Occupation law likewise outlined, as early as the 1907 Hague Regulations, legal safeguards for civilians under occupation against abuses by the occupying power in the areas of national law, security, the right to life and private property, family law, allegiance, respect for religious practices, and collective punishment.⁵⁰ In other words, the law of military occupation arose with a 'human rights' purpose *ante litteram*, so to speak, one that was supplemented and strengthened during the two main phases of adaptation and development of Geneva law in 1949 and 1977.

49 See, e.g., the cases *Gentilhomme v. France*, European Court of Human Rights (ECtHR) No. 48205/99, 14 May 2002; *Banković and Others v. Belgium and 16 Other Contracting States*, (dec.) [GC], No. 52207/99, ECtHR 2001-XII; *Assanidze v. Georgia* [GC], No. 71503/01, ECtHR 2004-II; *Ilaşcu and Others v. Moldova and Russia* [GC], No. 48787/99, ECtHR 2004-VII; *Issa and Others v. Turkey*, ECtHR No. 31821/96, 16 November 2004.

50 See Arts. 43–51 of the 1907 Hague Regulations.

Despite this, the law of military occupation remains incomplete as regards protection of civilians. The fact that human rights law is generally applicable to military occupation, as demonstrated in the preceding paragraph, provides an important tool for filling these gaps, particularly where civil and political rights are concerned. These rights are virtually absent from the Hague Regulations, the Geneva Conventions and Additional Protocol I, but are dealt with fully in the human rights texts, both in content and in terms of remedies for violations.⁵¹ They are of paramount importance in the event of occupation, primarily because such rights are often the first to be subject to derogation measures by the occupier if they conflict with its interests.⁵² In particular, the requirement that the occupier must ‘restore, and ensure ... public order and safety’, laid down in Article 43 of the Hague Regulations, may allow the adoption of measures in the occupied territory that comply with the guarantees set out in international humanitarian law (especially in Geneva Convention IV), but that derogate, at the same time, from human rights law.⁵³ Second, if the conditions of occupation so permit, the occupier may decide to restore some civil and political rights and, in so doing, will be compelled by the silence of occupation law on that subject to be guided by the rules protecting human rights.⁵⁴ These rules set the standards for civil and political rights, standards whose outlines will be adapted by the occupier to the specific needs of the situation. Occupation law is also silent on such questions as discrimination in workplaces or schools, or in relation to ‘third-generation’ rights – such as the right to a safe environment – areas in which the occupier must once again refer to human rights law, the only body of law able to provide the individual with clear rules and the necessary redress mechanisms.⁵⁵ Lastly, by invoking the fact that the domestic law of the occupied state does not respect basic human rights, the occupier could trigger the ‘absolute prevention’ clause contained in Article 43 of the Hague Regulations in order to justify its non-observance of the domestic laws concerned and introduce the legislative measures needed to bring the law of the occupied state in line with international human rights standards.⁵⁶

Reconciling the interests of the occupying army with the rights of the civilian population

The law of military occupation takes into consideration not only the interests of the civilian population in the occupied territory, but also the interests of the occupying power. Its ‘human rights’ purpose must therefore be juxtaposed with the military

51 Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1992, p. 189.

52 Benvenisti, above note 14, p. 30.

53 Marco Sassòli, ‘Legislation and maintenance of public order and civil life by occupying powers,’ *European Journal of International Law* (2005), pp. 664–5. In particular, Sassòli focuses on criminal prosecution.

54 Benvenisti, above note 51, p. 189.

55 See Roberts, above note 1, p. 594.

56 See Sassòli, above note 53, pp. 665 ff.

purpose of enabling the occupier to continue, to the best of its ability, its military effort against the enemy state in order to defeat it. The occupying power is in actual fact engaged in an armed conflict that has not yet ended, and must ensure not only respect for the civilian population under occupation, but also the safety of the occupying army and the pursuit of its military objectives. The law of military occupation is therefore designed to ensure a certain necessary balance between the interests of the local population and those of the occupying army. It is characteristic of occupation law to take these two opposing facets into account. The occupying power's consideration of its own requirements consequently means that the human rights it recognizes as belonging to the civilians of the occupied state may differ from the corresponding rights in peacetime. For example, the right to life and the prohibition of arbitrary arrest may be interpreted by it in the light of Articles 5, 68 and 78 of the Fourth Geneva Convention, which confer on the occupier the power to execute certain criminals and to arrest suspect individuals.⁵⁷ Likewise, Article 4(1) of the International Covenant on Civil and Political Rights, which provides for the possibility of derogation from some human rights in time of public emergency, may be interpreted by the occupier according to the seriousness of the situation. Whereas Article 4(1) provides that the state concerned shall take decisions 'to the extent strictly required by the exigencies of the situation', during an occupation these exigencies may vary in time and in space, depending on a number of parameters relating to the different situations that the occupier may have to face.

The general balance – or, rather, the relationship of forces – between the occupier's military requirements and the requirements of the population under occupation is not fixed; it has evolved significantly over the decades, hand in hand with the development of international law. We have in mind, in particular, the updating of the Hague law that took place in Geneva in 1949, in which the 'human rights' aspect of military occupation was markedly developed in reaction to the abuses of that law by the Axis Powers during the Second World War. Since 1949 the balance struck between military and civilian requirements has continued to evolve under the inevitable influence exerted on occupation law by the rise and consolidation of human rights. Yet although the law of military occupation has evolved in a 'human rights' direction in recent decades, it does not seem able to go beyond certain limits inherent in that legal regime. It must therefore not be forgotten that, generally speaking, as one author states,

The government of an occupied territory by the occupant is not the same as a State's ordinary government of its own territory: a military occupation is not tantamount to a democratic regime and its objective is not the welfare of the local population.⁵⁸

57 Ben-Naftali and Shany, above note 10, p. 104.

58 Dinstein, above note 30, p. 116.

There are nonetheless specific situations that refute this statement, as was the case recently during the US–UK occupation of Iraq in 2003–4: UN Security Council Resolution 1483 (2003) mandated the Coalition Authority to co-operate with the United Nations in ‘promoting the protection of human rights’, while working to establish institutions for representative governance and promoting a vast and thoroughgoing judicial reform.⁵⁹ While the protection of human rights, as we have seen, is generally possible in the framework of the law of military occupation, the *promotion* of human rights, coupled with initiatives to transform the organizational and institutional fabric of the occupied country, is undoubtedly a task on the occupier’s part that was specially envisaged by the Security Council for the specific case of the occupation of Iraq, and not as an obligation normally arising under the general law of military occupation.⁶⁰ This approach taken by the Council did not fail to create a certain tension between the law of military occupation, which tends to be conservative, especially where respect for the domestic law and institutions of the occupied state is concerned, and the requirements of the transformation that the Security Council wished to support via the occupying powers.⁶¹

Conclusion

In closing, we are aware that the framework briefly outlined in this article raises more questions than it answers. The wealth of rules and the complexity of the law of military occupation and human rights law, as well as the need to highlight the *lex specialis–lex generalis* relationship between them, taking into account the evolution of these two bodies of law in recent decades, are all elements that often render any effort to identify the exact content of the civilian population’s rights during military occupation very difficult. This complexity is the inevitable result of the intersection of two distinct legal regimes, both of which are needed to regulate different aspects of military occupation. At the same time, it unquestionably makes the application of the law less comprehensible, especially for military operators, who do not necessarily have the time and specialized tools required to consider all the subtle variations that may crop up from one case to the next. Military manuals are without doubt an essential practical source of clarification, but the balance between the different interests and values at stake – the interests of the occupying forces and those of the civilian population, the protection of human rights and the derogations necessary to maintain order – calls for further efforts by legal scholars to shed light on the many grey areas that still exist in the interaction between human rights law and the law of military occupation.

59 UN Security Council Resolution 1483 (2003), para. 8(c), (g) and (i). At the declared end of the occupation, in June 2004, the Security Council entrusted this task to the Special Representative of the Secretary-General and to the United Nations Assistance Mission for Iraq (Security Council Resolution 1546 (2004), para. 7(b)(iii)).

60 Roberts, above note 1, p. 613.

61 In this regard see *ibid.*, pp. 580–622.

Transfers of detainees: legal framework, *non-refoulement* and contemporary challenges

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Abstract

The article outlines the legal framework that governs transfers of individuals, and in particular the international law principle of non-refoulement and other obstacles to transfers. The author addresses some of the new legal and practical challenges arising in detention and transfers in the context of multinational operations abroad and analyses the contemporary practice of transfer agreements.

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The transfer and repatriation of persons during or after armed conflict is a long-standing concern of the ICRC. During armed conflicts detainees are sometimes transferred from one warring party to another, or back to their country of origin. At the end of conflicts, the repatriation of prisoners of war or the release of security detainees poses challenges as to their safe return.

Over the past few years there have been many headlines about transfers of detainees. It is now public knowledge that within the framework of anti-terrorism measures, persons have been secretly transferred to and from various places of detention and have sometimes been mistreated during or after the transfer.

* The views expressed in this article are those of the author and do not necessarily reflect those of the ICRC.

In current conflicts such as those in Afghanistan, Iraq, the Democratic Republic of the Congo, Sudan and Chad, the presence of multinational forces gives rise to a number of questions. Who has the authority and capacity to detain persons captured in relation to the conflict: the host country or the members of the coalition or peacekeeping forces present on that country's territory? What legal framework applies to the transfer of persons by detainees between coalition members or countries contributing troops to a peacekeeping mission, or to transfers of persons by international troops to the host country? One of the main legal issues in this context is to what extent the principle of *non-refoulement* applies to transfers of detainees in armed conflicts and, in particular, in the course of multinational operations.

The starting point for any analysis must be the existing international legal framework governing the transfer of persons and, more particularly, the international law principle of *non-refoulement* and other legal rules. This article therefore starts by recalling international legal norms relevant for transfers. Second, it addresses some of the new challenges posed by detention and transfers in the context of multinational operations. Third, it looks at the contemporary practice of transfer agreements. Lastly, it recalls a few legal principles regarding post-transfer responsibilities of sending states.

The principle of *non-refoulement* as the legal starting point

The principle of *non-refoulement* precludes the transfer of persons from one state to another if they face a risk of violations of certain fundamental rights. This principle is found – with some variations as to the persons it protects and the risks it protects from – in refugee law, extradition treaties, international humanitarian law and international human rights law. The following paragraphs will briefly recall its main features in the different bodies of law.¹

Legal sources of the principle of *non-refoulement*

Refugee law

The term '*non-refoulement*' is often associated with refugee law, since it is explicitly mentioned in Article 33 of the 1951 Refugee Convention.² This provision

1 The most extensive analysis of the principle of *non-refoulement* can be found in E. Gillard, 'There's no place like home: states' obligations in relation to transfers of persons', in this issue, and in Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: opinion', in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, 2003, available at www.unhcr.org/publ/PUBL/419c75ce4.pdf (last visited 9 October 2007).

2 The principle of *non-refoulement* is also enshrined, without any limitation on security grounds, in Article 2(3) of the OAU Convention governing the Specific Aspects of Refugee Problems in Africa and reaffirmed as a rule of *jus cogens* in the Cartagena Declaration on Refugees (at para. 5). The principle also

precludes the *refoulement* – that is, forcible return or expulsion – of a refugee ‘in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’. Under refugee law, the principle of *non-refoulement* is applicable to refugees (whether or not they have been recognized formally as such) and to asylum seekers. It should not be forgotten that some people captured in armed conflicts or other situations of violence may fall into these categories and are entitled to protection under refugee law. From the wording of Article 33(1) of the 1951 Refugee Convention (‘in any manner whatsoever’) it is clear that the *non-refoulement* rule is applicable to any form of forcible removal, including extradition, deportation or expulsion.³

In addition, a number of extradition treaties (whether multilateral or bilateral) as well as treaties combating terrorist or other crimes contain grounds to refuse transfers, such as the political offence exemption, non-persecution or non-discrimination clauses, non-extradition for reasons related to the requested state’s own notions of justice and fairness, or non-extradition based on international or regional human rights or refugee law.⁴

International human rights law

The principle of *non-refoulement* is also a principle of international human rights law. Under this body of law, human rights can stand in the way of any transfer to another state, regardless of its formal nature. While some treaties use specific wording such as ‘return’, ‘expulsion’ or ‘extradition’, the formal description of the transfer is irrelevant. The underlying criterion is that of effective control over the individual: if effective control over the individual changes from one state to another, the principle applies.⁵

The principle of *non-refoulement* is explicitly recognized in a number of human rights instruments, e.g. in Article 3 of the Convention against Torture

appears in Article 3(3) of the Principles concerning Treatment of Refugees adopted by the Asian–African Legal Consultative Committee in 1966, with a limitation on security grounds.

- 3 For an in-depth analysis of the principle of *non-refoulement* in the 1951 Refugee Convention, see Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd edn, Oxford University Press, Oxford, 2007, pp. 201 ff.
- 4 Article 3 of the UN Model Treaty on Extradition; Article 3 of the 1957 European Convention on Extradition; Article 4 of the Inter-American Convention on Extradition; Article 9 of the 1979 UN Convention against the Taking of Hostages; Article 5 of the European Convention on the Suppression of Terrorism; European Union Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, OJ L, 321, 6.12.2003, p. 26; European Union Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, OJ L190, 18 July 2002, pp. 1–20, preambular para. (13); UNHCR Executive Committee Conclusion, No. 17 (XXXI), 1980, ‘Problems of extradition affecting refugees’, paras. (d) and (e).
- 5 See Lauterpacht and Bethlehem, above note 1, para. 63; Committee against Torture (CAT), Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories, UN Doc. CAT/C/CR/33/3, 10 December 2004, para. 4(b) and para. 5(e).

and other Cruel, Inhuman or Degrading Treatment or Punishment,⁶ Article 22(8) of the American Convention on Human Rights, Article 13(4) of the Inter-American Convention to Prevent and Punish Torture, Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance, or Article 19(2) of the Charter of Fundamental Rights of the European Union.

More generally, as has been recognized in human rights jurisprudence, the *non-refoulement* principle is a fundamental component of the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.⁷

Indeed, the UN Human Rights Committee has stated that states parties to the International Covenant on Civil and Political Rights (ICCPR) may not in any manner ‘remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed’.⁸ The European Court of Human Rights (ECtHR) has also deemed the *non-refoulement* prohibition to flow directly from the prohibition of torture and cruel and inhuman treatment in Article 3 of the European Convention on Human Rights (ECHR).⁹ The UN Committee on the Rights of the Child has taken a similar position.¹⁰

The *non-refoulement* prohibition also covers the risk of arbitrary deprivation of life, in particular through imposition of the death penalty without

6 See Committee against Torture, General Comment No. 1: Implementation of article 3 of the Convention in the context of article 22, UN Doc. A/53/44, 16 September 1998, annex IX.

7 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/59/324, 1 September 2004, para. 28: ‘[t]he principle of non-refoulement is an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment.’

8 Human Rights Committee, General Comment No. 20, Prohibition of torture and cruel treatment or punishment, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 12; and General Comment No. 31, Nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. HRI/GEN/1/Rev.1, 28 July 1994, p. 31, para. 9. The Human Rights Committee has consistently adopted the same position in its jurisprudence, e.g., *Chitat Ng v. Canada*, Communication No. 469/1991, 7 January 1994, UN Doc. CCPR/C/49/D/469/1991, para. 14.1; *Joseph Kindler v. Canada*, Communication No. 470/1991, 18 November 1993, UN Doc. CCPR/C/48/D/470/1991, para. 6.2; see the disagreement of the government of the United States with this interpretation of Articles 6 and 7 in Comments by the Government of the United States of America on the concluding observations of the Human Rights Committee, UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.1, 12 February 2008, pp. 8 f.

9 European Court of Human Rights (ECtHR), *Soering v. The United Kingdom*, Judgment of 7 July 1989, Series A No. 161, para. 91; *Cruz Varas and Others v. Sweden*, Judgment of 20 March 1991, Series A No. 201, paras. 69–70; *Vilvarajah and Others v. The United Kingdom*, Judgment of 30 October 1991, Series A No. 215, p. 34, paras. 102–110; *Chahal v. The United Kingdom*, Judgment of 15 November 1996, Reports 1996-V, para. 74.

10 Committee on the Rights of the Child, General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/16, 1 September 2005, paras. 27–28.

fundamental guarantees of fair trial. The Human Rights Committee has held explicitly that a risk of violation of the ICCPR's Article 6 (the right to life) constitutes an obstacle to removal from the territory.¹¹ The European Court of Human Rights has not had to decide a case of a transfer entailing a risk of arbitrary deprivation of life or death penalty without fair trial,¹² but has held that imposition of the death penalty in violation of fair trial principles amounts to inhuman treatment.¹³ According to the Court's jurisprudence, a transfer would therefore be in violation of Article 3 ECHR if the person concerned faced such a risk. Moreover, given the irreparable harm that would arise from an arbitrary deprivation of life, Art 2 ECHR must be considered as bar to transfer if a person faces a risk of arbitrary deprivation of life. Thus the *non-refoulement* prohibition also covers transfers where a person risks arbitrary deprivation of life, including the death penalty without fair trial.

Moreover, under specific treaties and instruments the principle of *non-refoulement* extends to other grounds. For instance, Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance prohibits the transfer of any person who faces a risk of enforced disappearance; the Charter of Fundamental Rights of the European Union prohibits the transfer of persons who risk the death penalty.¹⁴ Under the jurisprudence of certain human rights bodies, the principle of *non-refoulement* can extend to other risks.¹⁵ In each situation it will therefore be necessary to examine the specific treaties to which a state is party and assess whether they impose a broader ban on *refoulement* than the one mentioned here – that is, the prohibition of transfer if the person risks torture, cruel, inhuman or degrading treatment or arbitrary deprivation of life.

- 11 Human Rights Committee, General Comment No. 31, above note 8, para. 12; imposition of the death penalty without guarantees of fair trial constitutes a violation of the right to life, Human Rights Committee, General Comment on Article 6, UN Doc. HRI/GEN/1/Rev.1, 29 July 1994, para. 7.
- 12 It has left the question open in *S.R. v. Sweden*, Decision of 23 April 2003 and *Bader and others v. Sweden*, Judgment of 8 November 2005, para. 49. Note, however, that Protocols 6 and 13 are interpreted by some to entail a prohibition to transfer someone where he or she faces a risk of death penalty.
- 13 ECtHR, *Öçalan v. Turkey*, Judgment of 12 March 2003, para. 213, confirmed by the Grand Chamber in its Judgment of 12 May 2005, para. 169; *Bader and others v. Sweden*, above note 12, para. 47.
- 14 Article 19(2); see also Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (*Official Journal* 2004, L 304, 30 September 2004, pp. 0012–0023), which provides for subsidiary protection where refugee law does not apply, but for other reasons such as the risk of the death penalty and torture or inhuman or degrading treatment or punishment people cannot be removed (Article 15).
- 15 For instance, the ECtHR has held that disregard for the minimum guarantees of fair trial might stand in the way of transfer: *Soering*, above note 9, para. 11; *Mamatkulov and Askarov v. Turkey*, Judgment of 4 February 2005 [GC], para. 88; see also Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/4/40, 9 January 2007, para. 49, on risk of arbitrary detention. The Committee on the Rights of the Child has also considered a number of risks which would cause irreparable harm to transferred children, such as forced recruitment: Committee on the Rights of the Child, General Comment No. 6, above note 10, p. 10.

International humanitarian law

The principle of *non-refoulement* is also reflected in Article 45(4) of the Fourth Geneva Convention, which provides that

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.¹⁶

No parallel is found in the Third Geneva Convention relating to prisoners of war. Article 118 thereof states that '[p]risoners of war shall be released without delay after the cessation of active hostilities'. As soon as work on drafting the 1949 Geneva Conventions began, the ICRC drew the attention of states to cases where prisoners of war were repatriated against their will,¹⁷ but exceptions to the obligation to repatriate were rejected by the Diplomatic Conference.¹⁸ Nonetheless, the ICRC has always taken the view that, while the mere wish of prisoners of war could not be a bar to repatriation, they must not be repatriated if it would be 'contrary to the general principles of international law for the protection of the human being' that the supervisory bodies must be able to satisfy themselves on a case-by-case basis that the decisions of the prisoners of war have been made freely and serenely.¹⁹ The ICRC has proceeded according to those principles in many conflicts, for instance in the war between Iran and Iraq,²⁰ the 1990–1 Gulf War²¹ and the war between Ethiopia and Eritrea.²²

Furthermore, the Geneva Conventions contain a much broader restriction on the transfer of prisoners of war or civilian internees between allied powers in

16 While the term 'persecution' is not defined in humanitarian law, it refers, as a minimum, to serious violations of human rights (right to life, freedom, security) on such grounds as ethnicity, nationality, religion or political opinion. See Article 1 of the 1951 Refugee Convention; *UNHCR Handbook on Procedures and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, re-edited January 1992, paras 51–53; 1998 Statute of the International Criminal Court, Article 7(2)g. See also Gillard, above note 1, with further references.

17 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. III, *Geneva Convention relative to the Treatment of Prisoners of War*, International Committee of the Red Cross, Geneva, 1960, p. 542.

18 Article 109 of the Third Geneva Convention does, however, prohibit the repatriation of sick or injured prisoners against their will during hostilities. This must clearly be interpreted as also covering prisoners of war who are not wounded and sick. *Ibid.*, p. 512. The reason why it was inserted in the rules on the wounded and sick is that they were the only ones eligible for early release under the Third Geneva Convention.

19 *Ibid.*, pp. 547–9.

20 *ICRC Annual Report 1989*, p. 87.

21 *ICRC Annual Report 1991*, p. 100.

22 *ICRC Annual Report 2006*, p. 97; *ICRC Annual Report 2007*, p. 102.

international armed conflict. Article 12(2) of the Third Geneva Convention stipulates that

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.

Article 45(3) of the Fourth Geneva Convention contains an identical clause for aliens in the territory of a party to an international armed conflict. These clauses have a very broad reach in two respects: first, they prohibit transfers of detainees not only in the case of specific risks, but in any situation where the Conventions would not be observed by the receiving state; second, they refer not only to the receiving state's formal adherence to the Geneva Conventions, but also to its willingness and ability to respect them.

These two provisions do not apply as broadly as those of human rights law, in that they apply only to certain categories of persons. Article 45 of the Fourth Geneva Convention applies to aliens in the territory of a party to an international armed conflict, and Article 12 of the Third Geneva Convention applies to prisoners of war. Also, in their original sense, they apply to transfers between allied powers in an international armed conflict, and there is no parallel provision for non-international armed conflicts.

Nonetheless, the humanitarian principle underlying these provisions, namely that a detaining power should ensure that the ally to whom it transfers detainees treats them according to the standards of the Geneva Conventions, should also be taken into account in non-international armed conflict (especially in so-called internationalized non-international armed conflicts – that is, internal conflicts in which foreign troops from outside the country intervene on the side of the government). For instance, if countries contributing troops to a multinational force in a non-international armed conflict transfer detainees amongst each other, the principle underlying Articles 12(2) of the Third and 45(3) of the Fourth Geneva Convention should be taken into account.

In addition, Article 3 common to the four Geneva Conventions absolutely prohibits torture, cruel treatment or outrages upon personal dignity, in particular humiliating and degrading treatment. This provision should be interpreted in the light of the interpretation given to the parallel provisions in human rights law. If the absolute human rights law prohibition of torture and other forms of ill-treatment precludes the transfer of a person at risk of such treatment, there is no reason why the absolute prohibition in humanitarian law should not be interpreted in the same way.

Another provision that is relevant in the context of transfers and release is Article 5(4) of Additional Protocol II to the Geneva Conventions:

If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.

While this provision does not contemplate the transfer of persons from one state to another, it nonetheless contains the important humanitarian principle that detaining authorities bear certain responsibilities for the detainees when they release them.

These existing norms of humanitarian law applying to transfers do not preclude application of the *non-refoulement* principle under human rights law or refugee law. Indeed, in certain situations, as the International Court of Justice has stated, humanitarian law is *lex specialis* to human rights law.²³ This could in principle also be the case where humanitarian law, by its silence – that is, by not prohibiting a certain conduct – would seem to preclude the application of such a prohibition under human rights law. In this regard the limited scope of *non-refoulement* and other legal norms of transfer in humanitarian law is not to be understood as a qualified silence in the sense that the drafters consciously eliminated the possibility of more protective norms. For while humanitarian law deals with certain aspects of transfers, there is nothing in the *travaux préparatoires* of the Geneva Conventions and Protocols to indicate that the drafters considered all situations in which transfers might take place (such as transfers to another state during a non-international armed conflict) and deliberately rejected application of the *non-refoulement* principle arising from other sources of law. Nor is there any conflict between the existing set of rules in humanitarian law on the one hand and human rights or refugee law on the other. Rather, the norms of humanitarian law and those of human rights or refugee law are complementary.

A parallel can be drawn with the relationship between *non-refoulement* in refugee law and in human rights law. It has been the long-standing position of the UN High Commissioner for Refugees that lack of protection under refugee law does not preclude protection under human rights law.²⁴ This is sometimes referred to as complementary protection.²⁵ Thus, taking humanitarian law into account as an additional pertinent body of law, the three bodies of law provide complementary protection in terms of *non-refoulement* within their respective sphere of application.

23 International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, pp. 226–593, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, para. 106.

24 See *Factum of the Intervenor*, UNHCR, United Nations High Commissioner for Refugees, *Suresh v. the Minister of Citizenship and Immigration; the Attorney-General of Canada*, SCC No. 27790, reprinted in *International Journal of Refugee Law*, Vol. 14 (January 2002), p. 141, at para. 27: ‘Article 3(1) [of the Convention against Torture] prevails over Article 33(2) [of the Refugee Convention]’; *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, UNHCR, January 2007, para. 11.

25 On complementary protection, see Goodwin-Gill and McAdam, above note 3, pp. 285 ff.; Jane McAdam, ‘Complementary protection and beyond: How states deal with human rights protection’, Working Paper No. 118, UNHCR, August 2005.

Obligations under the principle of *non-refoulement*

The scope of the *non-refoulement* principle has been developed in jurisprudence and practice over time. Only a few aspects of it will be highlighted here.

First, it applies to any type of transfer, regardless of the legal designation of the transfer measure, be it expulsion, extradition, return, repatriation or any other. This is made clear, as mentioned above, by the wording of Article 33(1) of the 1951 Refugee Convention ('in any manner whatsoever'), as well as the broad language of international humanitarian law and the jurisprudence of human rights bodies. Furthermore, under both humanitarian law and human rights law, the crucial factor is the transfer of effective control from one state to the other, which means that under these bodies of law the *non-refoulement* principle can stand in the way of transfers between states, even if the person stays within the same territory. While this is not the situation originally envisaged in the relevant provisions, it is the only interpretation compatible with the very object and purpose of the *non-refoulement* principle. Indeed, obligations could otherwise be circumvented by transferring a person first, for instance, to the transferring state's own embassy or military base in another country and then from the embassy to that country's government. Through a simple formality the whole principle would be undermined.

Second, the principle of *non-refoulement* not only prohibits transfers to a country where the person will face a threat of persecution, ill-treatment or arbitrary deprivation of life, but also prohibits so-called secondary *refoulement* – that is, transfer to another state from which there is a risk of further transfer to a third state where he or she will face such a threat.²⁶ Obviously, the test must be made by the first country *ex ante*, and if there is no foreseeable risk at the time it transfers a person to another country, it cannot be held accountable if he or she is subsequently transferred to a third state. A formal requirement that transfers be subject to the *non-refoulement* principle only if a person is transferred directly to the territory where he or she is at risk would have the unreasonable result that the principle could easily be circumvented. The prohibition of secondary *refoulement* means that if detainees are transferred between members of a coalition (for instance in order to share detention facilities or procedures for transfers), the transferring force must assure itself that the force to which it transfers a person will not then transfer that person to a third country in violation of the *non-refoulement* principle. To ensure that there is no unlawful secondary *refoulement*, some transfer agreements contain clauses barring transfer from the receiving state to a third state.

26 UNHCR, Note on the Principle of Non-Refoulement, 1 November 1997; UNHCR, Note on Diplomatic Assurances, August 2006, para. 8; Human Rights Committee, General Comment No. 31, above note 8, para. 12; Committee against Torture, General Comment No. 1, Implementation of Article 3 of the Convention in the context of Article 22, A/53/44, annex IX, 21 November 1997, paras. 2 and 3; ECtHR, *T.I. v. the United Kingdom*, Appl 43844/98, Decision as to admissibility of 7 March 2000, p. 15; UNHCR EXCOM Conclusion No. 58 (XL), Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection, 1989, para. f(i); Lauterpacht and Bethlehem, above note 1, para. 243.

Third, the principle of *non-refoulement* may prohibit transfers to countries where not only the receiving state's authorities constitute a potential risk, but also non-state entities or individuals if the receiving state is unable or unwilling to protect the transferee.²⁷ This is of particular relevance where the release of people from custody into certain areas might expose them not only to abuse by state authorities there, but also to retaliation or persecution by other parties. In such situations Article 5(4) of Additional Protocol II cited above, which stipulates that a detainee's safety must be ensured when he or she is released, is also relevant.

Fourth, it is important to reiterate that the principle of *non-refoulement* is absolute, with the sole exception of Article 33(2) of the 1951 Refugee Convention. None of the provisions of human rights law or international humanitarian law²⁸ allows for an exception to it. Since this principle has been derived from the absolute prohibition of torture and cruel, inhuman or degrading treatment and from the right to life itself, it is logical that states cannot, on any account, circumvent these obligations and place people in jeopardy by transferring them to other states where they risk such treatment.

In connection with counter-terrorism policies, states have sometimes questioned the absolute nature of the *non-refoulement* principle, arguing that it can compel them to keep convicted or suspected terrorists in their territory.²⁹ While this is a legitimate concern, it cannot override the consideration on which the principle is founded. Just as no reason, including war or any other emergency situation, can justify a derogation from or limitation to the absolute prohibition of torture or any other form of ill-treatment or arbitrary deprivation of life, there can be no reason that would justify a transfer exposing someone to the risk of such violations. This has been the long-standing jurisprudence of human rights bodies.³⁰

Lastly, it is important to stress the procedural obligations of states flowing from the principle of *non-refoulement*.

27 ECtHR, *H.L.R. v. France*, Judgment of 29 April 1997, Reports 1997-III, para. 40; *D. v. The United Kingdom*, Judgment of 2 May 1997, Reports 1997-III, paras. 49–53; *Salah Sheekh v. The Netherlands*, Judgment of 11 January 2007, para. 147. The Human Rights Committee has not yet had to decide this question specifically, but its general statement on the prohibition to transfer anyone who is at risk of 'irreparable harm' is not confined to violations committed by state officials; the Convention against Torture, on the other hand, covers only torture committed by or on behalf of state agents (but also cases when non-state entities exercise quasi-governmental functions: *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, 14 May 1999, UN Doc. CAT/C/22/D/120/1998, 25 May 1999).

28 Although Article 45(5) of the Fourth Geneva Convention exempts extraditions from its scope of application.

29 See the 'Observations of the governments of Lithuania, Portugal, Slovakia and the United Kingdom intervening in the Application No. 25424/05', *Ramzy v. the Netherlands*, paras. 25–29, available at www.redress.org/publications/GovernmentinterventionsobservationsinRamzy%20case22November.pdf (last visited 17 June 2008).

30 Human Rights Committee, Concluding observations: Canada, UN Doc. CCPR/C/CAN/CO/5, 20 April 2006, para. 15; Committee against Torture, *Tapia Paez v. Sweden*, UN Doc. CAT/C/18/D/39/1996, 7 May 1997, para. 14.5; Committee against Torture, Concluding observations: Canada, UN Doc. CAT/C/CR/34/CAN, 7 July 2005, para. 4(a); ECtHR, *Chahal*, above note 9, para. 80; *Saadi v. Italy*, Grand Chamber Judgment of 28 February 2008, para. 138. See also Rene Bruin and Kees Wouters, 'Terrorism and the non-derogability of *non-refoulement*', *International Journal of Refugee Law*, 15 (5) (2003).

The state that is planning to transfer a person to another state must assess whether there is a risk of violation of his or her fundamental rights, regardless of whether the person has expressed a fear or not. If the risk is considered to exist, the person must not be transferred. To ensure that the assessment is performed in a diligent manner and that the person in question will be duly heard, procedural obligations are essential.³¹ While these obligations are not contained in humanitarian law, both human rights law and refugee law stipulate that persons who are to be transferred have the right to challenge the transfer decision before an independent and impartial body – that is, independent of the one that took the decision. This procedural right is based on general principles of human rights law, including the right to a remedy and the requirement of a fair hearing.³² The extent to which the potential transferee's concern is well founded – that is, the existence of the risk – must be assessed on an individual basis.³³

The threshold of risk that must be assessed differs somewhat in the articulation of different human rights bodies, but the varying formulations do not really make a substantive difference in practice. As Bethlehem and Lauterpacht summarize, 'the fullest formulation of the threshold articulated in international practice' can be described as 'circumstances in which substantial grounds can be shown for believing that the individual would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment'.³⁴ The United States follows a different standard of proof under the Convention against Torture, according to which torture must be 'more likely than not'.³⁵ This standard, however, finds no support in the wording of Article 3 of the Convention against Torture, which speaks of 'substantial grounds for believing that he would be in

31 The procedural dimension is especially emphasised in Lauterpacht and Bethlehem, above note 1, paras. 159 f.; Gillard, above note 1. In national jurisprudence similar requirements have been imposed in: *Suresh v. Canada* (Minister of citizenship and immigration) (2002) ISCR. 3, 2002 500 1, paras 121–122 and *Khouzam v. Attorney General of the United States and others*, Decision of the United States Court of Appeals for the Third Circuit, 5 December 2008 (www.acl.org/immigrants/gen/37887gl20081205.html, viewed 6.12.2008).

32 See ICCPR, Articles 2(3), 13; ECHR, Article 13; ACHR, Article 27; Article 1 of Protocol No. 7 to the ECHR; Human Rights Committee, *Mansour Ahani v. Canada*, Communication No. 1051/2002, 15 June 2004 paras No. 6, No. 8, UN Doc. CCPR/C/80/D/1051/2002, paras 10.6–10.8; Committee against Torture, *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, Communication No. 233/2003, 24 May 2005, UN Doc. CAT/C/34/D/233/2003, para. 13.7; Committee against Torture, Concluding observations: Australia, UN Doc. CAT/C/AUS/CO/3, 22 May 2008, para. 17; Committee against Torture, Conclusions and recommendations: United States of America, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 20; ECtHR, *Chahal*, above note 9, paras. 151–152; Report of the Special Rapporteur on Torture, above note 7, para. 29; Inter-American Commission on Human Rights, Decision of 28 October 2002, 'Extension of precautionary measures (N. 259) regarding detainees in Guantánamo Bay, Cuba', and Resolution No. 1/06 on 'Guantánamo Bay precautionary measures' of 28 July 2006, para. 4; see also Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, 2002, para. 394.

33 This was recently reaffirmed by the Council of Europe's Steering Committee for Human Rights (CDDH), Group of Specialists in Human Rights and the Fight against Terrorism (DH-S-TER), 'Meeting Report, 1st Meeting', Strasbourg, 7–9 December 2005, DH-S-TER(2005)018, and 'Meeting Report, 2nd Meeting', Strasbourg, 29–31 March 2006, DH-S-TER(2006)005.

34 Lauterpacht and Bethlehem, above note 1, para. 249, with references to practices in paras. 245–248.

35 Reservations of the United States of America upon ratification of the Convention against Torture (www.ohchr.org/english/bodies/ratification/viewed 9 December 2008).

danger of torture'. Substantial grounds means that there has to be a proper evidential basis for concluding that a risk exists. Further, a risk is not to be equated with a likelihood. In the words of the UK Court of Appeal, 'a "real risk" is more than a mere possibility but something less than a balance of probabilities or more likely than not'.³⁶

While neither human rights law nor refugee law require that the review body be a court of law, it follows from general principles of human rights law, especially the right to a remedy and the guarantee of a fair hearing, that a number of minimum procedural safeguards must be respected for the remedy to be effective. Thus the authorities must inform the person concerned in a timely manner of the intended transfer, and the person must have an opportunity to make representations to the appropriate body in order to express any fears that he or she may face persecution or threats to life and limb after the transfer. This also implies that the information given to the person allows him or her to take a well-informed decision. He or she should be assisted through legal counsel.³⁷ During the review the transfer must be suspended, since otherwise the principle of *non-refoulement* would essentially be undermined, given the irreversible nature of the harm.³⁸ Depending on which legal regime is applicable, further procedural safeguards may have to be observed. In practice many countries have a system of court review of transfers.

Transfers and the role of the ICRC

On a number of occasions the ICRC has visited detainees who fear that if released or transferred they will be subject to violations of their human rights or exposed to other risks, such as retaliation within their community. In such situations it will make known the fears of the person concerned to the authorities. It is not the ICRC's role to assess whether and to what extent the fear is well founded. The obligation to do so rests with the authorities. Nonetheless, to be able to transmit any misgivings to the transferring authorities, the ICRC often asks to conduct pre-departure interviews with the detainees.

Another aspect which concerns the ICRC is the actual transfer procedure: the ICRC frequently lends its services to facilitate the return of detainees, and especially prisoners of war, to their places of origin. In this respect it is important to clarify that if the ICRC fears that transfers would be contrary to international legal requirements, it would not be in a position to lend its services. Moreover, as a

36 England and Wales Court of Appeal, *AS & DD (Lybia) v. Secretary of State for the Home Department*, [2008] EWCA Civ 289, para. 60.

37 1951 Refugee Convention, Article 32(2). Lack of counsel was one of the factors taken into account by the European Court of Human Rights to assess the effectiveness of the remedy in *Chahal*, above note 9, para. 154.

38 See, for example, ECtHR, *Jabari v. Turkey*, Judgment of 11 October 2000, para. 50, in which the Court found that a refugee status determination procedure that did not have suspensive effect on the deportation and which did not permit a review of the merits of an application violated Article 13 of the Convention (right to a remedy); Committee against Torture, Concluding observations: Australia, above note 32, para. 17; further references on the need for a suspensive effect are found in Gillard, above note 1.

matter of general policy the ICRC only helps those people to return who want to do so – that is, if they have given their informed consent to the transfer – for it would be incompatible with its humanitarian mandate to engage in activities which, even if lawful, could be harmful to the person concerned. So even if the transfer is lawful under international law, the ICRC would not in principle lend its services to facilitate the return of people against their will.

Transfers in the context of multinational operations

While transfers of persons are traditionally associated with transfer from the territory of one state to another, a growing phenomenon is the transfer of people in the context of multinational operations. These can take the form of operations to assist the host government, such as the International Security Assistance Force (ISAF) in Afghanistan and the Multi-National Force–Iraq (MNF-I), or of peace-keeping, peace-enforcement or peacemaking operations³⁹ under the auspices of the United Nations, carried out by states; they can also be carried out by states under the umbrella of regional organizations such as NATO or the European Union, which, in turn, have been mandated by the United Nations.

During such operations people can be transferred between troop- or police-contributing countries, between those countries and the host nation, or between the United Nations, troop- or police-contributing countries, regional organizations and the host nation.

While the complexity of such operations raises a multitude of truly challenging practical questions, it is possible – and important – to break the complex phenomenon down into its constituent parts according to the existing international legal framework, so that political and practical solutions can be found within that framework. For while the distinct nature of each such operation has legal implications for a number of issues, such as the mandate and basis for detention, it is immaterial for observance of the principle of *non-refoulement* and other legal obstacles for transfers, which apply in all situations as a matter of refugee law, human rights law and/or humanitarian law.⁴⁰

Application of the principle of *non-refoulement*

The first question to arise is whether the principle of *non-refoulement* can apply, as it stands, to persons who are detained by forces abroad. This will depend on the applicable body of law.

Under international humanitarian law, Article 12 of the Third Geneva Convention protects prisoners of war against transfers, wherever they are

39 For a description of the various forms of multinational operations under the auspices of the United Nations, see United Nations Peacekeeping Operations, Principles and Guidelines, ‘Annex 2’, UN Department of Peacekeeping Operations, Department of Field Support, pp. 94 ff.

40 The only exception which could modify the obligations of *non-refoulement* would be a Security Council resolution pursuant to Chapter VII of the United Nations Charter, as will be discussed below.

imprisoned, and Article 45 of the Fourth Geneva Convention similarly protects any persons who are aliens in the territory of a party to a conflict. Article 5(4) of Additional Protocol II applies to detainees in a non-international armed conflict, including those held by a party engaged in such a conflict abroad.

As for refugee law, UNHCR's position is that the principle of *non-refoulement* 'applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.'⁴¹ The decisive criterion for UNHCR is whether persons 'come within the effective control and authority of that State'.⁴²

With regard to human rights law, a discussion of the respective scope of application of the various human rights treaties is beyond the scope of this article.⁴³ For present purposes, suffice it to recall that the International Court of Justice has generally held that human rights obligations apply not only on the territory of a country, but also abroad.⁴⁴ International human rights bodies have held that human rights treaties apply whenever state authorities have the overall control over a territory⁴⁵ or when they have control over an individual.⁴⁶

41 *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, above note 24, para. 24, in which UNHCR explicitly distances itself from the decision of the US Supreme Court in *Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v. Haitian Centers Council, Inc., et al.*, 509 U.S. 155 (1993).

42 *Ibid.*, at para. 43.

43 For a more detailed discussion of the extraterritorial application of human rights treaties, see Cordula Droege, 'Between dissonance and harmony: humanitarian law and human rights', in this issue.

44 ICJ, *Nuclear Weapons* case, above note 23, para. 25; ICJ, *Wall* case, above note 23, paras. 106–111; *Case concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment of 19 December 2005, para. 216.

45 ICJ, *Wall* case, above note 23, paras 107–113; *DRC v. Uganda* case, above note 44, paras. 215–220; Human Rights Committee, General Comment No. 31, above note 8, para. 10; Human Rights Committee, Comments of the Human Rights Committee: Cyprus, CCPR/C/79/Add.39, 3 August 1994, para. 3; Human Rights Committee, Concluding observations: Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11; ECtHR, *Loizidou v. Turkey* (Preliminary Objections), Judgment of 23 March 1995, Series A 310, para. 62; *Cyprus v. Turkey*, Judgment of 10 May 2001, Reports 2001-IV, para. 77; *Bankovic & Others v. Belgium and 16 Other Contracting States*, Application No. 52207/99, admissibility decision [GC], 12 December 2001, para. 70.

46 Human Rights Committee, *López Burgos v. Uruguay*, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981, para. 12.3; *Celiberti v. Uruguay*, UN Doc. CCPR/C/13/D/56/1979, 29 July 1981, para. 10.3; Committee against Torture, Conclusions and recommendations: United Kingdom, above note 5, para. 4(b); Committee against Torture, Conclusions and recommendations: United States of America, above note 32, paras. 15 and 20. For the United States' arguments see United States' response to the Committee against Torture's list of issues to be considered during the examination of the second periodic report of the United States of America, UN Doc. CAT/C/USA/Q/2, 26 April 2006, pp. 33–7; ECtHR, *Öcalan*, above note 13, para. 93; *Issa & others v. Turkey*, Judgment of 16 November 2004, para. 71; Inter-American Commission on Human Rights, *Coard v. the United States*, Case 10.951, Report No. 109/99, 29 September 1999, para. 37; UK House of Lords, *Al-Skeini and others v. Secretary of State for Defence*, [2007] UKHL 26. In a recent judgment the Federal Court of Canada rejected the application of the Canadian Charter of Rights and Freedoms to persons detained in Canadian military custody in Afghanistan, but held that international law did apply to such persons. It did not make any statements as to the applicability of specific international human rights treaties: Federal Court of Canada, *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defense and Attorney-General of Canada*, Judgment of 12 March 2008, 2008 FC 336.

Thus if a country detains a person abroad and therefore has effective control over him or her, human rights law and the principle of *non-refoulement* flowing from it apply. It is important to note that such control is not contingent upon a formal requirement such as a formal detention. Effective control is the decisive criterion for the application of human rights because it is the factual criterion which makes it possible to assign responsibility for respect for human rights to state authorities. It is immaterial how long any deprivation of liberty lasts and how it is designated formally (arrest, *garde à vue*, detention, temporary detention, etc.). The principle of non-refoulement applies to short- and long-term deprivation of liberty.⁴⁷ So, if a transfer occurs immediately after a person is arrested, captured or even voluntarily surrenders to the authorities, the mere fact of being able to compel him or her to move from the control of one state to another against his or her will demonstrates that the authorities have control over that person.⁴⁸ In some situations, forces present in another state do not detain a person for any length of time, but instead hand him or her over to the host nation immediately after arrest or capture. In those cases the principle of *non-refoulement* applies by virtue of the fact that the transferring forces did assume enough effective control over the person to transfer him or her, however short the period of control may have been.

As pointed out above, the principle also applies in situations where a person is transferred within the territory of one state, but out of the effective control of one state to the effective control of another, for example if a person held by a multinational force is transferred to the authorities of the host country. The material question is whether the person faces a risk, not whether the person crosses a physical frontier.⁴⁹ In military operations abroad, in which a country or organization holds people 'on behalf of' or with the agreement of the host nation, that country or organization nonetheless does in fact have effective control over them and has the power to transfer a person or not. The principle of *non-refoulement* applies.⁵⁰

Attribution to the international organizations and/or contributing nations

In multinational operations people may be captured, detained or transferred by the forces of troop- or police-contributing countries. The first question that arises in

47 See ICCPR, Article 9(1); ECHR, Article 5; American Convention on Human Rights, Article 7; African Charter on Human and Peoples' Rights, Article 6. All these articles apply to arrest and detention.

48 Danish Ministry of Foreign Affairs, 'Non-paper on legal framework and aspects of detention', *Copenhagen Conference: The Handling of Detainees in International Military Operations*, 11–12 October 2007, Denmark, p. 12: 'a transfer will basically imply that the receiving State assumes the responsibility of the detainees'.

49 Gillard, above note 1; Lauterpacht and Bethlehem, above note 1, para. 114.

50 Committee against Torture, Conclusions and recommendations: United Kingdom, above note 5, paras. 4(b) and 5(e). The United Kingdom rejects the applicability of Article 3 of the Convention against Torture to detainees of the UK in Iraq and Afghanistan. See Comments by the United Kingdom to the Conclusions, CAT/C/GBR/CO/4/Add.1, 8 June 2006, para. 14.

the event of such a transfer is who is legally carrying it out – that is, to whom it is attributable – to the organization, the country, or both?

In an operation conducted under the auspices of an international organization (i.e. the United Nations or a regional organization), the transfer is attributable to that organization if it exercises effective control over the measure taken.⁵¹ Usually this is the case if it exercises operational control and command over the transfer measure.⁵² This means that for every operation the actual situation must be analysed in order to know who ultimately decides on the measure in question.

As regards the United Nations, a simple authorization of the Security Council for states to carry out the operation (e.g. Operation Turquoise in Rwanda, UNOSOM in Somalia⁵³) will not usually suffice to attribute to the United Nations acts carried out by their contingents. For instance, while Security Council Resolution 1546 expressly authorizes the Multinational Forces in Iraq to carry out ‘internment where this is necessary for imperative reasons of security’, detainees are under the exclusive control not of the United Nations, but of the United States and the United Kingdom, which decide on detention, release and transfer.⁵⁴ In the case of the International Security Assistance Force in Afghanistan, for instance, the decision to transfer lies exclusively with the troop-contributing countries and not with NATO or the United Nations. This is borne out by the fact that many of these countries have concluded separate bilateral agreements on transfers with the government of Afghanistan which contain guarantees for the treatment of detainees.⁵⁵

Transfer measures will usually be attributed to the United Nations if a peacekeeping force is conceived as one of its subsidiary organs (e.g. UNMIK in Kosovo, MONUC in the Democratic Republic of the Congo).⁵⁶ In practice,

51 Responsibility of international organizations – comments and observations received from international organizations, A/CN.4/545, 25 June 2004, pp. 17–18. See also the statements of states in the *Behrami* case, which mainly argued that the relevant criterion was ‘effective overall control’. ECtHR, *Behrami v. France and Saramati v. France, Germany and Norway*, Applications No. 71412/01 and 78166/01, Decision as to Admissibility [GC], paras 82, 98, 104, 113.

52 Report of the Secretary-General on the administrative and budgetary aspects of the financing of the United Nations peacekeeping operations, UN Doc. A/51/389, 20 September 1996, paras. 17–18; Response of the UN Secretariat to the International Law Commission, UN Doc. A/CN.4/545, 25 June 2004, pp. 17–18; Responsibility of international organizations – comments and observations received from governments and international organizations, UN Doc. A/CN.4/556, 12 May 2005.

53 Report of the Commission of Inquiry established pursuant to Security Council Resolution 885 (1993) to investigate armed attacks on UNOSOM II personnel which led to casualties among them, UN Doc. S/1994/653, 1994.

54 *R (on the application of Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL, para. 23.

55 See statement by Colonel Stephen P. Noonan in the case of *Amnesty International Canada*, above note 46, para. 33.

56 See ‘Agreements for settlement of claims in relation to damages suffered in the course of operations in Congo’, UN *Treaty Series*, Vol. 535, p. 191, at p. 199; Report of the Secretary-General on financing of United Nations peacekeeping operations, above note 52, paras. 7–8; letter of the UN Legal Counsel to the Director of the Codification Division of 3 February 2004, quoted in Second report on responsibility of international organizations by Mr Giorgio Gaja, Special Rapporteur, UN Doc. A/CN.4/541, 2 April 2004, para. 36.

however, even when operations are conceived as such subsidiaries they are nonetheless made up of state contingents, and the home countries will frequently interfere with the UN operational command and give orders to their contingents, especially where they operate detention facilities. In those situations it might be possible that detention and transfer are attributable either exclusively to the troop-contributing country or to both the country and the UN or regional organization if both have effective control.

While the question whether dual attribution is possible is not fully settled in doctrine,⁵⁷ in some situations it might be the legal reading most appropriate to the factual circumstances of the case. As the Special Rapporteur on the Responsibility of International Organizations of the International Law Commission writes, ‘what matters is not exclusiveness of control, which for instance the United Nations never has over national contingents, but the extent of effective control. This would also leave the way open for dual attribution of certain conducts’.⁵⁸

International human rights bodies have similarly focused on the remaining control by the troop-contributing country and have held that the latter continues to be bound by its obligations under human rights law even if it transfers some of its powers to an international organization. For instance, the Human Rights Committee has stated 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. ... This 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.⁵⁹

While the European Court of Human Rights takes a more complex approach, it likewise continues to hold states accountable for their conduct in pursuance of their obligations as members of international organizations. It has indicated in its jurisprudence that a state is not entirely absolved of its obligations under the European Convention on Human Rights if it transfers sovereign powers

57 For the possibility of dual attribution see Second report on responsibility, above note 56, para. 6; ‘Agreements for settlement of claims: Congo’, above note 56; see also the positions of states referenced in the Report by Mr Gaja, above note 56, para. 44; In the *Behrami* case, above note 51, paras. 135, 139, the European Court of Human Rights appears to have ignored the possibility of dual attribution.

58 Second report on responsibility, above note 56, para. 48.

59 Human Rights Committee, General Comment No. 31, above note 8, para. 10; see also Human Rights Committee, Concluding observations: Belgium, UN Doc. CCPR/C/79/Add.99, 19 November 1998, para. 14; Human Rights Committee, Concluding observations: Netherlands, UN Doc. CCPR/CO/72/NET, 27 August 2001, para. 8; Human Rights Committee, Concluding observations: Belgium, UN Doc. CCPR/CO/81/BEL, 12 August 2004, para. 6.

to an international organization. In the *Bosphorus* case, the Court held that there will be a presumption that the state acts in conformity with the European Convention on Human Rights if it acts in compliance with legal obligations flowing from membership in an organization whose protection of fundamental rights is equivalent to that afforded by the European Convention.⁶⁰

In the recent decision in the cases of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, the Court attributed the detention of persons by national contingents within the framework of KFOR (Kosovo Force) operations to the United Nations, because it found that ultimate effective control lay with the United Nations.⁶¹ While the application of the Court's general findings to the facts of the case seems rather stretched in this decision, the important point is that the European Court of Human Rights follows the approach that the conduct in a multinational operation is attributable to the organization or state which has effective control and command. Since the Court expressly distinguished the facts of the *Behrami* case from those of the *Bosphorus* case, it is to be assumed that it would uphold its jurisprudence on responsibility of states under the European Convention in cases where the conduct is attributable to the state.

It is possible that the Court will in future exercise restraint in adjudicating on any conduct of states party to the European Convention on Human Rights pursuant to a Chapter VII resolution of the Security Council. While this might be compatible with the primacy that the Charter takes over other treaties, it is problematic in terms of attribution, which is solely regulated by the factual question of effective control.

To sum up, the attribution of conduct in the event of transfers of persons will depend on a factual assessment of which organization and/or state has effective control, which will typically be the one that has operational command and control. In any case, either the country or the organization is responsible, if not both. There is consequently no gap as far as the obligation to respect refugee law, human rights law and humanitarian law is concerned.

Legal responsibilities of international organizations in respect of transfers

While the *non-refoulement* principle has been codified and developed in the context of transfers carried out by states, there is no question that the United Nations and regional organizations are also bound by it, insofar as it is customary law.⁶² Indeed, it is a long-standing principle that the United Nations and

60 ECtHR, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, Judgment of 30 June 2005, paras 149–158.

61 ECtHR, *Behrami*, above note 51, paras. 133–141.

62 For the customary nature of the principle of *non-refoulement*, see Goodwin-Gill and McAdam, above note 3, pp. 345–55; Lauterpacht and Bethlehem, above note 1, para. 63; UNHCR, 'The principle of *non-refoulement* as a norm of customary international law: Response to the questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93', 31 January 1994.

international organizations are bound by rules of international law to the extent that they carry out functions that have a bearing on such rules. As the International Court of Justice held in its advisory opinion in the *WHO and Egypt* case, 'International Organizations are subject to international law, and as such, are bound by any obligations incumbent upon them under general rules of international law.'⁶³ These obligations are circumscribed by limits of the international organization's mandate – that is, its purposes and functions as specified or implied in its constituent documents and developed in practice.⁶⁴

International organizations like the United Nations or the European Union carry out detention and transfers of detainees; these activities may affect the concerned persons' rights under humanitarian law, human rights law and refugee law. Insofar as the obligations under those bodies of law are part of customary law, such organizations are bound by them.

Beyond the responsibility arising from direct attribution to them, international organizations are also bound by the obligation to *ensure respect* for international humanitarian law.⁶⁵ Thus, if a multinational operation is carried out under the umbrella of an international organization, that organization is particularly well placed to take steps to prevent and terminate violations of international humanitarian law committed by the state. In such cases it should exert its influence as far as possible within the framework of its relations with the state concerned.

The challenge of differing international obligations and differing capacities of contributing countries

It is sometimes argued that the *non-refoulement* principle with its various legal bases cannot apply to multinational operations since it relies on too many different bodies of law; that it would be impracticable if different contributing countries have different obligations, especially under regional human rights treaties.⁶⁶

It is true that the diversity of legal obligations may give rise to a number of practical problems and may result in the somewhat incongruous situation that different persons in a same host nation might be protected by different legal obligations. But this consideration cannot put into question the legal rules. The legal position remains that states cannot absolve themselves from their obligations under international law by adhering to international organizations or by

63 ICJ, *Interpretation of the agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, ICJ Reports 1980, p. 73, para. 37.

64 ICJ, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 174, at p. 180.

65 See Article 1 common to the 1949 Geneva Conventions; ICJ, *Wall* case, above note 23, paras. 159, 160.

66 This consideration appears to underlie the decision in the case of *Behrami*, above note 51, where it was also argued by states (at paras. 90, 101, 111, 115); it is also an important consideration in *Amnesty International Canada*, above note 46, para. 274.

contributing to multinational operations. To the extent that states have effective control by virtue of the transfer, the obligations flowing from such control are incumbent upon them. This legal position is not unrealistic in view of the existing practice in multinational operations; on the contrary, it is common practice of contributing countries in multinational operations to abide by rules that are above the common denominator, either out of legal or policy considerations. For instance, European countries or the United Nations traditionally follow a policy not to transfer people to a country where they would face the death penalty, even though other countries might do so. Another example is the decision by the Canadian government to suspend transfers for a period, out of concern for the treatment of individuals upon transfer.⁶⁷ Nonetheless, practical considerations of consistency evidently make it desirable from the point of view of contributing countries to have a uniform standard, and clarity as to that standard.

Security Council resolutions under Chapter VII of the UN Charter

One question that might arise in the framework of multinational operations under Chapter VII of the UN Charter is whether transfers in such operations will also be governed by the principle of *non-refoulement* and other relevant legal norms. Or can the obligations flowing from the principle of *non-refoulement* be disregarded in operations conducted with the authorization of the Security Council or as delegated operations of it?

A parallel could be drawn to the European Court of Human Rights holding in the cases of *Behrami*. The Court argued that

The Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including ... with the effective conduct of its operations.⁶⁸

In a similar vein it has been argued with regard to the transfer of persons held by ISAF contributing troops to the government of Afghanistan that 'to interpret human rights obligations of one State as precluding the transfer of detainees taken prisoner in Afghanistan and held there to the Government of Afghanistan would be to frustrate the achievement of the objectives of the resolutions establishing ISAF and defining its mandate'.⁶⁹

67 See Canada's suspension of its transfers to the Afghan government: *Amnesty International Canada*, above note 46, para. 61.

68 *Ibid.*, para. 149.

69 Christopher Greenwood, *International Law Framework for the Treatment of Persons detained in Afghanistan by Canadian Forces*, Report submitted to the Federal Court of Canada in the case of *Amnesty International Canada*, above note 46, para. 33.

Indeed, it is widely accepted by jurisprudence,⁷⁰ states⁷¹ and parts of doctrine⁷² that the Security Council is not bound to respect all international law obligations apart from the UN Charter itself. If a multinational operation is conducted under the auspices of a Security Council resolution under Chapter VII of the Charter, the obligations of member states flowing from that resolution can override most obligations under international law, including humanitarian and human rights law, by virtue of the Charter's Articles 25 and 103.⁷³ In principle, this includes not only humanitarian and human rights treaty law, as the wording of Article 103 would indicate, but also customary law.⁷⁴

However, two considerations must be taken into account when considering the legal impact of Chapter VII resolutions.

The first is that Chapter VII resolutions cannot displace peremptory norms of international law (*jus cogens*).⁷⁵ While not all aspects of the *non-refoulement*

70 ICJ, *Orders of 14 April 1992 (provisional measures), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America and Libyan Arab Jamahiriya v. United Kingdom)*, ICJ Reports 1992, p. 16, para. 42 and p. 113, para. 39; European Court of First Instance, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Judgment of 25 September 2005, *Official Journal C/281/17*, para. 181; *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Case T-306/01, Judgment of 25 September 2005, *Official Journal C/281/17*, paras. 233, 234; ECtHR, *Behrami*, above note 51, para. 149; *Al-Jedda* (UKHL), above note 54. In the *Al-Jedda* case, however, a majority of the Lords did not consider that Article 5 of the ECHR was entirely displaced, but that it was qualified (*Ibid.*, paras 39, 125, 126, 136).

71 See, in particular, the argumentation of states in *Behrami*, above note 51, paras. 97 (Denmark), 102 (Estonia), 106 (Germany), 113 (United Kingdom); argumentation of the United Kingdom in the European Court of First Instance, *Yassin Abdullah Kadi*, above note 70, para. 177.

72 Jochen Frowein and Nico Krisch, 'Commentary to Article 42', in B. Simma (ed.), *The Charter of the United Nations*, 2nd edn, 2002, para. 27; Marten Zwanenburg, 'Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation', *International Review of the Red Cross*, Vol. 86 (856) (December 2004), p. 763; Steven R. Ratner, 'Foreign occupation and international territorial administration: the challenges of convergence', *European Journal of International Law*, Vol. 16 (2005), p. 710. A number of authors take a more differentiated view and argue that the Security Council must be bound by at least some parts of these bodies of law: Marco Sassòli, 'Legislation and maintenance of public order and civil life by occupying powers', *European Journal of International Law*, Vol. 16 (2005), p. 661 (at p. 681, Sassòli argues that any derogation from international humanitarian law by the Security Council must be explicit); Robert Kolb, 'Occupation in Iraq since 2003 and the powers of the Security Council', *International Review of the Red Cross*, Vol. 90 (869) (March 2008), p. 29, at p. 33, sets a limit at rules 'of a fundamentally humanitarian character'; Luigi Condorelli argues that the Security Council must respect international humanitarian law in its entirety: 'Le statut des Forces des Nations Unies et le droit international humanitaire', in Claude Emanuelli (ed.), *Les Casques bleus: Policiers ou Combattants?*, 1997, p. 89, at pp. 105–6.

73 Since Articles 40 and 42 of the Charter refer to 'necessary measures', there is some indication that the Security Council should be guided by the principle of proportionality. However, the Charter leaves such broad leeway to the Security Council in the exercise of its powers that only measures that were manifestly out of proportion to the aim pursued would be contrary to the Charter. See Frowein and Krisch, above note 72, para. 30; Kolb, above note 72, p. 35.

74 Rudolf Bernhard, 'Commentary to Article 103', in Simma, above note 72, para. 21.

75 See the Vienna Convention on the Law of Treaties, Articles 5, 53 and 64; European Court of First Instance, *Yassin Abdullah Kadi*, above note 70, para. 226 (note that the ECJ appears to adopt a rather broad view of the content of *jus cogens* with regard to human rights obligations, see paras 231, 282 of the same judgment); Separate Opinion of Judge Lauterpacht in the Case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia*

principle can be considered *jus cogens*, an argument can be made that at least insofar as *non-refoulement* is inherent to the prohibition of torture, it falls under the *jus cogens* prohibition of torture.⁷⁶ It has also been argued that the *non-refoulement* prohibition in refugee law is *jus cogens*.⁷⁷

Second, while it is understood that the Security Council is not entirely bound by international law as a whole, it is also accepted that as promotion of human rights is one of the purposes and principles of the United Nations,⁷⁸ a complete disregard for human rights law and humanitarian law would violate the Charter, for the Security Council is meant to exercise its powers in accordance with the purposes and principles of the United Nations.⁷⁹ Indeed, the Security Council has sometimes found violations of these bodies of law to constitute threats to international peace and security and has called for compliance with them in numerous resolutions.⁸⁰

The extent to which a Security Council resolution must be explicit or unequivocal in order to displace international law is not at all clear. For instance, if the Security Council were unequivocally to order transfers of persons to the host country, leaving no discretion to the troop-contributing countries, this could displace the *non-refoulement* principle, short of its *jus cogens* dimension. But Security Council resolutions, being the result of political compromises, are typically formulated in a broad manner. In general, they will contain wording like ‘take all necessary measures’. Even where a resolution goes into greater detail, such as Resolution 1546, which authorizes ‘internment where this is necessary for imperative reasons of security’ for MNF-I in Iraq, there is no indication as to how these measures will be implemented. The presumption, therefore, must be that member states will carry out these measures in conformity with existing international law, unless otherwise indicated.⁸¹ A contrary presumption, that in doubt international law may be violated, would be implausible.

and Montenegro), Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, p. 440, para. 100; Frowein and Krisch, above note 72, para. 29; Kolb, above note 72, p. 35.

76 See UNHCR, Note on Diplomatic Assurances, August 2006, above note 26, para. 16; International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Anto Furundzija*, Case IT-95-17/1, Trial Chamber II, Judgment of 10 December 1998, para. 144; note that the European Court of First Instance seems to accept that the prohibition of inhuman or degrading treatment constitutes *jus cogens*: European Court of First Instance, *Yassin Abdullah Kadi*, above note 70, para. 240.

77 UNHCR, Executive Committee, Conclusion No. 25, General conclusion on international protection, 1982, para. (b); Conclusion No. 79, General conclusion on international protection, 1996, para. (d); Cartagena Declaration on Refugees, para. 5; Jean Allain, ‘The *jus cogens* nature of *non-refoulement*’, *International Journal of Refugee Law*, Vol. 13 (2001), p. 533.

78 Charter, Article 1(3).

79 *Ibid.*, Article 24(2); Frowein and Krisch, above note 72, para. 28; Kolb, above note 72, p. 35.

80 Frowein and Krisch, above note 72, pp. 724–5, with references.

81 The Security Council explicitly mentioned Article 103 in Resolution 670 of 25 September 1990, where it recalled ‘the provisions of Article 103 of the Charter’ and ‘decide[d] that all States, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement ...’. The Security Council has subsequently affirmed the primacy of its decisions in numerous resolutions. See reference in Jean-Marc Thouvenin, ‘Commentaire à l’article 103’, in Jean-Pierre Cot, Alain Pellet and Mathias Forteau (eds.), *La Charte des Nations Unies*, 3rd edn, 2005, p. 2144.

Thus when a Security Council resolution allows for ‘all necessary measures’, especially if in support of a host country, this could be interpreted to not only include the use of force but also detention or internment, as well as transfers to the host country. However, the resolution will not have defined in any manner what legal framework will govern such use of force, detention or transfer. It must be presumed that such measures will be implemented in conformity with international law, unless otherwise explicitly indicated or unless the formulation is unequivocal and cannot be interpreted in a meaningful manner without requiring a displacement of existing international law.

Going even further, the European Court of Justice has held in the context of measures taken pursuant to Security Council resolutions under Chapter VII that, as far as acts of the European Community were concerned, ‘respect for human rights is a condition for the lawfulness of Community acts and that measures incompatible with respect for human rights are not acceptable in the Community’.⁸² Thus, as a matter of European Community law, even measures taken pursuant to Chapter VII must comply with European human rights law.

Needless to say, even though the Security Council is not bound by all norms of humanitarian and human rights law, basic humanitarian and human rights principles would strongly militate in favour of Security Council-mandated operations to be conducted in accordance with these bodies of law.

ICRC standpoint on interventions in multinational operations

From an ICRC standpoint, it must be stressed that the legal attribution is not the only relevant criterion for its humanitarian dialogue with the authorities. The ICRC may notify several authorities of its concerns with regard to transfers, and not only the authority which is ultimately legally responsible under international law.

In principle, it first submits its bilateral interventions to the authority that has direct control over persons of concern (e.g. the prison authority) and, depending on the case or type of violation, at various levels of authority.⁸³ In its confidential bilateral dialogue with parties to conflicts, the level at which the ICRC engages with the authorities will depend on where it can hope to prevent unlawful or harmful behaviour or make it cease. If, in the context of multinational operations, ultimate legal responsibility rests with an international organization, the ICRC could, for instance, hold a dialogue both with the detaining and transferring authorities of the troop-contributing country and with the authorities of the

82 European Court of Justice (Grand Chamber), *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Joint cases C-402/05 P and C-415/05 P, Judgment of 3 September 2008, para. 284.

83 ‘Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of the other fundamental rules protecting persons in situations of violence’, *International Review of the Red Cross*, Vol. 87 (858) (June 2005), p. 393, at p. 394.

United Nations or regional organization on whose behalf the country carries out the transfer and to which the transfer decision is ultimately attributable.

If the ICRC is unable to improve the situation through bilateral confidential representations, it may, in accordance with the principles and guidelines that determine its action, resort to humanitarian mobilization. It does so on the basis of Article 1 common to the Geneva Conventions, which enshrines an obligation of all states to respect and ensure respect for the Conventions. In this case, it can share its concerns about violations of the law with governments of third countries, with international or regional organizations, or with persons able to support it in seeking to influence the behaviour of parties to a conflict. However, the ICRC only takes such steps when it has every reason to believe that the third parties approached will respect the confidential nature of its representations to them.

Transfer agreements

When people are suspected of or convicted for criminal activity, especially terrorist activities, states have a very high incentive to remove such persons from their territory. As their *non-refoulement* obligations can hinder such removal, many states resort to agreements with the receiving states in which the latter give assurances as to the proper treatment of the transferred persons.⁸⁴ These

84 This has been the subject of wide discussion: see John B. Bellinger, Legal Advisor to the Secretary of State before the House Foreign Affairs Subcommittee on International Organizations, Human Rights, and Oversight, Diplomatic Assurances, ‘Statement of the Honorable John B. Bellinger, III, Legal Adviser, U. S. Department of States’, 10 June 2008; Kate Jones, ‘Deportations with assurances: Addressing key criticisms’, *International and Comparative Law Quarterly*, Vol. 57 (2007), p. 183, with further references at p. 184 on assurances entered by the United Kingdom; High Commissioner for Human Rights, Human Rights Day Statement, ‘On Terrorists and torturers’, 7 December 2005, available at www.unhchr.ch/hurricane/hurricane.nsf/0/3B9B202D5A6DCDBCC12570D00034CF83?opendocument (last visited 20 October 2008); Report of the High Commissioner for Human Rights on protection of human rights and fundamental freedoms while countering terrorism to the UN Commission on Human Rights, UN Doc. E/CN.4/2006/94, 16 February 2006, paras 9–10, 18–20; Report of the Special Rapporteur on Torture, above note 7, paras. 29–30; Report of the independent expert on the protection of human rights and fundamental freedoms while countering terrorism, UN Doc. E/CN.4/2005/103, 7 February 2005, paras. 54–56. See also Human Rights Committee, Concluding observations: Yemen, UN Doc. CCPR/CO/84/YEM, 9 August 2005, para. 13; Human Rights Committee, Concluding observations: Canada, UN Doc. CCPR/C/CAN/CO/5, above note 30, para. 15; Human Rights Committee, Concluding observations: United Kingdom, UN Doc. CCPR/C/GBR/CO/6, 30 July 2008, para. 12; Replies to the list of issues by the United Kingdom, UN Doc. CCPR/C/GBR/Q/6/Add.1, 18 June 2008, paras 84–97; Committee Against Torture, Concluding observations: Canada, UN Doc. CAT/C/CR/34/CAN, above note 30, paras 4(b), 5(e); Committee against Torture, Conclusions and recommendations: United Kingdom, above note 5, para. 4(d); Human Rights Watch, *Empty Promises: Diplomatic Assurances no Safeguard against Torture*, April 2004; Human Rights Watch, *Still at Risk, Diplomatic Assurances no Safeguard against Torture*, April 2005; Center for Human Rights and Global Justice, NYU Law, *Torture by Proxy: International and Domestic Law applicable to ‘Extraordinary Renditions’*, 2004; Centre for Human Rights and Global Justice, NYU Law, *Beyond Guantanamo: Transfers to Torture One Year After Rasul v. Bush*, January 2005; Amnesty International, *Afghanistan – Detainees Transferred to Torture: ISAF Complicity?*, November 2007, ASA 11/011/2007.

agreements – which can take many forms and can be binding or non-binding – are often referred to as diplomatic assurances and are meant to ensure that transferred persons will be treated in accordance with international standards.

The reason for entering into such agreements is that states cannot detain people indefinitely or cannot detain them at all under their national law for security reasons, or consider them to constitute a threat to national security.⁸⁵ Sometimes states find alternative solutions, such as transfer to third countries.⁸⁶ However, it is not an easy task to find countries willing to accept the persons concerned.

Similarly, transfer agreements are becoming an increasingly common feature in multinational operations. In Afghanistan, for instance, a number of members of ISAF have concluded agreements with the Afghan government on the transfer of detainees.⁸⁷ One of the reasons given by these states is that they are invited to support the host government, which retains the primary responsibility for maintaining law and order, and do not want to encroach on its sovereignty.⁸⁸ Also in Afghanistan, for instance, it is NATO policy to transfer or release detainees in principle within 96 hours.⁸⁹ Another much more practical reason is that states or international organizations might not have any capacity to hold people in custody, as in Afghanistan, where some countries contributing to ISAF have no detention facility. These considerations do not, however, provide a legal argument against the validity of the *non-refoulement* principle under international law. Clearly, if states are present in situations of armed conflict, it is foreseeable that they will have to take people under their effective control, in which case they will be responsible for those persons' well-being. Furthermore, it is possible to transfer people between countries contributing to a multinational force, as long as the transferring state ascertains that the receiving state will not violate its obligations under the *non-refoulement* principle or its broader obligations under Article 12 of the Third Geneva Convention and Article 45 of the Fourth Geneva Convention in cases of international armed conflict.

It is true, however, that *non-refoulement* obligations can present a considerable challenge to states unable to transfer people back to their countries of origin, but without any framework for dealing with them. In such situations, states

85 This is indeed a concern in some immigration regimes. See Committee against Torture, Concluding Observations: Australia, above note 32, para. 11(b).

86 Seeking legal admission to a third country is explicitly foreseen for refugees who are expelled for security reasons, 1951 Refugee Convention, Article 32 (3).

87 Such transfer agreements have been concluded, for instance, between the government of Afghanistan and the those of Canada, Denmark, the Netherlands, Norway and the United Kingdom respectively.

88 See argument of the Canadian government in Federal Court of Canada, *Amnesty International Canada*, above note 46, para. 85. This was also the underlying consideration in the United States Supreme Court decision in *Munaf et al. v. Green, Secretary of the Army et al.*, 12 June 2008, pp. 17–23, in which American citizens held by US forces in Iraq requested *habeas corpus* protection against being transferred to the Iraqi justice system. The Supreme Court rejected the case, but appeared to reserve the right to grant *habeas corpus* to a person who would be at risk of torture, pp. 24–5; see also Greenwood, above note 69, paras. 48, 61.

89 ISAF, 'Standard operating procedures: Detention of non-ISAF personnel', 31 August 2006, para. 7.

have sometimes found alternative solutions, such as prolongation of temporary detention; release of individuals who do not pose a serious risk, accompanied by surveillance measures and regular appearances before government authorities; transfers to third states; or transfers limited to specific detention facilities where the person does not run a risk or specifically excluding detention facilities where he or she would run a risk.⁹⁰

Transfer agreements and international obligations

Transfer agreements frequently contain some sort of post-transfer mechanisms to monitor compliance with the agreement. For instance, they may contain clauses that the transferring state's diplomatic or consular authorities, or bodies such as national human rights commissions, have a right to visit the transferee.

Transfer agreements do not, *per se*, relieve the country of its obligations under the *non-refoulement* principle, in particular the obligation to make an individualized assessment as to whether the potential transferee will face a risk of persecution, ill-treatment or arbitrary deprivation of life, during which the person concerned must be able to make his or her concerns heard.⁹¹ This is no different from conflicting obligations arising, for instance, from the principle of *non-refoulement* and extradition treaties. In those situations too, the obligation to transfer arising from the extradition treaty is overridden by the principle of *non-refoulement*.⁹² As mentioned above, the *non-refoulement* principle is absolute,⁹³ and states cannot absolve themselves from its requirements by entering into other agreements.

Any diplomatic assurance received is only one of many relevant factors that must be taken into account in assessing whether and to what extent the fears of the individual are well founded.⁹⁴ In determining the weight, if any, to be given to

90 This was accepted by the European Court of Human Rights in the case of *Al-Moayad v. Germany*, Appl. No. 35865/03, Decision of 20 February 2007, paras. 65–72.

91 With regard to refugee law see UNHCR, Note on Diplomatic Assurances, above note 26, paras 27, 36: in UNHCR's opinion, 'diplomatic assurances should be given no weight when a refugee who enjoys the protection of Article 33(1) of the 1951 Convention is being refouled, directly or indirectly, to the country of origin or former habitual residence' (para. 30); ECtHR, *Saadi*, above note 30, para. 148; The importance of a case-by-case review was most clearly reaffirmed by the Council of Europe's Steering Committee for Human Rights, above note 33, which stated that 'diplomatic assurances are not an alternative to a full risk assessment' which must be carried out 'on a case-by-case basis'. See also *Khouzam v. Attorney General of the United States* (above note 31).

92 ECtHR, *Soering*, above note 9, para. 86.

93 Except in Article 33(2) of the 1951 Refugee Convention.

94 The question whether the risk and in particular the reduction of risk through diplomatic assurances can be reviewed by a court was discussed at length in the case of *AS & DD (Libya) v. the Secretary of State for the Home Department*, [2008] EWCA Civ 289, which answered it positively; the effectiveness of a transfer agreement is also analysed at length in Special Immigration Appeals Commission, *Omar Othman v. Secretary of State for the Home Department*, SC/15/2005, 26 February 2007, paras. 490–521. The ECtHR has always reviewed the reliability of such agreements, as in the cases of *Chahal*, above note 9, para. 105, and *Saadi*, above note 30, para. 147. In the United States, on the other hand, courts take the approach that the executive branch is best placed to assess the risk, as restated by the Supreme Court in *Munaf et al. v. Green, Secretary of the Army et al.*, 12 June 2008, p. 25. The government does not show courts

an agreement, the review body should be guided by the position adopted by various human rights and other bodies, namely that

- in cases of transfer to states where there is ‘systematic practice of torture’, assurances are unlikely to remove the risk;⁹⁵
- general assurances to the effect that the receiving state will abide by international standards, without giving an assurance relating directly to the individual concerned, are not capable of removing the risk for that person;⁹⁶ and
- diplomatic assurances *may* remove the risk only if accompanied by an independent and effective post-transfer monitoring mechanism.⁹⁷

Beyond these legal considerations, transfer agreements to obtain assurances against ill-treatment or other violations should, if at all, be used cautiously and with circumspection. While they cannot be qualified in abstract terms as necessarily unreliable, since the political and diplomatic pressure created by single cases may – in certain circumstances, and if followed up with strong post-return mechanisms – protect the individual,⁹⁸ experience in some cases has shown that assurances have been disregarded.⁹⁹

The main reason for this disregard is that it is difficult to establish a reliable and effective monitoring mechanism. In one instance, the European Court

diplomatic assurances that it has obtained from other governments: John B. Bellinger, above note 84; Ashley Deeks argues that judicial review should be limited to procedural aspects and not substantive matters: ‘Avoiding transfers to torture’, Council on Foreign Relations Paper, CSR No. 35, June 2008, p. 38.

- 95 See Report of the Special Rapporteur on Torture, above note 7, para. 37; Report of the Special Rapporteur on Torture, UN Doc. A/60/316, 30 August 2005, para. 51; Committee against Torture, Conclusions and recommendations: United States of America, above note 32, para. 21; Human Rights Committee, Concluding observations: United States of America, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 16; Concluding observations: United Kingdom, above note 84, para. 12. The criterion of systematic violations is not foreign to the risk-assessment in *non-refoulement*: according to Article 3(2) of the Convention against Torture, to assess whether there are substantial grounds for believing that the person will be subjected to torture, the existence of a ‘consistent pattern of gross, flagrant or mass violations of human rights’ must be taken into account.
- 96 ECtHR, *Saadi*, above note 30, para. 147; similarly, UNHCR’s Note on Diplomatic Assurances, above note 26, para. 51, states that ‘diplomatic assurances would meet the suitability criterion only if they could effectively eliminate all reasonably possible manifestations of persecution in the individual case’.
- 97 Committee against Torture, Conclusions and recommendations: Canada, UN Doc. CAT/C/CR/34/CAN, 7 July 2005, para. 5(e); Conclusions and recommendations: United States of America, above note 32, para. 21; Conclusions and recommendations: United Kingdom, above note 5, para. 4(d). For the United Kingdom’s reply to these recommendations, see Comments by the government of the United Kingdom of Great Britain and Northern Ireland to the conclusions and recommendations of the Committee against Torture, UN Doc. CAT/C/GBR/4/Add.1, 8 June 2006, paras. 49–69.
- 98 As argued, for instance, by the government of the United Kingdom in ‘Replies to the List of Issues (CCPR/C/GBR/Q/6) to be taken up in connection with the consideration of the sixth periodic report of the government of the United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/6)’, UN Doc. CCPR/C/GBR/Q/6/Add.1, 18 June 2008, para. 88; Jones, above note 84, pp. 188–187; Bellinger, above note 84, p. 4; Ashley Deeks, above note 94, p. 22.
- 99 See, e.g., Committee against Torture, *Agiza*, above note 32; ECtHR, *Shamayev and 12 others v. Georgia and Russia*, Application No. 36378/02, Judgment of 12 April 2005; see also the redacted report of the Department of Homeland Security, Office of the Inspector General, on the case of Maher Arar: ‘The removal of a Canadian citizen to Syria’, OIG-08-08, March 2008, pp. 5, 22, 27.

of Human Rights, on receipt of an assurance from a state requesting extradition that the Court's staff would be given access to the persons concerned, lifted an order requiring it not to extradite them. When it attempted to visit them, however, access was denied.¹⁰⁰ In cases before the Committee against Torture, ill-treatment was found to have occurred despite the provision of assurances which included a monitoring mechanism.¹⁰¹ The UN High Commissioner for Human Rights and the UN Special Rapporteur on Torture have warned against the use of diplomatic assurances, such assurances being unreliable and unable, in their opinion, to remove the risk of torture or other forms of ill-treatment.¹⁰² Diplomatic assurances have also been strongly criticized by human rights organizations.¹⁰³

Indeed, when resorting to diplomatic assurances, states should be aware that while it is straightforward to determine whether a state has complied with an undertaking not to impose or carry out the death penalty, it is much more difficult to monitor compliance with an undertaking not to ill-treat persons deprived of their liberty, as torture typically takes place 'behind closed doors' and its occurrence is denied. In addition, only a very limited number of people in any particular place of detention are likely to be monitored pursuant to those assurances. It may be difficult for them to communicate any allegations of ill-treatment to the monitoring body, as they might run the risk of reprisals for having informed the monitoring body of the ill-treatment. Also, assurances can only be useful insofar as the authorities have control over security forces, which is not always the case. Lastly, if assurances are violated it is not clear what, if any, remedy is available to the individual concerned.

The ICRC and transfer agreements

The ICRC, on account of its very nature and methods of work, cannot act as the monitoring body under transfer agreements and does not wish to be considered or named as such in them.

First, any involvement by the ICRC in post-transfer monitoring might cause it to be viewed as an 'implementing agency or agent' of the transferring state – that is, as having been 'placed under contract' by that state to visit detainees in the receiving state, an assignment incompatible with its neutrality and independence and that would jeopardize perception thereof. To act as a monitoring

100 ECtHR, *Shamayev*, above note 99.

101 Committee against Torture, *Agiza*, above note 32.

102 High Commissioner for Human Rights, Human Rights Day Statement: 'On terrorists and torturers', 7 December 2005, above note 84; Address by the High Commissioner for Human Rights at Chatham House and the British Institute of International and Comparative Law, 16 February 2006, available at www.biiicl.org/news/view/-/id/14/ (last visited 21 October 2008); Report of the Special Rapporteur on Torture, UN Doc. A/60/316, 30 August 2005, para. 46. See also Inter-American Commission on Human Rights' decision on precautionary measures for the detainees at Guantánamo Bay, above note 32, p. 10 and Resolution No.1/06 on Guantánamo Bay precautionary measures, above note 32, para. 4.

103 Amnesty International, 'Diplomatic assurances' – no protection against torture or ill-treatment, campaign factsheet ACT40/021/2005, December 2005; and Human Rights Watch, *Empty promises: diplomatic assurances no safeguard against torture*, April 2004.

mechanism could ultimately undermine future negotiations on an agreement with the state in question or with third states for detention-related activities by the ICRC. It would moreover risk being used by transferring states for their own purposes, for instance if they claim that any danger of ill-treatment is averted thanks to ICRC visits.

Second, in accordance with its right to visit detained persons in international armed conflicts¹⁰⁴ and its right to take any humanitarian initiative in non-international armed conflicts and other situations of violence,¹⁰⁵ the ICRC sometimes makes post-transfer visits to transferees in receiving states. It may already be visiting a place of detention to which a person is transferred and therefore have access to that person. It will, however, negotiate access and the terms and conditions for its visits independently of any agreement between two states. To ensure compliance with the provisions of international law relating to detainees, the ICRC enters into dialogue with the detaining authorities and the detaining country. This dialogue is usually confidential, so that the transferring state will not necessarily learn about the ICRC's findings. While the ICRC may wish to inform that state or other states in cases where violations persist and its confidential dialogue alone has no effect, it will do so in line with its own internal directives,¹⁰⁶ not on the basis of an agreement between the transferring and the receiving state.

Post-transfer responsibilities

If a transfer does take place, the responsibility for the transferred person rests with the receiving state. The sending state might, however, have a number of post-transfer obligations. These can flow from primary obligations under international law, such as under humanitarian law, or from secondary obligations according to the law of state responsibility if the transfer was in violation of international law. There can also be responsibilities flowing from the duty to ensure respect for international humanitarian law and to abstain from assisting in any violations.

Post-transfer responsibilities in international humanitarian law

International humanitarian law contains specific provisions on responsibilities after transfers between allied powers. Article 12 of the Third Geneva Convention stipulates that

[I]f that Power [namely the receiving power] fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of

104 Third Geneva Convention, Article 126; Fourth Geneva Convention, Article 143.

105 Geneva Conventions, Common Article 3; Statutes of the International Red Cross and Red Crescent Movement, Article 5.

106 On the ICRC's terms and conditions for its work, see 'Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of the other fundamental rules protecting persons in situations of violence', above note 84, p. 393.

war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

Article 45(3) of the Fourth Geneva Convention imposes identical obligations in an international armed conflict with regard to protected persons transferred between allied powers.

In other words, if the sending state learns that detainees are being subjected to grave breaches of the Geneva Conventions or that their basic needs or the requirements concerning conditions of detention are not being met, such as accommodation, food, hygiene, or labour, it must take steps to provide direct assistance.¹⁰⁷ The commentary on these provisions specifies that if for any reason the situation cannot be remedied, ‘the power which originally transferred the prisoners must request that they be returned to it. In no case may the receiving Power refuse to comply with this request, to which it must respond as rapidly as possible’.¹⁰⁸ Thus international humanitarian law imposes significant post-transfer responsibilities on the sending state, requiring it to follow up on the treatment of transferred persons and to take action if their treatment is not satisfactory; such action can include requesting the return of the persons concerned. As said above, the humanitarian considerations underlying these provisions – that is, to ensure that in transfers between allied powers the sending power continues to be responsible for the well-being of detainees, should also be taken into account in respect of transfers between allied powers in a non-international armed conflict.

Furthermore, as already pointed out, Article 5(4) of Additional Protocol II requires states releasing detainees in a non-international armed conflict to take all necessary measures to ensure their safety.

Responsibility for an internationally wrongful act

Other bodies of international law do not contain similar obligations for the transferring state. However, if a state transfers a person in violation of the principle of *non-refoulement*, it commits an internationally wrongful act. In principle, this entails an obligation of reparation,¹⁰⁹ including an obligation of *restitutio in integrum*,¹¹⁰ which could consist in allowing the person to come back on to the

107 Pictet, above note 17, p. 138; and Pictet, above note 28, pp. 268–9.

108 Pictet, above note 17, p. 139.

109 Permanent Court of International Justice, *Factory at Chorzow (Claim for Indemnity) case*, (*Germany v. Poland*), (*Merits*), PCIJ (ser. A) No. 17, 1928, p. 29. See also Article 1 of the Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001: ILC Articles on State Responsibility, UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001; 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, adopted by General Assembly Resolution 60/147 of 16 December 2005, UN Doc. A/RES/60/147, 21 March 2006.

110 If it is not materially impossible or does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation. See Article 35 of the ILC Articles on State Responsibility, *ibid.*

sending state's territory. But human rights bodies have stopped short of requesting the person's return to the sending state, and have merely granted persons unlawfully transferred a right to compensation. More recently, the Committee against Torture and the Human Rights Committee have recommended that states should take measures to inquire about the whereabouts and well-being of the transferred person and to ensure that he or she is not being ill-treated.¹¹¹ If it is not possible to request that person's return, inquiring into his or her well-being and taking measures to alleviate any suffering can help to avoid or put an end to violations.

Obligation to ensure respect for international humanitarian law

On the basis of Article 1 common to the Geneva Conventions, all states have an obligation not only to respect but also to ensure respect for international humanitarian law. This entails a responsibility for all states, including those not engaged in a given armed conflict, to take feasible and appropriate measures to ensure that the rules of humanitarian law are respected by the parties to that conflict.¹¹² It is a commitment to promote compliance with that law,¹¹³ and to act 'with due diligence to prevent [violations of humanitarian law] from taking place, or to ensure their repression once they have taken place'.¹¹⁴

Thus all states that become aware of such violations should take steps to terminate them. They have various methods at their disposal, such as bilateral diplomatic interventions or multilateral mechanisms. These obligations are particularly pertinent in situations where states or international organizations are present in the territory of another state. Their troops must not only avoid giving any encouragement, aid or assistance if they witness violations of humanitarian law by the host nation, but should also take every possible step (within their mandate and in conformity with general international law) to dissuade it from committing them. Or if member states of an international organization are parties to a conflict, acting with its authorization or under its umbrella, the international organization should, where necessary, intervene to ensure respect for humanitarian law by them.

A number of states and international organizations have recently chosen to give host countries greater support in increasing their capacity to receive

111 Human Rights Committee, *Chitat Ng*, above note 8, para. 18; *Mansour Ahani*, above note 32, para. 12; Committee against Torture, *Brada v. France*, Communication No. 195/2002, UN Doc. CAT/C/34/D/195/2002, 24 May 2005, para. 15.

112 ICJ, *Wall case*, above note 23, para. 158; Laurence Boisson de Chazournes and Luigi Condorelli, 'Common Article 1 of the Geneva Conventions revisited: protecting collective interests', *International Review of the Red Cross*, Vol. 82 (837) (March 2000), pp. 67–87.

113 See intervention by Mr Claude Pilloud from the International Committee of the Red Cross at the Diplomatic Conference of Geneva of 1949, Final Act of the Diplomatic Conference of Geneva, 12 August 1949, Part II, Section B, Report of the ninth session of the Special Committee of the Joint Commission, 25 May 1949, p. 51; ICRC, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, 2nd edn, Geneva, April 1958, p. 129; Pictet, above note 17, p. 18.

114 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC/Martinus Nijhoff, 1987, commentary on Article 91, p. 1058.

transferred persons in satisfactory conditions of detention and to try them according to international standards.¹¹⁵ Such states are in a particularly favourable position to ensure respect for humanitarian law standards by the host nation and, accordingly, bear a particular responsibility in that regard.

Responsibility for a wrongful act of another state

One of the reasons for transfers can be that the persons concerned will be subject to criminal proceedings in the receiving state. Sometimes the sending state might cooperate with the receiving state in those proceedings, as often occurs for trials relating to terrorism or organized crime.

In such situations, if the proceedings do not comply with international fair trial standards, the sending state might be held internationally responsible for deliberate assistance in breaching the obligation to provide a fair trial. On the basis of international law and practice¹¹⁶ it is in fact accepted – and considered by the International Court of Justice to reflect customary law¹¹⁷ – that a state may not aid or assist another state in the commission of a breach of international law. For instance, if a sending state assists a receiving state in compiling evidence for an unfair trial, it might – depending on the importance of its assistance – be assisting in a violation of international law if aware of the circumstances of the case and if the evidence is material to the trial proceedings.

Summary

The foregoing analysis has sought to outline the legal framework that governs the transfers of individuals. While legal obligations vary from treaty to treaty, the baseline is that people must not be transferred if there are substantial reasons for believing that they would be exposed thereby to a risk of persecution, torture, cruel, inhuman or degrading treatment or arbitrary deprivation of life. An independent and impartial body must review the decision to transfer and assess whether there is a risk.

115 See Jones, above note 84, p. 190.

116 See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, 2002, p. 151, paras. 7–9, with references to state practice. The principle has been summarized in Article 16 of the Draft articles on responsibility of States for Internationally Wrongful Acts, with commentaries, in the following manner:

A State which aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.

117 ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, para. 420.

Transfers arising in multinational operations abroad are only now drawing attention to legal and practical issues. The real challenge will be to find practical solutions to accommodate the object and purpose of those operations and their inherent restrictions as operations carried out at the invitation of the host government and often under the auspices or even under the command and control of the United Nations. Solutions will have to take into account the very limited capacity and political will to detain persons who should normally be detained by the host country, while at the same time respecting the principle of *non-refoulement*. Solutions can encompass, among others, prolongation of temporary detention, transfers to third states, transfers to specific places where there is no risk, and monitoring or even joint administration of detention to monitor transferred persons.

The ICRC will strive to visit people whenever possible before their transfer and will notify the transferring authorities of any fears that they might have. While it will often also try to visit people after their transfer, it seeks to do so on the basis of its own humanitarian initiative and within the framework of its humanitarian dialogue with the relevant authorities, and carries out such visits in accordance with its own terms and conditions.

There's no place like home: states' obligations in relation to transfers of persons

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Abstract

The article sets out states' obligations in relation to transfers of persons under international law, and revisits the key elements of the principled non-refoulement, including its application where persons are transferred from one state to another within the territory of a single state; the range of risks that give rise to application of the principle; important procedural elements; and the impact on the principle of so called diplomatic assurances.



In recent years the detention operations of multinational forces in Iraq and Afghanistan as well as states' counter-terrorism activities have led national courts, international human rights supervisory bodies and humanitarian practitioners to take a closer look at states' obligations in relation to transfers of persons they are holding and, in particular, the application of what is often referred to as the principle of *non-refoulement*.

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Non-refoulement, the principle that precludes states from transferring persons within their control to another state if a real risk exists that they may face violations of certain fundamental rights, is the cornerstone of refugee law. It also finds expression, with certain variations in content and scope, in human rights and international humanitarian law. Traditionally, its protection is invoked by asylum seekers or by persons facing extradition or deportation. However, there is no reason for its application to be limited to such situations, as the underlying protection concerns and obligations of states with effective control over persons can arise in a variety of other situations – indeed, on every occasion when a state assumes effective control over a person.

The entitlement of multinational forces in Iraq to detain persons is established by Security Council resolution 1546 of 2004,¹ while the legal framework regulating such deprivation of liberty is set out in a number of Coalition Provisional Authority memoranda which remain in force today.² One dimension that is not expressly addressed in these instruments is how the states making up the Multi-National Force Iraq should implement their obligations under the principle of *non-refoulement* towards the persons they are holding. This is a live concern in Iraq when persons held by the multinational forces are transferred to Iraqi authorities for further detention where there may be a risk of ill-treatment or criminal proceedings leading to the imposition of the death penalty. This issue received extensive media coverage at the time of the transfer and subsequent execution of the former Iraqi president, Saddam Hussein and of other high-ranking members of his regime, and remains a cause of anxiety for the thousands of Iraqi held by the multinational forces in Iraq today.

It is not just transfers to further detention that raise protection concerns. In view of the situation prevailing in Iraq, the release of detainees in an environment where they may face serious risks from armed groups unconnected to the state or from the general public must also be considered. This could prove particularly problematic for senior figures of the former Baathist regime; for members of Mujahedin el-Khalq residing in Camp Ashraf, over whom the multinational forces assumed control in 2003;³ and for third-country nationals, who are particularly at risk both if released in Iraq and, in some cases if transferred to their state of nationality.

Some of these same problems in relation to transfers of detainees to local authorities also exist in Afghanistan. At the time of writing, the responsibility in this regard of Canada, one of the participants in the NATO-led International Security Assistance Force (ISAF) was being examined by the Canadian Federal

1 Security Council Resolution 1546, 8 June 2004.

2 Most notably, Coalition Provisional Authority Memorandum Number 3 (Revised), Criminal Procedures, 27 June 2004, and Coalition Provisional Authority Order Number 99, Joint Detainee Committee, 27 June 2004. The present article does not address the compliance of these instruments with the obligations under international humanitarian law and human rights law of the states making up the multinational forces in Iraq.

3 On the Mujahedin el-Khalq see, for example, www.fas.org/irp/world/para/mek.htm (last visited 22 January 2008).

Court.⁴ ISAF's detention operations also raise the question of the application of the principle of *non-refoulement* to transfers of detainees between different members of ISAF, including whether the risk exists that the persons concerned may ultimately be transferred to the Afghan authorities or out of Afghanistan altogether.

Until recently, scrutiny of the detention facility at Guantánamo Bay focused on treatment, conditions of detention and access to internment review mechanisms. However, one further preoccupation of many of the detainees is their possible repatriation, when they might be exposed to risk of ill-treatment.⁵ Similar concerns arise in relation to the bilateral agreements for the deportation of persons concluded by the United Kingdom with a number of states including with Jordan, Libya and Lebanon in the wake of the London bombings of July 2005.⁶

Against this background the present article revisits the key elements of the principle of *non-refoulement*. Many aspects of the principle of *non-refoulement* are well established and straightforward. Closer consideration is given to elements that have received less attention or which are particularly pertinent to states' obligations in the situations just outlined. These include:

- the application of the principle in situations where persons are transferred from the authority of one state to that of another within the territory of a single state, be it from multinational forces to local authorities or between different contingents of such forces;
- the range of risks that give rise to the application of the principle; the source of such risk – an issue that is particularly relevant when persons are released instead of transferred to ongoing detention;
- the procedural dimension of the principle, which is essential for its application in practice; and
- the effect on states' obligations regarding assurances they may have obtained from the receiving state.

The present article sets out states' obligations in relation to transfers of persons under international law: refugee law, human rights law and humanitarian

4 Federal Court of Canada, *Amnesty International Canada v. Canada (National Defence)*, 2007 FC 1147, 5 November 2007.

5 See, e.g., the case of the seven Russian nationals repatriated from Guantánamo in 2004 outlined in Human Rights Watch, *The 'Stamp of Guantánamo' – The Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the United States*, March 2007.

6 Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan Regulating the Provision of Undertakings in Respect of Specified Persons Prior to Deportation, signed August 10, 2005, <http://www.fco.gov.uk/resources/en/pdf/jordan-mou> (last accessed 3 January 2009); Memorandum of Understanding between the General People's Committee for Foreign Liaison and International Cooperation of the Great Socialist People's Libyan Arab Jamahiriya and the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, signed October 18, 2005, <http://www.fco.gov.uk/resources/en/pdf/libya-mou> (last accessed 3 January 2009); and Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Lebanese Republic Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, signed December 23, 2005, <http://www.fco.gov.uk/resources/en/pdf/lebanon-mou> (last accessed 3 January 2009).

law. While the majority of persons held in the situations just outlined are unlikely to be protected by refugee law – the first, but by no means only, hurdle being the fact that they remain within their state of nationality – mention of it is nonetheless warranted for the sake of completeness and because it is pertinent to the small but significant number of third-country nationals held by the multinational forces in Iraq and Afghanistan, as well as all the detainees held in Guantánamo.

Some of the situations referred to in the present article are contexts of armed conflict, where states' forces are operating extraterritorially. This raises questions as to the applicable legal framework, including whether human rights law applies in times of armed conflict; the interplay between human rights law and international humanitarian law in such circumstances;⁷ and the extent of the extraterritorial application of human rights law.⁸ These are complex questions that have often been raised in the periodic debates between states and human rights supervisory bodies referred to in the article, as well as in proceedings before national courts. A discussion of these issues is beyond the scope of the present article, which assumes, on the basis of recent and consistent jurisprudence: first, the concurrent and complementary application of human rights and international humanitarian law in times of armed conflict; and, second, that in situations where states are operating extraterritorially, whenever they are in a position to transfer persons and, consequently, the principle of *non-refoulement* applies, they are exercising the requisite level of effective control over such persons for their human rights obligations to apply extraterritorially.⁹

7 See, e.g., Cordula Droege, 'The interplay between international humanitarian law and human rights in situations of armed conflict', *Israel Law Review*, Vol. 40 (2) (2007), p. 310, and the references therein.

8 The Human Rights Committee confirmed the extraterritorial application of the International Covenant on Civil and Political Rights in its General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10, as well as in its Concluding Observations on the United States' second and third periodic reports in 2006. Human Rights Committee, Concluding Observations: United States of America, 18 December 2006, UN Doc. CCPR/C/USA/CO/3/Rev.1, para. 10. For the United States' arguments see, *inter alia*, Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Third periodic reports of States parties due in 2003, United States of America, 28 November 2005, UN Doc. CCPR/C/USA/3, paras. 129–30 and Annex I thereto. See also Committee against Torture General Comment No. 2, Implementation of article 2 by States Parties, 23 November 2007, UN Doc. CAT/C/GC/2/CRP.1/Rev.4, paras. 7 and 16, on the extra-territorial application of the Convention against Torture. For a comprehensive discussion of the extra-territorial application of human rights law, see Frans Coomans and Menno Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Intersentia, 2004. See also recent decisions of the International Court of Justice on this issue in the Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, pp.178–81, paras. 107–113; and in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 3 February 2006, paras. 215–20; cf. www.icj-cij.org/doCKET/index.php?p1=3&p2=1&code=co&case=116&k=51 (last visited 16 October 2008).

9 This is, for example, the view recently expressed by the Committee against Torture in its review of the United Kingdom and United States' periodic reports. Committee against Torture, Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories, UN Doc. CAT/C/CR/33/3, 10 December 2004, para. 4(b); and Committee against Torture, Conclusions and Recommendations: United States of America, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 15 and 20. For the United States' arguments, see United States' Response to the Committee against Torture's List of issues to be considered during the examination of the second periodic report of the United States of America, at pp. 33–7.

Most of the legal questions raised by states' transfers of persons have a clear answer. Regrettably, the same cannot be said of the practical solutions that must be found for persons whose transfer is precluded. While it is clear that such a solution must not violate other rights – for example, it cannot be indefinite detention – more thought must be devoted to finding acceptable alternative solutions. Their precise nature will have to vary according to the context. In relation to Guantánamo, in certain cases when persons were not transferred pursuant to diplomatic assurances, the preferred approach appears to have been transfer to a third state willing to accept the persons in question. As the case of the Uighurs transferred to Albania shows, this is by no means an easy task.¹⁰ Moreover, this approach is obviously not suitable for situations such as Iraq and Afghanistan, where hundreds, if not thousands, of persons are held and are at possible risk if transferred to local authorities. While the risk of the imposition of the death penalty may be averted by requesting undertakings, and some of the shortcomings in criminal proceedings that could lead to its imposition could be remedied, a different approach needs to be adopted in order to remove the underlying reasons for the risk of ill-treatment. This is an issue to which states participating in multinational operations will have to pay closer attention and address in their standard operating procedures. Whatever solution is adopted in any particular context, it must not deprive persons of the right to an individualized review of the well-foundedness of their fears by an independent body.

Legal bases of the principle

Non-refoulement is the cornerstone of refugee law. It is also a principle recognized by human rights law, in particular as a component of the prohibition on torture, cruel, inhuman or degrading treatment or punishment, and by international humanitarian law. The precise content and scope of the right varies slightly according to whether it is invoked as a principle of refugee law, human rights law or international humanitarian law.

Non-refoulement as a principle of refugee law¹¹

Possibly the best known expression of the principle of *non-refoulement* is found in Article 33(1) of the 1951 Convention Relating to the Status of Refugees, which provides that

No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be

10 Tim Golden, 'Chinese leave Guantánamo for Albanian limbo', *New York Times*, 10 June 2007. See also the endeavours of the United States in January 2009 in respect of other inmates Meraiah Foley and Mark McDonald, 'Australia and Britain signal reluctance to take Guantánamo prisoners', *International Herald Tribune*, 2 January 2009.

11 For a comprehensive discussion of *non-refoulement* as a principle of refugee law, see Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: opinion', in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003.

threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The principle of *non-refoulement* in the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa is slightly wider in scope, reflecting the wider definition of refugee adopted by this instrument to include persons fleeing, *inter alia*, armed conflict.¹²

Non-refoulement as a principle of human rights law

Non-refoulement is also a principle of human rights law. The prohibition on *refoulement* can be an express, self-standing right, or an implicit component of other rights. *Non-refoulement* is expressly referred to, for example, in Article 22(8) of the 1969 American Convention on Human Rights, which precludes transfers that may put persons' life or personal freedom at risk, and in Article 16(1) of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, which precludes transfers which may expose them to a risk of enforced disappearance.

Non-refoulement is also a constituent part of the prohibition on torture or cruel, inhuman or degrading treatment or punishment. Certain human rights treaties state this expressly, like Article 3(1) of the 1984 Convention against Torture, Cruel, Inhuman and Other Degrading Treatment or Punishment, which provides that

No State Party 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.

In addition to such express prohibitions, human rights monitoring bodies have consistently adopted the position that a state would be in violation of its obligations if it took action of which consequence would be the exposure of a person to the risk of ill-treatment proscribed by the relevant human rights instrument.¹³ This approach is a manifestation of the principle that a state can violate its obligations under human rights law not only by its own acts but also if it knowingly puts a person in a situation where it is likely that his or her rights will be violated by another state. The Human Rights Committee has couched this concept on the basis of states' obligation to respect and *ensure the rights* in the Covenant to all persons under their control.¹⁴

12 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), Article II(3). The principle also appears in Article III(1) of the non-binding 1966 Principles Concerning the Treatment of Refugees adopted by the Asian-African Legal Consultative Committee in 1966 and Section III (5) of the 1984 Cartagena Declaration on Refugees embodying the Conclusions of the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama.

13 See, e.g., ECtHR, *Saadi v. Italy*, Application No. 37201/06, Judgment of 28 February 2008, para. 126.

14 See Human Rights Committee General Comment No. 31, above note 7, para. 12. The General Comment reflects the position consistently adopted in the Committee's jurisprudence. See, e.g., its views in

In accordance with this approach, the prohibition on torture and cruel, inhuman or degrading treatment or punishment has been consistently construed as implicitly including a prohibition on transferring a person to a situation where s/he may face such treatment.¹⁵ This was asserted, for example, in the Human Rights Committee's General Comment No. 20 of 1992, which provides that

States parties [to the International Covenant on Civil and Political Rights] must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.¹⁶

In 2004 the Human Rights Committee reaffirmed this position in General Comment No. 31, where, *inter alia*, it stated that

the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.¹⁷

The United States challenged this long-established position in 2006 during the Human Rights Committee's review of its second and third periodic reports. The United States argued that, unlike Article 3 of the Convention against Torture, Article 7 of the Covenant did not impose a *non-refoulement* obligation. Instead, in its view, this was a *new* obligation, not contained in the plain language of the provision, but purportedly imposed by the Committee in its General Comment No. 20, by which the United States did not consider itself bound.¹⁸ Following extensive debates on this topic during the review of the report, in its Concluding

Joseph Kindler v. Canada, Communication No. 470/1991, Views of the Human Rights Committee of 18 November 1993, para. 6.2.

- 15 In the words of Theo van Boven, the former Special Rapporteur of the Commission on Human Rights on Torture, '[t]he principle of *non-refoulement* is an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment'. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/59/324, 1 September 2004, para. 28.
- 16 Human Rights Committee, General Comment No. 20, Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, UN Doc. HRI/GEN/1/Rev.1, 28 July 1994, p. 31, para. 9. The Human Rights Committee has consistently adopted the same position in its jurisprudence. See, e.g., *Chitat Ng v. Canada*, Communication No. 469/1991, Views of the Human Rights Committee of 7 January 1994.
- 17 Human Rights Committee General Comment No. 31, above note 8, para. 12.
- 18 United States Response to the list of issues to be taken up in connection with the consideration of the second and third periodic reports of the United States of America, undated, pp. 16–18, available at www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/USA-writtenreplies.pdf (last visited 15 October 2008).

Observations the Human Rights Committee recommended that the United States review its position in accordance with General Comments No. 20 and No. 31.¹⁹

The prohibition on torture and other forms of ill-treatment in Article 3 of the European Convention on Human Rights has been similarly and consistently interpreted by the European Court of Human Rights as imposing a prohibition of *refoulement* to a risk of such treatment.²⁰

Non-refoulement as a principle of international humanitarian law

Non-refoulement also expressly appears in international humanitarian law. Article 45(4) of the Fourth Geneva Convention provides that

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

Also of relevance is Article 12 of the Third Geneva Convention which states that

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.

Although Article 12 does not expressly refer to *non-refoulement*, its underlying objective is the same: ensuring that prisoners of war are not transferred to a state that will fail to treat them in accordance with the Third Geneva Convention. In fact, this provision affords prisoners of war a greater protection than that normally granted by the principle of *non-refoulement*. Ordinarily, the principle precludes transfers if the risk faced is torture, other forms of ill-treatment or persecution; however, Article 12 precludes a transfer if *any* of the rights and protections in the Third Geneva Convention cannot be assured.²¹ This provision is mirrored in Article 45(3) of the Fourth Geneva Convention for the benefit of aliens in the territory of a party to an international armed conflict.

19 Human Rights Committee, Concluding Observations: United States of America, above note 8, para. 16.

20 The Court first addressed the issue in *Soering v. The United Kingdom*, 7 July 1989, Series A, No. 69, para. 91. This approach has been upheld in a subsequent long line of jurisprudence. See, *inter alia*, ECtHR, *Cruz Varas and Others v. Sweden*, 20 March 1991, Series A, No. 201, p. 28, paras. 69–70 and ECtHR, *Vilvarajah and Others v. The United Kingdom*, 30 October 1991, Series A, No. 215, p. 34, paras. 102–103.

21 On the relationship between Article 12 and Article 118 of the Third Geneva Convention, which requires detaining powers to release and repatriate prisoners of war without delay after the cessation of hostilities, see the *Commentary* to the Convention. This explains that prisoners of war have an inalienable right to be repatriated, and that 'no exception may be made to this rule unless there are serious reasons for fearing that a prisoner of war who is himself opposed to being repatriated may, after his repatriation, be the subject of unjust measures affecting his life or liberty, especially on grounds of race, social class, religion or political views, and that consequently repatriation would be contrary to the general principles of international law for the protection of the human being. Each case must be examined individually'. Jean Pictet (ed.), *Commentary III Geneva Convention relative to the Treatment of Prisoners of War* (1960), p. 546.

Additionally, when interpreting the prohibitions in international humanitarian law on torture, cruel or inhuman treatment and outrages upon personal dignity, guidance should be drawn from the jurisprudence of the human rights supervisory bodies, so as to include a prohibition on transferring persons to a real risk of such treatment. Such an approach is particularly valuable in situations of non-international armed conflict as neither common Article 3 of the Geneva Conventions nor Additional Protocol II have to specifically address transfers. However both prohibit torture.

Non-refoulement and extradition

Extradition is but one of the many possible mechanisms for effecting the transfer of a person from the control of one state to that of another, and it is well established that the principle of *non-refoulement* also applies in relation to such forms of transfers.

The human rights rules just outlined apply to extraditions. Certain provisions such as, for example, the abovementioned Article 3(1) of the 1984 Convention against Torture, expressly mention extradition as a form of transfer to which the principle of *non-refoulement* applies.²² Similarly, the jurisprudence according to which the prohibition of torture, and other forms of ill-treatment also precludes *refoulement* to a risk of such treatment also applies to extradition; in fact, the landmark case of *Soering* before the European Court of Human Rights related to an extradition request.

The obligation to comply with the principle of *non-refoulement* also finds specific expression in standard-setting multinational conventions on extradition, such as the 1981 Inter-American Convention for Extradition.²³ A number of United Nations and regional conventions for the prevention and suppression of terrorism also contain provisions that aim to prevent *refoulement*.²⁴

22 See also Article 13 of the 1985 Inter-American Convention to Prevent and Punish Torture, and Committee against Torture, General Comment No. 1, Implementation of article 3 of the Convention in the context of article 22, 21 November 1997, UN Doc. A/53/44, Annex IX, para. 2.

23 Article 4(5) of the Convention precludes extradition when 'it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons'. See also Article 3(2) of the 1957 European Convention on Extradition.

24 These conventions operate by criminalizing certain activities and requiring states parties to prosecute or extradite persons suspected of these crimes. Recognizing the risk that persons whose extradition is sought may face ill-treatment or persecution, the conventions expressly foresee the non-application of the obligation to extradite in these cases. See, e.g., Article 9(1) of the 1979 UN Convention against the Taking of Hostages.

With regard to *non-refoulement* under refugee law and extradition, in 1980 UNHCR's Executive Committee adopted a Conclusion which, *inter alia*, called upon states to ensure that the principle of *non-refoulement* was duly taken into account in treaties relating to extradition and, as appropriate, in national legislation on the subject, and expressed the hope that due regard would be paid to the principle of *non-refoulement* in the application of existing treaties relating to extradition. UNHCR Executive Committee Conclusion, No. 17 (XXXI), 1980, Problems of extradition affecting refugees, paras. (d) and (e).

What is prohibited?

The principle of *non-refoulement* prohibits a state from transferring a person *in any manner whatsoever* to another state, if a real risk exists that certain of his or her fundamental rights will be violated. The formal description of the manner in which the person concerned is transferred is irrelevant. The prohibition applies to any form of return, rejection, expulsion or refusal, wherever it may occur (e.g., at the border, on the high seas, in an internationalized zone) as well as deportation and extradition – so to *any* act of transfer whereby effective control over an individual changes from one state to another.²⁵

Although *non-refoulement* is often described as prohibiting *return* – that is, transfer to a person's state of nationality – the principle in fact precludes the transfer of a person to *any* state where s/he may be at risk.

The principle has been interpreted as also precluding the removal of a person to a state from where she or he may be subsequently sent to a territory where she or he would be at risk – so-called 'secondary *refoulement*'.²⁶

The recent operations of multinational forces in Iraq and Afghanistan, where such forces have detained persons with the ultimate intention of transferring them to local authorities, have raised hitherto unaddressed questions relating to the scope of the principle. Does *non-refoulement* also apply to transfers of persons from the authorities of one state to those of another *within the territory of a single state*? And does it apply to transfers of persons between different contingents of multinational forces operating in the territory of the same state?

None of the treaty provisions just outlined expressly addresses these issues. Some of them employ language that could be read as implicitly requiring that the transfer take place across a border; for example, Article 22(8) of the 1969 American Convention on Human Rights speaks of 'return[ing a person] *to a country*' (emphasis added). This being said, this expression is not sufficient per se to exclude

25 For European Council Member states, the principle that a state must not by its actions put a person at risk of torture or other forms of ill-treatment has been reaffirmed in a very expansive manner in a European Council Directive on assistance in cases of transit for the purposes of removal of persons by air. This Directive provides that transit by air should neither be requested nor granted if the person concerned faces the threat of torture or other forms of ill-treatment, persecution or the death penalty in the country of destination or in a country of transit. The Directive thus imputes *non-refoulement* obligations on the state through whose airports persons are transiting, even though the local authorities are only exercising limited and temporary control over the persons being removed and are not involved in the decisions to remove them. Council Directive 2003/110/EU of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, OJ L, 321, 6.12.2003, p. 26.

26 See, e.g., the decision of the European Court of Human Rights in *T.I. v. The United Kingdom*, Application No. 43844/98, Decision as to Admissibility of 7 March 2000, p. 15. See also Committee against Torture General Comment No. 1, which, *inter alia*, states that 'The Committee is of the view that the phrase "another State" in article 3 [of the Convention against Torture] refers to the state to which the individual concerned is being expelled, returned or extradited, as well as to any state to which the author may subsequently be expelled, returned or extradited'. UN Committee against Torture, General Comment No. 1, above note 22, para. 2. See also UNHCR EXCOM Conclusion No. 58 (XL), 1989, Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection, para. f(i).

the possibility of the principle of *non-refoulement* applying to such transfers. The *travaux préparatoires* of the treaties in question reveal that the drafters had not considered the issue, so should not be taken as having excluded it by their choice of language. Moreover, other treaties – such as, for example, Article 3(1) of the Convention against Torture – speak of transfers to ‘another State’, implying that the focus is not territorial, but rather on the transfer from one authority to another.

More fundamentally, the objective of the principle of *non-refoulement* is to prevent a state from transferring a person to another state if the risk exists that certain of his or her fundamental rights will be violated. The geography and ‘mechanics’ of how the transfer is effected are irrelevant. What matters is the change in effective control over a person from one state to another. This view is supported by the extremely broad language used in the instruments to refer to the form of transfer.²⁷ Moreover, the decisions of human rights supervisory bodies and the resolutions of the Commission on Human Rights focus on the transfer to a ‘State’ and not a ‘country’ or ‘territory’.²⁸

This dimension of the principle was specifically addressed by the Committee against Torture in its review of the United Kingdom’s fourth periodic report. The Committee expressly raised the question of the application of the Convention against Torture to transfers of persons in the United Kingdom’s effective control in Afghanistan or Iraq to the local authorities or to other states, particularly those with military forces in the theatre in question.²⁹

In its response, the United Kingdom denied the application of the Convention to such transfers on the ground that its involvement in detention operations was simply to assist the Afghan or Iraqi authorities to enforce local

27 For example, Article 33(1) of the 1951 Refugee Convention precludes returning ‘a refugee in any manner whatsoever’. In respect of the prohibition under this instrument, Lauterpacht and Bethlehem point out that

... it must be noted that the word used is ‘territories’ as opposed to ‘countries’ or ‘States’. The implication of this is that the legal status of the place to which the individual may be sent is not material. The relevant issue will be whether it is a place where the person concerned will be at risk. This also has wider significance as it suggests that the principle of *non-refoulement* will apply also in circumstances in which the refugee or asylum seeker is within their country of origin but is nevertheless under the protection of another Contracting State. *This may arise, for example, in circumstances in which a refugee or asylum seeker takes refuge in the diplomatic mission of another state or comes under the protection of the armed forces of another State engaged in a peacekeeping or other role in the country of origin. In principle, in such circumstances, the protecting State will be subject to the prohibition on non-refoulement to territory where the person concerned would be at risk.* (Lauterpacht and Bethlehem, above note 11, at para. 114 (emphasis added).

28 See, e.g., the European Court of Human Rights in *Chahal*, which spoke of the prohibition of transfers to ‘another state’. ECtHR, *Chahal v. The United Kingdom*, Application No. 22414/93, Judgment of 15 November 1996, para. 80. Similarly, in its resolution on torture and other cruel, inhuman or degrading treatment or punishment of 2005, the Commission of Human Rights urged ‘States not to expel, return (*refouler*), extradite or in any other way transfer a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture’. UN Commission on Human Rights resolution 2005/39, 19 April 2005, para. 5 (emphasis added). Similar language, based on Article 3(1) of the Convention against Torture, was used in the resolutions in previous years.

29 Committee against Torture, Thirty-third session, List of Issues, UN Doc. CAT/C/33/L/GBR, 15–26 November 2004, para. 25.

jurisdiction and that it did not assert separate jurisdiction over the persons it was holding.³⁰

In its conclusions and recommendations, the Committee expressed concern at the United Kingdom's limited acceptance of the applicability of the Convention to the actions of its forces abroad and recommended that it apply Articles 2 (duty to take measures to prevent torture) and 3 (*non-refoulement*) of the Convention, as appropriate, to transfers of detainees in its custody to that, be it *de facto* or *de jure*, of any other state.³¹

The same issue of the application of the principle of *non-refoulement* to transfers of persons to local authorities in Afghanistan and Iraq was also raised by the review in 2006 of the United States periodic reports by the Committee against Torture and the Human Rights Committee. Although the United States denied the existence of a *non-refoulement* obligation under the International Covenant on Civil and Political Rights³² and the application of the Convention against Torture as a whole, and Article 3 in particular, to these contexts on a variety of grounds,³³ on neither occasion did it argue that the principle did not apply because the transfers were taking place within the territory of a single state.

The Sub-Commission on the Promotion and Protection of Human Rights has taken the same approach as the Committee against Torture and the Human Rights Committee on the scope of application of the principle of *non-refoulement* in a 2005 resolution on transfers of persons, which addressed various aspects of the principle. According to operative paragraph 1, the resolution, and thus the principles it reaffirmed, apply to:

any involuntary transfer from the territory of one State to that of another, or from the authorities of one State to those of another, whether effected through extradition, other forms of judicially sanctioned transfer or through non-judicial means.³⁴ (emphasis added)

30 Response by the United Kingdom to Issues raised by the United Nations Committee against Torture for Discussion at the Committee's 33rd session in November 2004, para. 222, on file with author.

31 Committee against Torture, Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories, above note 8, paras. 4(b) and 5(e). In June 2006 the United Kingdom submitted comments on the Committee's conclusions and recommendations, which, *inter alia*, addressed the application of the Convention to transfers of persons to the local authorities. While the United Kingdom had rejected the application of Articles 2 and 3 of the Convention in previous exchanges with the Committee, on grounds that it lacked jurisdiction in Iraq and Afghanistan, in this submission the United Kingdom made the additional argument that in these two contexts the persons transferred did not move from the territory of one state to another. Comments by the Government of the United Kingdom of Great Britain and Northern Ireland to the conclusions and recommendations of the Committee against Torture, UN Doc. CAT/C/GBR/CO/4/add.1, 8 June 2006, paras. 14–17.

32 United States Response to the list of issues to be taken up in connection with the consideration of the second and third periodic reports of the United States of America, undated, pp. 16–18, available at www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/USA-writtenreplies.pdf (last visited 16 October 2008).

33 United States Response to the Committee against Torture's List of issues to be considered during the examination of the second periodic report of the United States of America, above note 9, pp. 33–7.

34 UN Sub-Commission on the Promotion and Protection of Human Rights, resolution 2005/12, Transfer of persons, 12 August 2005, adopted by a roll-call vote of 21 to 1, with 2 abstentions. Neither the contrary vote nor the abstentions related to this aspect of the resolution.

All the human rights monitoring bodies that have considered the issue have consistently been of the view that transfers of persons from one authority to another within the same territory, including between different members of a multi-national force operating therein, must comply with the principle of *non-refoulement*. Indeed, this conclusion appears to be supported by the actions of certain contingents of the multinational forces in Iraq and Afghanistan, which have adopted a variety of methods to try to meet – or, in the view of some, side-step – their *non-refoulement* obligations. For example, in Iraq to allay its concerns that persons transferred to the Iraqi authorities might be subjected to ill-treatment, the United Kingdom concluded an agreement with the Iraqi authorities in which the latter undertook to ensure certain standards as to conditions of detention and treatment and judicial guarantees.³⁵ Similarly, a number of the states that have contributed troops to ISAF in Afghanistan are reported to have entered into similar agreements with the Afghan authorities.³⁶ Although, as will be discussed later, it is questionable whether such agreements relieve sending states of their obligations under the principle of *non-refoulement*, they are indicative of their belief that they bear some responsibility towards the persons transferred.

The nature of the risk to be faced

The prohibition against refoulement is not triggered by the risk of any violation of a person's rights. The nature of the risk that persons must face for their transfer to be precluded varies under the three different bodies of law.

Refugee law requires a threat to life or freedom on one of five specific grounds. International humanitarian law takes a much more expansive approach and precludes the transfer of prisoners of war or protected persons if any of their rights under the relevant convention cannot be ensured. Human rights law has the most rapidly evolving jurisprudence. While, traditionally, the principle applied to transfers to a risk of torture or other forms of ill-treatment, human rights supervisory bodies have also applied it to transfers where there was a risk of the imposition of the death penalty following a manifestly unfair trial and, most recently, for sending states that have abolished the death penalty, to transfers where the risk of the imposition of such punishment existed even absent shortcomings in the trial. It cannot be excluded that the list of violations of fundamental rights that may give rise to *refoulement* may be further expanded in future decisions.

35 Response by the United Kingdom to Issues raised by the United Nations Committee against Torture for Discussion at the Committee's 33rd session in November 2004, above note 30, para. 223. See also Committee against Torture, Third-third session, summary record of the 624th session, 17 November 2004, UN Doc. CAT/C/SR/SR.624, 24 November 2004, para. 26.

36 Amnesty International, *Afghanistan – Detainees transferred to torture: ISAF Complicity?*, November 2007, ASA 11/011/2007.

Under refugee law

Article 33 of the 1951 Refugee Convention precludes the transfer of persons to where their 'life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion'. The language of this provision differs slightly from that of Article 1A of the Convention, which lays down the grounds for entitlement to refugee status, and which speaks of 'persecution' rather than of threat 'to life or freedom' on the same five grounds. It is generally accepted that, as a matter of internal coherence of the Convention, these terms must be understood synonymously, and that the nature of the risk to be faced is the same: any kind of persecution which entitles a person to refugee status constitutes a threat to life or freedom within the meaning of Article 33, precluding his or her *refoulement*.³⁷

Under human rights law

Torture, cruel, inhuman or degrading treatment or punishment

Traditionally, *non-refoulement* as a principle of human rights focused principally on the risk of torture or cruel, inhuman or degrading treatment or punishment.³⁸

Although the express prohibition on *refoulement* in Article 3 of the Convention against Torture only refers to transfers to the risk of torture,³⁹ the implicit prohibitions under Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the European Convention on Human Rights have been interpreted as extending to cruel, inhuman or degrading treatment or punishment. What treatment amounts to torture or cruel, inhuman or degrading treatment or punishment is to be determined in accordance with the jurisprudence of the relevant human rights supervisory body.

37 See, e.g., Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951*, UNHCR Division of International Protection, Geneva, 1997, pp. 231–2. The 1969 OAU Convention adopts a wider approach to the types of risks that could give rise to *refoulement*, reflective of its wider definition of refugee. Under this instrument, the prohibition of *refoulement* extends to persons whose 'life, physical integrity or liberty' would be at risk because of persecution or because of external aggression, occupation, foreign domination or events seriously disturbing public order. OAU Convention, above note 12, Article 2(3).

38 In its General Comment No. 31, the Human Rights Committee spoke of 'a real risk of *irreparable harm* such as that contemplated by articles 6 [right to life] and 7 [prohibition of torture or cruel, inhuman or degrading treatment or punishment]'. Human Rights Committee, General Comment No. 31, above note 8, para. 12 (emphasis added).

39 In its jurisprudence the Committee against Torture has consistently denied applications where the risk in the receiving state was of ill-treatment short of torture. See, e.g., *T.M. v. Sweden*, UN Doc. CAT/C/31/D/228/2003, 2 December 2003; and *M. V. v. The Netherlands*, UN Doc. CAT/C/30/D/201/2002, 13 May 2003. Attempts in 2005 to expand the reference to the scope of the protection from *refoulement* under the Convention against Torture to cover other forms of ill-treatment in the resolutions on torture of the Commission on Human Rights and the Third Committee of the United Nations General Assembly were resisted by the United States. Annotated successive draft resolutions for 2005 on file with author.

The jurisprudence of the human rights supervisory bodies has also addressed the identity of the perpetrator of the harm. This is relevant to determine whether the ill-treatment and, consequently, the prohibition to transfer persons to situations where they may face such treatment, must be perpetrated exclusively by state agents, or whether the principle of *non-refoulement* also precludes transfers if the harm is inflicted by non-state actors. The issue is particularly relevant if the persons in question are not transferred to a state that will detain them, but are instead released in situations where they face a serious threat either from armed groups unconnected to the state or from the general public – the position, for example, of senior members of the former regime in Iraq currently held by the multinational forces.

As a consequence of the narrow definition of torture in the Convention against Torture, the Committee against Torture has adopted a more restrictive approach on this point than the Human Rights Committee and the European Court of Human Rights.

The definition of torture in Article 1 of the Convention against Torture requires the ill-treatment to have been ‘inflicted by or at the instigation of or with the consent and acquiescence of a public official or other person acting in an official capacity’. In view of this requirement, the prohibition on *refoulement* in Article 3(1) is very unlikely to be applied to transfers where the torture is inflicted without this level of state involvement or acquiescence.⁴⁰ This was the position adopted by the Committee against Torture in the first case in point to come before it, where the applicant was trying to set aside a decision to deport her to Peru, on the ground that it would expose her to a substantial risk of torture by Sendero Luminoso. The Committee rejected the application on the ground that the obligation to refrain from returning a person to a state where there are substantial grounds for believing that s/he would be in danger of being subjected to torture was directly linked to the definition of torture in Article 1, including the requirement therein for a nexus with a state.⁴¹

This conclusion should be contrasted with that adopted by the Committee one year later in the case of a Somali national who claimed that his expulsion to Somalia would put him at risk of torture at the hands of the clan which, at the time of the application, controlled most of Mogadishu.⁴² On this occasion, while recalling the position it had adopted in *G.R.B. v. Sweden*, in view of the exceptional circumstances prevailing in Somalia, the Committee adopted a different position.

40 The need for a nexus between the ill-treatment and a state was specifically addressed by the Committee against Torture in its General Comment No. 1 where, *inter alia*, it emphasized that ‘Pursuant to article 1, the criterion, mentioned in article 3, paragraph 2, of “a consistent pattern of gross, flagrant or mass violations of human rights” refers only to violations by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’. Committee against Torture, General Comment No. 1, above note 22, para. 3.

41 Committee against Torture, *G.R.B. v. Sweden*, Communication No. 83/1997, Views of the Committee against Torture of 15 May 1998, UN Doc. CAT/C/20/D/83/1997, 15 May 1998.

42 Committee against Torture, *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, Views of the Committee against Torture of 14 May 1999, UN Doc. CAT/C/22/D/120/1998, 25 May 1999.

In particular, it noted that for a number of years Somalia had been without a central government and that some of the factions operating in Mogadishu had set up quasi-governmental institutions. De facto, those factions exercised prerogatives comparable to those normally exercised by governments. Accordingly, in its view, the members of those factions could, for the purposes of the application of the Convention, be considered as falling within the expression 'public officials or other persons acting in an official capacity' contained in Article 1. Consequently, the Committee concluded that, although the source of the threat had no connection to a state, Article 3(1) nonetheless applied and precluded the applicant's expulsion.⁴³

Unlike the Convention against Torture, the prohibitions of torture or cruel, inhuman or degrading treatment or punishment in the International Covenant on Civil and Political Rights and in the European Convention on Human Rights do not contain definitions of the prescribed treatment. These have been developed in the jurisprudence of the Human Rights Committee and the European Court of Human Rights, including *in terms* of the perpetrator of the ill-treatment.

The Human Rights Committee has affirmed that states must afford everyone protection against the acts prohibited in Article 7, whether inflicted by persons acting in their official capacity, outside their official capacity or in a private capacity⁴⁴ and must take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.⁴⁵ However, to date it has not had to decide a *refoulement* case where the source of the threat of ill-treatment was a non-state actor.

The European Court of Human Rights, on the other hand, has addressed the issue on a number of occasions and has adopted a much more expansive approach than the Committee against Torture. In a series of consistent decisions, it has ruled that transferring a person to a state where a real risk of violations of Article 3 of the Convention at the hands of non-state actors existed could amount to a violation of the Convention. A key consideration in the Court's approach is whether the state that would ordinarily have this responsibility is in a position to afford the individual adequate protection against the threatened harm.

For example, in the case of *H.L.R. v. France*, the applicant claimed that if deported to his home state of Colombia he would be exposed to vengeance on the part of the drug traffickers who had recruited him as a smuggler and about whom

43 *Ibid.*, para. 6.5. The exceptional nature of this decision was confirmed by a virtually identical case that came before the Committee three years later. The Committee noted that in the intervening years the situation in Somalia had changed significantly. Somalia now possessed a state authority in the form of the Transitional National Government that had relations with the international community in its capacity as central government, although doubts existed as to the reach of its territorial authority and its permanence. In view of the existence of this authority, the Committee did not consider that the case fell within the exceptional situation in *Elmi v. Australia*, and took the view that the acts of the non-state entities operating in Somalia fell outside the scope of Article 3 of the Convention. Committee against Torture, *H.M.H.I. v. Australia*, Communication No. 177/2001, Views of the Committee against Torture of 1 May 2001, UN Doc. CAT/C/28/D/177/2001, 1 May 2001, para. 6.4.

44 Human Rights Committee, General Comment No. 20, above note 16, para. 2.

45 Human Rights Committee, General Comment No. 31, above note 8, para. 8.

he had provided information to the French authorities. Although the Court found that the applicant had failed to show the existence of such a risk, it stated that

Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.⁴⁶

The death penalty

Traditionally the transfer of a person to face proceedings that could lead to the imposition and implementation of the death penalty was not considered of itself a violation of the principle of *non-refoulement*. The decisions of human rights tribunals relating to extraditions in such circumstances focused on the *manner* in which the death penalty would be applied, or the ‘death row phenomenon’ leading up to it, which was frequently found to amount to cruel, inhuman or degrading treatment or punishment giving rise to *refoulement*, rather than on the death penalty itself.⁴⁷ However, in recent years human rights supervisory bodies have

46 ECtHR, *H.L.R. v. France*, Judgment of 22 April 1997, para. 40. This position was reiterated, for example, in *T.I. v. The United Kingdom*, although in this case too the applicant failed on the merits. ECtHR, *T.I. v. The United Kingdom*, Decision as to Admissibility of 7 March 2000, p. 14. The conclusion that a threat emanating from a non-state actor may give rise to a violation of Article 3 of the Convention appears to have been so uncontroversial that in the case of *Ahmed v. Austria* which, like the above-mentioned cases before the Human Rights Committee, related to an expulsion to Somalia during the late 1990s, the Court did not even address this dimension of the case. ECtHR, *Ahmed v. Austria*, Judgment of 27 November 1996. It was only considered at an earlier stage of the proceedings by the Commission, which upheld the applicant’s claim of violation of Article 3 on the ground that it was sufficient that those who held substantial power within a state, even though they were not the government, threaten the life and security of applicant. *Ahmed v. Austria*, Application No.25964/94, Report of the Commission of 5 July 1995, p. 11. See also ECtHR, *Salah Sheekh v. The Netherlands*, Judgment of 11 January 2007, para. 97. The Court adopted an even more extensive approach in the case of *D. v. The United Kingdom*, where the applicant, an AIDS sufferer whose illness had reached a critical stage and who was about to be deported to his home state of St Kitts and Nevis, claimed that, in view of the quality and availability of medical treatment in St Kitts, his deportation would amount to a violation of Article 3 of the Convention. The Court noted that the principle of *non-refoulement* was ordinarily applied when the risk emanated from intentionally inflicted acts of the public authorities in the receiving country or from those of non-state bodies in that country when the authorities there were unable to afford appropriate protection. However, given the fundamental importance of Article 3 in the Convention system, the Court considered that it should reserve to itself sufficient flexibility to address the application of the article where the source of the risk in the receiving country stemmed from factors which could not engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, did not in themselves infringe the standards of that article. To limit the application of Article 3 otherwise would, in the Court’s view, have undermined the absolute character of its protection. On this basis, the Court found that the implementation of the decision to deport the applicant to St Kitts would have amounted to inhuman treatment in violation of Article 3 of the Convention. ECtHR, *D. v. The United Kingdom*, Judgment of 2 May 1997, Application No. 30240/96, paras. 49–53.

47 For example, in the *Soering* case, the European Court of Human Rights did not base its decision on the risk of the imposition of the death penalty per se but rather on the fact that the ‘death row phenomenon’

shown an inclination to scrutinize the lawfulness of other dimensions of transfers to face the possible imposition or execution of the death penalty.

Particular attention has been paid to cases where the risk existed that the death penalty would be imposed or executed after a trial that did not respect minimum judicial guarantees. This could give rise to issues of *refoulement* in two ways. First, following the *Soering/Ng* line of reasoning, the imposition of the death penalty in such circumstances could of itself amount to torture or other forms of proscribed treatment and thus give rise to possible claims of *refoulement*. In the *Öcalan* case, for example, the European Court of Human Rights held that the imposition of the death penalty following an unfair trial amounted to inhuman treatment *per se*. Even if the sentence was ultimately not implemented, as in this case, where Turkey later abolished the death penalty, the claimant nonetheless had to suffer for several years the consequences of its imposition following an unfair trial, and this amounted to inhuman treatment.⁴⁸ The case did not specifically address the *non-refoulement* dimension. While this question has not come specifically before the Court yet, now that it has determined that the imposition of the death penalty in such circumstances amounts to inhuman treatment, there is no reason for it not to apply its consistent approach that a transfer to where the risk of such treatment exists would violate the convention.

Second, it is well established that the implementation of the death penalty following a trial in which minimum judicial guarantees were not respected amounts to an arbitrary deprivation of life.⁴⁹ Without entering into a discussion of what comprises an unfair trial, the essential safeguards that protect persons held by one state and subsequently transferred to another for trial, and that are most at risk of being denied in the context of this article include serious limitations on the rights to adequate time and facilities for the preparation of a defence and to communicate with counsel; and the use of improperly obtained evidence in criminal proceedings. This could be evidence and information obtained during interrogations during which their lawyer was absent, or in situations where the transferee's fundamental rights were seriously violated, for example information obtained as a result of torture.

Although to date human rights monitoring bodies have not specifically addressed the lawfulness of the transfer of a person in such circumstances, such a situation appears to fall squarely within the 'irreparable harm' contemplated by the

amounted to cruel, inhuman or degrading treatment. ECtHR, *Soering v. The United Kingdom*, above note 19, para. 111. Similarly, in the *Ng* decision, the Human Rights Committee found that the manner in which the applicant would be executed (by gas asphyxiation) constituted cruel and inhuman treatment, in violation of Article 7 of the Covenant. *Chitat Ng v. Canada*, above note 16, para. 16.4.

48 ECtHR, *Öcalan v. Turkey*, Application No. 46221/99, Judgment of 12 March 2003, para. 213, confirmed by the Judgment of the Grand Chamber of 5 May 2005. The Court reiterated this position in the case of *Bader and others v. Sweden*, Application No. 13284/04, Judgment of 8 November 2005, para. 47.

49 See, e.g., the views of the Human Rights Committee in *Glenford Campbell v. Jamaica*, Communication No. 248/1997, Views of the Human Rights Committee of 30 March 1992; and *Eustace Henry and Everald Douglas v. Jamaica*, Communication No. 571/1994, Views of the Human Rights Committee of 25 July 1996.

Human Rights Committee in its General Comment No. 31, which precludes states from transferring persons

where there are substantial grounds for believing that there is a real risk of *irreparable harm* such as that contemplated by articles 6 [right to life] and 7 [prohibition of torture or cruel, inhuman or degrading treatment or punishment]⁵⁰... (Emphasis added)

Finally, there is also a move towards considering that states that have abolished the death penalty must refrain from transferring persons to face its possible imposition or implementation, even absent allegations of unfair trial. This was the position adopted by the Human Rights Committee in 2003 in the case of *Judge v. Canada*. Here, having noted that its position, as well as that of states, on the question of the death penalty was constantly evolving, the Committee held that

For countries that *have* abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.⁵¹

The question is particularly pertinent for states that have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at the abolition of the death penalty, and for those states parties to the European Convention on Human Rights that have ratified Optional Protocols No. 6 or No. 13 thereto.⁵²

To date, the Human Rights Committee has not had to address the question of the effect of the Second Optional Protocol on transfers to face the death penalty. In the light of its view in the aforementioned *Judge* case, it seems safe to assume that it will read into the Protocol an obligation not to transfer persons to a situation where they could face the imposition or implementation of the death penalty.

Only one case has come before the European Court of Human Rights where the applicant argued that his deportation to proceedings that could lead to the imposition of the death penalty would violate Optional Protocols No. 6 and No. 13. Although the case failed on the merits, as the existence of the risk was not found to have been established, the Court reiterated its position that expulsions may give rise to violations of Article 3 if the person in question faced a real risk of being ill-treated in the receiving country. The Court added that it did not exclude that analogous considerations might apply to Article 2 of the Convention, on the

50 Human Rights Committee, General Comment No. 31, above note 8, para. 12 (emphasis added).

51 Human Rights Committee, *Roger Judge v. Canada*, Communication No. 829/1998, Views of the Human Rights Committee of 20 October 2003, para. 10.4.

52 Optional Protocol No. 6 abolishes the death penalty but allows states parties to make provision for it in respect of acts committed in time of war. Optional Protocol No. 13 abolishes the death penalty at all times.

right to life, and Article 1 of Protocol No. 6 if the transfer put a person's life in danger, as a result of the imposition of the death penalty or otherwise.⁵³

While the trend clearly appears to be towards precluding transfers in cases of risk of the imposition or execution of the death penalty following a manifestly unfair trial and, in the case of sending states that have abolished the death penalty, even absent allegations of serious shortcomings in the proceedings, it should be borne in mind that it is generally accepted that undertakings from the receiving state not to seek, impose or execute the death penalty *are* sufficient to avert the existence of the risk. Indeed, they are sometimes expressly foreseen, if not required, by the relevant instruments or in the decisions of the human rights monitoring bodies. This is in sharp contrast to similar undertakings intended to avert the risk of torture or other forms of ill-treatment, discussed below.

Other risks

The International Convention for the Protection of All Persons from Enforced Disappearance expressly prohibits transfers where there are substantial grounds for believing persons would be subjected to enforced disappearance, defined as

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.⁵⁴

Some human rights monitoring bodies have recently used language that would suggest a further broadening of the list of violations of fundamental rights, a risk of exposure to which could give rise to *refoulement*.⁵⁵ For example, in its aforementioned 2005 resolution on transfers, the Sub-Commission on Human

53 ECtHR, *S.R. v. Sweden*, Application No. 62806/00, Judgment of 23 April 2003. Similarly, although the question of the effect of Optional Protocol 13 was raised by the respondent state in *Bader v. Sweden*, the Court decided the application on other grounds and, consequently, did not address that issue. *Bader and others v. Sweden*, above note 48, para. 49. Additionally, the legal obligations or political commitments of a number of states, notably, but not exclusively, the members of the European Union and/or the Council of Europe preclude them from transferring persons to the possible imposition or execution of the death penalty. These include, for example, the aforementioned 1957 European Convention on Extradition; the EU Qualification Directive; the EU Directive on assistance in cases of transit for the purposes of removal by air; and the European Arrest Warrant (Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, OJ L190, 18.7.2002, pp. 1–20). National legislation often imposes additional limitations. See, e.g., the legislation referred to in Ruma Mandal, Protection Mechanisms Outside of the 1951 Convention ('Complementary Protection'), UNHCR Legal and Protection Policy Research Series, PPLA/2005/2, June 2005.

54 International Convention for the Protection of All Persons from Enforced Disappearance, Articles 2 and 16.

55 As long ago as 1989, in the *Soering* case, the European Court of Human Rights had noted that '[it did] not exclude that an issue might exceptionally be raised under Article 6 [right to fair trial] by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of fair trial in the requesting country'. *Soering v. The United Kingdom*, above note 20, para. 113. To date,

Rights added ‘extra-judicial killing’.⁵⁶ It also recommended – implying that in this respect no binding obligation yet existed – that persons should not be transferred to a state if there was a real risk of indefinite detention without trial or of any proceedings that may be brought against the person transferred being conducted in flagrant violation of international due process standards.⁵⁷

With regard to children, in its General Comment No. 6, the Committee on the Rights of the Child affirmed that states must not transfer children if there are substantial grounds for believing that there is a risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under Article 6 of the Convention on the Rights of the Child, on the right to life, and Article 37 prohibiting torture, cruel, inhuman or degrading treatment or punishment, the death penalty, or arbitrary deprivation of liberty.⁵⁸

The Committee added that the risk of under-age recruitment and participation in hostilities entailed a high risk of irreparable harm and that states had to refrain from returning children if a real risk of under-age recruitment existed, including not only recruitment as a combatant but also to provide sexual services for the military or where there was a real risk of direct or indirect participation in hostilities.⁵⁹

Mention should also be made of the 2007 report of the Human Rights Commission’s Working Group on Arbitrary Detention where, while stopping short of asserting that a risk of arbitrary deprivation of liberty already constituted one of the risks covered by the principle of *non-refoulement*, the Working Group emphasized the need for states to include this risk among the elements to be taken into consideration when considering the transfer of a person, particularly in the context of efforts to counter terrorism.⁶⁰

Under international humanitarian law

Under Article 45 of the Fourth Geneva Convention, the person must face risk of persecution for political opinions or religious beliefs for the prohibition on *non-refoulement* to apply.

Although the Convention does not define ‘persecution’, guidance can be obtained from the Statute of the International Criminal Court, which defines the crime against humanity of ‘persecution’ as ‘the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’.⁶¹ Also of relevance are the Elements of Crime of persecution

however, the Court has not had to decide a case relating to transfers to alleged flagrant denial of fair trial that did not involve the imposition of the death penalty.

56 UN Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2005/12, above note 34, para. 3.

57 *Ibid.*, para. 8.

58 Committee on the Rights of the Child, General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/6, 3 June 2005, p. 6.

59 *Ibid.*

60 Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/4/40, 9 January 2007, para. 49.

61 1998 Statute of the International Criminal Court, Article 7(2)g.

as a crime against humanity under the Statute of the International Criminal Court⁶² as well as the way the term has been interpreted in refugee law, in relation to the definition of refugee.⁶³

The essence of persecution is the deprivation of certain fundamental rights – right to life, freedom and security of the person – on account of particular characteristics of a person, such as ethnicity, nationality, religion or political opinion.

As mentioned above, although they do not expressly refer to *non-refoulement*, Article 12 of the Third Geneva Convention and Article 45 of the Fourth Geneva Convention preclude transfers of prisoners of war and aliens in the territory of a state party to an international armed conflict respectively to a state that is unwilling to ensure that *all* the protections in the Third and Fourth Geneva Conventions are respected.

The threshold of risk to be faced

The various treaties use slightly different expressions to refer to the level of risk to be faced for the principle of *non-refoulement* to apply.

The 1951 Refugee Convention prohibits sending refugees to territories where their life or freedom '*would be threatened*' on one of the proscribed grounds.⁶⁴

Article 45 of the Fourth Geneva Convention precludes transfers to a country where the person in question '*may have reason to fear*' persecution.

Article 3(1) of the Convention against Torture prohibits transferring a person '*where there are substantial grounds for believing that he would be in danger of being subjected to torture*'.⁶⁵ In relation to the level of risk to be shown to exist, in General Comment No.1 the Committee against Torture explained that

... the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.⁶⁶

62 Of particular relevance are elements 1–3. Preparatory Commission for the International Criminal Court, Addendum, Part II: Finalized draft text of the Elements of Crimes, Article 7 (1) (h), Crime against humanity of persecution, UN Doc. PCNICC/2000/1/Add.2, 2 November 2000.

63 UNHCR, *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 Re-edited, January 1992, paras. 51–53.

64 Article II(3) of the OAU Convention adopts the same standard, prohibiting the transfer of a refugee if his or her life, physical integrity or liberty '*would be threatened*'.

65 Upon ratification of the Convention against Torture, the United States made the following interpretative declaration of Article 3: '... the United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture," as used in article 3 of the Convention, to mean "if it is more likely than not that he would be tortured"' (emphasis added). The reasoning underlying this interpretation and its meaning are discussed at pp. 37–8 of the United States' Response to the Committee against Torture's List of issues to be considered during the examination of the second periodic report of the United States of America, above note 9.

66 Committee against Torture, General Comment No. 1, above note 22, para. 6.

Article 16(1) of the International Convention for the Protection of All Persons from Enforced Disappearance forbids the transfer of a person ‘where there are *substantial grounds for believing* that he or she would be in danger of being subjected to enforced disappearance’.

In interpreting the prohibitions of torture and other forms of ill-treatment under Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the European Convention on Human Rights, the Human Rights Committee and the European Court of Human Rights have adopted broadly similar language.

The Human Rights Committee has not been consistent in its formulation of the threshold of risk. In its General Comment No. 20 it stated that states parties to the Covenant ‘*must not expose individuals to the danger*’ of torture or cruel, inhuman or degrading treatment or punishment.⁶⁷ More recently, in General Comment No. 31, the Committee slightly modified this language and spoke of an obligation not to transfer persons ‘where *there are substantial grounds for believing that there is a real risk of irreparable harm*, such as that contemplated by articles 6 and 7 of the Covenant’.⁶⁸

In its jurisprudence, on the other hand, the Committee has held that states must refrain from exposing individuals ‘*to a real risk*’ of violations of their rights under the Covenant.⁶⁹

As for the European Court of Human Rights, in the case of *Soering* it held that an extradition decision could give rise to a violation of Article 3 of the Convention ‘*when substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk*’ of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.⁷⁰ In subsequent cases the Court adopted substantially identical language, which closely resembles that of Article 3(1) of the Convention against Torture.⁷¹

Although the expressions used by the instruments and the human rights monitoring bodies to describe the threshold of risk to be faced for the principle of *non-refoulement* to apply are not constant, it is unlikely that the slight variations in formulation make an actual difference in the assessment of risk.⁷²

67 Human Rights Committee, General Comment No. 20, above note 16, para. 9.

68 Human Rights Committee, General Comment No. 31, above note 8, para. 12.

69 See, e.g., *Chitat Ng v. Canada*, above note 16, para. 14.1.

70 *Soering v. The United Kingdom*, above note 20, para. 91.

71 See, e.g., ECtHR, *Vilvarajah and Others v. The United Kingdom*, above note 20, para. 115; ECtHR, *Chahal v. The United Kingdom*, above note 28, paras. 74 and 80; and ECtHR *T.I. v. The United Kingdom*, Application No. 43844/98, Judgment of 7 March 2000, p. 15.

72 According to Lauterpacht and Bethlehem, ‘[i]n practical terms, however, it is not clear whether the differences in the various formulations will be material, particularly as the Human Right Committee, the European Court of Human Rights, and the Committee against Torture ... have all indicated in one form or another that, whenever an issue of *refoulement* arises, the circumstances surrounding the case will be subjected to rigorous scrutiny’ (Lauterpacht and Bethlehem, above note 11, para. 247).

The following language has been suggested as reflecting the fullest formulation of the threshold of risk underlying *non-refoulement* as articulated in international practice:

circumstances in which substantial grounds can be shown for believing that the individuals would face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment.⁷³

Who is protected?

Under refugee law

Article 33 of the 1951 Refugee Convention prohibits the *refoulement* of a refugee – that is, someone who falls within the definition of refugee laid down in Article 1A⁷⁴ and who is not excluded from the protection of the Convention on the grounds set out in Article 1F.⁷⁵

This does not mean that persons falling within the exclusion clause can be *refouled*. They do not benefit from refugee status and the consequent rights, including falling within UNHCR's mandate. But *as* by definition, they face a risk if returned, they may be entitled to protection from *refoulement* under human rights law and, if they are in a state experiencing armed conflict, international humanitarian law. The fact that they have been excluded from protection under refugee law does not affect their claim to protection under these bodies of law.

Under human rights law

While the express prohibition in the American Convention on Human Rights only precludes the *refoulement* of aliens, the prohibition based on the risk of torture in

⁷³ *Ibid.*, para. 249.

⁷⁴ Article 1A of the Convention defines a refugee as 'any person who, owing to a well-founded fear of being persecuted for reasons of race, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country'. It is not necessary for a person to have been formally recognized as a refugee to benefit from the protection of the Convention. It is sufficient for him or her to meet the criteria of the definition. See, e.g., UNHCR EXCOM Conclusion No. 6 (XXVIII) 1977, *Non-refoulement*. Additionally, the lawfulness of a person's presence in the concerned state does not affect the application of the principle of *non-refoulement*. See, e.g., Convention relating to the Status of Refugees, 28 July 1951, Article 31.

⁷⁵ This provision excludes from the protection of the Convention:

any person with respect to whom there are serious reasons for considering that:

- he has committed a crime against peace, a war crime, or a crime against humanity ...
- he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- he has been guilty of acts contrary to the purposes and principles of the United Nations.

The OAU Refugee Convention is broader in scope than the 1951 Convention. Although it, too, contains exclusion clauses, Article II(3) provides that 'no person' may be *refouled*, presumably including those who fall within with exclusion clauses.

the Convention against Torture and implicit in instruments such as the International Covenant on Civil and Political Rights or the European Convention on Human Rights applies to *all* persons within a state's effective control, regardless of their nationality or whether they have refugee status.

Under international humanitarian law

The express prohibition of *refoulement* in Article 45 of the Fourth Geneva Convention applies to aliens in the territory of a state party to an international armed conflict, as does the broader protection in relation to transfers in the same provision. The equivalent provision in Article 12 of the Third Geneva Convention applies to prisoners of war.

The prohibition on torture and other forms of ill-treatment under international humanitarian law applies to all persons in the effective control of a party to a conflict. Consequently, to the extent that the interpretation of the prohibition of torture and other forms of ill-treatment in international humanitarian law is to be guided by the jurisprudence of the human rights monitoring bodies, *all* such persons are protected from transfers that may put them at risk of such treatment.

Consequences of the different scope of application of the principle

UNHCR's involvement

The key consequence of this difference in scope of application of the principle relates to UNHCR's involvement on behalf of the persons concerned. The agency only has an express mandate to assist and protect persons falling within the 1951 Refugee Convention and stateless persons. Thus, persons who do not fall within the definition of refugee, or who are excluded from it, but who would be at risk if transferred, must also not be *refouled*, although ordinarily UNHCR will not intervene on their behalf nor assist in finding a durable solution for them.

'Complementary protection'

In terms of protection, failure to fall within the refugee definition, exclusion therefrom or falling within the exceptions to the principle of *non-refoulement* under refugee law do not affect a person's claim to protection from *refoulement* under human rights law and, if she or he is in a state experiencing armed conflict, international humanitarian law.⁷⁶ The term 'complementary protection' is often used to refer to the protection against transfer in such circumstances.

76 See, e.g., 'Factum of the Intervenor, UNHCR, Suresh v. Minister of Citizenship and Immigration; the Attorney-General of Canada', SCC No. 27790', *International Journal of Refugee Law* (2002), pp. 149 ff.

Some states have regulated the grounds for granting complementary protection and, importantly, specified the rights and status to which beneficiaries are entitled.⁷⁷ Regrettably, the more common situation is that persons benefiting from complementary protection, although not *refouled*, remain without formal status and rights, often in an uncertain and precarious legal situation.⁷⁸

An absolute principle

Under refugee law

Under the 1951 Refugee Convention protection from *refoulement* may not be claimed

by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.⁷⁹

A discussion of the scope of application of this exception is beyond the scope of the present article.⁸⁰ For present purposes it is sufficient to point out that it is generally accepted that, given the humanitarian character of the prohibition of *refoulement* and the serious consequences to a refugee of being returned to a country where s/he is in danger, the exceptions must be interpreted restrictively and in strict compliance with due process of law.⁸¹ Moreover, as already indicated, persons excluded from protection against *refoulement* under refugee law can still benefit from the principle under human rights law or international humanitarian law.

77 For example, by means of 'subsidiary protection' in the European Union pursuant to Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, [2004] OJ L304/12 ('the Qualification Directive'). For a recent discussion of the grounds on which complementary protection may be claimed and the consequent rights see Jane McAdam, 'Complementary protection and beyond: how states deal with human rights protection', *New Issues in Refugee Research*, UNHCR Working Paper No. 118, August 2005. See also Mandal, above note 53.

78 In recognition of the vulnerable situation in which such persons often find themselves, minimum standards of treatment for persons benefiting from complementary forms of protection were discussed by the Standing Committee of UNHCR's Executive Committee in 2000: *Complementary Forms of Protection: their Nature and Relationship to the International Refugee Protection Regime*, UN Doc. EC/50/SC/CRP.18, 9 June 2000.

79 Convention relating to the Status of Refugees (1951), Article 33(2). Later refugee law instruments, such as the OAU Refugee Convention and the Cartagena Declaration, do not contain any exceptions to the principle of *non-refoulement*.

80 For a discussion of exclusion, see UNHCR, Background Note on the Application of the Exclusion: Article 1F of the 1951 Convention relating to the Status of Refugees, Protection Policy and Legal Advice Section, Department of International Protection, HCR/GIP/03/05, 4 September 2003.

81 See Lauterpacht and Bethlehem, above note 11, at para. 159.

Under human rights and international humanitarian law

Non-refoulement as a principle of human rights law allows no exceptions or derogation.

None of the treaty provisions expressly prohibiting *refoulement* contain exceptions. Moreover, inasmuch as it is a component part of the prohibition against torture and other forms of ill-treatment, *non-refoulement* benefits from the same absolute character. The absolute nature of the prohibition against torture has been expressly recognized in both the Convention against Torture itself and by the human rights monitoring bodies.⁸²

The absolute nature of the prohibition of torture and other forms of ill-treatment, including the implicit *non-refoulement* dimension, was recently reaffirmed by the Human Rights Committee in its Concluding Observations on Canada's fifth periodic report. In reaction to a decision by the Supreme Court of Canada to deport a person deemed to constitute a threat to national security despite the existence of a risk that he may be ill-treated, the Committee stated that

The State party should recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from ... No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment.⁸³

Similarly, in the recent case of *Saadi v. Italy*, relating to the deportation of a person accused of terrorist offences, the European Court of Human Rights reaffirmed the absolute nature of the prohibition of torture and inhuman or degrading treatment or punishment, from which no derogation is possible, even in the event of public emergencies threatening the life of the nation, and irrespective of the complainant's conduct.⁸⁴

82 Article 2(2) of the Convention Against Torture provides that '[n]o 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'. See also Human Rights Committee General Comment No. 20, above note 16, at para. 3, and General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 4 November 1994, UN Doc. CCPR/C/21/rev.1/add.6.

83 Human Rights Committee, Concluding Observations: Canada, 2 November 2005, UN Doc. CCPR/C/CAN/CO/5, para. 15. The same Supreme Court decision also attracted strong criticism from the Committee against Torture: Committee against Torture, Concluding Observations: Canada, UN Doc. CAT/C/CR/34/CAN, 7 July 2005, para. 4(a).

84 *Saadi v. Italy*, above note 13, para. 127. The case before the European Court of *Chahal v. The United Kingdom* also related to the deportation of a person for alleged involvement in terrorist activities. Emphasizing that it was aware of the difficulties faced by states in protecting themselves from terrorist violence the European Court of Human Rights nonetheless held that:

even in these circumstances the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the

Importantly, in this case the Court also rejected the argument made by the United Kingdom, which had intervened in the proceedings, that a distinction should be drawn between situations where the ill-treatment was being inflicted directly by the state party to the European Convention and those where the ill-treatment was being inflicted by a third state, to which the applicant was being transferred. The United Kingdom argued that, in the latter situation, the protection against ill-treatment of the individual concerned had to be weighed against the interests of the community as a whole. The Court forcefully rejected this approach, pointing out that the protection against *non-refoulement* under the European Convention on Human Rights was broader than that under the 1951 Refugee Convention inasmuch as the conduct of the person concerned, however undesirable or dangerous, was not something to be taken into account.⁸⁵

The Court also rejected as incompatible with the absolute nature of the prohibition of torture and other forms of ill-treatment, the intervening state's argument that in cases where the applicant presented a threat to national security, stronger evidence had to be adduced to prove the existence of risk of ill-treatment. In the Court's view, the fact that a person may cause a serious risk to the community if not returned, did not reduce in any way the risk of ill-treatment that she or he may be subjected to upon return; accordingly it would be incorrect to require a higher standard of proof to be met.⁸⁶

Under international humanitarian law the principle of *non-refoulement* as it expressly appears in Article 45(4) of the Fourth Geneva Convention is equally absolute,⁸⁷ as is its broader implicit formulation in Article 12 of the Third Geneva Convention and in Article 45(3).

The procedural dimension

One fundamental aspect of the principle of *non-refoulement* that, until recently, had received only limited attention and scrutiny is its procedural dimension: the minimum due process rights enabling individuals to challenge decisions to transfer them, which, in their view, this would expose them to a real risk of violation

substantive clauses of the Convention and of Protocols Nos. 1 and 4 ... Article 3 ... makes no provision for exceptions and no derogation from it is permissible under Article 15 ... even in the event of a public emergency threatening the life of the nation ...

The prohibition provided by Article 3 ... against ill-treatment is equally absolute in expulsion cases. Thus, whatever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 ... if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion ... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. (*Chahal v. The United Kingdom*, above note 28, paras. 79–80)

85 *Saadi v. Italy*, above note 13, para. 138.

86 *Ibid.*, para. 140.

87 The absolute nature of the principle is forcefully affirmed in Jean Pictet (ed.), *Commentary IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958), p. 269.

of their fundamental rights. This procedural dimension is essential to the actual practical implementation of the protection afforded by the principle of *non-refoulement*. It appears expressly in the Refugee Convention but has an equally strong basis under human rights law.⁸⁸

Authority responsible for determining the existence of a risk

It is for the national authorities of the state with effective control of the person concerned to determine whether a real risk of violation of fundamental rights exists should the transfer take place. The existence of the risk must be determined on objective grounds, on the basis of information that the state has or ought to have. Although, in most instances, the person concerned is likely to have expressed their concerns in relation to the transfer, it is not necessary for him or her to have done so for states' obligations under the principle of *non-refoulement* to arise. Even in circumstances where the person concerned does not, or is not in a position to express his or her fears, the sending state must itself assess whether a risk exists.

In the case of *non-refoulement* as a principle of refugee law, the assessment of the existence of a risk is usually carried during refugee status determination procedures before local courts or tribunals. In certain circumstances it may be UNHCR that carries out the refugee status determination at a state's request.⁸⁹

National authorities also make the determination of the existence of a risk under *non-refoulement* as a principle of human rights law. Some states have established special procedures for reviewing entitlement to this complementary protection, but, in most, proposed transfers must be challenged before the ordinary courts responsible for the review of administrative decisions.⁹⁰

The right to challenge the transfer decision

It is uncontroversial that a person facing potential *refoulement* must be given the opportunity to challenge the decision to transfer him or her.

The requirement that an expulsion may only be carried out in pursuance 'of a decision reached in accordance with due process of law' is expressly foreseen in the 1951 Refugee Convention.⁹¹

The right of individuals to challenge decisions to transfer them and the observance of due process safeguards in proceedings that could lead to *refoulement* is also required by human rights law, as has been highlighted by various human rights monitoring bodies. Article 13 of the International Covenant on Civil and

88 On this last point see, for example, Lauterpacht and Bethlehem, above note 11, para. 159.

89 General guidance on refugee status determination procedures and standards can be found in UNHCR, *Refugee Protection: A Guide to International Refugee Law*, UNHCR Handbook for Parliamentarians, No.2, 2001, and in *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, above note 63.

90 See, e.g., Mandal, above note 53, and McAdam, above note 77.

91 Convention relating to the Status of Refugees (1951), Article 32(2).

Political Rights allows the expulsion of aliens lawfully in the territory of a State Party only in pursuance of a decision reached in accordance with law. It also requires that, except when compelling reasons of national security otherwise require, such persons be allowed to submit the reasons against their expulsion and to have their case reviewed by, and be represented for the purpose before, a competent authority. The aim of this provision is to ensure for every alien lawfully in the territory of a State Party an *individual* decision as to removal and to avoid arbitrary expulsions.⁹² Article 1 of Protocol No. 7 to the European Convention on Human Rights contains similar procedural safeguards to be granted to aliens in expulsion proceedings.

These are the only two provisions expressly to mention a right of review; however, this right to 'due process' in challenging transfer decisions has been interpreted as applying to all persons in a state's effective control and not just aliens lawfully in the territory of the transferring state.

The European Court of Human Rights has developed this dimension of the principle of *non-refoulement* on the basis of the right to an effective remedy under national law for violations of the Convention. In situations where a transfer may expose a person to a risk of torture or other forms of ill-treatment the Court has applied stringent criteria as to the form such a remedy must take. For example, in the *Chahal* case, it held that

151. In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialized and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State.

152. Such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees that it affords are relevant in determining whether the remedy before it is effective.⁹³

With regard to other elements of the procedure, the Court noted

... that in the proceedings before the advisory panel the applicant was not entitled, *inter alia*, to legal representation, that he was only given an outline of

92 Human Rights Committee General Comment No. 15, The position of aliens under the Covenant, 11 April 1986, para. 10. The Human Rights Committee also pointed out that this provision applies to *all* procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise. *Ibid.*, para. 9.

93 *Chahal v. The United Kingdom*, above note 28, paras. 151–152. Applying this test to the facts of the case before it, the Court noted that neither the advisory panel of the court of appeal nor the courts could review the Home Secretary's decision to deport the applicant. Their role was limited to satisfying themselves that the former had balanced the risk to the applicant against the danger he posed to national security. In view of this, the Court concluded that the courts could not be considered as providing effective remedies as required by Article 13 of the Convention. *Ibid.*, para. 153.

the grounds for the notice of the intention to deport, and that the panel had no power of decision and that its advice to the Home Secretary was not binding and not disclosed. In these circumstances the advisory panel could not be considered to offer sufficient procedural safeguards for the purposes of Article 13.⁹⁴

Until recently other human rights monitoring bodies had not addressed this dimension of the principle in the same level of detail. For example, in a 1996 case relating to the transfer of a person suspected of terrorist activities effected by a direct handover from police force to police force without the intervention of a judicial authority, the Committee against Torture had found a violation of Article 3 of the Convention and of the detainee's rights. It had highlighted the need for transfers fully to respect the rights and fundamental freedoms of the individuals concerned – including those to due process – but had not entered into the details of what these were.⁹⁵

In recent years greater emphasis has been placed on this procedural dimension of the prohibition of *refoulement*. For example, the Committee against Torture did so in a 2005 decision relating to the transfer of an Egyptian national from Sweden to Egypt, approaching it, like the European Court of Human Rights, in the context of the right to a remedy. Having noted that Article 3 of the Convention against Torture should be interpreted so as to encompass a remedy for its breach, the Committee held that

... in the case of an allegation of torture or cruel, inhuman or degrading treatment having occurred, the right to a remedy requires, after the event, an effective, independent and impartial investigation of such allegations. The nature of *refoulement* is such, however, that an allegation of breach of that article relates to a future expulsion or removal; accordingly, *the right to an effective remedy contained in article 3* requires, *in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise*.⁹⁶

Without spelling out the minimum elements with which it considered that the transfer review procedure should comply, in 2006 the Committee against Torture also emphasized the right of individuals detained outside US territory – in this case Guantánamo, Afghanistan and Iraq – to challenge transfer decisions.⁹⁷

94 *Ibid.*, para. 154.

95 Committee against Torture, *Josu Arkauz Arana v. France*, Communication No. 63/1997, Views of the Committee against Torture of 16 December 1996, para. 11(5). The Committee against Torture had already expressed its concern at the practice of the police to hand over individuals to their counterparts in another country when it considered France's second periodic report pursuant to Article 19 of the Convention. Report of the Committee against Torture, UN Doc. A/53/44, 16 September 1998, para. 143.

96 Committee against Torture, *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, Communication No. 233/2003, Views of the Committee against Torture of 20 May 2005, para. 13.7 (emphasis added).

97 In its Conclusions and Observations on the United States' second periodic report the Committee simply stated that 'the State party should always ensure that suspects have the possibility to challenge decisions of *refoulement*'. Committee against Torture, Conclusions and Recommendations: United States of America, above note 9, para. 20.

The Human Rights Committee has also placed increasing emphasis on the procedural dimension of the principle. For example, in the 2006 case of *Mansour Ahani v. Canada*, it stated that where one of the highest values protected by the Covenant, namely the right to be free from torture, is at stake, 'the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at substantial risk of torture'.⁹⁸

The issue was also addressed by the Inter-American Commission on Human Rights in its 2005 decision reiterating and extending the precautionary measures imposed in respect to the detainees held in Guantánamo.⁹⁹ On this point, the Commission affirmed that the obligation of *non-refoulement*

... also necessarily requires that persons who may face a risk of torture cannot be rejected at the border or expelled without an adequate, individualized examination of their circumstances even if they do not qualify as refugees, and that the process requires the strictest adherence to all applicable safeguards, including the right to have one's eligibility to enter the process decided by a competent, independent and impartial decision-maker, through a process which is fair and transparent.¹⁰⁰

Similarly, in his interim report of 2004, the Special Rapporteur on Torture expressed serious concern at the increase in practices that, in his view, undermined the principle of *non-refoulement*, including the handing over of persons by the authorities of one country to their counterparts in other countries without the intervention of a judicial authority. He emphasized the need for 'proceedings leading to expulsion to respect appropriate legal safeguards, at the very least a hearing before a judicial instance and the right of appeal'.¹⁰¹

98 Human Rights Committee, *Mansour Ahani v. Canada*, Communication No. 1051/2002, Views of the Human Rights Committee of 15 June 2004, paras. 10.6–10.8.

99 Inter-American Commission on Human Rights, *Extension of Precautionary Measures (N. 259) regarding Detainees in Guantánamo Bay, Cuba*, decision of 28 October 2005, available at www.asil.org/pdfs/ilibmeasures051115.pdf (last visited 16 October 2008). See also Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights* (2002), para. 394.

100 *Ibid.*, p.9. To discharge this obligation the Commission requested the United States to 'take the measures necessary to ensure that detainees who may face a risk of torture or other cruel, inhuman or degrading treatment if transferred, removed or expelled from Guantánamo Bay are provided an adequate, individualized examination of their circumstances through a fair and transparent process before a competent, independent and impartial decision-maker. Where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or other mistreatment, the State should ensure that the detainee is not transferred and that diplomatic assurances are not used to circumvent the State's *non-refoulement* obligation'. *Ibid.*, p. 10. The Commission returned to this issue in its 2006 resolution on Guantánamo, where, *inter alia*, it urged the United States to ensure that persons who may face a risk of torture or other forms of ill-treatment if transferred from Guantánamo were 'provided an adequate, individualised examination of their circumstances through a fair and transparent process before a competent, independent and impartial decision-maker'. Inter-American Commission on Human Rights, Resolution No. 2/06 on Guantánamo Bay Precautionary Measures of 28 July 2006, para. 4.

101 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/59/324, 1 September 2004, para. 29.

At the European level, in addition to the jurisprudence of the European Court of Human Rights, the procedural dimension of the principle of *non-refoulement* was highlighted in a Recommendation by the Council of Europe's Commissioner for Human Rights in 2001, where he reaffirmed that

The right of effective remedy [under Article 13 of the European Convention] must be guaranteed to anyone wishing to challenge a *refoulement* or expulsion order. It must be capable of suspending enforcement of an expulsion order, at least where contravention of Articles 2 or 3 of the [Convention] is alleged.¹⁰²

The point was also addressed by Council of Europe's Group of Specialists on Human Rights and the Fight against Terrorism during two meetings held in 2005 and 2006,¹⁰³ and by the President of the European Committee for the Prevention of Torture in reaction to a memorandum of understanding on deportations the United Kingdom had concluded with Jordan.¹⁰⁴

Although the present article does not review national jurisprudence, as an exception reference will be made to the decision of the Canadian Supreme Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, where the procedural safeguards to be ensured in deportation proceedings where the risk of torture is asserted were considered in detail.¹⁰⁵

102 Recommendation of the Commissioner for Human Rights concerning The Rights Of Aliens Wishing To Enter A Council Of Europe Member State And The Enforcement Of Expulsion Orders, CommDH/Rec(2001)1, 19 September 2001, para. 11.

103 After reaffirming states' obligation not to expel an individual where there are substantial grounds to believe that she or he will be subject to a real risk of torture or inhuman or degrading treatment or punishment, the specialists emphasized that the assessment of the existence of a risk had to be carried out on a case-by-case basis and that sending states should not rely upon lists of 'safe' or 'unsafe' states. Council of Europe, Steering Committee for Human Rights (CDDH), Group of Specialists in Human Rights and the Fight against Terrorism (DH-S-TER), Meeting Report, 1st Meeting, Strasbourg, DH-S-TER(2005)018, 7–9 December 2005, and Meeting Report, 2nd Meeting, Strasbourg, DH-S-TER(2006)005, 29–31 March 2006.

104 The President, *inter alia*, emphasized the need for any intended deportation to be open to challenge before an independent authority, and for such proceedings to have suspensive effect. Letter sent by the President of the Committee for the Prevention of Torture to the United Kingdom authorities concerning a Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan reached on 10 August 2005 regulating the provision of undertakings in respect of specified persons prior to deportations, 21 October 2005, Appendix to the Report to the United Kingdom Government on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 20 to 25 November 2005, 10 August 2006, CPT/Inf (2006) 28. The Committee for the Prevention of Torture also addressed the procedural dimension in its 15 report on its activities where it stated that '[i]t should also be emphasized that prior to return, any deportation procedure involving diplomatic assurances must be open to challenge before an independent authority, and any such challenge must have a suspensive effect on the carrying out of the deportation. This is the only way of ensuring rigorous and timely scrutiny of the safety of the arrangements envisaged in a given case'. 15th General Report on the CPT's Activities, covering the period 1 August 2004 to 31 July 2005, Strasbourg, 22 September 2005, para. 41.

105 Supreme Court of Canada, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1. The Court based its reasoning on Section 7 of the Canadian Charter of Rights and Freedoms, which stipulates that '[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'.

In the Court's view the applicable procedural protections did not extend to requiring the minister responsible for the deportation decision to conduct a full oral hearing or a complete judicial process. However, the applicant was nonetheless entitled to significant rights, including being informed of the case to be met; receiving the material on which the minister was basing the decision, subject to reduced disclosure for valid reasons, such as safeguarding confidential public security documents; and the opportunity to respond to the case presented to the minister. However, in the absence of access to the material on which the minister had based much of her decision, the applicant and his counsel had no knowledge of which factors they specifically needed to address, nor did they have an opportunity for correcting factual inaccuracies or mischaracterizations. Submissions also had to be accepted from an applicant after he had been provided with an opportunity to examine the material being used against him. The Court also found that the applicant had to be given an opportunity to challenge the information before the minister. Thus, he should be permitted to present evidence as to the risk of torture on return. Finally, where the minister was relying on written assurances from a foreign government that a person would not be tortured, that person had to be given an opportunity to present evidence and make submissions as to the value of such assurances.¹⁰⁶

On the basis of the existing jurisprudence and other guidance from the human rights supervisory bodies, it can be concluded that at present the procedural safeguards to be ensured to persons facing transfers include the following minimum elements:

- once a decision to transfer a person has been taken she or he must be informed of this in a timely manner;
- if she or he expresses concern that she or he may risk ill-treatment, the well-foundedness of such fears must be reviewed on a case-by-case basis by a body that is independent of the authority that took the decision;
- such review must have a suspensive effect on the transfer;¹⁰⁷
- the person concerned must have the opportunity to make representations to the body reviewing the decision;
- she or he should be assisted by counsel; and
- she or he should be able to appeal the reviewing body's decision.¹⁰⁸

These 'principles of fundamental justice' reflect minimum procedural safeguards under international human rights law.

¹⁰⁶ *Ibid.*, paras. 121–123.

¹⁰⁷ See, e.g., the decision of the European Court of Human Rights in *Jabari v. Turkey* where the Court found that a refugee status determination procedure that did not have suspensive effect on the deportation and which did not permit a review of the merits of an application violated Article 13 of the Convention (right to a remedy). ECtHR, *Jabari v. Turkey*, Final judgment of 11 October 2000.

¹⁰⁸ The right to appeal a negative refugee status determination decision is well-established. See, e.g., EXCOM Conclusion No. 8 (XXVIII), 1977, Determination of Refugee Status, para. e. There is, however, far less international practice supporting a similar right to appeal a transfer decision on the basis of *non-refoulement* as a principle of human rights law. For the practice of selected states at the national level, see Mandal, above note 53.

Issues to be taken into account when assessing the risk

Some of the instruments that expressly address *non-refoulement* provide some guidance on the issues that should be considered by the bodies entrusted with assessing the well-foundedness of the risk. Most notably, Article 3(2) of the Convention against Torture provides that

for the purpose of determining whether there are [substantial grounds for believing that the person concerned would be in danger of being subjected to torture] the competent authorities will 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.

In its General Comment No. 1 the Committee against Torture provided the following non-exhaustive list of the particularly pertinent information it would consider when reviewing the merits of an application claiming risk:

- (a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights ... ?
- (b) Has the author been tortured or maltreated by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?
- (c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?
- (d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?
- (e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the state in question?
- (f) Is there any evidence as to the credibility of the author?
- (g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?¹⁰⁹

The Committee's list can provide useful guidance for national authorities engaged in similar assessments.

What does the principle of *non-refoulement* require states to do in practice?

In simple and general terms, the principle of *non-refoulement* requires a state that is planning to transfer a person to assess whether a real risk exists that s/he may be

¹⁰⁹ Committee against Torture, General Comment No. 1, above note 22, para. 5–8.

exposed to the relevant violations of fundamental human rights. If the risk is considered to exist, the person must not be transferred. If the risk is determined not to exist, to meet its obligations the state must

- inform the person concerned in a timely manner of the intended transfer;
- give the person the opportunity to express any concerns that s/he may face the proscribed violations of fundamental human rights after the transfer;
- suspend the transfer if such concerns are expressed;
- assess the well-foundedness of the concerns – that is, the existence of the real risk – on an individual basis by a body independent from the one that took the transfer decision, and that affords the person concerned minimum judicial guarantees; and
- offer the person concerned the possibility of claiming refugee status.

If the refugee claim is successful, a durable solution will have to be found, which can take the form of local integration or resettlement in a third state. UNHCR can play an important role in finding resettlement solutions.

If the asylum claim is unsuccessful, but complementary protection is granted, the person concerned must not be transferred and an alternative solution will have to be found. This could be local release or transfer to a third state, provided there is no risk of secondary *refoulement*.

Post-transfer responsibilities

The nature of the post-transfer responsibilities of the sending state depends on whether or not the transfer was effected in violation of the principle of *non-refoulement*.

Responsibilities following a transfer in violation of the principle of *non-refoulement*

States that transfer persons in violation of the principle of *non-refoulement* may have two forms of post-transfer obligations: first, and more simply as a matter of law, the obligation to make reparations; and, second, they may have ongoing responsibilities towards the persons transferred, although questions remain as to the manner in which such responsibilities must be discharged.

A violation of an obligation under international law gives rise to an obligation to make reparation.¹¹⁰ The aim of reparation is to eliminate, as far as possible, the consequences of the illegal act and to restore the situation that would have existed if it had not been committed. Reparation can take various forms, including

110 Permanent Court of International Justice, *Factory at Chorzow (Claim for Indemnity) case (Germany v. Poland) (Merits)*, PCIJ (ser. A) No. 17, 1928, p. 29. See also Article 1 of the Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001 ('ILC Articles on State Responsibility'), UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001.

restitution, compensation or satisfaction. These remedies can be applied either singly or in combination in response to a particular violation.¹¹¹

Naturally, this obligation also applies to violations of the principle of *non-refoulement*. Although this obligation is unquestionable, actual practice indicating the form reparation should take is limited and consists principally of the findings and recommendations of human rights courts and other supervisory bodies.

One of the reasons for the limited practice is that the human rights monitoring bodies have tended to address *refoulement* before the transfer of the person concerned. Transfer proceedings are suspended pending the body's review of the case. If the human rights monitoring body determines that transfer would violate the principle of *non-refoulement*, it directs that it should not take place.¹¹² As the majority of decisions operate preventively, the question of reparations has infrequently arisen.

In the cases decided *after* a transfer, until quite recently the tendency was to make a finding of breach of the relevant treaty and, possibly, award compensation as the sole form of reparation.¹¹³

Although they have never spoken in terms of ongoing responsibilities, the treaty-monitoring bodies have on occasion requested sending states to take some form of follow-up measures. For example, in *Ng v. Canada*, having determined that the petitioner's transfer to proceedings that could lead to the imposition of the death penalty violated Article 7 of the International Covenant on Civil and Political Rights, the Human Rights Committee called upon Canada to make such representations as were still possible to avoid the imposition of the death penalty and to ensure that a similar situation did not arise in the future.¹¹⁴

In *Ahani v. Canada*, following a deportation that exposed the applicant to the risk of torture, the Human Rights Committee called upon Canada to make reparations, should it be established that the applicant had been subjected to torture, but did not specify the form they should take. Also, somewhat unrealistically, considering he was no longer within Canada's effective control, it

111 See ILC Articles on State Responsibility, Articles 31–34.

112 See, e.g., *Chahal v. The United Kingdom*, above note 28, para. 107.

113 See, e.g., ECtHR, *Shamayev and 12 others v. Georgia and Russia*, Application No. 36378/02, Judgment of 12 April 2005, where the European Court of Human Rights awarded financial compensation to those claimants who had been transferred in violation of Article 3 of the Convention. This focus on compensation could partly be due to the nature of reparations that these bodies are authorized to award. For example, under Article 50 of the European Convention on Human Rights, the European Court can only award 'just satisfaction', which it has consistently interpreted as being limited to compensation. The powers of the Human Rights Committee are even more limited: Article 5(4) of the First Optional Protocol to the International Covenant on Civil and Political Rights only authorizes it to forward its views as to the existence of a violation to the claimant and State Party concerned.

114 *Chitat Ng v. Canada*, above note 16, para. 18. See also *Roger Judge v. Canada*, another case in which the claimant had been extradited in breach of the Covenant to proceedings that could lead to the imposition of the death penalty in the United States, where the Human Rights Committee held that an appropriate remedy for the violation would include the making of representations as are possible to prevent that carrying out of the death penalty. *Roger Judge v. Canada*, above note 51, para. 12.

requested the respondent state 'to take such steps as may be appropriate to ensure that the [applicant] is not, in the future, subjected to torture'.¹¹⁵

Similarly, in 2006, in its review of the United States second and third periodic report, the Committee specifically addressed the issue of responsibilities following *refoulement*. It stated that:

The State party should conduct thorough and independent investigations into the allegations that persons have been sent to third countries where they have undergone torture or cruel, inhuman or degrading treatment or punishment, modify its legislation and policies to ensure that no situation will recur, and provide appropriate remedy to the victims.¹¹⁶

The Committee against Torture has also started to turn its attention to reparations and other post-transfer responsibilities. For example, in *Brada v. France*, having determined that the claimant's expulsion to Algeria had violated Article 3 of the Convention against Torture, the Committee against Torture requested France to report back to it not only the measures taken to compensate the claimant, but also information on his current whereabouts and well-being.¹¹⁷

Despite the limitations of their competences, human rights supervisory bodies have commenced to look beyond the award of compensation to other post-transfer responsibilities that may be of greater protective value to persons who were still at risk of torture, ill-treatment or arbitrary deprivation of life. Their focus has been on the provision of information on the whereabouts and well-being of the persons in question, and on the receipt of undertakings from the receiving state as to their treatment or the imposition of the death penalty. To date they have stopped short of demanding the return of the persons in question.

Responsibilities following a transfer that did not violate the principle of *non-refoulement*

International humanitarian law alone addresses post-transfer responsibilities in cases where the transfer *did not* violate the principle of *non-refoulement*. As stated above, Article 12 of the Third Geneva Convention precludes the transfer of prisoners of war to a state that is not a party to the Convention or that is not willing or able to apply it. It goes on to provide that, even in cases where all these pre-requisites are met,

... if [the] Power [to which the prisoners of war are transferred] fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall

¹¹⁵ *Mansour Ahani v. Canada*, above note 98, para. 12.

¹¹⁶ Human Rights Committee, Concluding Observations: United States of America, above note 8, para. 16.

¹¹⁷ Committee against Torture, *Mafhoud Brada v. France*, Communication No. 195/2002, Views of the Committee against Torture of 17 May 2005, UN Doc. CAT/C/34/D/195/2002, 24 May 2005, para. 15.

request the return of the prisoners of war. Such requests must be complied with.¹¹⁸

According to the *Commentary* to the Third Geneva Convention, the receiving state would be failing to carry out the provisions of the Convention 'in an important respect' if it committed grave breaches of the Third Geneva Convention against the prisoners of war or failed to ensure the general conditions of internment laid down in the Convention as to quarters, food, hygiene, labour and working pay in an important respect.¹¹⁹

The 'effective measures to correct the situation' that transferring states are required to take include the provision of direct assistance, such as food supplies or medical staff and equipment, which the receiving state is obliged to accept.¹²⁰ The *Commentary* adds that

If these measures nevertheless prove inadequate, if the poor treatment given to prisoners is not caused merely by temporary difficulties but by ill-will on the part of the receiving Power, or if for any other reason the situation cannot be remedied, the power which originally transferred the prisoners must request that they be returned to it. In no case may the receiving Power refuse to comply with this request, to which it must respond as rapidly as possible.¹²¹

The approach under international humanitarian law is thus significantly broader than that under human rights law. Not only does it impose residual responsibilities on sending states even in relation to transfers of persons that did not violate the principle of *non-refoulement*, but the remedial action that may be required is far more onerous and can include demanding the return of the persons concerned. An essential prerequisite for the sending state to discharge its ongoing obligations is the establishment of a system that enables it to monitor the situation of the persons transferred.

118 This provision of the Third Geneva Convention is mirrored in Article 45(3) of the Fourth Geneva Convention, which offers the same protection to aliens in the territory of a state party to an international armed conflict.

119 Pictet, above note 20. With regard to the equivalent provision in the Fourth Geneva Convention, according to the *Commentary*, violations of Articles 27, 28 and 30 to 34 of the Fourth Geneva Convention would give rise to an obligation upon the transferring state to take remedial measures. Additionally, if the persons concerned were deprived of their liberty, specific reference is made to the provisions relating to internment and, in particular, those relating to civil capacity, maintenance, food, clothing hygiene and medical attention, religious and intellectual activities, correspondence and relief. Pictet, above note 87, pp. 268–9.

120 *Ibid.*, p. 139. By way of example, the *Commentary* refers to an instance in August 1945 – a time before Article 12 of the Third Geneva Convention had been adopted – when the ICRC drew the attention of the United States to the difficult situation of German prisoners of war whom the United States had transferred to the French authorities, because of the general shortage of foodstuffs in France. Following this intervention, the United States placed large quantities of foodstuffs and clothing at the disposal of the ICRC for distribution to prisoner-of-war camps in France.

121 *Ibid.*

The effect of 'diplomatic assurances'

A final issue to be considered is the effect on state's obligations under the principle of *non-refoulement* of so-called 'diplomatic assurances'. These are undertakings given by the receiving state to the sending state, to the effect that the person concerned will not be subjected to torture or other forms of ill-treatment or to the imposition or execution of the death penalty. Such assurances aim to remove the risk underlying the claim of *refoulement*. States are increasingly resorting to such assurances in an attempt to avert the risk of torture or other forms of ill-treatment in order to meet or, in the view of critics, to side-step their obligations under the principle of *non-refoulement*.¹²²

Assurances can take a variety of forms. They may be written undertakings in formal agreements such as *notes verbales* or memoranda of understanding, or assurances given less formally, including orally, through diplomatic channels. The present article employs the generic terms 'assurances' and 'undertakings' interchangeably to refer to all such agreements.

Assurances are often resorted to in relation to the death penalty by states that consider that their human rights obligations preclude them from transferring persons to the possibility of such punishment. It is generally accepted that an undertaking not to seek the death penalty or to impose or execute it is an effective way of avoiding the risk of the death penalty and that transfers carried out after the receipt of such assurances do not violate the principle of *refoulement*.

The effect of diplomatic assurances on transfers with regard to ill-treatment is much more problematic.¹²³ From a protection point of view, many of the concerns expressed are extremely valid, as the actual effectiveness of such

122 For critical reviews of transfers effected by states in reliance on such assurances see, e.g., Human Rights Watch, *Empty Promises: Diplomatic Assurances No Safeguard against Torture*, April 2004; Human Rights Watch, *Still at Risk, Diplomatic Assurances No Safeguard Against Torture*, April 2005; Center for Human Rights and Global Justice, NYU Law, *Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions'*, 2004; Centre for Human Rights and Global Justice, NYU Law, *Beyond Guantánamo: Transfers to Torture One Year After Rasul v. Bush*, January 2005; and Amnesty International, *Afghanistan – Detainees transferred to torture: ISAF Complicity?*, November 2007, ASA 11/011/2007; and Human Rights Watch, *Not the Way Forward: British Policy on Diplomatic Assurances*, October 2008. For the other side of the argument see, for example, Kate Jones, 'Deportations with Assurances: Addressing Key Criticisms', *International and Comparative Law Quarterly*, Vol 57 (2008), 183 and Ashley Deeks, 'Promises Not to Torture: Diplomatic Assurances in U.S. Courts', ASIL Discussion Paper Series, December 2008.

123 Human rights supervisory bodies have focused on assurances relating to ill-treatment. Interestingly, in its report of 2007 the Working Group on Arbitrary Detention addressed the question of assurances in relation to the lawfulness of detention and fair trial, including the practice of what it referred to as 'reverse diplomatic assurances': undertakings by the receiving state that the transferred person will be deprived of his/her liberty even absent criminal charges or other legal basis for detention. These undertakings are found in some agreements relating to the transfer of persons held in the context of the 'Global War on Terror'. The Working Group noted that states could not accept detainees under such conditions without seriously violating their obligations under international human rights law. This being said, it noted that not all commitments by the receiving state to take measures to prevent a person suspected of constituting a threat to the sending state had to be rejected. For example, it might be acceptable for a receiving state to undertake to keep a person returned to its territory under surveillance, as long as such surveillance did not amount to a deprivation of liberty without charges; was not so

assurances is questionable. While it is straightforward to determine whether a state has complied with an undertaking not to seek, impose or execute the death penalty, it is much more difficult to monitor compliance with an undertaking not to ill-treat persons deprived of their liberty, as such treatment will take place behind closed doors and its occurrence is likely to be denied.

Although, as will be seen, the human rights supervisory bodies have placed some faith in post-transfer monitoring mechanisms, serious doubts exist as to whether it is possible to establish a truly reliable and effective mechanism. Additionally, it is likely that only a very limited number of persons in any particular place of detention are likely to be monitored pursuant to the assurances. In view of this, it will be virtually impossible for any allegations of ill-treatment to be communicated by the monitoring body to the sending state and detaining state ‘anonymously’ – that is, without indicating the source, thus putting the persons at risk of reprisals for having informed the monitoring body of the ill-treatment. Finally, if assurances are violated it is not clear what, if any, remedy is available to the individual concerned. This problem is compounded by the frequent successful invocation of state secrecy where victims of ill-treatment in such circumstances have sought a remedy before the courts of the receiving state.

From a legal point of view, some of the criticisms levied at the assurances are misplaced. For example, it is sometimes stated that they are not binding. This cannot be asserted in a generalized manner. Whether or not they are binding depends on the intention of the parties. Often the undertakings are given in what is clearly intended to be a binding agreement.¹²⁴ Instead, the problem relates to whether they are reliable – that is, whether they can remove the risk that appears to exist and gives rise to the potential *refoulement*.

It is uncontroversial that the receipt of such undertakings does not affect states’ obligations under the principle of *non-refoulement*. In particular, it does not affect a person’s right to challenge the decision to transfer him or her and the state’s duty to ensure that the well-foundedness of the concerns expressed is reviewed by an independent body. The issue which, until recently remained unclear, is the weight, if any, to be given to such assurances in removing the risk underlying the claim of *refoulement* by the review body. This question has received considerable attention from human rights supervisory bodies in recent years. Although, initially there was a divergence of views, there now appears to be an emerging consensus as to the position to be adopted.¹²⁵ The determining factor in deciding how much

intrusive as to violate other fundamental rights and was subject to periodic review. Report of the Working Group on Arbitrary Deprivation of Liberty, 9 January 2007, paras. 53–58.

124 Questions of the enforceability of the agreements at the national level may arise, particularly within federal states, as was the case, for example, in the United States in the proceedings that gave rise to the *Avena* case before the International Court of Justice. ICJ, *Case concerning Avena and other Mexican Nationals (Mexico v. The United States of America)*, 31 March 2004.

125 With regard to *non-refoulement* under refugee law, the position is clear-cut: undertakings are not to be given any weight when a refugee is being *refouled*, directly or indirectly, to his/her country of origin or former habitual residence. They also cannot be used to deny asylum-seekers access to refugee status

weight is to be given to the assurances is whether there is a systematic practice of torture in the receiving state.

The question of assurances has come before the European Court of Human Rights on numerous occasions. The Court has never condemned the practice outright, nor has it adopted a general position.¹²⁶ Instead, it has addressed the reliability of the assurances on a case-by-case basis, basing its conclusion on the general situation in the receiving state and the particular circumstances of the applicant.¹²⁷

To date, the Committee against Torture has also not adopted a general position on the compatibility and effect of diplomatic assurances on states' obligations under the Convention against Torture. In its jurisprudence, the fact that diplomatic assurances have been received is but one factor among many taken into account by the Committee in evaluating the existence of a risk of torture.¹²⁸

More recently, as states made increased resort to assurances, the Committee against Torture began scrutinizing them more closely.¹²⁹ For example,

determination proceedings. *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, August 2006.

126 The question of the effect of assurances came squarely before the Court in the *Mamatkulov* case. However, the Court did not expressly rule on the compatibility of the assurances with the principle of *non-refoulement*. Instead, it found that on the basis of the facts before it, it was unable to conclude that substantial grounds existed at the time of the transfer for believing that the applicants faced a real risk of torture or ill-treatment. ECtHR, *Mamatkulov and Askarov v. Turkey*, Applications Nos. 46827/99 and 46951/99, Judgment of 4 February 2005.

127 For example, in the abovementioned *Chahal* case, in view of the situation prevailing in India at the time and, in particular, of the fact that ill-treatment by certain members of the security forces was a 'recalcitrant and enduring problem', as well of the applicant's background, the Court was not persuaded that the assurances given by the receiving state that the applicant would not be ill-treated were sufficient to remove the risk. *Chahal v. The United Kingdom*, above note 28, para. 105. See also *Saadi v. Italy*, above note 13, para. 148. The Court has, in fact, itself relied upon assurances to lift its request to a sending state to refrain from effecting a transfer pending its review of an application. In the *Shamayev* case having been seized of the case of the imminent extradition from Georgia to Russia of a number of Chechens on terrorism charges, the Court had requested Georgia not to effect the transfer pending its review of the case. Upon receiving assurances from Russia that the death penalty would not be imposed; that the Chechens' health and safety would be protected; that they would be guaranteed unhindered access to medical care and legal representation; that they would have unhindered access to the European Court of Human Rights, and free correspondence with it; that the Court would have unhindered access and possibility of communication with them, including the possibility of visiting them, the Court had lifted the request, thus *itself* relying on the undertakings. *Shamayev and 12 others v. Georgia and Russia*, above note 113.

128 See, e.g., Committee against Torture, *Hanan Ahmed Fouad Abd El Khalek Attia v. Sweden*, Communication No. 199/2002, Views of the Committee against Torture of 17 November 2003, UN Doc. CAT/C/31/D/199/2002, para. 12.2. In the case of *Agiza v. Sweden*, which came before the Committee after the applicant had been transferred to Egypt and ill-treated, the Committee merely noted that the procurement of diplomatic assurances, which had no effective mechanism for enforcement, had not sufficed as a matter of practice to protect the applicant from the manifest risk of torture. It did not address the question of the weight, if any, that Sweden should have given to the assurances in determining whether to transfer the applicant. *Agiza v. Sweden*, above note 96, para. 13.4.

129 For example, in its review of the United Kingdom's fourth periodic report in 2004, the Committee expressed concern at 'the State party's reported use of diplomatic assurances in the "refoulement" context in circumstances where its minimum standards for such assurances, including effective post-return monitoring arrangements and appropriate due process guarantees followed, are not wholly clear and thus cannot be assessed for compatibility with article 3 of the Convention'. Committee against

it addressed the issue of diplomatic assurances in 2006, in its Conclusions and Recommendations on the United States' second periodic report. It expressed concern at the use of assurances, the secrecy of such procedures, and the absence of judicial scrutiny and of monitoring mechanisms to assess whether the assurances had been honoured. In view of this, it recommended that

When determining the applicability of its *non-refoulement* obligations under article 3 of the Convention, the State party should only rely on 'diplomatic assurances' in regard to States which do not systematically violate the Convention's provisions, and after a thorough examination of the merits of each individual case. The State party should establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements.¹³⁰

The Human Rights Committee also considered diplomatic assurances in its review of the United States' second and third periodic reports in 2006. It recommended that

The State party should exercise the utmost care in the use of diplomatic assurances, and adopt clear and transparent procedures with adequate judicial mechanisms for review before individuals are deported, as well as effective mechanisms to monitor scrupulously and rigorously the fate of the affected individuals. The State party should further recognize that the more systematic the practice of torture or cruel, inhuman or degrading treatment or punishment, the less likely it will be that a real risk of such treatment can be avoided by such assurances, however stringent any agreed follow-up procedures may be.¹³¹

Successive UN Special Rapporteurs on Torture have adopted a progressively stricter line. In his interim report of 2002 the then Rapporteur, Theo van Boven, used language implying that unequivocal guarantees not to ill-treat a person *could* be relied upon, provided a system had been established to monitor the treatment of the persons transferred.¹³²

He returned to the question of assurances in his interim report of 2004. In reaction to the fact that in the two years since his previous report he had come across a number of instances where there were strong indications that assurances

Torture, Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories, above note 9, para. 4(d). For the United Kingdom's response to these recommendations see Comments by the Government of the United Kingdom of Great Britain and Northern Ireland to the conclusions and recommendations of the Committee against Torture, above note 31, paras. 49–69.

130 Committee against Torture, Conclusions and Recommendations: United States of America, above note 9, para. 21.

131 Human Rights Committee, Concluding Observations: United States of America, above note 8, para. 16.

132 Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, 2 July 2002, UN Doc. A/57/173, para. 35.

had not been respected, he set out his position in greater detail. He was of the view that

In circumstances where this definition of 'systematic practice of torture' [as interpreted by the Committee against Torture] applies ... the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to.¹³³

With regard to other situations, having reiterated his call of two years earlier that the assurances contain unequivocal guarantees and a monitoring mechanism, he suggested a number of requirements that the diplomatic assurances should fulfil to make them 'solid, meaningful and verifiable'.¹³⁴ In particular, he noted that

assurances should as a minimum include provisions with respect to prompt access to a lawyer ... recording (preferably video-recording) of all interrogation sessions and recording the identity of all persons present ... prompt and independent medical examination ... and forbidding incommunicado detention or detention at undisclosed places ...

Finally, a system of effective monitoring is to be put in place so as to ensure that assurances are trustworthy and reliable. Such monitoring should be prompt, regular and include private interviews. Independent persons or organizations should be entrusted with this task and they should report regularly to the responsible authorities of the sending and the receiving States.¹³⁵

The most recent Special Rapporteur, Manfred Nowak, who took up the position in 2004, has adopted a stricter line on diplomatic assurances.¹³⁶ In August 2005 he issued a critical statement in response to the announcement by the United Kingdom that it intended to deport persons to their states of nationality on the basis of bilateral agreements in which assurances had been obtained that the persons concerned would not be subjected to torture or ill-treatment. The Special Rapporteur expressed concern at this new practice, which, in his view, was an attempt to circumvent the principle of *non-refoulement*. In his view, the fact that assurances were obtained was evidence of the fact that the sending state perceived a serious risk of the deportee being subjected to torture or ill-treatment upon arrival in the receiving country. Diplomatic assurances were not an appropriate tool to

133 Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, 1 September 2004, UN Doc. A/59/324, para. 37.

134 *Ibid.*, para. 40.

135 *Ibid.*, paras. 41–42.

136 In his statement to the Commission on Human Rights in 2005, he reiterated the view, already expressed by his predecessor, that diplomatic assurances are not adequate means to satisfy the principle of *non-refoulement* in relation to transfers to countries where torture is *systematically* practiced. UN Press Release, Statement of the Special Rapporteur on Torture, Manfred Nowak to the 61st Session of the UN Commission on Human Rights, 4 April 2005, available at www.ohchr.org/english/press/newsFrameset-2.htm (last visited 15 October 2008).

eradicate this risk. His statement called on states to refrain from seeking diplomatic assurances or concluding memoranda of understanding to circumvent their international obligation not to deport anybody if there is a serious risk of torture or ill-treatment.¹³⁷

Manfred Nowak also devoted a significant part of his report to the 2005 UN General Assembly to the issue of *non-refoulement* and diplomatic assurances. After reviewing the practice of human rights treaty monitoring bodies, he expressed the view that post-return monitoring mechanisms did little to mitigate the risk of torture and had proved ineffective in both safeguarding against torture and as a mechanism of accountability.¹³⁸ He concluded his report with the following strong criticism of diplomatic assurances:

diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are usually sought from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated. The Special Rapporteur is therefore of the opinion that States cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment.¹³⁹

Successive General Assembly resolutions on torture have referred to diplomatic assurances in a general manner, stating that where resorted to, they do not release states from their obligations under international human rights law, humanitarian law and refugee law.¹⁴⁰

137 Ibid.

138 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. 60/316, 30 August 2005, para. 46.

139 Ibid., para. 51. This statement could be interpreted as meaning that assurances must never be given any weight, including in relation to transfers to states where there is not a systematic practice of torture. However, at a meeting of Council of Europe Specialists on Human Rights convened to discuss diplomatic assurances, in response to a specific question as to whether diplomatic assurances in respect of countries with no substantial risk of torture might be permissible, Mr Nowak appeared to adopt a softer stance, replying that such additional guarantees, under the condition that they did not aim to circumvent international obligations of *non-refoulement*, would not be harmful. Council of Europe, Steering Committee for Human Rights (CDDH), Group of Specialists in Human Rights and the Fight against Terrorism (DH-S-TER), Meeting Report, 1st Meeting, above note 103, para. 3.

140 See, e.g., General Assembly, Resolution on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/RES/60/148, 16 December 2005, para. 8; General Assembly, Resolution on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/RES/61/153, 19 December 2006, para. 9; and General Assembly, Resolution on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/RES/62/148, 18 December 2005, para. 12. The Human Rights Council has been equally general. See, e.g., Human Rights Council Resolution 8/8, Torture and other cruel, inhuman or degrading treatment or punishment, 18 June 2008, para. 6(d).

The Sub-Commission on Human Rights, on the other hand, addressed the question of diplomatic assurances in considerable detail in its resolution 2005/12 on transfers. It confirmed that

4. ... where torture or cruel, inhuman or degrading treatment is widespread or systematic in a particular State, especially where such practice has been determined to exist by a human rights treaty body or a special procedure of the Commission on Human Rights, there is presumption that any person subject to transfer would face a real risk of being subjected to such treatment and recommends that, in such circumstances, the presumption shall not be displaced by any assurance, undertaking or other commitment made by the authorities of the State to which the individual is to be transferred;

...

6. *Strongly recommends* that, in situations where there is a real risk of torture or cruel, inhuman or degrading treatment in a particular case, no transfer shall be carried out unless:

- (a) The State authorities effecting the transfer seek and receive credible and effective assurances, undertakings or other binding commitments from the State to which the person is to be transferred that he or she will not be subjected to torture or cruel, inhuman or degrading treatment;
- (b) Provision is made, in writing, for the authorities of the transferring State to be able to make regular visits to the person transferred in his/her normal place of detention, with the possibility of medical examination, and for the visits to include interviews in private during which the transferring authorities shall ascertain how the person who has been transferred is being treated;
- (c) The authorities of the transferring State undertake, in writing, to make the regular visits referred to.¹⁴¹

At the regional level, in addition to the jurisprudence of the European Court of Human Rights outlined above, diplomatic assurances have also recently been addressed by the Committee for the Prevention of Torture – the monitoring body of the European Convention for the Prevention of Torture;¹⁴² the Council of Europe's Group of Specialists on Human Rights and the Fight against

141 Sub-Commission on Human Rights resolution 2005/12, above note 34, paras. 4–6.

142 The Committee did not reach a conclusion on the legitimacy of diplomatic assurances, pointing out that the risk faced and the reliability of the assurances received would have to be assessed on the basis of the specific circumstances of every case. With regard to monitoring mechanisms, it stated that it still had to see convincing proposals for an effective and workable mechanism. In its view, such a mechanism could have to incorporate some key guarantees, including the right of independent and suitably qualified persons to visit the individual concerned at any time, without prior notice, and to interview him/her in private in a place of their choosing. The mechanism would also have to offer means of ensuring that immediate remedial action is taken, in the event of it coming to light that assurances given were not being respected. 15th General Report on the CPT's Activities, covering the period 1 August 2004 to 31 July 2005, Strasbourg, 22 September 2005, paras. 38–42.

Terrorism;¹⁴³ the Council of Europe's Venice Commission in its report on secret detention facilities and inter-state transport of prisoners;¹⁴⁴ and the Inter-American Commission on Human Rights.¹⁴⁵

In view of the above, the human rights supervisory bodies are unanimous in their view that diplomatic assurances cannot be used to circumvent *non-refoulement* obligations, and that, most notably, they do not affect individuals' right to the review of the well-foundedness of their fears by an independent review body. Instead, they are a factor among many to be considered by such bodies. There also appears to be consensus that the weight to be given to them varies according to the situation in the receiving state. In relation to transfers to states where there is a 'systematic practice of torture', assurances do not remove the risk of ill-treatment and must not be given any weight. With regard to transfers to other

143 Council of Europe, Steering Committee for Human Rights (CDDH), Group of Specialists in Human Rights and the Fight against Terrorism (DH-S-TER), Meeting Report, 1st Meeting, above note 101; and, Meeting Report, 2nd Meeting, above note 101. The Group met twice to discuss diplomatic assurances in the context of the fight against terrorism. Its discussions focused on expulsions where there was a risk of torture, cruel, inhuman or degrading treatment or punishment. It was also requested to consider the appropriateness of developing a Council of Europe legal instrument on diplomatic assurances. At the end of the second meeting, in March 2006, the Group emphasized a number of points, including that:

- iii. States must not expel an individual where there are substantial grounds to believe that he or she will be subject to a real risk of treatment contrary to Article 3 [of the European Convention on Human Rights];
- iv. the assessment [of the existence of the risk] must be carried out on a case-by-case basis. There should be no list of 'safe' or 'unsafe' States;
- v. the existence of diplomatic assurances in a particular case does not relieve the sending States of their obligation not to expel if there are substantial grounds to believe that there is a real risk of treatment contrary to Article 3 [of the European Convention on Human Rights]. In other words, diplomatic assurances are not an alternative to a full risk assessment.

However, the Group was unable to reach agreement on the potential role and impact of assurances to mitigate or eliminate the risk of torture or other forms of ill-treatment. In view of the significant divergence of views, the Group decided that it was inappropriate for the Council of Europe to draft a legal instrument on the topic. Meeting Report, 2nd Meeting, Strasbourg, 29–31 March 2006, DH-S-TER(2006)005, paras. 9–17. For a summary of the arguments made by the Group by the UN Special Rapporteur on the Question of Torture, see the Report of the Special Rapporteur on the Question of Torture, UN Doc. E/CN.4/2006/6, 23 December 2005 at paras. 31–32.

144 On the issue of diplomatic assurances the Commission concluded that '[d]iplomatic assurances must be legally binding on the issuing State and must be unequivocal in terms; when there is substantial evidence that a country practices or permits torture in respect of certain categories of prisoners, Council of Europe member States must refuse the assurances in cases of requests for extradition of prisoners belonging to these categories'. Opinion on the International Legal Obligations of Council of Europe Member States in respect of Secret Detention Facilities and Inter-State Transport of Prisoners, adopted by the Venice Commission at its 66th Plenary Session, Venice, 17–18 March 2006, Opinion No.363/2005, CL-AD(2006)009, para. 159, Conclusion g. See also the discussion at paras. 141–142.

145 The Commission addressed the issue in relation to the detainees held at Guantánamo in a decision on precautionary measures, where it stated that '[w]here there are substantial grounds for believing that [a detainee] would be in danger of being subjected to torture or other mistreatment, the State should ensure that the detainee is not transferred or removed and that diplomatic assurances are not used to circumvent the State's non-refoulement obligation'. Inter-American Commission on Human Rights' decision on precautionary measures for the detainees at Guantánamo Bay, above note 97, p. 10. The point was reiterated in a resolution on the same topic. Inter-American Commission on Human Rights, Resolution No. 1/06 on Guantánamo Bay Precautionary Measures of 28 July 2006, para. 4.

states, some weight can be given to assurances provided they include some form of post-transfer monitoring mechanism. Although the Special Rapporteur on Torture has spoken out against resort to diplomatic assurances in *any* circumstances, rejecting the value of post-transfer monitoring mechanisms, at present other supervisory bodies have not adopted a similarly categorical position.

REPORTS AND DOCUMENTS

ICRC Protection policy

Institutional Policy

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1. Introduction

The International Committee of the Red Cross (ICRC) has always undertaken activities that aim to protect lives and human well-being and secure respect for the individual. Its mission is to:

“... protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles ...”

The ICRC's multidisciplinary operational response capacity, in which protection and assistance are combined, and its special relationship with international humanitarian law (IHL) make the institution unlike any other. Protection has always occupied a unique place within the ICRC. It is at the core of the organization's identity and is the motive force of its activities.

This policy document begins by defining key notions and describing the framework for action. It then outlines the principles of the ICRC's protection framework, as well as the operational guidelines based on that framework. The document concludes by describing different types of ICRC protection activity and outlining specific considerations related to the various categories of beneficiary.

2. Definitions and framework for action

2.1. Definitions

The four Geneva Conventions of 1949 refer to “protection” several times without actually defining the term. The Statutes of the International Red Cross and Red

Crescent Movement (Movement) introduced the notions of “protection” and “assistance” in 1952. This two-pronged terminology aimed to give specific meaning to what was once termed “humanitarian activities.” “Protection” and “assistance” are intrinsically linked and are inseparable elements of the ICRC’s mandate.

The term “protection” has several literal meanings.¹ Broadly speaking, four spheres of action are involved in protection: political, military or security, legal (including judicial), and humanitarian. Every actor with a role in protecting persons, or an obligation to do so, belongs to one of them.

2.1.1. The ICRC’s definition of protection

Protection aims to ensure that authorities and other actors² respect their obligations and the rights of individuals in order to preserve the safety, physical integrity and dignity of those affected by armed conflict and other situations of violence.

Protection includes efforts to prevent or put a stop to actual or potential violations of IHL and other relevant bodies of law or norms.

Protection relates firstly to the causes of, or the circumstances that lead to, violations – mainly by addressing those responsible for the violations and those who may have influence over the latter – and secondly to their consequences.

This definition of protection also includes activities that seek to make individuals more secure and to limit the threats they face, by reducing their vulnerability and/or their exposure to risks, particularly those arising from armed hostilities or acts of violence.

Protection remains a constant concern for the ICRC. Promoting and strengthening IHL and other relevant norms and responding to humanitarian needs are, for the ICRC, always linked endeavours. The ICRC combines activities related to the causes of human suffering – especially those that seek to address the causes of violations – with activities to alleviate human suffering, particularly those in response to the consequences of, and the needs created by, such violations.

1 The root of the Latin expression *pro tegere*, whose literal meaning is “to cover in front” suggests either a curtain or a shelter against the sun or storms, or a screen or shield to protect a person or an object from danger. Synonyms or explanatory terms – safeguard, guaranty, aid, support, envelope, cover, screen, shield, rampart or mask – all connote some sort of security.

2 In this document, the expression “authorities and other actors” covers all authorities and bearers of arms – State entities, armed forces, international peace-keepers, armed groups, clans and other non-State actors – who are able to launch hostile action against persons or a population and who are responsible for protecting those who fall under their control.

“Protection” as defined above thus refers to those types of activity that are unambiguously definable as “protection”³ and to be distinguished from:

- other activities carried out within a protection framework or those that aim to have an indirect protection impact, particularly assistance activities that seek to alleviate or to overcome the consequences of violations;
- the permanent concern of the ICRC to ensure that its action does not have an adverse impact on, or create new risks for, individuals or populations (the precept to “do no harm”).

2.1.2. *Violations*

Generally, legal rules exist to protect individuals and to limit the use of violence. Figuratively speaking, these rules may be said to be a type of barrier between individuals and the dangers that threaten them: authorities and other actors are responsible for the maintenance of this barrier.

Based on the definition of protection given above, violations play a central role in protection work.

A violation may be defined as disregard for a formal obligation. The ICRC extends the definition to include disregard for widely accepted standards. The concept of “violation” must therefore be interpreted broadly. Besides the failure to comply with binding norms (hard law), it must also include failures to observe non-binding norms (soft law), relevant traditions and customs, the spirit of the law, and humanitarian principles.

This concept of “violation” is quite similar to that of the more widely used “abuse.”

A violation may be intentional, linked to a deliberately repressive practice or strategy. Or it may be unintentional, the result of a technical, material, financial or structural incapacity to provide certain basic services. This definition of “violation” therefore includes not only acts of violence and arbitrary abuse of power or discriminatory practices, but also the failure to fulfil the obligation to assist people in need. Violations can also come in less immediately obvious guises, such as the economic or social ostracism of part of the population.

Violations almost always result in human suffering and humanitarian consequences for the individual or group concerned. It is these consequences that trigger the ICRC’s response.

Authorities bear the primary responsibility for ensuring the application of legal rules and of other widely accepted norms regulating behaviour. They and other actors must acknowledge and respect the rights of individuals and take measures to fulfil their obligations in this regard. Authorities and other actors are,

3 In this document, the terms “protection,” “protection response,” “protection work,” “protection effort,” “protection approach” or “protection action,” are used as synonyms. They all stand for the entire set of specific protection activities that form the ICRC’s protection framework.

in fact, the primary guarantors of respect for the lives and the dignity of individuals, and also directly responsible for ensuring their security.

2.1.3. Risks, vulnerability, and the need for protection

The concept of risk, with regard to violations, concerns the probability of their commission. More generally, “risk” is created by the cumulative impact of:

- the probability of dangers or threats resulting from a deliberate practice of authorities and other actors or from unintended consequences (structural breakdown or incapacity, adverse consequences of even lawful actions during the conduct of hostilities or during law enforcement operations);
- the vulnerability of persons.

In any given context, dangers or threats are assessed on the basis of precedents and probabilities. The interpretation of events – especially the analysis of the means employed by authorities and other actors, or of the goals they pursue – makes possible the identification of population groups potentially “at risk.”

Vulnerability is an inherent element of risk. It reflects the fragility of an individual or group confronted by hazards or aggression. It denotes a deficiency or shortage, although the latter might not be tangible. Put more precisely, vulnerability reflects the incapacity of persons or population groups to offer resistance to arbitrary acts or violence, as well as their lack of access to services. Vulnerability is determined by specific factors such as legal or social situation, or socio-political, economical and personal characteristics (gender and age, for instance).

Protection needs arise when victims, or potential victims, of violations are unable to defend their basic interests and no longer benefit from the basic respect they are entitled to from authorities and other actors who have control over them or on whom they depend.

Protection needs are determined by analysing:

- actual or probable violations – their nature, gravity, scope, frequency and duration;
- actual or potential victims of violations, and the specific vulnerabilities that result from their being the object of violations;
- the urgency to respond, based on the response of authorities and other actors and on the ability of existing institutions and regulatory mechanisms to address key protection issues.

This process for defining protection needs enables the ICRC to:

- determine the severity of a particular crisis: emerging crisis/pre-crisis phase, acute crisis, chronic crisis or post-crisis period;⁴

4 Four cases can be defined: limited basic needs still being met but which will probably not be met at some time in the future (emerging crises and pre-crisis situations); most basic needs not being met (acute crisis); all or part of basic needs not being met properly, and the existence of a risk of the re-emergence of

- make a decision on the extent of its involvement;
- establish priorities.

2.2. Framework for protection

2.2.1. Normative framework for intervention

ICRC responsibilities vary according to the context.

The ICRC directly responds to protection needs in four types of situation as defined by IHL, the Statutes of the Movement, and its own institutional policies:

- international armed conflicts;
- non-international armed conflicts;
- internal disturbances;
- other situations of internal violence.

In addition, some contexts are of a mixed nature and combine some of the characteristics of the situations⁵ mentioned above. ICRC protection work might also be required after the end of one of these situations (to handle direct consequences or during a transition period).

The ICRC's mandate (defined below) unambiguously imposes a responsibility⁶ on the organization to act in international armed conflicts; this corresponds with the obligation of States to allow the ICRC to undertake certain activities in these contexts. This responsibility is less explicit, and consequently decreases, as one moves down the list of situations given above. In internal disturbances and other situations of internal violence, the ICRC's main responsibility is to examine each case and to offer its services where appropriate. The less stringent the ICRC's mandate, the more its decision to act is shaped exclusively by humanitarian considerations. In these situations the decision to act is based on the nature and the extent of identified needs; the ICRC also carefully considers the extent to which its action, experience and expertise would provide an added value.

Action based on a precise framework of reference

The framework of reference consists of four elements:

- The legal rules and other norms applicable, which are determined by the legal classification of the situation (the main question is whether IHL applies) and other specific aspects of the context, such as whether the country in question has ratified IHL treaties and other instruments of international law.

an acute crisis (chronic crisis); basic needs again being met by existing mechanisms and structures that, however, remain fragile, or basic needs again only being partially met (post-crisis situation).

5 Mainly internationalized internal armed conflicts and peace enforcement operations.

6 This responsibility is of an ethical rather than legal nature. There are a number of competencies that are conferred upon the ICRC, which it is, however, not obliged to exercise; but it has to take into account the short and long-term interests of the victims, humanitarian priorities, and the need to balance different tasks and mandates.

- The ICRC's mandate. The ICRC has a clearly defined and internationally recognized role to promote implementation of and respect for IHL as well as the development and dissemination of this body of law. The role of the ICRC in relation to other bodies of law and norms depends on the circumstances and the context, and is governed by its institutional policies.

In international armed conflicts, the ICRC also has tasks and operational prerogatives in the field of protection that are set out in the four Geneva Conventions and their Additional Protocols and confirmed by the Statutes of the Movement and by the International Conference of the Red Cross and Red Crescent (International Conference).

With regard to non-international armed conflicts,⁷ internal disturbances or other situations of internal violence,⁸ the Statutes of the Movement and various resolutions of the International Conference – which constitute a basis for ICRC action – also mention protection activities in a variety of ways.

The Central Tracing Agency (CTA) is a special case. It is an institution that was originally established for situations of international armed conflict in accordance with the provisions of the four Geneva Conventions and Additional Protocol I of 1977, and with the Statutes of the Movement. Its effectiveness and later resolutions of the International Conference have widened the range of its activities to non-international armed conflicts and other situations of violence; more recently, the CTA has begun to assist in restoring family links (RFL) during natural disasters and in other situations in which National Red Cross and Red Crescent Societies (National Societies) are involved.

The CTA carries out four types of activity:

- activities to benefit persons affected and services that are provided directly to them: RFL, efforts to clarify the fate of the missing, the transfer of people, and the provision of travel and other documents;
- activities and services for the benefit of National Societies, particularly coordination and technical assistance for their tracing services;
- activities for States (e.g. assisting in the establishment of a national information bureaus as provided for by IHL);
- management of data on persons who require individual follow-up.

On the basis of the 1997 Seville Agreement and its 2005 Supplementary Measures adopted by the Council of Delegates of the Movement, the ICRC has been given the lead role for activities related to the work of the CTA. Broadly speaking, this covers all activities associated with RFL.⁹

7 The four Geneva Conventions give the ICRC the right to offer its services.

8 In these cases the ICRC may offer its services based on its right of initiative, which is authorized by the Statutes of the Movement.

9 This was elaborated and confirmed by the *Strategy of the Movement for restoring family links*, which was adopted by the Council of Delegates of the Movement in 2007 (Resolution 4). The Strategy is referred to in Resolution 1 of the 30th International Conference, also held in 2007.

Within the Movement, the ICRC's leading role in protection activities is generally recognized: it develops guidelines, provides technical advice and, where it is operational, coordinates activities.

- The Fundamental Principles of the Movement: humanity, neutrality, independence, impartiality, universality, voluntary service and unity.
- The ICRC's institutional policies and other internal reference documents.

2.2.2. ICRC action focuses on the individual

The individual remains the primary concern of the ICRC. The basis of all protection activities is the identification of individuals or groups who are affected or at risk: those who are victims of violations or who face threats or risks that jeopardize their rights and well-being.

The ICRC's protection work requires professional integrity of its personnel and respect for ethical standards and values in the following areas:

- the interests of individuals, especially with respect to the collection and use of information (particularly in the transmission of personal data);
- the express wishes of affected persons;
- respect for the individual's dignity.

However, the ICRC's protection activities are aimed mainly at authorities and other actors and/or must be carried out in relation to them. The perpetrators or those responsible for violations, as well as those who have influence over these actors, must, of course, be identified.

2.2.3. ICRC action is an integral element in creating an environment conducive to the provision of protection

Ensuring respect for human dignity and for the rights of individuals depends on a number of factors. The ICRC's protection work cannot be conceived and carried out in isolation. It contributes to the creation of a favourable environment, along with other actors. The parties that bear different responsibilities and carry out a variety of activities include the following:

- authorities and other actors concerned: they have the primary responsibility and their omissions/violations trigger the need for separate but complementary action by other bodies;
- States other than that to which the authorities concerned belong: they are responsible for ensuring respect for IHL¹⁰ and for various other duties based on the United Nations Charter;

10 Article 1 common to the four Geneva Conventions.

- external regulatory mechanisms, in particular other members of the international community, the international media, international NGOs, UN agencies and bodies of international justice; and internal regulatory mechanisms, (e.g. associations for the defence of certain groups or communities);
- persons who are, or who may in the future be, affected: circumstances permitting, they can take measures of their own to avoid risks and to protect themselves, their families and their communities.

The ICRC implements protection strategies that are complementary to those of other actors; it also tries to avoid confusion.

3. Guiding principles

Guiding principle 1: Neutral and independent approach

A neutral and independent approach is essential for the ICRC to gain the acceptance of all stakeholders. The ICRC adopts this approach in all phases of its work, and this gives the organization the credibility it needs to conduct its operations.

Its neutrality and independence enable the ICRC to avoid becoming instrumentalized by some and rejected by others. Such an approach also guarantees an impartial analysis of the problems identified, which leads to impartial action, i.e. the ICRC's activities will be implemented without discrimination and based solely on needs. By being neutral and independent, the ICRC is able to play the role of neutral intermediary and to offer its mediation and good offices whenever required.

Guiding principle 2: Dialogue and confidentiality

Dialogue is an essential element of the ICRC's protection approach: with affected persons, with authorities, with those suspected of having committed violations and those who control these persons, as well as with all persons or entities that can influence the fate of victims of acts of violence or of persons at risk. Such dialogue must be based on trust, which is strengthened by the fact that it takes place in confidence.

Confidential dialogue is the ICRC's preferred method of working and a strategic choice, but it is not an end in itself. Usually, dialogue that takes place in confidence facilitates access to victims; it also enables the ICRC to understand and appreciate their needs. The ICRC's practice of confidentiality is reinforced by the organization's immunity from the obligation to testify in a court of law.

However, the confidentiality of the ICRC's dialogue with authorities and other actors is not without limits. It is proportional to the willingness of the authorities to take into account the ICRC's recommendations. The justification for confidentiality thus depends on the quality of the ICRC's dialogue with authorities and other actors and on the humanitarian impact of its bilateral confidential

representations. The ICRC reserves the right, should this dialogue not have the desired impact, to resort to other action, including public denunciation.

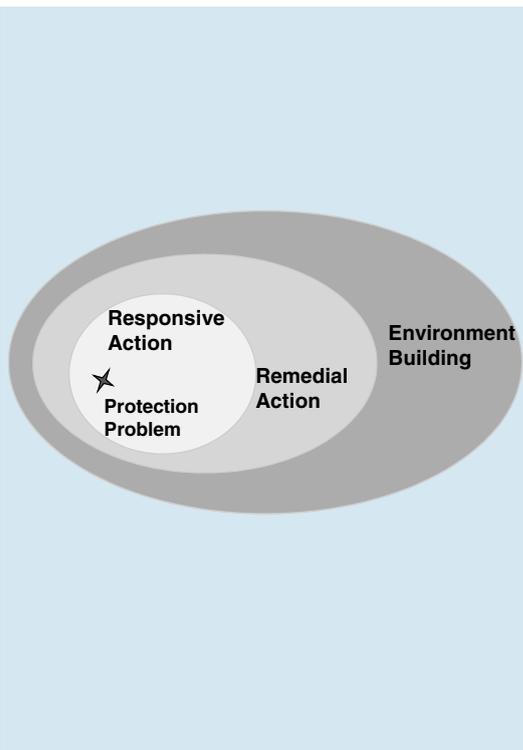
Guiding principle 3: Holistic and multidisciplinary character of ICRC action

The ICRC's protection strategies are based on comprehensive analyses of protection problems and on their causes and consequences. This does not necessarily mean that the ICRC will respond to all protection needs in a given situation; however, it ensures the effective setting of priorities. The ICRC sets its priorities on the basis of the following criteria:

- the nature and gravity of the violations or risks;
- the effects of the violations or risks on victims;
- the impact on victims that the ICRC can reasonably expect its action to have;
- the ICRC's capacities and the means at its disposal.

The ICRC's response is multiform: a number of coordinated activities are implemented at three levels of intervention that are interdependent and mutually reinforcing:

- responsive action: any activity undertaken to deal with an emerging or established protection problem (mainly violations), and that is aimed at preventing its recurrence, ending it, and/or alleviating its immediate effects;
- remedial action: any activity undertaken to restore people's dignity and to ensure adequate living conditions after they have suffered abuse; and
- environment-building action: all efforts to establish or foster a social, cultural, institutional and legal environment in which the rights of individuals might be respected.



Guiding principle 4: Search for results and impact

Protection activities aim to achieve results, to have an impact, and to put in place effective and lasting solutions to the problems they address. They are carried out in conformity with the highest ethical and professional standards. All protection activities are subject to internal monitoring and to evaluations of their results.

They are shaped by choices that are derived from a particular strategy, which is developed by selecting and integrating various modes of action. The ICRC's *modes of action* are: raising awareness of responsibility (persuasion, mobilization, and denunciation), support, and substitution (direct provision of services). The ICRC does not limit itself to any one of them; on the contrary, it combines them, striking a balance between them.

1. The aim of raising awareness of responsibility is to remind people of their obligations and, where necessary, persuade them to change their behaviour. Three methods are used for this purpose
 - a. *Persuasion* aims to convince the authorities and other actors, through bilateral confidential dialogue, to do something (protect people at risk, for instance), which falls within their area of responsibility or competence.
 - b. *Mobilization* entails the seeking of outside interest and action, from influential third parties (e.g. States, regional organizations, private companies, members of civil society or eminent persons who have a good relationship with the authorities in question). The ICRC chooses such third parties with care, contacting only those who it thinks will be able to respect the confidential nature of the information that they receive.
 - c. *Denunciation* is the public exposure of specific imminent or established violations of IHL or other norms protecting individuals. When it is faced with an authority that has chosen to neglect or deliberately violate its obligations, and when other methods have failed, the ICRC might decide to break with its practice of confidentiality.¹¹

¹¹ The conditions for doing this are defined in the ICRC's institutional policy (see "Action by the International Committee of the Red Cross in the event of violations of international humanitarian law and other fundamental rules protecting persons in situations of violence," *International Review of the Red Cross*, Vol. 858, June 2005, pp. 393–400): "(1) the violations are major and repeated or likely to be repeated; (2) delegates have witnessed the violations with their own eyes, or the existence and extent of the violations have been established on the basis of reliable and verifiable sources; (3) bilateral confidential representations and, when attempted, humanitarian mobilization efforts have failed to put an end to the violations; (4) such publicity is in the interest of the persons or populations affected or threatened."

2. *Support* aims to reinforce the capacity of the authorities and existing structures so that they are able to assume their responsibilities and fulfil their functions.
3. *Substitution* (or direct action) is the direct provision by the ICRC of services that the authorities are unable to provide (owing to lack of means, or unwillingness, or when no such authorities exist). If the situation is critical, the ICRC acts immediately and speaks to the authorities to persuade them to take appropriate measures or to help them examine possible solutions.

4. Operational directives

The following highlights key elements that guide the ICRC's relationships with affected persons:

4.1. Directives related to persons affected by violations

4.1.1. *Proximity*

Proximity:

- increases empathy with the persons affected, and raises awareness of their best interests and their express wishes;
- makes it easier to reach a better understanding of the situation;
- facilitates contact with those who have committed violations and with those who control them, and makes it possible to maintain a dialogue with all persons concerned; and
- increases the credibility of the dialogue with authorities and other actors.

Except in special circumstances, the ICRC does not directly carry out protection activities in contexts where it has no access to affected persons and no first-hand knowledge of the situation.

4.1.2. *Individual follow-up*

The extent to which the ICRC attempts to follow up on vulnerable or “targeted” persons individually depends on the severity of the risks faced by these persons. In particular, the ICRC does follow up on protected persons individually in situations of international armed conflict, as required under IHL. It also informs their families of their fate.

Individual follow-up includes the registration and preservation of personal data. Registration – although not an end in itself – is the basis for conducting various activities adapted to the circumstances and problems at hand, and a necessary tool.

4.1.3. *Participatory approach and empowerment*

The ICRC takes into account the capacity of individuals and communities to protect themselves and is careful not to weaken any such mechanisms that exist. When possible, the ICRC conducts activities that empower persons and communities, and that strengthen and develop mechanisms, by:

- building the capacity of individuals and communities, and adding to their knowledge, to ensure respect for their rights and to avoid certain risks;
- providing them with the means to prevent and avoid risks.

4.2. Directives for implementing the ICRC's protection activities

The following outlines the main elements of the ICRC's protection response:

4.2.1. *Rapid response*

Following the onset of an armed conflict or other situation of violence, the ICRC responds to needs as rapidly as possible. To this end, the ICRC has developed a rapid response mechanism, and trained the necessary personnel, for carrying out various protection activities that can be undertaken at very short notice.

4.2.2. *Long-term commitment*

The ICRC remains engaged for as long as is required by the situation of those it seeks to protect. Its engagement is often long-term (e.g. chronic crises or certain activities related to missing persons). The ICRC is careful to draw up a graduated exit strategy beforehand, but it makes certain that its disengagement will have no adverse consequences for those whom it seeks to protect.¹²

The ICRC also tries to prevent its engagement from resulting in the abandonment of their responsibilities by authorities and other actors. It strives not to involuntarily obstruct the involvement of other humanitarian actors or the

12 The following developments might constitute a criterion for the ICRC's gradual disengagement from a particular context: a) the end of an armed conflict or other situation of violence; b) a substantial and lasting reduction in the number of people affected, in the gravity of the violations, in the risks and threats, and in the levels of insecurity and tension; c) the establishment or restoration of the rule of law, including the re-establishment of respect for the law; d) the coverage of essential protection needs by the authorities concerned and by official regulatory institutions and mechanisms; e) the durable and efficient intervention of other external actors; f) a marked decrease in the added value of the ICRC's presence; g) the legal, economic and social rehabilitation and integration of the victims; h) the strengthening of civil society, including the capacity of the pertinent National Society to reassume responsibility for certain activities; i) the lack of impact, confirmed over a meaningful period of time, of the entire ICRC protection operation.

development of internal regulatory mechanisms (e.g. the strengthening of civil society).

4.2.3. Operational innovation

The ICRC encourages operational innovation. When the effectiveness of its innovations has been confirmed, they are communicated to other ICRC operations, so that they may contribute to the development of institutional knowledge and expertise as well as to exchanges with other humanitarian actors.

4.3. Interaction with humanitarian actors

The following outlines the key elements and the scope of the ICRC's interaction with others and its commitment to operational complementarity:

4.3.1. General considerations

The ICRC pays close attention to the interpretation that may be given to its interaction with other humanitarian actors. It is careful to guarantee its neutrality, independence and other operating principles, as well as its operational capacity, in all circumstances. The proliferation of actors in the field of protection requires consultations and adjustments to the ICRC's operational strategies in order that its activities may have the strongest possible impact.

The ICRC's interaction with other humanitarian actors varies according to the context, the types of activity that are undertaken, the identity of the actor concerned and the constraints associated with confidentiality. Such interaction is likely to take one of the following forms:

- coordination (with others): interaction that permits autonomous but orchestrated action that avoids duplication of effort and the leaving of gaps in the humanitarian response;
- cooperation: complementary or joint activities, carried out within a mutually agreed upon framework, to reach pre-determined objectives; this includes cooperation based on an alliance or collaboration (independent action based on a joint strategy and on common goals);
- partnership: cooperation – based on the provision of resources – agreed to within a formal framework;
- leadership (applicable only to the Movement): exercising of two different forms of leadership within the Movement: a) the lead role of the ICRC, a *permanent* responsibility to inspire, motivate, guide, and advise other components of the Movement in a specific thematic area (e.g. RFL); b), the ICRC has – as the lead agency – a *temporary* responsibility to direct and coordinate other components of the Movement in certain situations requiring an international response.

4.3.2. Interaction within the Movement

The components of the Movement, primarily National Societies, are the ICRC's privileged partners.

The ICRC has three responsibilities in parallel:

- to undertake the humanitarian activities specified by its mandate;
- to coordinate both the international activities of other components of the Movement in situations of armed conflict or internal disturbance and RFL activities in all situations requiring an international response;
- to provide leadership in RFL and, more broadly, protection activities.

The division of tasks within the Movement must always be respected. The nature of the interaction within the Movement is determined by a number of factors: the situation (the ICRC has to first determine whether a particular context falls within its mandate), the activities to be undertaken (protection of the civilian population and of persons deprived of their liberty, or RFL), as well as the capacity of the National Society in question. The way in which a particular National Society tackles the challenges before it (e.g. how stakeholders perceive its neutrality and its autonomy from the authorities), and its ability to apply, at all times, the Fundamental Principles of the Movement, will also influence the ICRC's interaction with it.

In the area of RFL the ICRC has a number of specific roles and responsibilities: in particular, activating and coordinating the Movement's Family Links Network and providing technical assistance to the tracing services of National Societies.

4.3.3. Interaction with other actors

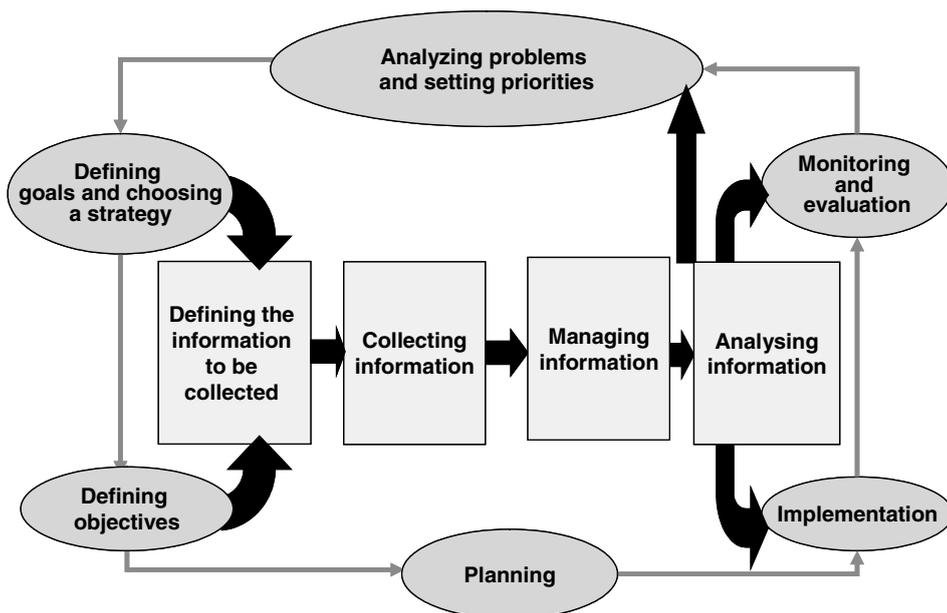
The ICRC enters into operational dialogue with organizations whose roles or mandates and objectives are complementary to its own, especially with regard to modes of action and activities undertaken. This enables gaps in the humanitarian effort to be filled more effectively, allows the exchange of expertise, and makes the best use of the capacity of each organization. The ICRC also maintains and promotes the highest professional and ethical standards, and encourages the proper use of applicable legal norms.

The ICRC may consider sharing tasks – by geographical region, type of activity or target population – with other humanitarian actors whose operational methods and policies are compatible with its own. Sharing of tasks must not, however, compromise the ICRC's operational capacity either in the context of direct concern or elsewhere. Partnerships may be forged under the same conditions.

4.4. Operational cycle

Protection activities are carried out in a sequential manner within a cycle. The various stages of this cycle must be reviewed periodically and adapted whenever

significant changes occur within the context in question. The initial in-depth analysis of the protection problems and the setting of priorities and goals precede the selection of a detailed strategy. The continuous gathering of information – which is fed back into the operational cycle – helps determine whether the strategy needs to be adapted to changes in the situation.



From the beginning of the cycle, a system is put in place for monitoring performance. This ensures the systematic and continuous assessment – using selected indicators – of progress over time. Evaluations and reviews are used to enhance the organization's overall performance, as well as its transparency, and accountability.

5. Operational response and beneficiaries

The beneficiaries of the ICRC's protection activities – persons deprived of their liberty; the civilian population and other affected persons not in detention; separated family members or persons listed as missing – cannot be rigidly categorized. Affected persons may benefit from both generic (in behalf of all three categories) and specific (in behalf of some but not all categories) protection activities.

5.1. Generic activities

The ICRC directly implements its protection action through a wide range of activities in which it has expertise. It carries them out in combinations that are

adapted to the problems it encounters, the context, and the available possibilities. These activities are implemented at the appropriate levels of intervention – as outlined under Guiding principle 3. They are adapted to identified objectives, and realized through the application of one or several appropriate modes of action.

The aim of all ICRC activities is to improve the situation of victims of violations and of persons at risk. However, the organization distinguishes between two major categories of activity:

- activities targeting those responsible for violations: these aim to reduce the threat posed by authorities and other actors and to strengthen the protection they are meant to offer;
- activities developed directly to benefit affected individuals and communities: these aim to reduce vulnerability and exposure to violence.

The following chart lists the full range of activities that may be undertaken by the ICRC as part of its protection action. It also shows the general objectives of each set of activities, and the population group directly targeted by it.

Activities		Objectives	Target
DOCUMENTATION OF PROBLEMS	BILATERAL AND CONFIDENTIAL REPRESENTATIONS	Engage responsibility	Authorities
	Discreet representations to third parties		
	Public denunciation		
	Development of the law	Support	Persons at risk
	Promotion of the law		
	Structural support for implementation of the law	Reduce vulnerability	
	Activities as neutral intermediary		
	Registration/monitoring of individuals		
	Presence and accompaniment		
	Self-protection capacity building		
	Risk education		
	Assistance aimed at reducing risk exposure		

Representations – written or oral – are central to the ICRC’s protection activities. Bilateral and confidential representations – general or in behalf of particular individuals – form the ICRC’s preferred approach. The purpose of these representations is to forcefully remind authorities of their responsibilities: they are basic negotiating tools in protection issues.

The bilateral and confidential approach (see Guiding principle 2) may not always be successful. When it does not yield tangible results it may be complemented – in exceptional cases, replaced – by discreet representations to third

parties (States, international and regional organizations, or various individual personalities or entities who may be able to exercise a positive influence on the situation) or by public denunciation.

Discreet representations to third parties are usually conceived to precede public denunciation (see Guiding principle 4).

These steps may be accompanied or preceded by other measures such as:

- developing the law and standards
- reminding the parties concerned of applicable law and relevant standards
- promoting knowledge of the law and relevant standards with a view to changing attitudes towards them
- providing structural support for the implementation of the law and relevant standards in order to strengthen the capacity of authorities and other actors to integrate IHL provisions and other fundamental rules protecting persons into domestic legislation and national systems. The objectives of these activities vary according to the authorities in question, who might be:
 - weapon bearers, including security forces (police and other State forces);
 - legislative authorities;
 - educational authorities;
 - detaining or prison authorities;
 - judicial authorities;
 - health and other authorities with normative responsibilities.

The decision to act and the actual choice of activities depend on the political will of the authorities and other actors to effect lasting change, as well as their degree of structural capacity and cohesion. The potential for problems related to perceptions of the ICRC's activities (particularly in relation to its structural support for law enforcement and systems of judicial administration) is another important consideration.

- acting as a neutral intermediary
- aiming to directly reduce the vulnerability of persons and their exposure to risk through:
 - registration/follow-up of individuals at risk;
 - strengthening the capacity of communities, families and individuals for empowerment and self-protection;
 - risk education;
 - provision of aid and services aimed at reducing exposure to risk.

The ICRC's presence, particularly within affected communities, can have a potentially dissuasive effect.

5.2. Activities to benefit persons deprived of their liberty

Being deprived of one's liberty is psychologically undermining: it makes people more vulnerable and markedly dependent on detaining authorities. The ICRC

recognizes that the intrinsic vulnerability of all detainees can be exacerbated by a number of factors: the personal characteristics of detainees, the prevailing political and military situation, and the practices of authorities and other actors.

5.2.1. The ICRC's general approach to issues related to persons deprived of their liberty

The ICRC:

- identifies the problems encountered by detainees;
- analyses the circumstances in which persons are deprived of their liberty;
- is guided by the normative international framework for the treatment of persons deprived of their liberty;
- operates within a precise methodological framework;
- strives to ensure that the rights of persons deprived of their liberty are respected throughout the period of their detention: this can have significant consequences for the protection strategy, the length of the ICRC's involvement, and the expertise and resources required.

Visits to persons deprived of their liberty form the basis of the ICRC's approach. They are, in principle, a prerequisite of all protection activities to benefit such persons. These visits are carried out in accordance with established ICRC practice¹³ that is uniformly applied and has to be accepted beforehand by authorities and other actors concerned. The ICRC's methods guarantee professionalism and credibility and enable the ICRC to assess the situation as accurately as possible, whilst safeguarding the interests of detainees. They make it possible to analyse specific systemic issues, identify problems, assess conditions of detention, and carry on a dialogue with detainees and detaining authorities. They can also have a dissuasive effect on the commission of violations and be of value, in psychosocial terms, to detainees.

5.2.2. Persons deprived of their liberty who are of direct concern to the ICRC

Besides its responsibilities under IHL, the ICRC acts primarily to benefit persons deprived of their liberty in relation to situations that trigger its intervention. Broadly speaking – and as dictated by circumstances – the ICRC concerns itself with detainees who have no effective means of protecting themselves from abuse or arbitrary acts, who are neglected, who do not or who no longer have access to the

13 There are five main pre-conditions governing ICRC visits: 1. Access to all detainees within the ICRC's field of interest; 2. Access to all premises and facilities used by and for detainees; 3. Authorization to repeat the visits; 4. The right to speak freely and in private (without witnesses) with detainees of the ICRC's choice; 5. The assurance that the authorities will give the ICRC a list of the detainees within its field of interest or authorize it to compile such a list during the visit. The ICRC can then at any time check on the detainees' presence and monitor them individually throughout their detention.

most basic services they are entitled to receive from the authorities, or who are subject to the arbitrary behaviour of those exercising power over them.

The following categories of detainee are of direct concern to the ICRC:

- protected persons deprived of their liberty in a situation of international armed conflict;
- persons deprived of their liberty in relation to a situation of non-international armed conflict;
- persons deprived of their liberty not in relation to a situation of international or non-international armed conflict, but the conditions of whose detention are affected by the conflict;
- persons deprived of their liberty in relation to a situation of internal disturbances;
- persons deprived of their liberty in relation to some other situations of internal violence who are regarded by the authorities and other actors as actual or potential opponents or as threats (owing to their nationality, ethnic origins, religion or other consideration), or others who have been arrested as a means of intimidation;
- persons deprived of their liberty in a situation of internal disturbances or some other situation of internal violence who do not or who no longer receive the minimum protection they are entitled to from the authorities or who are subject to the arbitrary behaviour of those exercising power over them.

In situations other than those in which the ICRC is expressly mandated to act in behalf of persons deprived of their liberty, the organization's decision to offer its services is determined by the gravity of humanitarian needs and by the urgency of responding to them, whatever the causes of the protection problems or the reasons for detaining the persons concerned.

The ICRC deals specifically with the vulnerability of certain detainees, for reasons of age, gender, because they are under sentence of death, owing to their status as detained migrants, etc.

The ICRC insists – in all contexts – on preserving its independence in determining which categories of person deprived of their liberty it is interested in. Negotiations for access to detainees must ensure that no category of detainee is excluded and that the ICRC will be permitted the greatest latitude possible in its work.

5.2.3. Scope of ICRC intervention

The ICRC concerns itself with the following matters:

- the behaviour and actions of those responsible for making arrests, conducting interrogations and taking decisions related to detention;
- the material conditions of detention;
- access to medical care;
- the management and care of persons deprived of their liberty.

Its interventions focus on certain protection problems and violations:

- enforced disappearances and undisclosed detention;
- summary executions;
- torture and other forms of ill-treatment;
- problems created by violations of the physical or moral integrity of detainees and of their dignity and of the obligation to provide the essential necessities for their survival:
 - problems related to water and food;
 - problems related to personal hygiene and sanitation facilities in places of detention;
 - problems related to health and access to medical care;
 - problems related to material conditions of accommodation;
 - problems related to the management of detainees;
- violations of minimum judicial guarantees and procedural safeguards;
- violations of respect for family unity:
 - problems related to maintaining contact between detainees and their families.

5.2.4. ICRC approach

The ICRC distinguishes between two types of approach:

- the individual approach - which is a priority of the ICRC and specific to the organization – consists of carrying out activities to benefit certain individuals or categories of person who have been targeted by the repressive policies of the authorities or who are at risk;
- the structural approach - which the ICRC may also choose to implement in parallel to or separately from an individual approach – focuses on the institutions responsible for detention issues (on aspects of their organizational and normative frameworks, on management issues, particularly in the areas of health, infrastructure and material supplies) and benefits the entire detainee population.

The ICRC will carry out generic protection activities (see 5.1.) according to the individual and/or structural approaches chosen, depending on the nature and intensity of the needs identified. This also includes the provision of RFL services.

5.3. Activities to benefit the civilian population and other affected persons not in detention

The ICRC is conscious that the forms of repression and abuse to which the civilian population and other affected persons might be subjected and the risks to which

they might be exposed, as well as the adverse consequences of conflict, are potentially very varied.

The ICRC requires the fulfilment of certain pre-conditions and the taking of certain steps before implementing its protection framework. These pre-conditions are as follows:

- a minimum amount of access to victims and witnesses of violations;
- safety of ICRC staff (e.g. the extent to which the ICRC's mandate is recognized and accepted by authorities and other actors, or the degree to which security guarantees are provided for the ICRC's activities);
- safety of victims and other persons contacted by the ICRC (e.g. the extent to which guarantees are provided that persons in contact with the ICRC will not be subjected to reprisals);
- identification of and contact with pertinent authorities and other actors.

5.3.1. The ICRC's general approach to problems faced by the civilian population and other affected persons

The ICRC:

- analyses the problems faced by affected persons; it does so by exploiting its access to reliable and pertinent information, which is collected either by its own delegates or through a network of contacts;
- is mindful of the specific difficulties of analysing the conduct of hostilities, for instance, their impact – direct and indirect – on civilians, as well as the difficulties of analysing the use of force during law enforcement operations;
- is guided by the international normative framework applicable to various situations;
- operates within a precise methodological framework that enables it to undertake activities even when the conditions for its humanitarian work are only partially met.

5.3.2. Persons and objects of concern to the ICRC

- Civilians and combatants, or other weapon bearers, who are *hors de combat* or are no longer participating in hostilities.
- Objects specifically protected under IHL.
- All persons affected by internal disturbances or other situations of violence. This refers to persons who are not or who are no longer participating in acts of violence or against whom violence was used unlawfully when they took part in acts of violence.

The ICRC seeks to contribute to the protection of all those persons affected by violence, and those who are at risk, without discrimination. Nevertheless, it

makes every effort to respond to the specific needs of certain categories of person (e.g. children, women, refugees,¹⁴ internally displaced persons, or international migrants).

5.3.3. Scope of ICRC intervention

The ICRC concerns itself with the following matters:

- the actions of weapon bearers and of the various authorities with responsibilities pertaining to the civilian population;
- the access to medical care and other basic services for individuals or population groups;
- the vulnerability of individuals or population groups and their exposure to risk.

The ICRC's interventions focus on violations, and the humanitarian problems that have been identified, by examining the following:

The use of force – means and methods:

- in the conduct of hostilities, including the impact – direct and indirect – of hostilities and of the weapons that are used;
- in law enforcement operations.

The treatment of persons:

- assaults on and threats to the lives, security and physical and moral integrity of persons;
- denial of basic health services and violation of the obligation to ensure access to basic necessities for survival;
- violations of respect for family unity;
- violations of rules related to missing persons and their families;
- violations of rules regarding the free movement of persons;
- the consequences of the unlawful or arbitrary destruction or expropriation of private property;
- disruption of access to education or to places of worship in situations of occupation.

5.3.4. ICRC protection activities

In addition to the generic protection activities mentioned above (see 5.1.), the ICRC undertakes specific activities to benefit the civilian population and other

¹⁴ The Office of the United Nations High Commissioner for Refugees (UNHCR) has the primary responsibility for refugee issues; however, the ICRC also has a responsibility in those instances in which IHL applies, as well as a subsidiary responsibility when UNHCR is absent.

affected persons not in detention, depending on the nature and intensity of the situation, such as:

- ICRC accompaniment (ICRC delegates accompanying individuals or groups of civilians, thereby placing them under the protection of the red cross emblem);
- evacuation of persons at risk;
- establishment of protected areas;
- provision of RFL services.

5.4. Activities to benefit separated family members and the missing

The ICRC is conscious that the well-being of individuals is largely dependent on the preservation of their ties to loved ones.

Efforts to ascertain the fate of the missing entail the undertaking of a wide range of complementary and closely coordinated activities. The ICRC is committed to addressing issues related to persons who are unaccounted for (missing persons) and to assisting their families. Its activities in this regard are adapted to the context and to the period of time that has elapsed since the persons concerned were reported missing. Some of these activities necessitate close collaboration with the authorities concerned and with all parties to the conflict, and take place mainly during post-crisis or transition periods.

5.4.1. The ICRC's general approach to problems faced by separated family members and missing persons

The ICRC:

- determines its course of action after analysing needs and estimating the length of its engagement; it also examines the causes of ruptures in contact and communication (e.g. displacement, restricted access to means of communication and family contact, absence of records of people who have been executed or who have died in detention);
- acts within a precise methodological framework and employs rigorous working procedures that demand the following: speed in processing cases (which requires the assistance of the Movement's Family News Network, reliability in data management and transmission, protection of personal data, which varies according to the situation and the amount of time that has passed);
- carries out, in addition to RFL, activities that aim to prevent the severance of family ties and to respond to the specific material and psychological needs of persons who are directly affected, as well as to the needs of their families. The ICRC's efforts to ascertain the fate of the missing take a number of different forms: managing human remains, conducting forensic studies, providing support for families, integrating relevant norms into domestic legislation, ensuring that members of the armed forces are equipped with the necessary means of identification, etc.;

- sets up effective information, communication and tracing systems that enable the development of various tools that are adaptable to extremely varied needs and operational environments.

5.4.2. Persons of concern to the ICRC

- Separated family members: persons who have lost contact with their families as a consequence of an armed conflict or other situation of violence, or after a natural disaster.
- The missing: persons whose families have no news of them or who, based on reliable information, are listed as missing in relation to a situation of armed conflict or other situation of violence, or after a natural disaster.
- Persons deprived of their liberty who are individually monitored by the ICRC or who are held in places of detention visited by the organization.
- Relatives of the persons mentioned above.

Attention is paid to the specific needs of certain groups (children, women, internally displaced persons, refugees, or migrants). This is particularly the case with regard to children who are separated from their families or who are on their own (unaccompanied).

5.4.3. Scope of ICRC intervention

The ICRC concerns itself with the following matters:

- the behaviour of authorities and other actors;
- access to means of communication;
- constraints on free movement;
- the information available to families about the fate of relatives who are unaccounted for;
- the vulnerability of individuals or population groups and the degree to which they are exposed to risk;
- the consequences of the disruption of family links.

Besides the violations and problems discussed above (sections 5.2 and 5.3), the ICRC's interventions also address issues related to the rights of families to know the fate of their loved ones, to recover the remains of their dead, and to pay their last respects.

5.4.4. ICRC protection activities

Besides the generic protection activities mentioned above (see 5.1.), the ICRC carries out the following protection activities:

- registration/monitoring of persons at risk
- tracing individuals;

- operating a system that enables separated family members to correspond and to exchange documents;
- producing various certificates and issuing travel documents;
- reuniting family members;
- promoting and/or setting up mechanisms tasked with clarifying the fate of missing persons: the collection and management of information about the dead, the location, identification and recovery of human remains, etc.;
- providing support for the families of missing persons.

ICRC, Geneva, 23 September 2008

REPORTS AND DOCUMENTS

National implementation of international humanitarian law

Biannual update on national legislation and case law July–December 2007

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A. Legislation

Azerbaijan

The *Law on the Red Crescent Society of Azerbaijan*¹ was adopted on 8 May 2007 and entered into force on 22 May 2007. The law establishes the status and legal basis of the Red Crescent Society of Azerbaijan and defines the scope of the Society's activities. It confers upon the Society the rights and entitlements provided by national legislation to non-governmental organizations. The law authorizes the Society to conclude agreements with public institutions at the central and local levels, to use the red crescent emblem in accordance with national legislation, and to carry out its humanitarian mandate in accordance with Azeri laws. The law was supplemented on 22 May 2007 by a presidential decree enabling the cabinet to adopt the necessary implementing regulations.

Colombia

The *Colombian Armed Forces Directive No. 10/2007 on the Reaffirmation of the Obligations of the Law Enforcement Authorities to Prevent Homicides against Protected Persons*² was adopted and entered into force on 6 June 2007. The directive's purpose is to reaffirm the obligation of the Colombian armed forces to comply with the principle of legality and to respect the principles of necessity, proportionality and distinction in the conduct of military operations. The directive confirms the applicability in Colombia of the provisions of Article 3 common to

the 1949 Geneva Conventions and of Additional Protocol II of 1977. The directive also recalls that certain crimes may fall under the jurisdiction of the International Criminal Court (ICC) and establishes, under the authority of the General Commander of the Armed Forces, a temporary committee to assist in conducting investigations of crimes committed against protected persons. The directive further enjoins the General Commander of the Armed Forces to issue instructions in order to incorporate the rules of international humanitarian law (IHL) into the planning and execution of military operations, to lay down rules of engagement and to require the consultation of legal advisers prior to any military engagement.

Cook Islands

The *Cook Islands Chemical Weapons (Prohibition) Act*, No. 36 of 2007,³ was approved and entered into force on 30 November 2007. The act gives effect to the provisions of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. It confers on the Ministry of Foreign Affairs and Immigration the responsibility to act as the national authority in charge of supervising, monitoring and enforcing the act. Actions taken in violation of the prohibitions of the Chemical Weapons' Convention constitute, under the act, criminal offences liable to a fine or to imprisonment, or both. In the event of a violation being attributable to a corporate body, the punishment must apply to that body as well as to any officer or officers of the body who either committed or ordered the offence to be committed or who contributed to the commission of the offence through their negligence.

The *Cook Islands Anti-Personnel Mines Act*, No. 35 of 2007,⁴ was adopted and entered into force on 30 November 2007. The purpose of the act is to provide for the implementation of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction. The act outlines the prohibitions under the Convention, provides for administrative and criminal sanctions in the event of violations of its provisions, and includes detailed provisions relating to the operation of a fact-finding mission pursuant to Article 8 of the Convention.

- 1 Law on the Red Crescent Society of Azerbaijan. Officially published in the newspaper *Azerbaijan*, no. 111 (4628), on 23 May 2007. A Presidential Decree on the implementation of the Law on the Azerbaijan Red Crescent Society was adopted on 22 May 2007.
- 2 Directiva Permanente No. 10/2007, Reiteración obligaciones para autoridades encargadas de hacer cumplir la ley y evitar homicidios en persona protegida, available at www.mindefensa.gov.co.
- 3 Chemical Weapons (Prohibition) Act, an Act to give effect to the provisions of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction and for related matters.
- 4 The Anti-Personnel Mines Act, 2007, an Act to implement the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction in the Cook Islands.

Cyprus

Additional Protocol (Protocol III) to the Geneva Conventions (Ratification) Act, No. 39(III) of 2007,⁵ entered into force on 2 November 2007. The act gives effect to Protocol III additional to the Geneva Conventions of 12 August 1949 and relating to the Adoption of an Additional Distinctive Emblem, and prohibits the use in the Republic of Cyprus, without authorization, of any of the distinctive emblems or signs defined in the Protocol. Such authorization must be provided by the Council of Ministers and will become effective pursuant to its publication in the *Official Journal*. The act provides for administrative fines for persons who, within the Republic of Cyprus, misuse the distinctive emblems or signs defined in the Protocol.

Dominican Republic

*Law No. 220-07 on the Protection and the Use of the Emblems and Name of the Red Cross and Red Crescent*⁶ was adopted on 2 August 2007 and entered into force on 18 August 2007. The purpose of the law is to protect and regulate the use of the red cross and red crescent emblems and the names used to denote them, as well as 'other emblems, signs and signals' recognized by IHL. It confers on the State Department of the Armed Forces the authority to control and monitor the protective use of the emblem. The law provides for the use of the emblem as an indicative device by the Dominican Red Cross and enjoins the National Society to apply the Regulations on the Use of the Emblem of the Red Cross or the Red Crescent by the National Societies. The law establishes sanctions, including prison sentences or fines, or both, in the event of misuse of the emblems, and stipulates that perfidious use constitutes a war crime punishable under Dominican criminal law.

Ecuador

*Law No. 2007-84 on the Use and Protection of the Red Cross and Red Crescent Emblems*⁷ was adopted on 28 August 2007 and entered into force on 10 September 2007. The law aims to protect the red cross and red crescent emblems and the names used to denote them, as well as the distinctive signs and signals for the identification of medical transports and units, in accordance with the four Geneva Conventions of 1949, their Additional Protocols and Annex I to Additional

5 The Additional Protocol (Protocol III) to the Geneva Conventions (Ratification) Law, 2007, a Law to Ratify the Additional Protocol to the Geneva Conventions of 12 August 1949 and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III) and Providing for Related Matters. Published in the Cyprus official gazette, Supplement I(III), on 2 November 2007.

6 Ley No. 220-07 sobre la protección y uso de los emblemas y de las denominaciones de Cruz Roja y de la Media Luna Roja. Published in the *Gaceta Oficial*, Year CXLVI, No. 10434, on 18 August 2007.

7 Ley No. 2007-84 Sobre el Uso y Protección del Emblema de la Cruz Roja y de la Media Luna Roja. Published in the *Registro Oficial*, No. 166, on 10 September 2007.

Protocol I. The law defines the authorized uses of the emblem as a protective and indicative device. It outlines sanctions of an administrative nature to be applied in the event of misuse, without prejudice to penal procedures and penalties under applicable criminal law. It confers on the Ministry of National Defence and the Ministry of Public Health a monitoring role regarding the law's implementation. Lastly, it provides for large-scale promotion and dissemination of its contents aimed at the armed forces, civilian authorities and the general public, and instructs the Ministry of Education to include within its educational programmes information about the International Red Cross and Red Crescent Movement, its history and principles, as well as the emblems.

Hungary

*Order No. 6/2007 of the Hungarian Minister of Defence amending the Service Regulations of the Hungarian Armed Forces*⁸ was adopted on 14 February 2007 and entered into force on 1 March 2007. The order amends the Service Regulations of the Hungarian Armed Forces and establishes new rules reflecting Hungary's treaty-based obligations under IHL. Specific amendments to the Service Regulations relate *inter alia* to burial of and respect for the dead, to protection of cultural property placed under enhanced protection and to the marking, removal and destruction of remnants of war. Lastly, the chapter of the Service Regulations on 'signs of identification' is revised to include a reference to the red crystal alongside the other distinctive emblems and signs provided for under the 1949 Geneva Conventions and their 1977 Additional Protocols.

Japan

Law No. 32/2007 concerning the Protection of Cultural Property in the Event of Armed Conflict was adopted on 27 April 2007 and entered into force on 10 September 2007. The law gives effect to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and to its First and Second Protocols of 1954 and 1999. The law outlines the procedures for the identification of cultural property and for the safeguarding of cultural property in the event of occupation. The law also defines the use of the Convention's distinctive emblem in the event of armed attacks and provides for penalties ranging from a fine to hard-labour prison sentences for persons who violate the Convention and its Protocols. Punishments may apply to perpetrators of certain offences under the law committed outside Japan.

Law No. 37/2007 concerning Co-operation with the International Criminal Court was adopted on 27 April 2007 and entered into force on 1 October 2007.⁹ The law aims

8 Order of the Minister of Defence No. 6/2007 on the amendment of Order of the Minister of Defence nr. 24/2005 (VI.30) on the adoption of the Service Regulations. Published in *Official Gazette* No. 2007/17 (II.14).

9 Officially published on 11 May 2007.

to ensure the implementation of the 1998 Rome Statute of the International Criminal Court and lays down rules and procedures for co-operation with the ICC, including the surrender and transfer of suspects to the Court. The law also provides for the punishment of offences against the administration of justice in connection with the ICC.

Montenegro

*Decision No. 03-2160 of the Government of the Republic of Montenegro to form a Commission on Missing Persons*¹⁰ was adopted on 29 March 2007 and entered into force on 19 May 2007. The decision establishes a Commission on Missing Persons, responsible for monitoring, reviewing and making recommendations on matters relating to persons unaccounted for in the context of the armed conflicts in the former Yugoslavia. The Commission's task is to co-ordinate the work of relevant state authorities and other organizations involved in the tracing of missing persons and, in co-operation with family organizations and other interested parties, to assist in resolving the specific needs faced by the families. The Commission is composed of representatives of different ministries, agencies and organizations, including the ministries of Defence, Interior Affairs and Public Administration, Justice, Health, Labour, Health and Social Insurance, the Refugee Bureau and the Red Cross of Montenegro. The government of the Republic of Montenegro appoints the chairman and members of the Commission.

Republic of Korea

The *Republic of Korea's International Criminal Court (Crimes and Punishment) Act, or Act on the Punishment, etc. of the Crimes within the Jurisdiction of the International Criminal Court Act*, No. 8719 of 2007, was adopted by the National Assembly in November 2007. The act gives effect to the Republic of Korea's obligations under the Rome Statute of the International Criminal Court and establishes procedures for co-operation with the ICC. The act provides for the jurisdiction of domestic courts over the crimes within the jurisdiction of the ICC and assigns a range of penalties applicable to those offences, including the death penalty, life imprisonment and lesser sentences, depending on the gravity of the crimes. The act also provides for the application of the Republic of Korea's acts on Extradition of Criminals and on Mutual Legal Assistance in Criminal Matters to procedures conducted in relation to the ICC. The act also provides for the punishment of offences against the administration of justice in connection with the ICC.

10 Adopted pursuant to Article 12(3) of the Decree of the Government of the Republic of Montenegro (*Official Gazette*, issues 15/94 and 4/97) and officially published in the *Official Gazette of the Republic of Montenegro*, issue 25/07 on 11 May 2007.

Samoa

The *International Criminal Court Act*, No. 26 of 2007,¹¹ was adopted on 9 November 2007 and entered into force on 1 July 2008. The act gives effect to the Rome Statute of the International Criminal Court in Samoa and establishes procedures for co-operation with the ICC. These include rules on the enforcement and the serving of sentences in Samoa. The act further incorporates into Samoan law the crimes defined in the Rome Statute, and provides for sentences ranging from life imprisonment to lesser prison sentences applicable to any person who, in Samoa or abroad, commits any of the crimes defined in the act. The act also includes provisions on command responsibility and on the exclusion of the excuse of superior orders as a defence, and rules out official capacity as a bar to arrest, prosecution or surrender to the ICC. The act further provides for the punishment of offences against the administration of justice in connection with the ICC.

Singapore

The *Geneva Conventions (Amendment) Act* No. 55 of 2007¹² was adopted on 12 November 2007 and entered into force on 15 January 2008. The act amends the Geneva Conventions Act to give effect to Protocol III additional to the Geneva Conventions of 12 August 1949 and relating to the Adoption of an Additional Distinctive Emblem. The act includes definitions of the red cross, red crescent, red lion and sun “and red crystal” emblems and prohibits unauthorized use of these emblems and of the names ‘red cross’ or ‘Geneva cross’.

Slovakia

Law No. 218 on the Prohibition of Biological Weapons and on Amendments and Supplements to Certain Acts was adopted on 28 March 2007 and entered into force on 1 June 2007. The law complements existing Slovak legislation implementing the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. The law establishes a new legal and administrative framework for the surveillance of relevant biological agents with a view to preventing their use for activities prohibited by the Convention. In particular, the law specifies high-risk biological agents and toxins that have the potential of being used contrary to the Convention and regulates the rights and duties of individuals, natural-person entrepreneurs and legal entities with regard to the prohibitions on

11 An Act to enable Samoa to implement and give effect to its obligations under the Rome Statute of the International Criminal Court, and for related matters. Available at www.parliament.gov.ws/documents/acts/International%20Criminal%20Court%20Act%202007%20-%20%20English%20Version.pdf.

12 An Act to amend the Geneva Conventions Act (Chapter 117 of the 1985 Revised Edition) and to make consequential and miscellaneous amendments to the Singapore Red Cross Society (Incorporation) Act (Chapter 304 of the 1985 Revised Edition). Officially published in GN No. S6/2008.

biological weapons. The act confirms the function of the Ministry of Health as the national authority in charge of overall supervision of compliance with the prohibition on biological weapons. The law further establishes the conditions for the handling of highly hazardous biological agents and toxins and for the granting of licences, and makes provision for penal and administrative sanctions in the event of breaches of the prohibitions under the act.

South Africa

The *South African Red Cross Society and Legal Protection of Certain Emblems Act*¹³ was adopted on 9 August 2007 and entered into force on 16 August 2007. The act provides statutory recognition for the South African Red Cross Society. It restates the Society's goals in its work to prevent and alleviate suffering and to foster human dignity in all communities in accordance with the Geneva Conventions of 1949 and pursuant to its Constitution, and confirms the entitlement of the Society, if so requested, to place its medical personnel and resources at the disposal of the state. The act further regulates the uses and the protection of the red cross and red crescent emblems and provides for both criminal and administrative penalties in the event of misuse of the distinctive emblems by any person or by corporate bodies.

Spain

*Law No. 52/2007 to Recognize and Broaden Rights and to Establish Measures in Favour of those who Suffered Persecution or Violence during the Civil War and the Dictatorship*¹⁴ was adopted on 26 December 2007 and entered into force on 28 December 2007. The law recognizes and implements the right to rehabilitation, individual recognition and reparations for persons who suffered persecution or violence on political, religious or ideological grounds during the Spanish Civil War and the military dictatorship. The law declares the illegitimacy of the courts and of any other criminal or administrative organs established during the Civil War or during the dictatorship to impose sentences and sanctions for ideological, political or religious motives. The law recognizes the right of victims of the Civil War and of the dictatorship and of their relatives to obtain a declaration of reparations and individual recognition to be decided upon by an independent Council. It also provides for compensation and increased benefits for the relatives of Spanish nationals who died during the Civil War and of persons detained during the dictatorship. Lastly, the law instructs the relevant public authorities to facilitate the

13 Act No. 10. An Act to provide statutory recognition for the South African Red Cross Society and to provide statutory protection for certain emblems; and to provide for matters connected therewith. Officially published on 16 August 2007 in the *Government Gazette*, No. 30178, Vol. 506.

14 Ley 52/2007 de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura. Published on 27 December 2007 in the *Boletín Oficial del Estado* (BOE), No. 310, available at www.boe.es/g/es/.

location and identification of persons unaccounted for as a result of the Civil War and the dictatorship, as well as the recovery and reburial of human remains by the families.

Sudan

The *Armed Forces Act of 2007*¹⁵ was adopted on 17 December 2007 by the National Council of Sudan. The act defines the status of members of the armed forces and affiliated persons and personnel, and provides for the establishment and operation of a system of military criminal justice and military jurisdictions. The act stipulates that military courts are competent to judge crimes committed by members of the armed forces in the course of their duties. It criminalizes a wide range of offences committed during or in the aftermath of military operations, including crimes against persons enjoying special protection and prisoners of war, attacks against civilians or protected objects, attacks against humanitarian and international organizations, perfidious use of the flag of truce or of internationally protected emblems, as well as the use of prohibited weapons. The act provides for the jurisdiction of Sudanese military courts over such crimes on the basis of universal jurisdiction, subject to the presence of the alleged perpetrator in Sudan.

United States

The *Consolidated Appropriations Act, 2008*¹⁶ was adopted on 26 December 2007. Section 646 of the act covers landmines and cluster munitions. It places a one-year moratorium, for the period of the current fiscal year, on furnishing military assistance for cluster munitions and on the granting of defence-export licences for the sale or transfer of cluster munitions and related technology. The moratorium is not applicable to cluster munitions enjoying a 99 per cent or higher tested rate and when the agreement on assistance, transfer or sale of cluster munitions or cluster munitions technology specifies that the cluster munitions will only be used against clearly defined military targets and will not be used where civilians are known to be present.

The Executive Order on the Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency¹⁷ was issued by President George W. Bush on 20 July 2007. The executive order reaffirms the determination that members of Al Qaeda, the Taliban and associated forces are 'unlawful enemy combatants' and, as such,

15 The Armed Forces Act of 2007 was adopted by the National Council of Sudan by virtue of the Transitional Constitution of the Republic of Sudan of 2005.

16 Consolidated Appropriations Act, 2008. An Act making appropriations for the Department of State, foreign operations, and related programs for the fiscal year ending 30 September 2008, and for other purposes. HR 2764, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.02764>.

17 Available at www.whitehouse.gov/news/releases/2007/07/20070720-4.html.

are not entitled to the protection afforded prisoners of war under the Third Geneva Convention of 1949. In connection with Common Article 3 of the Geneva Conventions, the order establishes that it is authoritative for all purposes as a matter of US law and determines that interrogation and detention programmes operated by the Central Intelligence Agency (CIA) must fully comply with the obligations of the United States under Common Article 3, and do so provided that they do not include acts considered comparable to, *inter alia*, murder, torture, mutilation or cruel or inhuman treatment. In addition, the order stipulates that foreign detainees will be subject to the conditions of confinement and interrogation practices outlined in the act if the CIA director determines that they are members of or support Al Qaeda, the Taliban or associated organizations and are likely to have information that would help in locating other such members or in preventing terrorist attacks. Lastly, the order instructs the Director of the CIA to issue instructions relating to the interrogation programmes, including training for interrogators.

B. National committees on international humanitarian law

People's Republic of China

The *Chinese Inter-ministerial Committee for International Humanitarian Law* was established by decision of the Chinese government on 24 November 2007. The Committee's mandate is to promote knowledge of IHL, to support the adoption of national measures to implement that law and to promote thematic research and international co-operation in this field. The posts of committee chairman and secretary are held by the Red Cross Society of China. The Committee is composed of representatives of the ministries of Foreign Affairs, Defence, Education, Justice and Administration of Cultural Heritage, as well as of the People's Liberation Army and of the Red Cross Society of China.

Ecuador

The *Ecuadorian National Committee for the Application of International Humanitarian Law*¹⁸ was created by Executive Decree No. 1741, issued by the President on 16 August 2006, and was established on 9 March 2007 by Ministerial Agreement No. 0000074, issued by the Ministry of Foreign Affairs. The Committee's tasks are to promote accession to IHL instruments, to prepare draft laws, regulations and instructions for the national implementation of IHL, and to promote the incorporation of IHL at all levels of military training and civilian education. The Committee is also entrusted with the development and co-ordination of a 'national plan of action' to ensure the promotion and effective application of IHL and with promoting co-operation between the government and

18 Comisión Nacional para la aplicación del Derecho Internacional Humanitario.

interested international organizations in order to strengthen respect for IHL. The Committee chairmanship is held by the Ministry of Foreign Affairs and the secretariat by the Ecuadorean Red Cross. The Committee is composed of representatives of the ministries of Foreign Affairs, Commerce and Integration, National Defence, Police and Local Government, and Social Welfare, as well as by the Congressional Commissions for Legislation and Codification and for Human Rights, the Supreme Court of Justice and the Ecuadorean Red Cross.

Iceland

The *Icelandic National Committee on International Humanitarian Law* was established on 24 October 2007 by decision of the Ministry of Foreign Affairs. The Committee's mandate is to advise the government on the interpretation, national implementation and promotion of IHL. The Committee is chaired by the Ministry of Foreign Affairs and composed of representatives of the ministries of Foreign Affairs, Justice, Education, Health and Social Affairs, and of the Icelandic Red Cross.

Malaysia

The *Malaysian National International Humanitarian Law Committee*¹⁹ was established pursuant to a decision of the Cabinet issued in December 2007. The Committee's mandate is to oversee the national implementation of IHL and to promote knowledge of that law and related obligations among the general public. The Committee must take the necessary steps to ensure that Malaysia respects its obligations under the 1949 Geneva Conventions and the Malaysian Geneva Conventions Act of 1962. The Committee also determines the responsibilities of government agencies in the implementation and application of IHL in the event of armed conflict. The Ministry of Foreign Affairs provides the Committee's chairman and secretary. The Committee is composed of representatives of the ministries of Defence, Home Affairs, Information, Women, Family and Community Development, Culture, and Arts and Heritage, as well as of the Attorney General's office, the armed forces and the police.

Nepal

The *Nepalese National Committee for the Implementation of International Humanitarian Law* was established on 26 February 2007 by a decision of the government of Nepal. The Committee's mandate is to support the development of national legislation in implementation of IHL treaties to which Nepal is party and to review existing law. The Committee conducts activities aimed at promoting knowledge in the field of IHL. The posts of chairman and secretary are held by the

¹⁹ Jawatankuasa Undang-undang Kemanusiaan Antarabangsa Malaysia (JUKAM).

Ministry for Law, Justice and Parliamentary Affairs. The Committee is composed of representatives of the Office of the Prime Minister and of the Council of Ministers, as well as of the ministries for Law, Justice and Parliamentary Affairs, Foreign Affairs, Defence, Home Affairs, Health and Population, Education and Sports, Culture, Tourism and Civilian Aviation, and Women, Children and Social Welfare.

Spain

The *Spanish National Committee on International Humanitarian Law* was established by Royal Decree 1513/2007 of 16 November 2007.²⁰ The Committee's mandate is to advise the Spanish government on the ratification and national implementation of IHL treaties, including proposals for new legislation, recommendations on the promotion of IHL and the training of armed and security forces and public servants, and initiatives to support and promote the application of IHL in other states. The Committee must also prepare Spain's participation in the International Conference of the Red Cross and Red Crescent and act as a permanent link with national Red Cross and Red Crescent societies and the ICRC. The Committee is composed of representatives of the ministries of Foreign Affairs and Co-operation, Justice, Defence, Interior, Economy, Education and Science, Labour and Social Affairs, Public Administration, Culture, Health and the Environment, as well as of the Attorney General's Office, and members of the autonomous communities, independent experts and the Spanish Red Cross. The Committee is chaired by the Ministry of Foreign Affairs and Co-operation.

C. Case law

Bosnia and Herzegovina

*Court of Bosnia and Herzegovina, case of Momčilo Mandić*²¹

On 18 July 2007 the Court of Bosnia and Herzegovina rendered a first-instance verdict acquitting the accused of war crimes against civilians and crimes against humanity alleged to have been committed in April 1992. Mandić had been charged with having, in his capacity as Republika Srpska's deputy minister of the interior, planned and ordered an attack against a training centre of the Ministry of the Interior of the Republic of Bosnia and Herzegovina, and of having incited and

20 Real Decreto 1513/2007 de 16 Noviembre, por el cual se crea y regula la Comisión Española de Derecho Internacional Humanitario, adopted on 16 November 2007 and officially published in the *Boletín Oficial del Estado*, No. 283, on 26 November 2007, available at www.boe.es/boe/dias/2007/11/26/pdfs/A48303-48305.pdf. Entered into force on 27 November 2007.

21 Court of Bosnia and Herzegovina, *Momčilo Mandić*, No. X-KR-05/58, 18 July 2007, available at www.sudbih.gov.ba/files/docs/presude/2007/Momcilo_Mandic_-_VERDICT_-_ENG.pdf.

aided in the subsequent inhumane treatment of the centre's staff. The court found that it had not been established that on the date of the attack, the accused had held, whether *de jure* or *de facto*, the office of deputy minister of the interior, or that he had acted as a superior over the members of the police who had detained, interrogated and physically abused the victims. The court also concluded that at the time of the attack, on 4 April 1992, there was not yet an armed conflict within the meaning of Article 3 common to the 1949 Geneva Conventions, the panel having accepted as proven the fact that the armed conflict broke out after Republika Srpska was recognized on 6 April 1992.

Mandić was also acquitted of crimes against humanity. In his capacity as minister of justice of Republika Srpska, he was charged with personal and command responsibility for crimes committed in the correctional institutions under the control of Republika Srpska. The trial panel concluded that it had not been proved beyond a reasonable doubt that he had personally committed the criminal offences he was directly charged with, nor that he had exercised effective control over the subordinates who committed the offences or were about to commit them.

Court of Bosnia and Herzegovina, case of Krešo Lučić²²

On 19 September 2007 a trial panel of the War Crimes Section of the Court of Bosnia and Herzegovina sentenced a local commander of the Croat Defence Council Military Police to six years' imprisonment for crimes against humanity, including unlawful deprivation of liberty, torture and other inhumane acts committed against Bosniak civilians. In establishing the constituent elements of the crimes, the court referred to Article 1 common to the 1949 Geneva Conventions and the absolute obligation to 'respect and ensure respect for the present Convention in all circumstances' without any condition of reciprocity. The court held the view that the unlawful behaviour of the party under attack had no relevance to the existence of a widespread and systematic attack against any civilian population as a constituent element of crimes against humanity.

In the course of the trial the panel decided *ex officio* to refuse a motion calling on a representative of the International Committee of the Red Cross to be examined as a witness given the nature of his activities as an ICRC delegate during the armed conflict. The panel determined that introducing confidential ICRC information into the court's proceedings, without prior consent from the organization, would seriously jeopardize the role of the Red Cross and its ability to carry out its mandate under international law.

22 Court of Bosnia and Herzegovina, *Krešo Lučić*, No. X-KR-05/68, 19 September 2007, available at www.sudbih.gov.ba/files/docs/presude/2007/Kreso_Lucic_-_Verdict_-_redigovana.pdf.

*Court of Bosnia and Herzegovina, Panel of the Appellate Division, case of Niset Ramić*²³

On 21 November 2007 the Appellate Panel of the War Crimes Section of the Court of Bosnia and Herzegovina upheld a verdict of the trial panel of 17 July 2007, in which a member of the Territorial Defence of the Republic of Bosnia and Herzegovina received a compound sentence of 30 years' imprisonment for war crimes committed against civilians, including murder and serious injury to physical integrity. The Appellate Panel rejected the objections of the defence according to which the first instance verdict had incorrectly or incompletely established the facts. It also held that the admission of certain facts from the description of the criminal offence by the accused did not carry the same weight as a full admission and could thus not be considered for the purpose of mitigation of punishment.

Moldova

*Resolution No. 22 of the Constitutional Court of the Republic of Moldova on the constitutionality of the Rome Statute of the International Criminal Court, 2 October 2007*²⁴

Having signed the Rome Statute of the International Criminal Court on 8 September 2000, the government of the Republic of Moldova asked the Constitutional Court in July 2007 to verify the compatibility of several articles of the Statute with Moldova's constitution. The court held that, since it would not substitute for the national criminal justice system in the investigation and prosecution of the most serious crimes, the ICC could not be considered an extraordinary jurisdiction falling under the constitutional prohibition on 'special tribunals'. The Constitutional Court further examined the compatibility of the Rome Statute with the constitutional immunities enjoyed by Moldova's President, members of parliament and judges. It held that the domestic immunities of public officials concerned only acts committed in the course of their official duties and could not be interpreted as an absolute right exempting public officials from prosecution and punishment by the ICC. Finally, the court reviewed the compatibility of the constitutional ban on the extradition of Moldovan nationals with the state's obligations under the Rome Statute to surrender suspects to the ICC. The court concluded that the procedures for extradition to another state and of surrender to the ICC were distinct and could not be placed in the same category.

23 Court of Bosnia and Herzegovina, *Niset Ramić*, No. X-KRŽ-06/197, 21 November 2007, and No. X-KR-06/197, 17 July 2007, available at www.sudbih.gov.ba/?opcija=predmeti&id=34&završen=1&jezik=e.

24 Resolution No. 22, Acts of the Constitutional Court of the Republic of Moldova, N°161-164 (3048-3051). Officially published on 12 October 2007 in *Monitorul Oficial al Republicii Moldova*.

In conclusion, the Constitutional Court issued a resolution declaring the Rome Statute to be compatible with Moldova's constitution.

Nepal

*Nepal Supreme Court, Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal (Advocate) v. Nepal Government, Home Ministry and Others, 1 June 2007*²⁵

This case concerns several petitions for a writ of habeas corpus filed with the Nepalese Supreme Court on behalf of persons allegedly arrested between 1999 and 2004 by Nepalese security forces and unaccounted for since their arrest. The questions drawn to the court's attention concerned the health and safety of the persons referred to in the petitions and to the nature of the obligations of the state in matters relating to persons who have disappeared or are unaccounted for, in particular during an armed conflict.

In its decision, after recognizing that the status and whereabouts of the missing persons remained unknown, the court analysed the international obligations binding on the state with regard to clarifying what has happened to missing persons and concerning the right of the missing and of their relatives to appropriate remedy and relief. In its determination, the court made reference to the International Convention for the Protection of All Persons from Enforced Disappearance, which, although not ratified by Nepal, sets a 'fundamental standard' no different from those laid down in international human rights instruments to which Nepal is party, such as the UN Covenant on Civil and Political Rights. It also concluded that civil liberties protected under the constitution are at greater risk during an armed conflict and that the liability and responsibility of the state to address violations of human rights and international humanitarian law should therefore be greater in such unusual circumstances. This should entail in particular a greater commitment on the part of the state to identifying the fate of missing persons, to initiating legal action against those responsible and to providing the victims with a remedy.

In the case at hand the court found that no serious efforts had been made by the government either to investigate the alleged disappearances, to improve or strengthen the domestic legal framework or to provide relief and remedy to the victims' families. As a result, the court issued several orders to the government of Nepal to adopt new legislation in order both to define enforced disappearance as a criminal offence and to provide for the right of detained persons to humane treatment and fundamental guarantees, as well as to establish a commission of

25 Nepal Supreme Court, *Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal (Advocate) v. Nepal Government, Home Ministry and Others*, Writ No. 3775, 1 June 2007, available at www.supreme-court.gov.np/nja/disappearance_Case.pdf.

inquiry into the disappearance of the victims on whose behalf the petitions had been brought.

Norway

*Oslo District Court, Sentence of 9 February 2007*²⁶

The case concerned a dental clinic in Oslo which had been using a sign composed of a red cross on a white background to mark its offices. In 2004 the Norwegian Red Cross, which had been made aware of this misuse of the red cross emblem, took the initiative of alerting the clinic and of calling for the removal of the sign. At the end of 2004 the Norwegian Red Cross reported this misuse of the emblem to the Norwegian armed forces and the matter was brought to the Oslo District Court. The court convicted the defendant of breaching the Norwegian Criminal Code and its prohibition on the unlawful use of any sign or name designed to be used in connection with aiding the wounded and sick in time of armed conflict. The court emphasized that Norway is a state party to the Geneva Conventions and their Additional Protocols, which protect the emblem of the red cross on a white background. It recalled that the purpose of the red cross emblem is to provide protection in armed conflict and that its misuse in peacetime could undermine respect for it in wartime. The defendant was sentenced to a fine and to bearing the legal costs.

United States

*Military Commission Order on Jurisdiction, United States of America v. Omar Ahmed Khadr,*²⁷ 4 June 2007

On 4 June 2007 a military commission dismissed the charges against Omar Ahmed Khadr. The judges determined that a military commission was not the proper authority to determine whether the accused was an ‘unlawful enemy combatant’ for the purpose of establishing initial jurisdiction for the commission to try him. The judges held that military commissions were, under the Military Commissions Act of 2006, courts of limited jurisdiction and that they could exercise jurisdiction over ‘unlawful enemy combatants’ only subsequent to a prior determination by a combatant status review tribunal (or other competent jurisdiction) on the status of such persons. It was only once such a determination had been made that the provisions of the Military Commissions Act came into play and that a person could be charged and referred for trial to a military commission.

26 Case No. 07-002291MED-OTIR/02, 9 February 2007.

27 Military Commission Order on Jurisdiction, *United States of America v. Omar Ahmed Khadr a/k/a ‘Akhbar Farhad’ a/k/a ‘Akhbar Farnad,’ a/k/a ‘Ahmed Muhammed Khahi’*, 4 June 2007, available at www.icj.org/IMG/Khadr_Order.pdf.

*United States Court of Appeals for the Fourth Circuit, Ali Saleh Kahlah al-Marri, Petitioner – Appellant v. Commander S. L. Wright, USN Commander, Respondent, 11 June 2007*²⁸

The case concerned a citizen of Qatar who had entered the United States lawfully with his wife and children on 10 September 2001 and had been arrested as a material witness in the government's investigation of the September 11 attacks. By order of the President of the United States, the appellant had subsequently been determined to be an 'enemy combatant' and detained without charges since that time.

Following the dismissal of successive petitions for habeas corpus brought by the appellant, an appeal was filed on his behalf in 2006 before the Court of Appeals for the Fourth Circuit. The government sought to dismiss the case for lack of jurisdiction, arguing that Section 7 of the Military Commissions Act of 2006 stripped courts of jurisdiction to consider an application for a writ of habeas corpus filed by or on behalf of an alien who had been detained by the United States and had been determined to be properly detained as an 'enemy combatant' or was awaiting such determination.

On 11 June 2007 the Court of Appeals decided, contrary to the government's assertion, that the Military Commissions Act did not deny the appellant his constitutional rights and affirmed jurisdiction to consider his petition. It concluded that the appellant should be granted habeas corpus relief as guaranteed by the US constitution. In its ruling, the Court of Appeals reviewed the Authorization for Use of Military Force Statute and the *Hamdi* and *Padilla* rulings which, according to the US government, had provided the legal background to ordering the appellant's indefinite detention as an 'enemy combatant'. The court found no authority to conclude that the Authorization for Use of Military Force Statute had empowered the President to detain the appellant as an 'enemy combatant'. The court determined instead that he was a civilian who did not lose his civilian status even if he had committed serious crimes and been associated with a secret enemy organization engaged in hostilities against the United States. In addition, the President did not have the authority to suspend the appellant's protection under the constitution, irrespective of his status as an 'enemy combatant'.

The Court of Appeals remanded the case to the District Court with instructions 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.

28 United States Court of Appeals for the Fourth Circuit, *Ali Saleh Kahlah al-Marri, Petitioner – Appellant, and Mark A. Berman, as next friend, Petitioner, v. Commander S. L. Wright, USN Commander, Consolidated Naval Brig., Respondent*, No. 06-7427, argued 1 February 2007, decided 11 June 2007. Available at <http://pacer.ca4.uscourts.gov/opinion.pdf/067427.P.pdf>.

*United States Court of Appeals for the District of Columbia Circuit, Haji Bismullah, Petitioner v. Robert M. Gates, Secretary of Defense, Respondent,*²⁹ 20 July 2007

The case concerned petitions brought by non-US nationals captured abroad and detained at the US naval base at Guantánamo Bay. The petitioners sought review of the determination made by a combatant status review tribunal that they were ‘enemy combatants’ and therefore subject to indefinite detention. Both the petitioners and the government asked the Court of Appeals to enter protective orders to address the issue of access to and review of the information and evidence to be considered by the court in its examination of the detainees’ petitions. The petitioners argued that – in addition to the inculpatory and exculpatory evidence presented to the tribunal by the recorder of proceedings, the detainee and the detainee’s representative – the court should review all the evidence reasonably available to the government. The government argued that the record should be limited to the evidence presented by the recorder.

In its ruling the Court of Appeals emphasized that the Detainee Treatment Act required it to review whether the tribunal’s status determination was supported by a preponderance of evidence. The court concluded that in order for it to ascertain whether a preponderance of evidence justified the tribunal’s determination that an alien detained in Guantánamo Bay was an ‘enemy combatant’, it needed to have access to all the information available to the government. The court entered a protective order adopting the presumption that the counsel for the petitioners had a ‘need to know’ all government information concerning his client’s case, with the exception of highly sensitive information which the government could withhold from the petitioners’ counsel. The Court of Appeals also granted the government’s motion for a protective order allowing it both to inspect the correspondence exchanged between the detainee and his counsel and to remove from it any content unrelated to the detainee’s capture and proceedings before the Combatant Status Review Tribunal.

*United States Court of Military Commission Review, United States of America v. Omar Ahmed Khadr,*³⁰ 24 September 2007

On 24 September 2007 the Court of Military Commission Review reversed the military commission order on jurisdiction issued in the *Omar Ahmed Khadr*

29 United States Court of Appeals for the District of Columbia Circuit, *Haji Bismullah a/k/a Haji Bismillah, and a/k/a Haji Besmella, Haji Mohammad Wali, Next Friend of Haji Bismullah, Petitioners v. Robert M. Gates, Secretary of Defense, Respondent*, No. 06-1197, argued 15 May 2007 and decided 20 July 2007. This case was decided together with *Huzaiifa Parhat, et al., Petitioners v. Robert M. Gates, Secretary of Defense, et al., Respondents*, No. 06-1397. Available at <http://caselaw.lp.findlaw.com/data2/circs/dc/061197a.pdf>.

30 United States Court of Military Commission Review, *United States of America v. Omar Ahmed Khadr*, 24 September 2007, available at [www.defenselink.mil/news/Sep2007/Khadr%20USCMCR%20Order%20RE%20Abatement%20\(24%20Sept%2007\)%20\(6%20pages\).pdf](http://www.defenselink.mil/news/Sep2007/Khadr%20USCMCR%20Order%20RE%20Abatement%20(24%20Sept%2007)%20(6%20pages).pdf).

case.³¹ It determined that the military commission had erred in deciding that a prior determination by a combatant status review tribunal on the status of a person as an ‘enemy combatant’ is a prerequisite for the referral of charges to a military commission. The Court held that the language of the Military Commissions Act of 2006 (MCA), together with clear precedents on the issue of establishing jurisdiction in federal courts, is proof that a military commission possesses the independent authority to decide on this jurisdictional prerequisite. The court determined that the text, structure and history of the MCA clearly demonstrate that a military judge presiding over a military commission may decide on both the factual issue of an accused’s ‘unlawful enemy combatant’ status and the corresponding legal issue of the military commission’s *in personam* jurisdiction. The court concluded that a military commission may exercise jurisdiction where ‘enemy combatant’ status is established by a preponderance of evidence, and ordered the military commission to conduct all proceedings needed to determine its jurisdiction over the accused.³²

31 See above, note 27.

32 On 6 November 2007 the US Court of Appeal for the District of Columbia Circuit rejected an appeal from Omar Ahmed Khadr, thus confirming the decision of the Court of Military Commission Review which had reinstated the charges against him.

National implementation of international humanitarian law

Biannual update on national legislation and case law January–June 2008

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A. Legislation

Austria

The *Federal Law on the Recognition of the Austrian Red Cross and the Protection of the Red Cross Emblem (Red Cross Law – RKG)*¹ was adopted on 6 December 2007 and entered into force on 1 February 2008. The law replaces the Red Cross Protection Act of 1962. Its aims are to define the legal status of the Austrian Red Cross and to regulate the use and the protection of the distinctive emblems as defined in the four Geneva Conventions of 1949 and their three Additional Protocols of 1977 and 2005. The law protects the emblems of the red cross, red crescent, red lion and sun, red crystal and their names in all languages, and the arms of the Swiss Confederation, as well as other emblems, signs and signals defined in Article 38 and Annex I of Additional Protocol I. Under the new law, the registration as a trademark of the figurative designs and names of the emblems are subject to authorization from the Austrian Red Cross, and any misuse of the emblems is subject to administrative fines without prejudice to other sanctions of a penal or disciplinary character.

Canada

The *Geneva Conventions Amendment Act*² was approved on 22 June 2007 and entered into force on 31 January 2008. The act amends the Canadian Geneva Conventions Act in accordance with Protocol III additional to the Geneva

Conventions of 12 August 1949 and relating to the adoption of an additional distinctive emblem. The act extends the criminalization of perfidious misuse of the distinctive emblems of the red cross, red crescent, and red lion and sun pursuant to Article 85(3)(f) of Additional Protocol I to the third Protocol emblem, the red crystal. It further revises the Act to incorporate the Canadian Red Cross Society to provide for punishment of commercial misuse of the red crystal emblem and name. The Trade Marks Act is also amended by inserting a reference to the red crystal as a trademark of which unauthorized use is prohibited.

Fiji

The *Geneva Conventions Promulgation Act*, No. 52 of 2007,³ was adopted on 13 December 2007 and entered into force on 1 January 2008. The act gives effect to the four Geneva Conventions as well as to their three Additional Protocols of 1977 and 2005. The law provides for the punishment of grave breaches of the Conventions and of Additional Protocol I based on the principles of territoriality and active personality. It also provides for the protection of the red cross and other distinctive emblems, signs and signals and establishes prison terms and financial penalties in the event of misuse. The Minister of Home Affairs has the authority to make regulations in implementation of the act.

Mauritania

*Law No. 2008-06 on the Prohibition of Anti-personnel Mines in Mauritania*⁴ was adopted on 16 March 2007 and entered into force on 2 January 2008. This law gives effect to the provisions of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction.⁵ The law incorporates into Mauritanian law the prohibitions on anti-personnel landmines as set out in the Ottawa Convention. It also specifies the number and types of stockpiled mines retained for training purposes in accordance with the Convention and provides for the creation of a national committee responsible for applying the law and for designing an action plan in implementation

1 Bundesgesetz über die Anerkennung des Österreichischen Roten Kreuzes und den Schutz des Zeichens des Roten Kreuzes (Rotkreuzgesetz – RKG). Officially published on 11 January 2008 in 351 der Beilagen XXIII. GP – Ausschussbericht NR – Gesetzestext.

2 Bill C-61, an Act to Amend the Geneva Conventions Act, an Act to incorporate the Canadian Red Cross Society and the Trade-marks Act. Officially published on 20 February 2008 in the *Canada Gazette*, Vol. 142, No. 4.

3 An Act to Enable Effect to be given to Certain Conventions done at Geneva on 12 August 1949 and to the Protocols Additional to those Conventions done at Geneva on 8 June 1977, and 8 December 2005, and for Related Purposes. Officially published on 29 December 2007 in the *Republic of Fiji Islands Government Gazette*, Vol. 7, No. 100.

4 Loi No. 2008-06 relative à l'interdiction des mines antipersonnel en Mauritanie. Officially published on 30 April 2008 in the *Journal Officielle de la Mauritanie*, No. 1116 (pp. 533–6).

5 The Islamic Republic of Mauritania ratified the Ottawa Convention by Law No. 99-07 of 20 January 1999.

of the National Humanitarian Mine-clearance Programme for Development. Further, the law establishes administrative and penal sanctions should its provisions be violated.

Nicaragua

*Law No. 641, Penal Code of the Republic of Nicaragua*⁶ was approved by the National Assembly on 13 November 2007 and promulgated by the President on 16 November 2007. It entered into force on 8 July 2008. The new Nicaraguan Penal Code includes a new title 'Crimes against the International Order', which incorporates specific chapters defining the crimes of genocide, crimes against humanity and crimes against objects and persons protected during armed conflict. This last chapter reflects the definitions of war crimes found in Article 8 of the Rome Statute of the International Criminal Court, and provides for the criminalization of such offences irrespective of whether the situation in which they occur is categorized as an international or non-international armed conflict. The code also includes detailed provisions for the prohibition of certain weapons deemed to cause superfluous injury and unnecessary suffering, including asphyxiating gases, chemical, biological and atomic weapons, anti-personnel mines, booby traps and other devices, as well as weapons the primary effect of which is to injure by fragments which are undetectable by X-rays. The code provides for the jurisdiction of national courts over those international crimes based on the principle of universal jurisdiction in accordance with international treaties to which Nicaragua is a state party. The code further provides for the responsibility of superiors and prescribes that war crimes proceedings and sentences may not be subject to any statute of limitations.

Peru

*Law No. 29248 on Military Service*⁷ was adopted on 6 June 2008 and will enter into force on 1 January 2009. The law regulates voluntary military service and provides for its operation in conformity with the national constitution and Peru's international obligations deriving from international treaties to which it is a state party. In particular, the law recognizes that military service is 'an activity of a personal character' and that all Peruvians may exercise their constitutional right and duty to participate in national defence from the time they have reached the age of 18. The law further regulates the organization of military service, including the procedures for registration, the conditions for forced mobilization, and the disciplinary sanctions applicable to offences committed in the course of military service.

The *Law No. 2939 on Control Mechanisms for Substances susceptible to use for the*

6 Ley No. 641, Código Penal. Officially published on 9 May 2008.

7 Ley No. 29248 del Servicio Militar. Officially published on 28 June 2008 in the *Diario Oficial 'El Peruano'* (pp. 374974–84). This Law derogate the previous Law on the Military Service of 14 September 1999 (Ley No. 27178 del Servicio Militar).

*Production of Chemical Weapons*⁸ was adopted on 20 May 2008. This law establishes mechanisms for compliance with the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. The law defines the types of chemical substances subject to control and outlines activities for which the use of these chemicals is not prohibited under the Convention. The law provides for the establishment of the National Inter-ministerial Council for the Prohibition of Chemical Weapons to implement Peru's obligations under the Convention, to disseminate information about the Convention and the law, and to promote international co-operation in the realization of the Convention's aims. The law also provides, for controls and confidence-building measures, such as the creation of a registry of users of toxic chemical substances and their precursors, and of a technical secretariat to monitor the application of the law's prohibitions on the national territory. The law stipulates that violations of its provisions constitute punishable administrative offences, without prejudice to civil responsibility or penal sanctions under the Peruvian Criminal Code.

Slovakia

The *Slovak Red Cross and Protection of the Emblem and Name of the Red Cross and on Amendment and Supplement to Certain Acts' Act*⁹ was adopted on 20 September 2007 and entered into force on 1 January 2008. The first part of the act recognizes the independent status of the Slovak Red Cross as well as its role as an auxiliary to the public authorities in the humanitarian field. It sets forth the tasks of the Slovak Red Cross, *inter alia* to assist the medical services of the armed forces, to participate in civil defence tasks and to provide tracing services pursuant to the 1949 Geneva Conventions and their Additional Protocols of 1977. The act also defines the organizational structure of the National Society. The second part of the act regulates the use of the red cross and red crescent emblems. It identifies the natural and legal persons entitled to use the emblems and their names and establishes penalties in the event of misuse both in time of armed conflict and in peacetime.

Sri Lanka

The *Chemical Weapons Convention Act*, No. 58 of 2007¹⁰ was certified on 20 November 2007 and entered into force on 15 April 2008. The act provides for

8 Ley N° 2939 sobre medidas de control de sustancias químicas susceptibles de empleo para las fabricación de armas químicas. Officially published on 29 May 2008 in the *Diario Oficial 'El Peruano'* (pp. 372974–9).

9 Officially published in Zbierka zákonov c. 460/2007, Ciastka 195, Strana 3281 (Act No. 460/2007 Coll., section 195, p. 3281).

10 An Act to Provide for the Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and their Destruction and to Provide for Matters

the implementation of the 1993 Chemical Weapons Convention and its prohibitions on the use, development, production, acquisition, stockpiling or retention, or transfer of chemical weapons. The act includes as a schedule a list of prohibited toxic chemicals and their precursors and provides for the establishment of a national authority on chemical weapons to be chaired by the ministry in charge of the industries sector. The act provides for a range of penalties ranging from fines to imprisonment for a period not exceeding twenty years in the event of violations of its provisions. The act details the modalities of registration of persons engaged in the production, processing and transfer of toxic chemicals or their precursors and outlines the procedures for verification, inspection and forfeiture in implementation of the law's prohibitions.

B. National committees on international humanitarian law

Algeria

The *Algerian Committee on International Humanitarian Law* was established by Presidential Decree No. 08-163 of 4 June 2008.¹¹ The Committee's mandate includes advising and preparing recommendations for the government on all matters relating to the promotion and national implementation of international humanitarian law, including the evaluation of domestic law and practice. The Committee is chaired by the Minister of Justice and composed of representatives of the ministries of Foreign Affairs, Justice, National Defence, Interior, Finance, Energy and Mines, Water Resources, Industry, Religious Affairs and *Awkaf*, Environment and Tourism, National Education, Health, Culture, Information, Training and Professional Education, Higher Education, Labour and Social Insurance, National Solidarity, Youth and Sports, as well as of the General Directorate for National Security, the general command of the National Gendarmerie, and the Algerian Red Crescent, the Islamic Algerian Scouts and the National Consultative Commission for the Promotion and Protection of Human Rights. Confirmed experts in the field of IHL and various organizations may also be invited to take part in the Committee's work.

Madagascar

The Internal Regulations of Madagascar's *National Committee on International Humanitarian Law* were adopted on 29 February 2008¹² and complement Decree No. 2006-435 of 27 June 2006 establishing the Committee. The regulations confer

Connected Therewith or Incidental Thereto. Officially published on November 23, 2007 as a Supplement to Part II of the *Gazette of the Democratic Socialist Republic of Sri Lanka*.

11 Published in the *Official Gazette*, issue No. 29 of 4 June 2008, pp. 16–17.

12 Règlement intérieur de la Commission Nationale du Droit International Humanitaire (CONADIH). Registered at the Primature on 29 February 2008 under No. 5255/2008.

on the Committee the task of overseeing the application, national implementation and promotion of IHL and of advising the government in these fields. They stipulate that the Committee must submit an annual report to the government and prime minister on its activities and achievements. The regulations lay down the Committee's structure and organization and stipulate that its various organs shall include a chairman, a general assembly, a series of sub-committees and a permanent secretary. The Ministry of Justice holds the chairmanship.

C. Case law

Canada

*Supreme Court of Canada, Canada (Justice) v. Khadr, 23 May 2008*¹³

The case concerned a Canadian national who had been detained by US forces in Guantánamo Bay since 2002, where he faced charges of murder and terrorism against US and coalition forces. On several occasions Canadian officials had questioned the respondent on matters related to the charges he was facing and had shared the records of those interviews with United States authorities. The respondent sought disclosure of all documents related to the charges laid against him in possession of the Canadian government, including the records of the interviews with Canadian officials. His request was first rejected in the lower federal courts, but allowed by the Court of Appeal, which issued an order that all relevant documents be produced before federal courts for review. The Minister of Justice appealed against the Court of Appeal's decision before the Supreme Court, asking that the order be set aside.

On 23 May 2008 the Supreme Court of Canada dismissed the appeal lodged by the Ministry of Justice. The court held that section 7 of the Canadian Charter of Rights and Freedoms imposed a duty on Canada to disclose materials in its possession arising from its participation in a foreign process of detention and trial determined to be contrary to international law and to jeopardize the liberty of a Canadian citizen. Although the court did not pronounce itself on the legality of the US procedures in Guantánamo Bay, it based itself on several US Supreme Court cases, including *Rasul v. Bush* and *Hamdan v. Rumsfeld*, in deciding that the detention regimes and trial procedures applicable to the respondent at the time of his interviews with Canadian officials constituted a violation of Canada's international human rights obligations and of the Charter of Rights and Freedoms.

¹³ Supreme Court of Canada, *Canada (Justice) v. Khadr*, 2008 SCC 285, 23 May 2008, Docket 32147, *Minister of Justice, Attorney General of Canada, Minister of Foreign Affairs, Director of the Canadian Security Intelligence Service and Commissioner of the Royal Canadian Mounted Police (Appellants) v. Omar Ahmed Khadr (Respondent)*, available at <http://csc.lexum.umontreal.ca/en/2008/2008scc28/2008scc28.pdf>.

The Supreme Court consequently upheld the Court of Appeal's order that all relevant documents be produced before the federal court and affirmed the respondent's right to a remedy under the Charter.

Israel

*Supreme Court of Israel sitting as the Court of Criminal Appeals, A and B v. State of Israel, 11 June 2008*¹⁴

On 11 June 2008 the Supreme Court of Israel rendered a decision concerning the constitutionality of Israel's Internment of Unlawful Combatants Law (5760-2002) (hereafter the internment law). The case concerned two inhabitants of Gaza who had been detained respectively since 2002 and 2003 under the internment law on the grounds that they were 'unlawful combatants', that they were associated with the Hezbollah organization and that they had committed hostile acts against Israel. The detainees in the case had appealed against decisions by the District Court approving their continued internment and upholding the constitutionality of the internment law upon which their detention was based.

The appellants claimed that their continued internment violated their right to liberty and dignity under Israel's Basic Law and argued that the internment law was unconstitutional and inconsistent with Israel's obligations deriving from international law. They further argued that under the Fourth Geneva Convention of 1949, Israel could no longer detain them since it no longer exercised military rule in the Gaza Strip. Lastly, the appellants contested the factual findings of the first instance court, according to which they were members of the Hezbollah organization and their release would harm Israel's security. The government, for its part, contended that the internment orders had been made lawfully and that the internment law had a legitimate purpose and involved a proportionate violation of personal liberties.

In its ruling the Supreme Court examined the background of the internment law and provided an interpretation of the statutory definition of 'unlawful combatant' as referring to any 'foreign party who belongs to a terrorist organization that operates against the security of Israel'. In response to the appellants' argument that international humanitarian law did not recognize the existence of a separate category of 'unlawful combatant', the Supreme Court recalled that it had already ruled on this issue in its *Public Committee against Torture in Israel v. Government of Israel* decision, in which it had determined that the term 'unlawful combatant' was a 'sub-category of "civilians"' from the viewpoint of international law. The Court of Criminal Appeals further rejected the appellants' assertion that the Fourth Geneva Convention was not applicable to them because they were detained in the Gaza Strip rather than Israel. The court stated that although Israeli

14 The Supreme Court of Israel, No. 6659/06, heard on 5 March 2007, decided on 11 June 2008. Available at http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf.

military rule over the Gaza Strip had ended at the time the appellants were detained, the hostilities between Israel and the Hezbollah organization continued. With respect to the alleged violation of the constitutional right to liberty under the Basic Law, the court stated that, because administrative detention constituted an unusual and extreme measure, the state was required to demonstrate by clear and convincing evidence that a sufficient security threat existed to warrant its use. The court held that there must be more than a single piece of evidence from an isolated event to establish that, even if the detainee did not take a direct or indirect part in hostilities against Israel, he nonetheless belonged to a terrorist organization and took part in the 'cycle of hostilities'.

The Supreme Court applied the limitations clause under the Basic Law and its constituent tests in order to pronounce on the internment law's constitutionality and concluded that the internment law had a 'proper purpose' in that it was meant to prevent individuals who threaten the security of Israel from returning to the 'cycle of hostilities'. The court also concluded that the internment law did not constitute a violation of constitutional rights which was excessive or incommensurate with the social benefits arising from its application. Consequently the Supreme Court concluded that the internment law satisfied the test of constitutionality under the Basic Law and denied the appeals.

United States

*United States' Court of Appeals for the Second Circuit, Vietnam Association for Victims of Agent Orange/Dioxin v. Dow Chemical Co., 2nd Cir., 22 February 2008*¹⁵

On 22 February 2008 the US Court of Appeals for the Second Circuit confirmed a judgment of the US District Court for the Eastern District of New York, which had denied the claim for injunctive relief brought by Vietnamese nationals against several US-registered companies. The appellants' claim concerned injuries they had allegedly sustained from their exposure to Agent Orange and other herbicides manufactured by the defendants as contractors of the US government and used by the US armed forces during the Vietnam War.

As foreign nationals, the plaintiffs sought monetary damages and relief under the Alien Tort Statute, which grants US district courts jurisdiction over any civil action by an alien claiming damages for a tort committed in violation of an international treaty to which the United States is party. They also asserted claims grounded in domestic tort law. The defendants argued that the plaintiffs had failed to make a claim under the Alien Tort Statute because they had not alleged a violation of any well-defined and universally accepted rule of international law

15 United States Court of Appeals for the Second Circuit, *Vietnam Association for Victims of Agent Orange/Dioxin v. Dow Chemical Co.*, Docket No. 05-1953-cv, argued 18 June 2007, decided 22 February 2008, available at <http://caselaw.lp.findlaw.com/data2/circs/2nd/051760p.pdf>.

and that their claims were both non-justiciable and barred under applicable statutes of limitations. Following the dismissal of their claims by the district court, the plaintiffs appealed, contending that the defendants had violated customary international law prohibiting the use of 'poisoned weapons' and the infliction of unnecessary suffering.

In its ruling the Court of Appeals recalled that in order for a norm of international law to form the basis of a claim under the Alien Tort Statute, it had to be both defined with a specificity comparable to the torts corresponding to the eighteenth-century paradigm which informed the legislation and based on a norm of international character accepted by the civilized world.

The court decided that the international sources relied on by the plaintiffs, such as in particular the 1907 Hague Regulations, the Annex to the 1907 Hague Convention (IV), the 1925 Geneva Gas Protocol and the 1949 Fourth Geneva Convention, did not support a universally accepted norm which would have prohibited the use of Agent Orange during the war in Vietnam. The court further held that it could not find consensus on whether the prohibition against the use of poison would apply to defoliants with possible unintended toxic side effects, as opposed to chemicals intended to kill combatants. With regard to the allegation that the use of Agent Orange violated the norm prohibiting unnecessary suffering, the court found that norms containing wording like 'great suffering' or 'serious injury' (such as the grave breach listed in Article 147 of the Fourth Geneva Convention) are too imprecise and that their application must be analysed case by case in order to balance competing interests. As to the purported violation of the principle of proportionality, the Court of Appeals felt that the *mens rea* element inherent in this principle was not satisfied, considering that Agent Orange had been used by the US military as a defoliant to prevent US troops from being ambushed, rather than intentionally as a 'weapon of war against human populations'.

The court therefore concluded that the plaintiffs had failed to satisfy the standard for recognition of a tort cognizable under the Alien Tort Statute and declared itself without jurisdiction to consider the claim.

*Supreme Court of the United States, Boumediene et al. v. Bush, President of the United States, et al., 12 June 2008*¹⁶

On 12 June 2008 the Supreme Court rendered a decision determining that detainees at Guantánamo Bay enjoy a constitutional right to habeas corpus before federal courts without having to seek prior review of their determination as an 'enemy combatant' by a combatant status review tribunal (CSRT). In its ruling the Supreme Court stated its opinion that the Military Commissions Act of

16 Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Case No. 06–1195, argued 5 December 2007, decided 12 June 2008. This case was decided together with No. 06–1196, *Al Odah, next friend of Al Odah, et al. v. United States et al.*, also on certiorari to the United States Court of Appeals for the District of Columbia Circuit, available at www.supremecourtus.gov/opinions/07pdf/06-1195.pdf.

2006 (MCA) represents an unconstitutional suspension of the habeas corpus privilege, because under the US constitution habeas corpus can only be suspended ‘when public safety requires it in times of rebellion or invasion’, which was neither asserted in the MCA, nor argued before the court by the US government. The Court further concluded that the procedures in place to review detentions in Guantánamo, in particular the CSRTs and the limited right to appeal under the Detainee Treatment Act of 2005 (DTA) do not constitute a sufficient substitute for habeas corpus proceedings.

The case related to petitions brought by non-US citizens captured outside the United States and detained in Guantánamo Bay as ‘enemy combatants’. The detainees had unsuccessfully petitioned for a writ of habeas corpus in the US District Court for the District of Columbia. The Court of Appeals had confirmed the lower court’s decision, determining that paragraph 7 of the MCA stripped federal courts from jurisdiction to review the detainees’ habeas corpus applications. The petitioners applied for a writ of certiorari to determine whether they enjoyed a constitutional privilege of habeas corpus, which could only be withdrawn in accordance with the Suspension Clause under the US Constitution.

In its decision the majority examined the question of the reach of the right to habeas corpus under the constitution and whether the protections under the Suspension Clause should apply to detainees at Guantánamo Bay.

The Court concluded in this regard that three factors were central to such a determination: the citizenship and status of the detainees and the adequacy of the process through which that status determination was made, the nature of the sites where apprehension and then detention took place, and the practical obstacles inherent in resolving the prisoner’s entitlement to the writ. While recalling the history of the writ, the Court first concluded that in common law a petitioner’s status as an alien is not a categorical bar to habeas corpus relief and stated that the CSRT hearing fell well short of the procedure and adversarial mechanisms that would eliminate the need for a habeas corpus review. As to whether the location of the petitioners in Guantánamo Bay affected their right to habeas corpus, the Court adopted a functional approach to the reach of habeas corpus rights, stating that ‘questions of extraterritoriality turn on objective factors and practical concerns, not formalism’. The Court thus opined that the Guantánamo Bay detention facility was not a transient possession of the United States and that, in every practical sense, it was not located abroad, since the United States maintains complete and total control and de facto sovereignty over the territory. Finally, the Court felt that there were no credible arguments that the military mission at Guantánamo Bay would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims. The Court thus concluded that the suspension clause under Article 1, Section 9 of the constitution has full effect in Guantánamo Bay and that, if the right to habeas corpus was to be denied detainees held there, such a decision should be in conformity with the clause.

Noting that the detainees should not be harmed by further delay in the consideration of their petitions, the Court proceeded with an examination of whether existing review processes for detention at Guantánamo Bay – notably the

CSRT and the limited civilian court review under the DTA – provide an adequate replacement for habeas corpus. The Court defined the minimum requisites for an adequate substitute for habeas corpus, namely those of offering the detainee a ‘meaningful opportunity’ to demonstrate that he was being erroneously held and that ‘conditional release’ must be one of the possible outcomes of the process. The Court determined that neither the CSRTs nor the DTA represented adequate substitutes. The Court notably held that the petitioners had met their burden of demonstrating that the DTA review process is on the face of it an inadequate replacement for habeas corpus as it does not, *inter alia*, allow the petitioners to challenge the authority of the president under the Authorization for Use of Military Force to detain them indefinitely or for the consideration of newly discovered evidence or evidence outside the CSRT records. The Court concluded that paragraph 7 of the MCA results in an unconstitutional suspension of the writ of habeas corpus.

The Supreme Court reversed the determination of the Court of Appeals, according to which the suspension clause is inapplicable to the petitioners, and ordered the cases to be remanded for further proceedings.

*Supreme Court of the United States, Munaf et al. v. Geren, Secretary of the Army, et al., 12 June 2008*¹⁷

On 12 June 2008 the US Supreme Court issued a unanimous decision affirming the jurisdiction of US federal courts to grant habeas corpus to US citizens arrested and detained in Iraq since October 2004 by US military forces operating as part of the Multinational Force – Iraq. The Court did not, however, recognize the authority of federal district courts under the habeas corpus clause to order the United States to refrain from transferring US citizens alleged to have committed crimes and detained in a foreign state to that state for criminal prosecution. The court therefore denied the petitioners’ claim.

The petitioner in the case had, following his arrest by the Multinational Force – Iraq, been transferred to Iraqi custody and charged with kidnapping by the Central Criminal Court of Iraq. A petition for a writ of habeas corpus was filed on his behalf before the District Court for the District of Columbia. The District Court had dismissed the application on the grounds that the petitioner had been convicted in a foreign court and that US federal courts consequently no longer enjoyed habeas corpus jurisdiction.

The Court of Appeals confirmed this decision. The Supreme Court granted certiorari and consolidated the petition with that brought in another case (*Geren, Secretary of the Army, et al. v. Omar et al.*).

17 Supreme Court of the United States, *Munaf et al. v. Geren, Secretary of the Army, et al.* Certiorari to the United States Court of Appeals for the District of Columbia Circuit, No. 06-1666, argued 25 March 2008, decided 12 June 2008. Decided together with case No. 07-394, *Geren, Secretary of the Army, et al. v. Omar et al.*, also on certiorari to the United States Court of Appeals for the District of Columbia Circuit. Available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=06-1666>.

In its decision the Supreme Court began by stating its opinion that the habeas corpus statute extends to US citizens held overseas by US forces operating under a US chain of command, and rejected the government's arguments that federal courts lacked jurisdiction in the case on the grounds that US forces holding the petitioners had operated as part of a multinational force.

The Court nevertheless denied the petitioners' claim that they enjoyed a 'legally enforceable right' not to be transferred for criminal prosecution to the Iraqi authority under both the Due Process Clause and the Foreign Affairs and Restructuring Act of 1998 and that they were 'innocent civilians unlawfully detained by the government'. It concluded that the petitioners had failed to state grounds on which relief could be granted. While emphasizing that habeas corpus is governed by equitable principles and that prudential concerns may require federal courts not to exercise their habeas corpus authority, the Court held that no injunction could be entered prohibiting the government from transferring the petitioners to Iraqi custody, since the petitioners' requests would interfere with Iraq's sovereign right to 'punish offences against its laws committed within its borders'. Regarding the petitioners' allegation that they would be likely to face torture if they were released to Iraqi custody, the Court, while stressing that this represented a matter of serious concern, concluded that it was an issue to be addressed by the political branches of government rather than by the judiciary. It noted that the State Department had determined that the Iraqi Justice Ministry, under whose authority the petitioners and its detention facilities were placed, generally met international standards regarding the basic needs of prisoners.

In a concurring opinion, Justice Souter emphasized that the specific circumstances of the case were key to the Court's determination and that the Supreme Court reserved judgment in an 'extreme case in which the Executive has determined that a detainee [in US custody] is likely to be tortured but decides to transfer him anyway', or where 'the probability of torture is well-documented, even if the Executive fails to acknowledge it'.

BOOKS AND ARTICLES

Recent acquisitions of the Library & Research Service, ICRC

Africa – books

Prunier, Gérard. *Darfur: The Ambiguous Genocide*, new edn. New York: Cornell University Press, 2007, 236 pp.

Africa – articles

Malafosse, Antoine. ‘Tchad, une continuité de conflits’, *Etudes*, vol. 409, no. 1–2, July–August 2008, pp. 19–29.

Péclard, Didier et al. ‘L’Angola dans la paix: autoritarisme et reconversions’, *Politique africaine*, no. 110, June 2008, pp. 5–121.

Asia – books

Gayer, Laurent and Christophe Jaffrelot (eds.). *Milices armées d’Asie du Sud: privatisation de la violence et implication des Etats*. Paris: Presses de Sciences Po, 2008, 300 pp.

Lucas, Edward. *The New Cold War: Putin’s Russia and the Threat of the West*. New York: Palgrave Macmillan, 2008, 260 pp.

Minassian, Gaïdz. *Caucase du Sud, la nouvelle guerre froide: Arménie, Azerbaïdjan, Géorgie*. Paris: Autrement, 2007, 188 pp.

Latin America – books

Drouhaud, Pascal. *FARC: confessions d’un guérillero*. Paris: Choiseul, 2008, 203 pp.

Groupe de recherche et d’information sur le paix et la sécurité. *Où va l’Amérique Latine? Tour d’horizon d’un continent en pleine mutation*. Brussels: Grip: Complexe, 2007, 128 pp.

Sánchez Otero, Germán. *Transparencia de Emmanuel*, foreword by Fidel Castro. Havana: Plaza, 2008, 199 pp.

Armed conflicts, violence and security – books

Centre pour le dialogue humanitaire, Union interparlementaire. *Pièces manquantes du puzzle: guide pour faire reculer la violence armée par l'action parlementaire*. Guide pratique à l'usage des parlementaires no. 12. Geneva: Union interparlementaire, 2007, 204 pp.

Coker, Christopher. *Ethics and War in the 21st Century*. LSE International Studies. London etc.: Routledge, 2008, 201 pp.

Crocker, Chester A., Fen Osler Hampson and Pamela Aall (eds.). *Leashing the Dogs of War: Conflict Management in a Divided World*. Washington, DC: United States Institute of Peace Press, 2007, 726 pp.

Kauffmann, Mayeul et al. *La guerre est-elle une bonne affaire?*, preface by Jean-Pierre Stroot and Gabriel Galice. Cahiers du GIPRI 6. Paris: L'Harmattan; Geneva: GIPRI, 2007, 109 pp.

Montclos, Marc-Antoine de. *Guerres d'aujourd'hui, les vérités qui dérangent*. Paris: Tchou, 2007, 233 pp.

Stewart, Frances (ed.). *Horizontal Inequalities and Conflict: Understanding Group Violence in Multiethnic Societies*, foreword by Kofi Annan. Basingstoke etc.: Palgrave Macmillan, 2008, 364 pp.

Armed conflicts, violence and security – articles

Smith, M. L. R. and Sophie Roberts. 'War in the gray: exploring the concept of dirty war', *Studies in Conflict and Terrorism*, no. 31, 2008, pp. 377–98.

Arms – books

Boutherin, Grégory. *La lutte contre la prolifération des armes de destruction massive*, preface by Claude Imperiali. Paris: La documentation française, 2007, 544 pp.

ICRC. *Mine Action 2007: Special Report*. Geneva: ICRC, 2008, 37 pp.

Williams, Jody, Stephen D. Goose and Mary Wareham (eds.). *Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security*. Lanham etc.: Rowman & Littlefield, 2008, 327 pp.

Arms – articles

Millet-Devalle, Anne-Sophie. 'Armes à sous munitions (ASMD): l'encadrement juridique des bombes à sous-munitions, évolution des négociations', *Revue générale de droit international public*, vol. 112, no. 1, 2008, pp. 135–42.

White, Stephen E. 'Brave new world: neurowarfare and the limits of international humanitarian law', *Cornell International Law Journal*, vol. 41, no. 1, winter 2008, pp. 177–210.

Woudenberg, Nout van. 'The long and winding road towards an instrument on cluster munitions', *Journal of Conflict & Security Law*, vol. 12, no. 3, winter 2007, pp. 447–83.

Aid – books

Barnett, Michael and Thomas G. Weiss (eds.). *Humanitarianism in Question: Politics, Power, Ethics*. Ithaca, NY, and London: Cornell University Press, 2008, 303 pp.

Crawford, Timothy W. and Alan J. Kuperman (eds.). *Gambling on Humanitarian Intervention: Moral Hazard, Rebellion and Civil War*. New York: Routledge, 2006, 100 pp.

Aid – articles

Reinisch, Jessica et al. 'Relief in the aftermath of war', *Journal of Contemporary History*, vol. 43, no. 3, July 2008, pp. 371–545.

Children – books

Boothby, Neil, Alison Strang and Michael Wessells (eds.). *A World Turned Upside Down: Social Ecological Approaches to Children in War Zones*. Bloomfield: Kumarian Press, 2006, 260 pp.

Chapleau, Philippe. *Des enfants dans la Résistance (1939–1945)*. Rennes: Ouest-France, 2008, 127 pp.

Coalition to Stop the Use of Child Soldiers. *Child Soldiers: Global Report 2008*. London: Coalition to Stop the Use of Child Soldiers, 2008, 416 pp.

Combatants and armed forces – books

Lange, Katja. *Der Status der Aufständischen im modernen humanitären Völkerrecht*. Frankfurt am Main etc.: Peter Lang, 2007, 238 pp.

Robinson, Paul, Nigel de Lee and Don Carrick (eds.). *Ethics Education in the Military*. Aldershot: Ashgate, 2008, 208 pp.

Schmitz-Elvenich, Heiko F. *Targeted killing: die völkerrechtliche Zulässigkeit der gezielten Tötung von Terroristen im Ausland*. Frankfurt am Main etc.: Peter Lang, 2008, 263 pp.

Combatants and armed forces – articles

'Engaging non-state armed groups/Les groupes armés non étatiques', *Disarmament Forum/Forum du désarmement*, 2008, no. 1.

Solomon, Solon. 'Targeted killings and the soldier's right to life', *ILSA Journal of International and Comparative Law*, vol. 14, no. 1, 2007, pp. 99–120.

History – books

Kaenel, Philippe and François Vallotton (eds.). *Les images en guerre (1914–1945): de la Suisse à L'Europe*. Lausanne: Antipodes, 2008, 212 pp.

Morsch, Günter and Astrid Ley (eds.). *Sachsenhausen Concentration Camp 1936–1945: Events and Developments*. Berlin: Metropol, 2008, 191 pp.

Posty, Pierre Marqués. *Espagne 1936: correspondants de guerre: l'ultime dépêche ...*, preface by Bernard Vincent. Paris: L'Harmattan, 2008, 270 pp.

van Dongen, Luc. *Un purgatoire très discret: la transition 'helvétique' d'anciens nazis, fascistes et collaborateurs après 1945*, preface by Henry Rousso. Paris: Perrin; Geneva: Société d'histoire de la Suisse romande, 2008, 649 pp.

Human rights – books

Lanord, Christophe. *Protection de la personne humaine: sélection de textes de droit international*, 2nd edn. Lulu, 2008, 671 pp.

Steiner, Henry J., Philip Alston and Ryan Goodman. *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, 3rd edn. Oxford: Oxford University Press, 2008, 1492 pp.

ICRC, International Red Cross and Red Crescent Movement – books

Bernardo y Garcia, Luis Angel et al. *Héros anonymes, mission héroïque: la Croix-Rouge de Belgique durant la Seconde Guerre Mondiale*. Brussels: Archives générales du Royaume and Croix-Rouge de Belgique, 2006, 151 pp.

Makaci, Mustapha. *Le Croissant-Rouge algérien*. Algiers: Editions Alpha, 2007, 254 pp.

Moebius. *Histoire d'une idée: le Mouvement international de la Croix-Rouge et du Croissant-Rouge de 1859 à nos jours*. Geneva: ICRC, 2007, 10 pp.

Morgenbrod, Birgitt and Stephanie Merkenich. *Das Deutsche Rote Kreuz unter der NS-Diktatur 1933–1945*, forewords by Rudolf Seiters and Hans Mommsen. Paderborn etc.: F. Schöningh, 2008, 483 pp.

ICRC, International Red Cross and Red Crescent Movement – articles

Troppmann, Birgit. 'Auf dem Weg zu einem Recht der internationalen Katastrophenhilfe – die Regelungsvorschläge der Rotkreuz- und

Rothalbmondbewegung', *Humanitäres Völkerrecht: Informationsschriften*, vol. 21, no. 1, 2008, pp. 17–24.

International criminal law – books

Heinsch, Robert. *Die Weiterentwicklung des humanitären Völkerrechts durch die Strafgerichtshöfe für das ehemalige Jugoslawien und Ruanda: zur Bedeutung von internationalen Gerichtsentscheidungen als Rechtsquelle des Völkerstrafrechts*. Berlin: Berliner Wissenschafts-Verlag, 2007, 413 pp.

Moreillon, Laurent et al. *Droit pénal humanitaire*, series 2, vol. 4. Geneva etc.: Helbing & Lichtenhahn; Brussels: Bruylant, 2006, 378 pp.

International criminal law – articles

Cullen, Anthony. 'The definition of non-international armed conflict in the Rome Statute of the International Criminal Court: an analysis of the threshold of application contained in article 8(2)(f)', *Journal of Conflict & Security Law*, vol. 12, no. 3, winter 2007, pp. 419–45.

International humanitarian law – books

Buirette, Patricia and Philippe Lagrange. *Le droit international humanitaire*. Paris: La Découverte, 2008, 122 pp.

Fleck, Dieter (ed.), in collab. with Michael Bothe et al. *The Handbook of International Humanitarian Law*, 2nd edn. New York: Oxford University Press, 2008, 770 pp.

Fuss, Michael. *Das Verantwortlichkeitsregime der nicht staatlichen Konfliktpartei für die Verletzung des humanitären Mindeststandards*. Hamburg: Dr. Kovac, 2008, 251 pp.

La Haye, Eve. *War Crimes in Internal Armed Conflicts*. Cambridge Studies in International and Comparative Law. Cambridge: Cambridge University Press, 2008, 424 pp.

Melzer, Nils. *Targeted Killing in International Law*. Oxford: Oxford University Press, 2008, 468 pp.

Olásolo, Héctor. *Unlawful Attacks in Combat Situations: From the ICTY's Case Law to the Rome Statute*. Leiden: Martinus Nijhoff, 2008, 288 pp.

Ronzitti, Natalino. *Diritto internazionale dei conflitti armati*, 3rd edn. Turin: G. Giappichelli, 2006, 383 pp.

South Asia Human Rights Documentation Centre. *Human Rights and Humanitarian Law: Developments in Indian and International Law*. New Delhi: Oxford University Press, 2008, 479 pp.

International humanitarian law – articles

- Bothe, Michael. 'Humanitäres Völkerrecht und Schutz der Menschenrechte', *Humanitäres Völkerrecht: Informationsschriften*, vol. 21, no. 1, 2008, pp. 4–8.
- Brilmayer, Lea and Geoffrey Chepiga. 'Ownership or use? Civilian property interests in international humanitarian law', *Harvard International Law Journal*, vol. 49, no. 2, summer 2008, pp. 413–46.
- Guldahl, Camilla G. 'The role of persistent objection in international humanitarian law', *Nordic Journal of International Law*, vol. 77, no. 1–2, 2008, pp. 51–86.
- Kelsey, Jeffrey T. G. 'Hacking into international humanitarian law: the principles of distinction and neutrality in the age of cyber warfare', *Michigan Law Review*, vol. 106, no. 7, May 2008, pp. 1427–51.
- Orakhelashvili, Alexander. 'The interaction between human rights and humanitarian law: fragmentation, conflict, parallelism or convergence?', *European Journal of International Law*, vol. 19, no. 1, 2008, pp. 161–82.
- Prescott, Jody M. 'Training in the law of armed conflict: a NATO perspective', *Journal of Military Ethics*, vol. 7, no. 1, 2008, pp. 66–75.
- Rensmann, Thilo. 'Die Humanisierung des Völkerrechts durch das ius in bello: von der Martens'schen Klausel zur "responsibility to protect"', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 68, no. 1, 2008, pp. 111–28.
- Sloane, Robert D. 'The cost of conflation: the dualism of jus ad bellum and jus in bello in the contemporary law of war', *Yale Journal of International Law*, vol. 34.
- Wang, Haiping. 'Comments on the 2007 draft manual on international humanitarian law in air and missile warfare', *Chinese Journal of International Law*, vol. 7, no. 1, 2008, pp. 107–13.

International organisations – books

- Amnesty International: *Amnesty International Report 2008: The State of the World's Human Rights*. London: Amnesty International, 2008, 381 pp.
- Chesterman, Simon (ed.). *Secretary or General? The UN Secretary-General in World Politics*. Cambridge etc.: Cambridge University Press, 2007, 280 pp.

Military occupation – articles

- Wills, Siobhan. 'Occupational law and multi-national operations: problems and perspectives', *British Yearbook of International Law*, vol. 77, 2006, pp. 256–332.

Psychology – books

- Baum, Steven K. *The Psychology of Genocide: Perpetrators, Bystanders, and Rescuers*. Cambridge etc.: Cambridge University Press, 2008, 255 pp.

Public international law – books

Colloque de Grenoble (rapporteur Théodore Christakis). *La nécessité en droit international*. Paris: Pedone, 2007, 384 pp.

Denza, Eileen. *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 3rd edn. Oxford: Oxford University Press, 2008, 556 pp.

Refugees, displaced persons – books

Agier, Michel. *On the Margins of the World: The Refugee Experience Today*, trans. David Fernbach. Cambridge: Polity, 2008, 118 pp.

Feller, Erika, Volker Türk and Frances Nicholson (eds.). *La protection des réfugiés en droit international*. Brussels: Larcier, 2008, 835 pp.

Hollenbach, David (ed.). *Refugee Rights: Ethics, Advocacy and Africa*. Washington, DC: Georgetown University Press, 2008, 264 pp.

Religion – books

Duriez, Bruno, François Mabilie and Kathy Rousselet (eds.). *Les ONG confessionnelles: religions et action internationale*. Paris: L'Harmattan, 2007, 282 pp.

Guérin, Michel and Jean-Luc Marret. *Histoires de djihad*. [Sainte-Marguerite sur Mer]: Editions des Equateurs, 2007, 125 pp.

Kane, Solomon, in collaboration with Felice Noelle Rodriguez. *La Croix et le Kriss: violences et rancoeurs entre chrétiens et musulmans dans le Sud des Philippines*, preface by Antoine Gazano. Paris: Les Indes savantes, 2006, 223 pp.

Schlegel, Jean-Louis et al. *Effervescences religieuses dans le monde*. Paris: Esprit, 2007, 383 pp.

Terrorism – books

Asad, Talal. *On Suicide Bombing*. New York: Columbia University Press, 2007, 128 pp.

Cronin, Audrey Kurth. *Ending Terrorism: Lessons for Defeating al-Qaeda*. Adelphi Paper 394. New York: Routledge, 2008, 85 pp.

Miller, Seumas. *Terrorism and Counter-terrorism: Ethics and Liberal Democracy*. Malden, MA, etc.: Blackwell, 2008, 222 pp.

Terrorism – articles

‘L’atlas du terrorisme’, *Courrier international*, special issue, March–April–May 2008.

Zwitter, Andrej. 'An international law perspective on the long-term prevention of terrorism', *Humanitäres Völkerrecht: Informationsschriften*, vol. 21, no. 1, 2008, pp. 24–33.

Torture – books

Association for the Prevention of Torture. *Annual Report 2007*. Geneva: APT, 2008, 22 pp.

Nowak, Manfred and Elizabeth McArthur. *The United Nations Convention against Torture: A Commentary*, with contributions by Kerstin Buchinger et al. Oxford Commentaries on International Law. Oxford: Oxford University Press, 2008, 1649 pp.